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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner Integrity Staffing Solutions, Inc. does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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REPLY BRIEF

The Portal-to-Portal Act of 1947 expressly makes non-compensable pre-shift and post-shift travel time and other "activities which are preliminary to or postliminary to" an employee's principal productive activities. 29 U.S.C. § 254(a). There is an exception to the general rule for those pre- or post-shift activities that are so "integral and indispensable" to "the principal activities for which covered workmen are employed" that they can be fairly treated as part and parcel of the employee's principal activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). The security screenings at issue here are a paradigmatic example of a non-compensable "postliminary" activity. Like the process of checking out—which has long been deemed non-compensable, *see* 29 C.F.R. § 790.7(g)—the screenings are merely part of the egress process, and are neither "integral" nor "indispensable" to Respondents' principal job duties of filling customer orders in Amazon.com warehouses. In holding to the contrary, the Ninth Circuit essentially revived the legal rule from *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that Congress *overturned* when it enacted the Portal-to-Portal Act.

Respondents appear to have abandoned any argument that the security screenings actually satisfy the "integral and indispensable" test, which was the basis for the Ninth Circuit's decision. Pet.App.10-13. Instead, Respondents now argue that there is an alternative route through which preliminary and postliminary activities can be deemed compensable despite the clear command of the Portal-to-Portal Act. Respondents contend that such activities are

compensable if they are *either* "integral and indispensable" to principal activities *or* required by the employer and done for the employer's benefit. In other words, while the Ninth Circuit employed a required-by-and-for-the-benefit-of-the-employer test as a flawed means for determining whether an activity was "integral and indispensable," *see* Pet. Br. 33-38, Respondents would convert that flawed test into an independent means for treating preliminary and postliminary activities as compensable, even when they are *not* integral and indispensable to principal activities.

Respondents' novel argument suffers all the flaws of the Ninth Circuit's approach, and is even more flatly contrary to the statutory text and this Court's precedents. The statutory text plainly states that preliminary and postliminary activities are non-compensable, and does not so much as hint that the substantial universe of employer-mandated preliminary and postliminary activities are exempted. Moreover, both *Steiner* and *Mitchell v. King Packing*, 350 U.S. 260 (1956), involved activities that were "required" by the employers for the employers' benefit, yet the Court applied the integral and indispensable test to determine whether they were compensable.

Respondents also cite various DOL regulations in support of their theory, but the cited regulations merely *apply* the integral and indispensable test to certain types of activities and do not remotely suggest an alternative route to compensability. DOL has already made clear that its regulations foreclose the Ninth Circuit's simplistic view that any activity required by an employer for its benefit is "integral and

indispensable." *See* U.S. Br. 19-25. The regulations equally foreclose Respondents' novel argument that anything "required" or "directed" by an employer and done for the employer's benefit is *per se* compensable, even when it is not integral and indispensable to principal activities.

Respondents suggest that, if Integrity were to prevail, employers would have free rein to force their employees to cut the lawn, wash the employer's car, or perform numerous other tasks before or after their shifts without pay. But those arguments rest on a fundamentally mistaken conception of the Portal-to-Portal Act in general and "principal activities" in particular. As Respondents themselves acknowledge, the Portal-to-Portal Act did not attempt to redefine "work" or "workweek" for all FLSA purposes. The Act's more modest goal was to make clear that courts had gone too far in imposing massive retroactive liability for travel and walking time and other preliminary and postliminary activities. The concept of "principal activities" is not a general-purpose test for identifying compensable work, but a specialized test for determining which arguably preliminary and postliminary activities are nonetheless compensable. Thus, for activities such as cutting the lawn or washing a car—which are not even arguably preliminary or postliminary—the question of whether these tasks are "principal activities" need not even arise.

Security screenings are different. While countless employees are paid to cut lawns and wash cars, no employee is paid to go through security screenings all day. Rather, going through a security screening as

part of the egress process is a quintessential postliminary activity materially indistinguishable from punching the clock (or waiting to do so) as part of the egress process. Thus, unless Respondents could somehow show that going through security is integral and indispensable to their principal activities—and Respondents have essentially given up even trying to do so—the time is non-compensable.

