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 FOR RESPONDENTS

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QUESTIONS PRESENTED

(1) Does the time an hourly employee spends participating in an employer-mandated anti-theft search constitute "work" within the meaning of the Fair Labor Standards Act?

(2) If such a search occurs at the end of the workday, is the employee's time nonetheless non-compensable as a postliminary activity under the Portal-to-Portal Act?

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REGULATIONS INVOLVED

The regulations involved, in addition to those appended to the brief for Integrity and the Government, are set out in an appendix to this brief.

STATEMENT OF THE CASE

A. The Legal Framework

The Fair Labor Standards Act ("FLSA") was enacted in 1938 and provides that a covered employee who "is employed for a workweek longer than forty hours" must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a). "Employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). The FLSA itself does not contain a definition of "workweek" or "work."

Congress amended the FLSA in 1947 with passage of the Portal-to-Portal Act. 61 Stat. 84 (1947). The Portal-to-Portal Act "narrowed the coverage of the FLSA slightly by excepting two activities that had been treated as compensable under [prior Supreme Court] cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005) (quoting 29 U.S.C. § 254(a)). As with the FLSA, the Portal-to-Portal Act itself does not define "work." The Portal-to-Portal Act left unchanged this Court's prior precedent relating to what constitutes "work" under the FLSA. *IBP*, 546 U.S. at 28 ("[T]he Portal-to-Portal Act does not purport to change this Court's earlier

descriptions of the terms 'work' and 'workweek', or define the term 'workday.'").

1. The Definition of "Work" Under The FLSA

The first case to address the definition of "work" under the FLSA was *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Tennessee Coal*, this Court held that "work" means "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 & R. Co.*, 321 U.S. at 598; *see also Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 164-66 (1945). Subsequently, in *Armour & Co. v. Wantock*, this Court made clear that work also includes a period of time during which an employer directs a worker to be on its premises, even if the worker is only waiting to engage in some affirmative exertion. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Thus, under *Tennessee Coal* and *Armour* work is any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

2. The Emergence Of The Dichotomy Between Employer-Required Activities and Practical Necessities

In *Anderson v. Mt. Clemens Pottery Co.*, this Court significantly broadened its interpretation of "work." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Mt. Clemens* expanded the "require[ment]" element of the *Tennessee Coal* to encompass two distinct concepts: (1)

activities that are required because they are employer-directed and (2) activities that are required merely in the sense that they are a "practical necessity". *Mt. Clemens,* 328 U.S. at 690-91 ("[T]he statutory workweek includes all time during which an employee is *necessarily required* to be on the employer's premises . . . .") (emphasis added). The Court held that the time employees spent walking from the time clocks where they punched in at the factory gate to the work areas where they made pottery was compensable work, not because the employer had issued any directive about how workers were to get from the time clock to their work stations, but because that internal travel was a practical necessity. *Id.* at 691 ("[T]hey walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business."). The decision in *Mt. Clemens* set in motion events that led to the adoption of the Portal-to-Portal Act.

As the title of the Act makes clear, the primary concern behind the Portal-to-Portal Act was to address *Mt. Clemens*' holding that work under the FLSA includes the entire period between when an employee enters the employer's premises at the beginning of the day and when the employee exits at the end, even though part of that time is devoted merely to traveling between the entrance and the employee's work station. The Portal-to-Portal Act provides limited immunity from liability, in pertinent part, as follows:

> [N]o employer shall be subject to any liability . . . under the Fair labor Standards Act . . . on account of the failure of such employer . . . to pay an employee overtime compensation, for or on account of any of the following activities

> of such employee engaged in on or after May 14, 1947—
>
> > (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 either prior to the time on any particular workday at which such 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). Section 254(a) consists of two exclusions (subsections (1) and (2)) which are themselves subject to a limitation (in the phrase which begins "which occurred either"). The limiting language that follows subsection (2) embodies the continuous workday rule. Under that rule, an employee is entitled to compensation from the first work of the day until the last work of the day, regardless of whether during some portion of the period in between he or she is doing something that in and of itself would not be considered "work" (e.g., waiting for the next customer, going to the wash room, or chatting with a co-worker). *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). The same rule applies to walking and waiting that occurs between the first and last principal activities of workday. "[D]uring a continuous workday, any walking time that occurs after

the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [section 254(a) of the Portal-to-Portal Act], and as a result is covered by the FLSA." *IBP,* 546 U.S. at 37; *see* 29 C.F.R. § 790.6.

The first case to address the meaning of "work" under the FLSA and the scope of the exclusions in section 254(a) of the Portal-to-Portal Act was *Steiner v. Mitchell*, 350 U.S. 247 (1956). Like *Mt. Clemens*, the activity at issue in *Steiner* was not required by an employer-directive; rather, it was required as a practical necessity. *Id.* at 250. The workers in *Steiner* were employed at a battery manufacturing plant pervaded by dangerous lead and acid, which would destroy a worker's clothing and endanger a worker's health. *Id.* at 251. Although many of the workers in that case chose to change clothes for safety reasons at the beginning and end of the day at the employer's facility, the employer did not *require* the workers to do so.[1] This Court granted review to decide both whether the donning and doffing of those work clothes constituted "work" under the FLSA, and whether it was excluded from compensation by section 254(a).

Steiner held that the donning and doffing was indeed work and that this work was outside the scope of the section 254(a) exclusions. *Steiner,* 350 U.S. at 255. In doing so, the Court emphasized that under the circumstances of the case, wearing non-street clothes on the job, and thus the donning and doffing thereof, were "integral and indispensable" to the work of the employees in the plant.

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1. *See* Petitioners' Brief and Argument on the Merits, No. 22 (O.T. 1955), 4, available at 1955 WL 72535.

Id. at 252. That "integral and indispensable" analysis arose out of an activity that was not required by an employer-directive, but was rather a practical necessity for the employees. *Id.* at 252; *see also Mitchell v. King Packing Co.,* 350 U.S. 260 (1956) (sharpening a knife is a practical necessity for cutting meat).