ARGUMENT

I. This Court Should Reject Respondents' Attempt To Evade The Longstanding "Integral And Indispensable" Test.

From the start, this case has been about the meaning of the "integral and indispensable" standard. The district court granted Integrity's motion to dismiss, holding that time spent passing through a security screening was "not integral and indispensable to [Respondents'] principal activities of employment." Pet.App.28. The Ninth Circuit reversed, holding that Respondents had stated a claim under that court's expansive interpretation of "integral and indispensable." Pet.App.10-12. And, in their brief in opposition, Respondents emphasized that "[t]his case concerns the application of [the] well-established 'integral and indispensable' standard." BIO at 2. Respondents argued that their complaint satisfied that test because "[p]articipating in an end-of-shift anti-theft search is … integral to a worker's on-shift duty to refrain from taking Amazon merchandise." *Id.* at 20.

Perhaps understandably, Respondents no longer argue that not stealing is a principal job duty or that security screenings are otherwise integral and

indispensable to any of their principal job activities. Instead, Respondents' lead argument (at 15-33) is that the "integral and indispensable" test is just one way for a pre- or post-shift activity to be deemed compensable. They contend that *any* pre- or post-shift activity that is "required" or "directed" by an employer and performed for the employer's benefit is *per se* compensable, even if the activity is neither integral nor indispensable to the worker's principal activities. That argument is foreclosed by the plain text of the Portal-to-Portal Act and based on an untenable reading of this Court's precedents and DOL's regulations. It would also bring within the FLSA numerous types of activities that Congress plainly intended to exclude when it enacted the Portal-to-Portal Act.

A. Respondents' Proposed Alternative Test Is Inconsistent With the Portal-to-Portal Act and This Court's Precedents.

The first obstacle to Respondents' novel effort to treat pre-shift and post-shift activities that are not "integral and indispensable" to principal activities as nonetheless compensable is the plain text of the Portal-to-Portal Act. The Act broadly provides that time walking and "traveling to and from the actual place of performance of the principal activity or activities" is not compensable absent a custom or practice to the contrary. 29 U.S.C. § 254(a). The Act likewise provides that "activities which are preliminary to or postliminary to said principal activity or activities" are non-compensable. *Id.*

The statutory language necessitates some dividing line between non-compensable preliminary

and postliminary activities and compensable pre- and post-shift activities that are indistinguishable from principal activities. The "integral and indispensable" test marks DOL's and this Court's long-established identification of that dividing line. That test is fully consistent with the statutory text because activities that are integral and indispensable to principal activities are part and parcel of the principal activities and are thus properly classified as compensable principal activities in their own right.

But nothing in the statutory language suggests that there is a class of preliminary or postliminary activity that is nonetheless compensable because it is required by the employer and done for the employer's benefit. Nor do Respondents offer a theory why preliminary and postliminary activities are any less preliminary or postliminary (*i.e.*, that they become principal activities) simply because they are mandatory. Mandatory preliminary and postliminary activities are still preliminary and postliminary activities, and the Portal-to-Portal Act treats preliminary and postliminary activities as non-compensable. Many preliminary and postliminary activities are mandated by the employer. *See* U.S. Br. 22-24. And it seems a safe assumption that most employer-mandates are designed to benefit the employer. Thus, Respondents' novel argument would render a substantial percentage of preliminary and postliminary activities compensable despite the clear language of the Portal-to-Portal Act to the contrary.

Respondents purport to draw support from this Court's precedents, but those cases in fact foreclose the argument. In the very first sentence of *Steiner*,

this Court noted that it was broadly addressing how the FLSA applies to "work performed before or after the direct or productive labor for which the worker is primarily paid." 350 U.S. at 248. As the Court explained, "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. *Steiner* thus articulates only a *single* test for determining whether pre- or post-shift activities are compensable—the integral and indispensable standard—and does not in any way suggest that a completely different rule would apply to activities that are "required" or "directed" by the employer.

Respondents' effort to read *Steiner* as merely articulating one, non-exclusive avenue for treating pre- and post-shift time as compensable depends critically on their contention (at 24) that *Steiner*'s holding was limited to "a situation in which an activity (changing clothes) had not been mandated by an employer, but was nonetheless a task-specific practical necessity." But the Court plainly did not cabin its holding in this manner. The activities at issue in *Steiner* included *both* employer-required tasks *and* tasks that were a "practical necessity." Respondents conveniently fail to cite language from *Steiner* emphasizing that "'[i]n the afternoon *the men are required by the company to take a bath* because lead oxide might be absorbed into the blood stream.'" 350 U.S. at 251 (emphasis added). The Court proceeded to apply the integral and indispensable test to post-shift bathing even though this activity was

unquestionably required by the company. *Id.* at 256. Respondents are thus wrong to characterize *Steiner* as being limited to activities that were "not … mandated by an employer." Resp. Br. 24. And if there really were a separate test for employer-mandated activities, surely *Steiner* would have applied that test to the employer-mandated baths and applied the "integral and indispensable" test only to changing clothes.

Moreover, Respondents largely ignore this Court's decision in *King Packing*, which is also fatal to their legal theory. *King Packing* addressed whether butchers were entitled to compensation for pre-shift knife sharpening, which this Court repeatedly noted was "required" by the employer. The Court emphasized that "*the knifemen are required to sharpen their own knives outside the scheduled shift of eight hours*," and that "[a]t the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives." 350 U.S. at 262 (emphasis added).

If Respondents' view of the law were correct, the Court would have stopped right there and found the knife-sharpening compensable solely because it was "required" by the employer and done for the employer's benefit. But, instead, the Court proceeded to apply the integral and indispensable test to this pre-shift activity, just as it had applied the test to the required post-shift bathing in *Steiner*. *Id.* at 263. Respondents' novel theory that all tasks "required" by

an employer are *per se* compensable simply cannot be squared with this Court's precedents.[1]

B. DOL's Regulations Do Not Remotely Suggest That All Activities "Required" by the Employer Are Compensable.

DOL's regulations also make clear beyond cavil that the integral and indispensable test is the sole test used to determine when pre- or post-shift activities are compensable. *See* 29 C.F.R. § 790.8(a) (activity compensable if it is "'indispensable to the performance of productive work'"); *id.* § 790.8(b) (activity compensable if it is "an integral part of a principal activity"). Respondents (at 24-26, 28-33) cite various regulations in support of their legal theory, but—far from establishing a separate rule for employer-required tasks—the cited regulations merely *apply* the longstanding integral and indispensable test to certain types of activities.

1. Respondents (at 24-26, 31) rely heavily on DOL regulations that address situations in which an employee is "engaged to wait." Under those regulations, "[w]here … an employee is required by his employer to report at a particular hour at his

[1] Respondents (at 23 n.15) cite several lower court decisions in support of their theory, but those cases applied the "integral and indispensable" test rather than a separate rule for employer-mandated activities. *See Dunlop v. City Electric*, 527 F.2d 394, 400-01 (5th Cir. 1976) (filling out order forms and fueling, loading, and cleaning trucks integral to electricians' work); *Barrentine v. Arkansas-Best Freight*, 750 F.2d 47, 50-51 (8th Cir. 1984) (vehicle safety inspections integral for truck drivers); *Kellar v. Summit Seating*, 664 F.3d 169, 174 (7th Cir. 2011) (distributing fabric and reviewing work schedules integral for sewing manager).

workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. § 790.7(h); *see id.* § 790.6(b); *id.* § 553.221. Respondents contend (at 26) that a post-shift security screening is no different from a requirement that workers remain on the premises for another hour after the end of their shifts, which would be compensable under the "engaged to wait" regulation.

That argument is wrong for several reasons. First, the "engaged to wait" regulation simply *applies* the "integral and indispensable" test to certain types of waiting time. It thus provides no support whatsoever for Respondents' argument that all employer-required activities are compensable without regard to the integral and indispensable test.

Second, the same regulations make clear that, while workers must be compensated when they are "engaged to wait," they need not be compensated when they "wait[] to be engaged." 29 C.F.R. § 790.7(h). The difference between the two situations goes to the heart of the difference between principal and preliminary activities. When an employee must be at the workstation at a time certain and then is forced to wait because there is not enough work to do at the beginning of the shift, that waiting time is properly treated as a principal activity. If there had been sufficient work ready to go, the employee would have been engaged at the beginning of the shift (and would likely be docked pay if not there and ready to work).

Time spent going through security is nothing like that. Employees are not waiting to be engaged as soon as a late-breaking order needs fulfillment. Their workday is done. They are free to visit the breakroom or linger in a post-shift conversation. They are simply required to go through security as part of the egress process.[2] The screening process is thus not at all like being "engaged to wait" or any other activity integral and indispensable to a principal activity, but it is exactly like checking out or waiting to do so, which are quintessential non-compensable postliminary activities.