More recently, this Court addressed the continuous workday doctrine and compensable activities under the FLSA in *IBP, Inc. v. Alvarez*. *IBP* held that the exceptions contained in 29 U.S.C. § 254(a) are not applicable after an employee engages in his or her first principal activity and prior to the end of that employee's last principal activity. *IBP,* 546 U.S. at 37. The Court reiterated the rule in *Steiner* that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *Ibid.* *IBP* also recognized the singular importance of an employer directive, noting that certain activities that would not be compensable if engaged in voluntarily would be work if ordered by an employer. *IBP,* 546 at 40, n.8. It held that although waiting at the beginning of the day to don protective gear would not by itself be compensable, an employee would be entitled to compensation if his or her employer ordered the worker to be on the premises during that same period of time. *Ibid.* ("[O]ur analysis would be different if [the employer] required its employees to arrive at a particular time in order to begin waiting."). The Court further held that waiting in line to "doff" the same clothing at the end of the day was compensable because of the continuous workday rule, since the doffing was also a principal activity necessitated by the job. *Id.* at 22-23.

B. Early Overtime Claims Based On Employer-Mandated Searches

Prior to 2009 the only published rulings under the FLSA and Portal-to-Portal Act regarding searches of employees were arbitration decisions regarding overtime claims based on such employer-imposed searches. *In re U.S. Marine Corps Supply Center*, held that federal workers were entitled to overtime payments for a period of time during which the workers were unable to leave the parking lot where they worked because government officials had decided to search every car for an item they believed had been stolen. *In re U.S. Marine Corps Supply Ctr. and American Fed'n of Gov't Employees*, 1975 Lab. Arb. LEXIS 308, 65 Lab. Arb. (BNA) 59, *1 (1975) (King, Arb.). Although the search of each car had taken only about a minute, there were an "inadequate number of personnel assigned to accomplish the search." *Id.* As a result, the departing workers were delayed as much as 35-minutes. *Ibid.* In holding that the workers were entitled to overtime pay, the arbitrator relied on the FLSA, which had become applicable to federal employees[2] as well as the Labor Department "Hours Worked" regulations. *Id.* at *9. The arbitrator rejected the government's contention that the search (and related delay) were not work; "[t]he fact that the[] [employees] performed no physical or mental labor during that period is not controlling. The employees

2. Citing: "Interim Instructions for Implementing the Fair Labor Standards Act. Basic Rule: Hours work (sic), in general include all the time an employee is *required to be* on duty or on the Agency's premises or at a prescribed work place, and all time during which he is suffered or permitted to work for the agency." *U.S. Marines Corps Supply Ctr.*, 65 Lab. Arb. (BNA) at *9 (emphasis in opinion).

were required to remain on the premises of the employer for its benefit . . . ." *Id.* at *10.

In re Curtis Mathes Mfg. Co., construed the FLSA and Portal-to-Portal Act in a similar fashion. *In re Curtis Mathes Mfg. Co.*, 1979 Lab. Arb. LEXIS 298; 73 Lab. Arb. Rep. (BNA) LA 103 (1979) (Allen Jr., Arb.), The arbitrator concluded from a review of other cases "that arbitrators are persuaded to conclude that security searches and similar types of delays are compensable if the amount of time involved is not considered '*de minimis*.'" *Id.* at *12. Citing the decision in *U.S. Marine Corps Supply Ctr.*, the arbitrator reasoned that "such delays can be considered as 'hours worked' since the employer retains control and authority over workers." *Ibid.* The arbitrator rejected the overtime claim in that case only because it was *de minimis*, relying on the fact that the search in question had occurred on only a single occasion. *Id.* at *17. The arbitrator noted that a claim would not be *de minimis* if the practice or delay were a regular occurrence of 10 minutes per day. *Ibid.; see also, In re Safeway Stores, Inc.*, 44 Lab. Arb. (BNA) 1193, 1194-95 (1985) (Gentile, Arb.) (Overtime claim upheld on contractual grounds arising out of a search that delayed workers' departure by 35 minutes.).

C. Proceedings Below

Petitioner Integrity Staffing Solutions, Inc., ("Integrity") provides employees to perform the labor at many Amazon.com warehouses nationwide. Pet. App. 3-4, 20; J.A. 18-19. Respondents (and plaintiffs in the District Court) Busk and Castro ("Plaintiffs") worked for Integrity as hourly employees in Nevada warehouses, filling orders

placed by Amazon.com customers. Pet. App. 3-4; J.A. 17-18, 20. At the end of each day, after they had clocked out, plaintiffs were not permitted to leave the warehouse until they had been subjected to an anti-theft security search. J.A. 21-22. During the search process, plaintiffs and other employees "were required to remove all personal belongings from their person[s] such as wallets, keys, and belts, and pass through metal detectors before being released from work and allowed to leave the facility." J.A. 22. The screening process required plaintiffs to wait approximately 25 minutes each day at the end of each shift. J.A. 21. This time could have easily been reduced to a *de minimis* amount through the addition of more security checkers and/or staggering the quitting time of the shifts, so that employees could move through the clearance more quickly. J.A. 27. Plaintiffs commenced this action in federal district court, asserting that Integrity violated the FLSA because it did not pay them overtime for the time spent waiting for and during in the search process. J.A. 23, 24-28. The complaint asked the court to permit the FLSA claim to be heard as a collective action on behalf of all similarly situated Integrity employees nationwide.[3]

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3. First Amended Complaint ("FAC"), ¶ 21. The FLSA requires individuals who wish to take part in the proceedings to opt in individually. Pet. App. 5-6. Because this case was dismissed at the pleadings stage and otherwise stayed during the appeal process, plaintiffs have been denied the opportunity to send out court-approved notices of the pendency of the FLSA action as provided in *Hoffman–La Roche Inc. v. Sperling,* 493 U.S. 165, 170 (1989). *See Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) ("Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time.").

The district court dismissed the complaint for failure to state a claim on which relief could be granted. Pet. App. 19-35. The district court rejected plaintiffs' contention that participation in the search itself "was a princip[al] activity [under the Portal-to-Portal Act] because this exercise was a daily requirement . . . ." Pet. App. 27. It held that plaintiffs were entitled to compensation for the time consumed by the search only if they could show that it was "integral and indispensable to their principal activities as warehouse employees fulfilling online purchase orders." *Id*. The district court concluded that the searches were not integral and indispensable to the warehouse duties because "[p]laintiffs could perform their warehouse jobs without such daily security screenings." Pet. App. 28. The district court opinion suggested that all security screenings are non-compensable under the FLSA and the Portal-to-Portal Act. Pet. App. 28 and n.2.