2. Respondents also cite a DOL regulation regarding employees who are required to report early to "distribut[e] clothing or parts of clothing at the work-benches of other employees and get[] machines in readiness for operation by other employees." 29 C.F.R. § 790.8(b). According to Respondents (at 28-29), time in which an employee assists other workers is "not integral and indispensable to his own work" but is "compensable because the employer required the employee to perform the task." In reality, the regulation is doubly unhelpful to Respondents' argument.

First, the regulation hardly supports Respondents' effort to bypass the "integral and

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[2] Indeed, if employees were entitled to time-and-a-half overtime pay for all time up to and including the exit screening, this would give them a strong incentive to take their time getting through the screening. *Cf. IBP v. Alvarez*, 546 U.S. 21, 35 (2005) (noting the "open-ended and potentially expansive liability that might result from a rule that treated travel before the workday begins as compensable").

indispensable" test, as the regulation itself specifies that this example is an illustration of "what is meant by an integral part of a principal activity." 29 C.F.R. § 790.8(b). Second, passing through security as part of the egress process is nothing like the example discussed in the regulation. For the employee who must report early to distribute clothing and get machines ready for operation, those activities are clearly principal activities that are compensable. Indeed, some employees' principal activities consist entirely of preparatory work for others, as many a junior chef would attest. But no one gets paid simply to go through security or punch a clock. Those are postliminary activities whether or not mandated by the employer.

Respondents' reliance on DOL regulations regarding changing clothes is similarly misplaced. Respondents claim (at 29-30) that "[d]onning and doffing an employer-required uniform on the employer's premises is compensable even if the uniform itself is not indispensable to whatever the employee does while wearing it." That assertion is baffling, as the regulation explicitly applies the integral and indispensable test. The regulation provides that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday *would be an integral part of the employee's principal activity*." 29 C.F.R. § 790.8(c) (emphasis added).

A footnote appended to this sentence in the regulation notes that "[s]uch a situation may exist where the changing of clothes on the employer's

premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. § 790.8(c) n.65. But that footnote simply underscores that there is nothing talismanic about employer mandates. When changing clothes is integral and indispensable to discharging principal activities, it is compensable whether the need to change clothes flows from legal requirements, employer mandates, or practical necessity. And when clothes-changing is not integral or indispensable, it is non-compensable. The presence of legal requirements, employer mandates, or practical necessities may have some probative value in informing whether something is integral and indispensable, but they are no substitute for that test.

3. There is a final, glaring problem with Respondents' effort to draw support for their alternative test from DOL's regulations—namely, DOL's position in this Court as reflected in the *amicus* brief of the United States. In that brief, DOL makes clear that the Ninth Circuit's holding that any activity required by the employer for the employer's benefit satisfied the "integral and indispensable" test was too simplistic, and was inconsistent with the statutory text, judicial precedent, and regulatory gloss. U.S. Br. 19-22 (describing Ninth Circuit's analysis as "unduly spare"). Respondents' related argument that employer-mandated activities that benefit the employer are compensable whether or not "integral and indispensable" is even less compatible with those sources, including DOL's regulations.

The reality is that DOL's contemporaneously-adopted regulations made clear that the process of checking out is a non-compensable postliminary

activity. 29 C.F.R. § 790.7(g). And when DOL first applied those regulations to an employer-mandated security screening, it confirmed that such activity was non-compensable without regard to whether it was part of the ingress or egress process or primarily done to protect employee safety or prevent employee theft. *See* U.S. Br. 28-29 (discussing 1951 Wage & Hour opinion). In short, DOL has made clear that the relevant inquiry is more searching than a simplistic inquiry into whether the activity is employer-mandated and for the employer's benefit. And DOL has made equally clear—both in 1951 and in its brief—that a security screening as part of the egress process is unquestionably a non-compensable postliminary activity.

C. Respondents' Interpretation of the Portal-to-Portal Act Would Dramatically Expand the Scope of Compensable Activities.

Many pre- or post-shift tasks are "required" by employers and done for the employers' benefit but are nonetheless non-compensable preliminary or postliminary activities. Most notably, checking in and out and waiting in line to do so are non-compensable because they are merely part of the ingress and egress process and are neither integral nor indispensable to employees' productive work. 29 C.F.R. § 790.7(g); *see* U.S. Br. 23 (security screenings are "materially analogous to checking out").