The Ninth Circuit reversed. The Ninth Circuit rejected "a blanket rule that security clearances are noncompensable." Pet. App. 13. The court of appeals correctly utilized the definition of "work" (and "principal activity") and concluded that the search in this case was compensable because it was required by the employer (as a direct employer-mandate) and for the benefit the employer.

> Busk and Castro have alleged that Integrity requires the security screenings, which must be conducted at work. They also allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security

> clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. Assuming, as we must, that these allegations are true, the plaintiffs have stated a plausible claim for relief.

Pet. App. 12-13. The Court of Appeals noted that the complaint alleged that the employer "requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." Pet. App 12. The Ninth Circuit distinguished the anti-theft screening in this case from security checks directed at or applied to the general public. *Id.; compare Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) (screening of anyone entering or leaving a nuclear power plant); *Bonilla v. Baker Concrete Construction Inc.*, 487 F.3d 1340 (11th Cir. 2007) (screening to permit only certain workers, but not the public, to access the tarmac at an airport).

SUMMARY OF ARGUMENT

This Court's decisions defining what constitutes "work" under the FLSA encompass two distinct types of activities: (1) activities that are expressly ordered by an employer and (2) activities which, although not so ordered, employees must as a practical matter engage in because of the non-mandated activity's connection with some ordered activity. The "integral and indispensable" standard in *Steiner v. Mitchell,* delineates work of the second type. That standard supplements, rather than limits, the usual rule that work includes an activity that is both required by and beneficial to the employer. Numerous Department of Labor regulations provide that

the existence of an employer directive is sufficient (albeit not necessary) to render an activity "work," even when that mandated activity is not related to the worker's other responsibilities. For example, the regulations provide that an employer requirement that a worker attend a class or lecture is work even if the subject matter involved "is not directly related to the employee's job." 29 C.F.R. § 785.27.

Steiner does not mean, as Integrity and the Government appear to contend, that employer-required pre- and post-shift activity is not compensable unless the employer has ordered the worker to do something that is directly or closely related to that worker's shift work. If an employer requires a worker to engage in pre- or post- shift activity for the benefit of the employer, that activity is work within the scope of the FLSA, even if it is wholly unrelated to the employee's shift work. Under the interpretation of the law advanced by Integrity and the Government, Integrity could require warehouse workers, prior to or after their paid shift, to engage without compensation in any mandatory work activity that was not closely related to filling Amazon.com customer orders, such as mowing the lawn in front of the warehouse or washing the bosses car. The statute and regulations clearly do not permit an employer to require uncompensated, "off-the-clock" work so long as it is not essential to a worker's paid activity.

The activity at issue in this case easily falls within the definition of work under the FLSA. The complaint alleges that workers are required, prior to leaving the warehouse, to take part in a search of their persons. That search, intended to detect and deter theft of property, obviously benefitted the employer. J.A. 22. If a worker were required to come into the warehouse on his or her day

off to take part in a search—such as a search of his or her locker, cell phone or person—that activity would constitute work. Just like the lawn mowing by a warehouse worker after the end of a shift, the search becomes a part of that employee's job, and therefore, a principal activity per se, and is compensable. 29 C.F.R. § 790.8 ("The 'principal activities' referred to in the statute are activities which the employee is 'employed to perform'").

The Department of Labor's regulations provide that checking in and checking out, under ordinary circumstances, are preliminary or postliminary activities. But being searched is obviously different from checking in and out. Checking in and out is an activity that identifies for the employer which specific workers have entered or left the premises or work area, and usually makes a record of the time at which they did so. A search does neither of those things; a guard or other searcher typically would not ask for employee identification at the time of the search or make a record of who was searched or when. The employer does not even care about the identity of the worker searched unless there is a problem. Moreover, an activity that would otherwise constitute work does not become postliminary merely because it occurs at the end of the day. Under the regulations and well-established precedent, turning in reports, clothes, or equipment are common end-of-day activities that constitute work and principal activities; those activities do not become non-compensable simply because they are moved to a location near an exit. 29 C.F.R. § 790.8 ("The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed.").

Most searches and security screenings do not give rise to claims under the FLSA. In most circumstances, the time involved in connection with a search would be so brief as to be *de minimis*. *See* 29 C.F.R. § 785.47. In the instant case, Integrity could in any number of ways render *de minimis* the search and any related delays. Furthermore, many searches or screenings apply to and may be directed primarily at members of the general public entering or exiting a building; in that circumstance, the agency or company imposing that condition on entry onto its property would be acting as the proprietor of the facility, not as an employer.

ARGUMENT

The compensability of a particular activity under the FLSA turns on two distinct questions: whether it constitutes "work" within the meaning of the FLSA, and whether a claim for compensation for that "work" is precluded by section 254(a) of the Portal-to-Portal Act.

Although the instant litigation concerns a post-shift search, it turns on a more fundamental and far reaching dispute about the general legal standards governing the compensability of pre- and post-shift[4] activities. The briefs for Integrity and the Government suggest, for example, that employer-mandated pre- and post-shift activities are only compensable if the activity in question is integral and indispensable to the primary shift duty of an employee. Such an interpretation of the FLSA would permit employers to impose countless unpaid tasks on

4. Plaintiffs use the term "shift" to refer to the period of time for which an employer is paying a worker.

their workers. A receptionist could be required to come in early and make coffee without pay. A computer technician could be ordered to stay late to wash the windows without compensation. The arguments advanced in this case are replete with such broader implications.

I. Participation In An Employer-Mandated Search For Stolen Merchandise Is Work Under The FLSA Because It Is Done At The Direction Of And For The Benefit Of The Employer

A. An Activity Required by and Benefitting the Employer Constitutes Work Under the FLSA

Any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" is "work" under the FLSA. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Both the Department of Labor regulations, 29 C.F.R. § 785.7[5], and virtually

5. Section 785.7 provides:

> The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "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 Co. v. Muscoda Local No. 123,* 321 U.S. 590 (1944) . . . . The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities.

See 29 C.F.R. § 551.104 ("Hours of work means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency.")

every court of appeals[6] continue to utilize that definition. *See* 1 Ellen Kearns, ed., *The Fair Labor Standards Act* (2d ed. 2010), 8-11 ("The proper inquiry as to whether activities constitute 'work' is . . . . whether it is 'controlled or required by the employer and pursued for the benefit of the employer.'") (quoting *Tennessee Coal*).

An activity is "work" within the meaning of the FLSA even if an employer directs an employee to do nothing other than to be on its premises. "[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . . . Readiness to serve may be hired, quite as much as service itself . . . . [I]nactive duty may be duty nonetheless . . . ." *Armour & Co. v. Wantock,* 323 U.S. 126, 133 (1945); *Skidmore v. Swift & Co.,* 323 U.S. 134, 136–37 (1944). The employer in *Armour* had cited *Tennessee Coal's* passage describing "work" as "physical or mental exertion" required by an employer; the company argued that merely waiting for something to do involved no such exertion. In rejecting that contention, the Court emphasized that the definition in *Tennessee Coal* was intended only to explain why the circumstances of that

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6. *See e.g.*, *Manning v. Boston Medical Center*, 775 F.3d 34, 46 (1st Cir. 2013); *Singh v. City of New York*, 524 F.3d 361, 367 (2d Cir. 2008)(opinion by Sotomayor, J.); *De Ascencio v. Tyson Foods, Inc.,* 500 F.3d 361, 365 (3d Cir. 2007); *Perez v. Mountaire Farms, Inc.,* 650 F.3d 350, 363 (4th Cir. 2011); *Von Friewalde v. Boeing Aerospace Operations,* 339 Fed.Appx. 448, 453 n.3 (5th Cir. 2009); *Chao v. Tradesmen Int'l, Inc.,* 310 F.3d 904, 907 (6th Cir. 2002); *Sehie v. City of Aurora,* 432 F.3d 749, 751 (7th Cir. 2005); *Blair v. Wills,* 420 F.3d 823, 829 (8th Cir. 2005); *Alvarez v. IBP, Inc.,* 339 F.3d 894, 902 (9th Cir. 2003), *aff'd sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *United Transp. Union Local 1745 v. Albuquerque*, 178 F.3d 1109, 1117 (10th Cir. 1999); *Leone v. Mobil Oil Corp.,* 523 F.3d 1153, 1162 (D.C.Cir. 1975).

particular case constituted work, and not to establish an exclusive definition limiting the scope of the FLSA with regard to other dissimilar circumstances. *Armour,* 323 U.S. at 133.

In *Anderson v. Mt. Clemens Pottery Co.*, this Court adopted the more far reaching holding that an employee is entitled to compensation for the entire time he or she needs to be on the employer's premises, even for the period when the worker is walking between the factory gate and his or her workstation. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 691 (1946). Congress enacted the Portal-to-Portal Act in response. *Sandifer v. United States Steel Corp.,* 134 S. Ct. 870, 875 (2014); *IBP,* 546 U.S. at 27.[7]

The Portal-to-Portal Act did not establish a new definition of "work"; rather, it only limited in two specific ways the application of the existing definition. Absent a contract or custom to the contrary, section 254(a) precludes employer liability for claims based on certain travel (section 254(a)(1)) or for "preliminary" or "postliminary" activity (sections 254(a)(2)). *See IBP*, 546

7. This case is concerned with the narrow prospective provisions of 29 U.S.C. § 254 rather than the broad retrospective general amnesty provisions of 29 U.S.C. § 252, which shows that if Congress wanted to grant broad relief, it could easily have done so. *See* Brief for the Secretary of Labor, *Steiner v. Mitchell*, 10-11 ("[A] sharp distinction must be drawn between the broad exclusionary standard adopted in relation to suits for back pay for alleged pre-Portal-to-Portal Act violations (Sec. 2) and the discrete, more liberal set of criteria governing future (i.e., post-enactment rights of compensation) (Sec. 4) . . . . Congress, in dealing with the declared 'existing emergency,' did not propose to alter drastically or permanently the future operation of the Fair Labor Standards Act.").

U.S. at 28 ("Other than its 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, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work,' and 'workweek,' or to define the term 'workday.'") "[T]he [Portal-to-Portal] Act preserved potential liability for working time not made compensable by contract or custom but narrowed the coverage of the FLSA by excepting two activities that had been treated as compensable under our cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity."[8] Any activity which is a "principal activity" remains compensable under section 254(a).

Steiner v. Mitchell, interpreted both the meaning of work under the FLSA and the scope of the exclusions in section 254(a) of the Portal-to-Portal Act. *Steiner*, 350 U.S. at 255. *Steiner* concerned the compensability of activities that were required as a practical necessity to perform a particular job, as distinct from activities that were required by an employer-directive. *Id.* at 252-53. *Steiner* held that an activity that is not required by an employer-directive would nonetheless constitute work if it is integral

8. The Government endorses this view. "[T]he Portal-to-Portal Act left unchanged the 'Court's earlier descriptions of the terms "work" and "workweek," though it added '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.' *IBP*, 546 U.S. at 28." U.S. Br. 3-4. The Department of Labor regulations adopted that interpretation of section 254(a) several decades before this Court's decision in *IBP*. *See* 29 C.F.R. § 785.7.

and indispensable to the worker's formal assignments. *Id.* at 252. The workers in that case were not required by the employer to change clothes before and after their shift and some did not.[9] This Court endorsed the lower court's conclusion that even though (or if) the activities were not required by an employer-directive, the activities were nonetheless required as a practical necessity because changing clothes was integral and indispensable to the employees' work manufacturing batteries. *Id.* at 256. As a result, changing clothes was both work (and thus compensable under the FLSA) and a principal activity under the Portal-to-Portal Act (thus outside the scope of the section 254(a) exclusions).