Despite the prevalence of the checking out analogy in the briefs of both Integrity and the United States, Respondents have little to say about the non-compensability of the check-out process beyond the

assertion (at 35, 38) that it primarily benefits employees and benefits employers only incidentally. That argument strains credulity, as the check-in/check-out process unquestionably benefits the employer. *See* U.S. Br. 24-25; *Tennessee Coal v. Muscoda*, 321 U.S. 590, 594 (1944) (process "enables the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes"). It serves important record-keeping and accounting functions, and also prevents cheating, one of the principal functions of the egress security clearance. In a world of perfect honesty, there would be no need for a time clock, a check-out process, or security screenings. In the world we actually live in, all of these are non-compensable postliminary activities.

Respondents' legal theory also would compensate similarly-situated employees differently based on the trivial distinction between activities that are "required" and not just a "practical necessity." If a work area is a five-minute tram ride from the parking lot, it would make little sense to make the compensability of travel time turn on whether the employer requires employees to use the tram for safety reasons or gives employees the option of a longer walk. Similarly, the compensability of time spent in a security screening should not turn on whether the employer formally requires it or designs the workplace to make exiting through a metal detector a practical necessity. It would be nonsensical to adopt a new legal rule that gave dispositive significance to such meaningless distinctions, but that is what Respondents propose.

D. Respondents' Attempts To Disavow the Implications of Their Arguments Are Unavailing.

1. Perhaps recognizing the true breadth of their legal theory, Respondents offer several concessions in an attempt to make their position seem more reasonable. Most notably, Respondents contend (at 14, 48-49) that "[i]n many circumstances, overtime claims related to ordinary security screenings will be precluded by the *de minimis* doctrine." But importing an atextual *de minimis* doctrine to avoid the absurd consequences of a required-by-and-for-the-benefit-of-the-employer test that itself has no grounding in statutory text has little to recommend it. When it comes to statutory construction, two wrongs do not make a right.

Worse still, Respondents' suggested *de minimis* exception repeats an error that Congress has already corrected once. Respondents (at 48-49) cite, apparently without irony, *Mt. Clemens* for the proposition that the "*de minimis* doctrine has for decades been an established part of FLSA jurisprudence." But Congress enacted the Portal-to-Portal Act to abrogate *Mt. Clemens*' core holding *despite* this Court's reassurance that "[w]e do not, of course, preclude the application of a *de minimis* rule where the … time is such as to be negligible." 328 U.S. at 692. There is no need for a judicially-crafted *de minimis* exception for negligible amounts of time spent in postliminary activities. Congress already made clear that *all* preliminary and postliminary activities, properly defined, are non-compensable.

Moreover, the *de minimis* rule provides cold comfort to employers because it is all but useless at the motion-to-dismiss stage. *See Mt. Clemens*, 328 U.S. at 692 (*de minimis* rule could be applied "only after the trier of facts makes more definite findings as to the amount of walking time in issue"). This is a case in point. The district court dismissed this case despite the fanciful allegation that the screening process took 25 minutes on average. Under the *de minimis* rule, however, Integrity would need to engage in substantial discovery—and withstand the powerful incentives to settle, *see* Retail Litig. Ctr. Br. 16-18—before it could establish the truth about screening times and the existence of a *de minimis* defense.

2. Respondents also seek to downplay the breadth of their arguments by insisting that the FLSA would not apply to security screenings that are "directed at the public as a whole, not at employees." Resp. Br. 49. But, as Integrity explained, *everyone* who enters a secured area in an Amazon.com warehouse is subject to a security screening upon exit, and Respondents do not allege otherwise in their complaint. Pet. Br. 40-42; U.S. Br. 29-30. Thus, in their effort to make their atextual test sound reasonable, Respondents have sacrificed their own complaint.

Moreover, Respondents' purported concession about screenings "directed at the public as a whole" is contrary to their core legal theory that an activity is compensable if it is "expressly ordered by an employer." Resp. Br. 11, 22-33. A security screening required of everyone on the warehouse floor, whether employee or visitor, is just as much required by and

for the benefit of the employer as one that exempts visitors.

Finally, the diverse array of *amici* supporting Integrity undermines Respondents' attempts (at 46-48) to portray this case as a one-off dispute that does not implicate "most typical security practices." Integrity's position is supported by DOL, and groups representing large businesses, small businesses, retailers, manufacturers, human resources professionals, cities, counties, mayors, and municipalities. These groups have diverse and often-conflicting interests, but all agree that interpreting the FLSA to apply to security screenings would be countertextual, tremendously expensive and complicated, and would undermine employers' good-faith efforts to ensure a safe and crime-free workplace.