> The trial court held that these activities "are made necessary by the nature of the work performed" . . . that they "directly benefit [the employer] in the operation of their business, and that they "are so closely related to other duties performed by [the] employee as to be an integral part thereof and are, therefore, included among the principal activities of said employees."

350 U.S. at 253[10]; s*ee also Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (applying integral and

9. *See Durkin v. Steiner*, 111 F. Supp. 546, 548 (M.D.Tenn. 1953) ("there are some employees who did not change clothes"); *Steiner v. Mitchell*, 215 F.2d 171, 172 (6th Cir. 1954) ("most . . . employees" change clothes).

10. Both the district court and the court of appeals had held that changing clothes was so necessary to the work of the employees as to be part of those duties. *Steiner v. Mitchell*, 215 F.3d at 172; *Durkin v. Steiner*, 111 F. Supp. at 547-48.

indispensable standard to knife sharpening that was practically necessary for an employee's work). *Steiner* supplemented, but it did not displace, the definition of work in *Tennessee Coal*. Work under the FLSA includes both activities that are "an integral part" of a worker's assigned duties (thought not expressly assigned by the employer), as well as all expressly assigned duties themselves.[11] The characterization of an activity does not change merely because the activity occurs at the end of the shift.

This Court more recently addressed the scope of "work" and the Portal-to-Portal Act in *IBP, Inc.*, 546 U.S. at 12. *IBP* made clear that that the term "principal activities" refers to activities, other than those excluded by sections 254(a)(1) and 254(a)(2), which would constitute "work" under the FLSA. *IBP*, 546 U.S. at 27-28. *IBP* holds that the exclusions in section 254(a)(1) and 254(a)(2) are the only "exceptions" created by the Portal-to-Portal Act to the Court's prior definitions of "work" and "workweek." *Id.* at 28. The phrase "principal activity or activities" thus does not contain some tacit third limitation on what is work under the FLSA."[12] Thus, a "principal activity" is "work"

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11. A number of the lower courts have fashioned hybrid standards for compensability that in various ways combine elements of the analytically distinct *Tennessee Coal* and *Steiner* tests, although the ultimate conclusions in those cases are not necessarily incorrect under the more complete analysis presented here.

12. "Principal activities" necessarily does not include either section 254(a)(1) travel and section 254(a)(2) preliminary and postliminary activity, because otherwise section 254(a) would be meaningless. Section 254(a)(1) travel or section 254(a)(2) preliminary or postliminary activities could not occur "prior to" or "after" the first and last "principal activities" of the workday if they were themselves principal activities.

other than the activities specifically excluded by sections 254(a)(1) and 254(a)(2).[13]

B. Participation In The Search In This Case Was Work Under the FLSA

The complaint in this case clearly alleges circumstances that constitute work under *Tennessee Coal*. The First Amended Collective and Class Action Complaint ("FAC") asserts that the plaintiffs were "required to go through a security search before leaving the facilities at the end of the day," "required to wait in line in order to be searched," and "required to remove all personal belongings from their person . . . and pass through metal detectors before being released from work and allowed to leave the facility." FAC ¶¶ 15-17; J.A. 21-22. The complaint in this case repeatedly alleges that the employer commanded the employees to wait and then undergo the exit search and bag check for stolen inventory. *Id*. The task of waiting in line and then undergoing a screening at the end of the day was specifically required by the employer. J.A. 19, 21. An Integrity employee could not leave the warehouse unless he or she stood on line and waited to be searched by order of the employer. J.A. 19, 21-22. The complaint also alleges that these requirements benefited Integrity,

13. Integrity insists that in adopting the Portal-to-Portal Act "Congress swiftly and emphatically rejected th[e] approach" in the *Tennessee Coal* definition of work. Pet. Br. 21 (quoting *Tennessee Coal*); *see* Pet. Br. 35 ("[t]he express purpose of the Portal-to-Portal Act was to overthrow the *ancient regime*"). But *IBP* makes clear, and the Government agrees, the Portal-to-Portal Act had a far more limited effect, excluding only the specific activities delineated in section 254(a)(1) and 254(a)(2), and leaving otherwise intact the *Tennessee Coal* definition.

which the Ninth Circuit considered a plausible allegation supported by the fact that the search was conducted only upon exiting. FAC ¶ 11; J.A. 19, 21.

If an employer were to require a worker to come into the plant or office on his or her day off, and spend 25 minutes participating in a search (or waiting to be searched), there would be no serious question that the activity constituted work for which compensation was required. That would be true whether the work consisted of going through the worker's locker or purse, rummaging through the worker's cell phone, providing a blood or urine test, or—as here—searching the workers and thier bags. The Government acknowledges that at least some employer-imposed searches are compensable, but does not propose a rule to distinguish them from assertedly non-compensable searches. U.S. Br. 31 n.18.

II. Because Integrity Mandated Participation In This Search, It Is Not A Postliminary Activity Under The Portal-to-Portal Act

The employer-mandated search in this case was a principal activity, and thus compensable. "The legislative history . . . indicates that Congress intended the words 'principal activities' to be liberally construed . . . to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. § 790.8(a).[14] As a number of circuits have repeatedly recognized, to be

14. The Government acknowledges the correctness of that regulation. U.S. Br. 21 ("As the regulations indicate, 'Congress intended the words 'principal activities' to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed.'" 29 C.F.R. 790.8(a).").

excluded by section 254(a), activities "must be undertaken 'for the employees' own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." *Dunlop v. City Electric, Inc.,* 537 F.3d 394, 398 (5th Cir. 1976) (citing *Mitchell v. Southeastern Carbon Paper Co.,* 228 F.2d 934 at 939 (5th Cir. 1955)).[15] If the search itself was a principal activity, the waiting period that preceded the search, is also compensable under the continuous workday rule because the final principal activity of the day—the search—had not yet been completed. Waiting to be searched at the end of the day is like waiting in line to doff required clothing or safety equipment in *IBP*.

A. Section 254(a) Does Not Limit Compensability To Activities That Meet The *Steiner* "Integral and Indispensable" Standard

Integrity argues that pre- and post-shift work is a non-compensable preliminary or postliminary activity under section 254(a) unless an employee can affirmatively demonstrate that the *Steiner* "integral and indispensable" standard is met. This is true only for activities that are *not* mandated by the employer; absent such an employer directive, an activity would only be work (and thus a principal activity) if it were necessary as a practical matter for the worker to perform the assigned tasks. *Steiner, IBP,* the text of section 254(a), and the Department of Labor's regulations each make clear that an activity which is *required* by an employer-mandate need not also satisfy the "integral and indispensable" standard.

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15. *See Kellar v. Summit Seating, Inc.,* 664 F.3d 169, 175 (7th Cir. 2011) (quoting *Dunlop*); *Barrentine v. Arkansas-Best Freight System, Inc.,* 750 F.2d 47, 50 (8th Cir. 1984) (quoting *Dunlop*).

(1) In *Steiner* the integral and indispensable standard was merely one method of establishing that an activity was a principal activity and thus outside the section 254(a) exclusions, not the exclusive method for doing so.[16] *Steiner* held that "the term 'principal activity or activities' in Section [254] *embraces* all activities which are an 'integral and indispensable part of the principal activities[]' . . . ." *Steiner*, 350 U.S. at 252-53 (emphasis added, footnote omitted). In *Steiner*, the term "embraces" means "includes," not "is limited to." *Ibid.* The purpose of *Steiner* was to address a situation in which an activity (changing clothes) had not been mandated by an employer, but was nonetheless a task-specific practical necessity; the Court in *Steiner* assuredly did not mean to hold that employer-directed tasks are non-compensable unless integral and indispensable to something else.

(2) Second, Integrity's insistence that pre- and post-shift work is noncompensable unless it (in some fashion) satisfies the "integral and indispensable" standard is inconsistent with the holding in *IBP* regarding compulsory waiting time. One question in *IBP* was whether the employees were entitled to compensation for time they spent at the beginning of the day waiting to don certain specialized clothing; the donning itself was held to be "integral and indispensable," and hence, itself a principal

16. Integrity repeatedly insists that in *Steiner* "this Court has held that an activity is compensable *only* if it is an 'integral and indispensable part of the principal activities for which covered workmen are employed.' *Steiner*, 350 U.S. at 256." Pet. Br. 22 (emphasis added). That assertion, in each instance with the key word "only" inserted before the quotation from *Steiner*, is repeated essentially verbatim four other times in Integrity's brief. Pet. Br. 2, 10, 16, 36. *Steiner* never uses the word "only" in this context.

activity. *IBP* held that such pre-donning waiting was noncompensable under section 254(a) if the employer only required the workers to be wearing that clothing when work started, and the waiting occurred simply because there was a line to pick up clothing. *IBP,* 546 U.S. at 40-42.

This Court made clear, however, that the waiting period would have been compensable if the employer had *ordered* the workers to be on its premises during that (or any other) period. "[O]ur analysis would be different if [the employer] required its employees to arrive at a particular time in order to begin waiting." *Id.* at 40 n.8. *IBP* recognized that if the employer had "required its workers to report to the changing area at a specific time", 29 C.F.R. § 790.7(h) would be applicable.[17]

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17. 29 C.F.R. § 790.7(h) states that when an employee is required by his employer to report at a particular hour at his 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. *Id.* at 41. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.(Footnote omitted).

29 C.F.R. § 553.221 states:

> Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call,

An employer-mandated arrival and resulting waiting period would not by itself be integral and indispensable to anything; yet under *IBP* and the governing regulation an employer must compensate a worker who arrives at such a mandated time, even if the employee has nothing to do. The same logic applies to an employer mandate that the employee remain later than the end of the shift, regardless of the employer's purpose in having the employee stay late. If an employer only paid workers until 5:00 p.m., but directed the workers to stay on its premises doing nothing for another hour, that additional one hour period would be compensable even though it was not integral and indispensable to any activity. And if the employer told the employees to stay on the premises another 25 minutes after the shift was over so that the employees could complete another primary activity, the waiting time would assuredly be compensable.

(3) None of the various standards proposed by Integrity and the Government are consistent with the text of section 254(a). Integrity contends that "this Court has held than an activity is compensable *only* if it is an 'integral and indispensable part of the principal activities for which covered workmen are employed.' *Steiner*, 350 U.S. at 256." Pet. Br. 22 (emphasis in original). But the limitation "only" does not appear in *Steiner* itself.[18] This

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writing up and completing tickets or reports, and washing and re-racking fire hoses.

18. Similarly, the Government asserts that in *IBP* "the Court reiterated that the touchstone for determining whether an activity is compensable under Section 254(a) is whether it 'is "integral and indispensable" to a "principal activity." *IBP*, 546 U.S. at 37." U.S. Br. 4. This characterization of *IBP* is inconsistent with the holding in that case that workers would have been entitled to

proposed standard would exclude activities that are themselves principal activities, but not a "part" of some other principal activity. Elsewhere Integrity asserts that "an activity is compensable under the FLSA only if it is so integral and indispensable to the employee's *other* primary activities that it too counts as part of those primary activities." Pet. Br. 2 (emphasis added). But compensable pre-and post-shift principal activity under section 254(a) is not limited to a principal activity that is integral and indispensable to some "other" principal activity. If that were the rule, an employee would have to have at least two principal activities to be entitled to compensation; but section 254(a) provides for compensability of the "principal activity"—singular—as well as in a case of multiple "principal activities." Other formulas proposed by Integrity would limit "principal activity or activities" to work an employee does during his or her paid shift; pre- and post- shift work could not by itself be a principal activity, and thus could be compensable only if integral and indispensable to some shift work. If that were the case, the use of the phrase "principal activity or activities" in section 254(a) would constitute an additional limitation on what constitutes compensable work, and would exclude any work for which the employer simply refuses to pay. *IBP* held, however, that the only limitations in section 254(a) on what constitutes compensable work are those in subsections 254(a)(1) (certain travel) and 254(a)(2) (preliminary and postliminary activities). *IBP,* 546 U.S. at 40-41.[19]

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compensation if the employer had required them to be at work at a certain time, regardless of whether they were performing any job duties at that time.