II. Respondents Badly Misconstrue The Meaning Of "Principal Activities."

Respondents no longer argue that post-shift security screenings actually *satisfy* the integral and indispensable test. Nor can they, as waiting for and walking through a security screening before exiting the building is simply not the kind of task that is integral and indispensable to a warehouse worker's principal job activities. *See infra* Part III; Pet. Br. 24-27; U.S. Br. 18-22. Respondents do, however, take issue with Integrity's application of the integral and indispensable test, and they claim that Integrity's position would allow employers to force employees to perform numerous tasks without pay. Those arguments rest on a fundamentally mistaken conception of an employee's "principal activities" and that concept's role in the statutory scheme.

As Respondents themselves recognize (at 17-18), the Portal-to-Portal Act did not purport to define terms like "work" and "workweek" for FLSA purposes. Rather, the Portal-to-Portal Act sought to address the massive retroactive liability introduced by decisions like *Mt. Clemens* by making clear that time spent traveling to and from the place where workers undertook their "principal activities" was non-compensable, as was time spent on "activities which are preliminary to or postliminary to said principal activit[ies]." 29 U.S.C. § 254(a).

Given the Portal-to-Portal Act's distinction between non-compensable preliminary and postliminary activities and compensable principal activities, it is necessary to have a test to distinguish them. The Portal-to-Portal Act and DOL's regulations use the term "principal activities" for that limited purpose—*i.e.*, for distinguishing between compensable pre-shift and post-shift activities and non-compensable preliminary and postliminary activities. "Principal activities" is not a general-purpose definition of what is compensable, but rather just a way of identifying certain pre-shift and post-shift activities that remain compensable, even though at first blush they might appear to be preliminary or postliminary.[3]

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[3] The limited office of the "principal activities" concept is underscored by the continuous workday rule, under which an employee is entitled to compensation for the entire "period between the commencement and completion on the same workday of [the] employee's principal activity or activities." 29 C.F.R. § 790.6.

Once it is clear that the concept of "principal activities" is only a means of identifying compensable pre-shift and post-shift activities that might otherwise appear preliminary or postliminary but are in fact "integral and indispensable," all of Respondents' concerns (at 12, 40) about uncompensated lawn mowing and car washing disappear. Those activities are not even arguably preliminary or postliminary and so there is no reason to even ask whether they are principal activities. Security screenings as part of an egress process, by contrast, are obviously postliminary. People are paid to wash cars and cut grass, but no one is paid to go through security all day. That does not mean that every post-shift activity is non-compensable—workers are not paid just to take baths or doff protective gear—but it does explain why activities like lawn mowing need not even be subjected to the integral and indispensable test.[4]

For similar reasons, Respondents are wrong to assert (at 40-41) that Integrity is proposing a test under which courts must determine whether each job activity is "primary" or "secondary," and only count the "primary" ones in determining whether the integral and indispensable test has been satisfied. The "principal activities" standard is not designed to classify workers as being principally engaged in one kind of work or another. It is simply seeking to

[4] Respondents' misunderstanding of the role of "principal activities" in the statute is also at the root of their mistaken suggestion (at 22, 32) that everything from blood tests to training sessions would be uncompensated. Those activities are not even arguably preliminary or postliminary, and thus their compensability does not turn on whether they are integral or indispensable to anything else.

identify pre-shift and post-shift activities that are properly treated as compensable, and for those purposes being "integral and indispensable" to any of an employee's principal activities will suffice. DOL's regulations have long recognized that "[t]he use by Congress of the 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." 29 C.F.R. § 790.8(a) (emphasis added).

III. *Amici* Fail To Show That Post-Shift Security Screenings Are Integral And Indispensable To Respondents' Principal Job Duties.

Unlike Respondents, the AFL-CIO argues that post-shift security screenings satisfy the "integral and indispensable" test—albeit just barely. *See* AFL-CIO Br. 7 ("it might have been preferable for [Respondents] to have pleaded more detailed facts about their job responsibilities and the nature of the screenings"); *id.* 8, 25 (Respondents stated a claim under Rule 8 "if just so"). But those arguments are just as flawed as the Ninth Circuit's reasoning in the decision below.