19. In 1996 Congress passed the Employee Commuting Flexibility Act ("ECFA") amendment to the Portal-to–Portal

(4) Department of Labor regulations have for decades provided that when an employer directs a worker to do something, the employer must pay the employee for the time spent engaging in that activity, regardless of whether the employer-mandated activity is integral and indispensable to the employee's other job responsibilities.

The regulations regarding the Portal-to-Portal Act specifically address a situation in which an employee is required by his or her employer to engage in activities that are not integral and indispensable to his own work:

> In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such

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Act of 1947, 29 U.S.C. § 254(a), to provide that merely driving a company car to and from work, or incidental activities such as filling the car with gas, are not compensable, so long the drive was within normal commuting distance and as long as the worker (or his or her union) *has agreed to that arrangement*. This amendment clearly assumes that under prior law, a worker would be entitled to compensation if he or she were ordered to drive the company vehicle to and from work, at least absent some union agreement. The ECFA states:

> For the purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

> 30 minutes distributes clothing or parts of clothing at the work benches of *other employees* and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.
>
> Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act . . . .

29 C.F.R. § 790.5(b) (emphasis added).[20] Although there might be some situations in which assisting other workers would affect an employee's own shift work (such as where the other employees prepare garments on which that employee in question later works), this regulation is not limited to (and, indeed, does not refer to) such cases. Nor would it matter if the employee who passed out the garments was a garment worker or a receptionist or a bookkeeper. The time is compensable because the employer required the employee to perform that task.

The Department of Labor regulations clearly require compensation for time spent on activities that are not integral and indispensable to the worker's duties during the "regular shift." The regulations provide that donning and doffing employer-required uniforms on employer premises is compensable, regardless of whether the

20. This situation in which a worker engages in pre-shift activity to assist other workers was referred to in the Senate Report and in the Senate debates. S. Rep. No. 48, 80th Cong., 1st Sess. 48; 93 Cong. Rec. 2298 (remarks of Sen. McGrath and Sen Cooper), 2350 (remarks of Sen. Barkley and Sen. Cooper).

uniforms are needed to do the job. "[C]lothes-changing . . . must be counted as hours worked if the changing of clothes . . . is indispensable to the performance of the employee's work or *is required* by law or *by the rules of the employer*." 29 C.F.R. § 785.26 (emphasis added).[21] Donning and doffing an employer-required uniform on the employers premises is compensable even if the uniform itself is not indispensable to whatever the employee does while wearing it.[22] If Integrity were to require warehouse workers to wear uniforms and don and doff those uniforms at the warehouse facility, that obviously would not be essential to filling orders from Amazon.com customers, yet the regulations clearly would require Integrity to pay for the time needed to put on and take off the uniforms, and indeed for waiting and walking time prior to removing the uniform.[23]

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21. Similarly, 29 C.F.R. § 790.8(c) provides that clothes changing is compensable under section 254(a) if it is "required by law, by rules of the employer, or by the nature of the work." In discussing the Portal-to-Portal Act, Senator Cooper contrasts clothes changing required by the nature of a job with clothes changing that is "merely a convenience to the employee." 93 Cong. Rec. at 2298.

22. Integrity insists that "changing clothes would be compensable only 'if the employee could not perform his [principal] activity' without it." Pet. Br. 9 (quoting 93 Cong. Rec. 2297-98 (1947) (remarks of Sen. Cooper). The regulations expressly provide otherwise.

23. The Government also asserts that clothes changing which is required by an employer would not be compensable if the clothes lacked "a close or direct relationship to the actual performance of the employee's productive work." U.S. Br. 19. In that situation, the clothes changing would be noncompensable, in the United States' view, because it would be "indispensable" (i.e., mandated by the

29 C.F.R. § 790.6(b) provides that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he report there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time." That regulation includes situations in which for some reason (such as a shortage of supplies) the worker will have nothing to do, but some official forgot to tell the employees not to come in that day; such inactivity would not "integral and indispensable" to anything. [24]

The regulations also require compensation for "[t]ime spent in work for public or charitable purposes at the employer's request, or under his direction or control." Participation in such charitable activities would not be integral and indispensable to the work of any employees except perhaps those who work in a company's community relations department. 29 C.F.R. § 785.44. The regulations regarding time spent on employee suggestions provides that such activity is compensable if an employee "is assigned" to do so. *See* 29 C.F.R. § 785.45.[25] An employee

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employer) but not "integral." *Id.* The very regulation which the Government cites, however, states specifically that such employer-mandated clothes changing would be integral and compensable. 29 C.F.R. § 790.8(c) and n.65.

24. There are some positions, such as a firefighter, in which waiting to be called into action is a central part of the job. But section 790(6)(b) is not limited to such situations.

25. "Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are

might be assigned to work on a suggestion that was not essential to his or her own tasks. Employer-required attendance at a lecture or training program counts as work time even if that lecture or training "is not directly related to the employee's job." 29 C.F.R. § 785.27. Integrity would be obligated to compensate its employees if it directed them, after the end of their shift, to attend a lecture on a topic wholly unrelated to their jobs as warehouse workers.

The Department of Labor's Field Operations Handbook provides that the Wage Hour Division will not consider as hours worked time spent on a company sports team, but only "if the participation of the employee in these activities is completely voluntary and if his/her regular employment is not conditioned upon participating in these activities." Field Operations Handbook section 31b05 (2000). If Integrity required its workers to play on a company softball team, Integrity would have to compensate the workers for the time involved, even though those sporting events would be neither integral nor indispensable to the regular duties of the employees in question.

All of these regulations concern activities that occur before a worker's paid shift begins or after that shift has ended; if the activities occurred in between, they would be compensable anyway under the continuous workday rule. If Integrity ordered Plaintiffs in this case to engage in any of those activities after they clocked out, the

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permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered time worked."

regulations would clearly have required compensation, even though the activities would obviously not have been integral and indispensable to filling Amazon.com orders. Yet both Integrity and the Government insist that the time spent waiting to be searched and the time spent being searched pursuant to an employer-directive are not compensable if they occur after the shift ends. It is difficult to understand how the position taken in pages 10 to 22 of the Government's brief (other than footnote 6) can be reconciled with these Labor Department regulations.