Like the Ninth Circuit, the AFL-CIO addresses the relevant job duties at far too high a level of generality. For example, the AFL-CIO asserts (at 18) that employee theft is a "serious concern" and that the employer has an "efficiency" interest in preventing theft. All of that may well be true, but it does not show that post-shift security screenings are integral and indispensable to Respondents' *principal job activities.* Employers also have an efficiency interest in ensuring that their workers check in and out each day, *see*

Tennessee Coal, 321 U.S. at 594—and an employee's failure to properly check in or out would be a serious concern for the employer—but that does not convert the check-in process into compensable activity.

The AFL-CIO correctly acknowledges that Respondents' job duties involved "'walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf and direct[ing] the product to be distributed to Amazon.com customers.'" AFL-CIO Br. 26 (quoting JA20). But the AFL-CIO makes no serious attempt to explain how a post-shift security screening is integral and indispensable to those specific job activities. Respondents can perform every single one of their principal activities in a safe and effective manner regardless of whether they pass through a security screening as part of the egress process after work. Pet. Br. 17; U.S. Br. 21. The screenings simply ensure that employees have not engaged in the *extracurricular* (and illegal) activity of stealing Amazon's merchandise.

The AFL-CIO (at 26) also quotes Respondents' allegation in the complaint that "'it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse.'" But the "integral and indispensable" test is not satisfied by merely pleading that a post-shift activity is "essential" (or "indispensable"). Pet. Br. 33-38. And the AFL-CIO does not—and cannot—assert that "not stealing" is one of Respondents' principal job activities for which compensation must be paid. Pet. Br. 40.

IV. Respondents' Policy Arguments Are Unavailing.

Rather than addressing Congress' policy goals in enacting the Portal-to-Portal Act—the statute at issue here—Respondents focus on the general policies underlying the FLSA. But the express purpose of the Portal-to-Portal Act was to *limit* the scope of the FLSA and massive retroactive liability by abrogating this Court's expansive interpretation of the "workweek" in *Mt. Clemens*. *See* Pet. Br. 5-9, 21-24. Congress underscored that the FLSA was never intended to radically reshape customary compensation practices and that mandatory compensation for preliminary and postliminary activities was never intended, even if those tasks—like the ones at issue in *Mt. Clemens*—were performed on the employer's premises and "under the complete control of the employer." *Mt. Clemens*, 328 U.S. at 690-91.

Even the broad goals of the FLSA as originally enacted only underscore why security screenings should not be deemed compensable. For example, Respondents note (at 44-46) that one of the purposes of the FLSA's overtime rules was to "spread employment" by encouraging employers to "hir[e] additional workers rather than burden their existing workforce." But because security screenings are neither productive work in their own right nor integral and indispensable to productive work, it would be nonsensical (and impossible) for an employer to attempt to "spread" this task among more workers. The obvious mismatch between the original goals of the FLSA and the security screenings only underscores why this task is not compensable.

Respondents also claim (at 44, 46) that the time spent in security screenings could be shortened if Integrity "simply hire[d] additional screeners." But a similar argument could be made for nearly any preliminary or postliminary activity. The line to punch the time clock would be shorter if there were more time clocks. The trip between the portal of a mine and the work area would be shorter if the employer installed a faster transport system. And the non-compensable waiting time in *IBP*, 546 U.S. at 40-42, could have been reduced if the employer hired more people to pass out protective clothing.

In sum, the time necessary for most preliminary or postliminary activities could be reduced by greater employer expenditures, and yet Congress expressly made that time non-compensable. Indeed, Congress specifically abrogated the *Mt. Clemens* decision even though the tasks at issue in that case took "2 to 12 minutes daily, if not more." 328 U.S. at 691. Respondents' appeal to arguments that carried the day in *Mt. Clemens* only to be rejected in the Portal-to-Portal Act cannot prevail. *Cf. American Broadcasting Cos. v. Aereo*, 134 S. Ct. 2498 (2014) (declining to embrace arguments that prevailed in an earlier Supreme Court case only to be rejected by Congress in amending the Copyright Act).

Respondents' theory of the FLSA would dramatically expand the types of activities that are subject to the FLSA's mandatory compensation rules, and would fundamentally upset Congress' reasoned policy choice in the Portal-to-Portal Act. If such a sea-change in the law is to be made 65 years after the enactment of the Portal-to-Portal Act, it should be

made by Congress on a prospective basis, not by holding employers retroactively liable for massive money damages for widespread practices that have never before been deemed compensable. *See Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012).

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

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