B. This Search Is Neither Walking Under Section 254(a)(1) Nor Preliminary and Postliminary Activity Under Section 254(a)(2)

Section 254(a)(1) precludes FLSA claims for time spent "walking . . . to and from the actual place of performance of the principal activity or activities." Section 254(a)(2) bars such claims for "activities which are preliminary to or postliminary to said principal activity or activities." The regulations regarding section 254(a)(2) delineate two types of activities that would be preliminary or postliminary: First, activities undertaken by a worker for his personal convenience, 29 C.F.R. § 790.8(c), and second, activities related to the compensation process, such as checking in and out or waiting in line to receive pay checks. 29 C.F.R. § 790.7(g). Neither section 254(a)(1) nor section 254(a)(2) apply to the search in this case.

(1) Integrity suggests that participation in the search (and the related waiting) is rendered noncompensable

by section 254(a)(1), which bars compensation claims for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities," unless that travel occurs during the continuous workday.[26] Integrity asserts that inching forward in a long waiting line, and stepping through a metal detector, constitute "walking" within the exclusion of section 254(a)(1). A 25-minute period during which an employee moves a few yards would more aptly be described as standing in line, waiting, rather than walking to the exit. The target of the employee's slow shuffle is not the exit, but the metal detector used to search the employee.

In any event, as with waiting, the compensability of walking (if the circumstances of this case could fairly be described as "walking") depends on what an employee is walking to and from. Walking to a time clock is not compensable. But *IBP* held that time walking between a work station and the place where an employee doffs protective gear *is* compensable.[27] *IBP*, 546 U.S. at 33-40. And the regulations make clear that section 254(a)(1) does not preclude compensation if an employee was

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26. "Waiting in line for a security screening is indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as . . . walking from the parking lot to the workplace . . . . *See* 29 C.F.R. § 790.7(f)-(g) . . . . Indeed, time spent waiting to clear security is indistinguishable from time spent walking between the time clock and the work station that was . . . squarely addressed in the Portal-to-Portal Act." Pet. Br. 16-17.

27. Integrity's argument that "a reasonable amount of waiting time" at the beginning or end of the day is always noncompensable is incorrect. Pet. Br. 26. Waiting that occurs prior to the last principal activity is compensable no matter how reasonable the length of time involved.

required to engage in some work activity while traveling. "An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section [254(a)]." 29 C.F.R. § 790.7(d). "Any work which an employee is required to perform while traveling must, of course, be counted as hours worked." 29 C.F.R. § 785.41. An employee who after leaving his or her main work area "transport[s] equipment to a central location" U.S. Br. 31-32 n.18, would be necessarily be traveling; yet, as the government correctly observes, that activity would be compensable. Stepping through a metal detector (and waiting to do so) is not "indistinguishable" from walking to a time clock merely because both activities involve walking, any more than on it would be indistinguishable from walking to a guard station to turn in equipment or a report. The mere fact that the activity in this case arguably involved walking does not establish that it is noncompensable.

(2) Integrity and the Government rely on the regulations which provide that checking in and out, such as by punching in and out at a time clock, are ordinarily noncompensable under the Portal-to-Portal Act. 29 C.F.R. §§ 785.24, 790.8(g). They assert that being searched "is just the modern equivalent . . . of punching the clock." Pet. Br. 26; Gov't Br. 24. But punching in and out is fundamentally different from being searched. The considerations that render clocking in and out noncompensable are not present in the case of a search for stolen warehouse inventory.

The usual purpose of punching in and out is to collect information related to compensation, to create a record[28] of

28. *See* U.S. Br. 25: "A requirement to check in and out may also be driven by the employer's reasonable desire to have a *record*

when a particular employee entered and left the location of the time clock, usually to provide a basis for determining how long the employee was on the job and how much the employee should be paid. A search has none of those elements. A guard who conducts a search would not usually make a record of who was searched or when; the facts set out in the complaint do not suggest any such thing occurred here. A guard ordinarily would not care which employee he or she had searched or when. Air travelers readily distinguish "checking in" at an airport ticket counter from being searched (or otherwise screened) by the Transportation Security Agency. Integrity fails to explain what checking (or punching) out has in common with being searched, other than that (like the doffing of safety gear in *IBP*) they both occur after a worker has completed his or her shift but before leaving the facility.

The Government argues that in at least some cases a time clock (or other checking in and out) "could be characterized as an 'anti-theft measure,' making it like a search, because checking in and out would make inaccurate reporting of hours less likely." U.S. Br. 24. It is possible, the government notes, that a "supervisor inaccurately recorded [the worker's] hours." *Id.* The government is hypothesizing an employer which ordinarily relies on supervisor-created notes about how long each employee work, but suspects that the supervisor is falsifying those records to obtain undeserved wages for an employee, and therefore installs a time clock to double check the supervisor's records. It seems exceedingly unlikely that the framers of the regulation in question had in mind such

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for various purposes, of who is on the premises at any given time." (Emphasis added).

a highly atypical case; surely, that is not checking in and out "under the conditions normally present." 29 C.F.R. § 790.7(g).

The government suggests that checking out might involve a guard "who checks an employee's identity" and notes that the employee is leaving. U.S. Br.23. Such a quasi-investigatory act by a guard, it argues, would not be all that different from looking into an employee's purse or briefcase. U.S. Br. 24. But while checking out might occasionally involve giving one's name to a guard, or filling out a log sheet maintained by a guard, guards in such situations do not ordinarily "check[] an employee's identity," to make sure the departing individual is the employee he or she claims to be. In those rare instances in which a guard might be assigned to confirm the identity of each departing worker, such as scrutiny of departing prison guards to make sure that none was an inmate masquerading as a guard, it seems unlikely that the official responsible for checking identities would also be asked to do the work of time clock.

The government appears to suggest that a search is like (or part of) checking out because it happens when the worker is leaving, occurs near the door, and does not take very long; being searched is merely "part of the process of departing the premises" or "ancillary to departing the premises." U.S. Br. 24, 25. But neither the statute nor the regulations deny compensation to principal activities if they occur while a worker is in "the process of departing the premises." It is difficult to reconcile this suggestion with the government's acknowledgement that "if employees were required to complete paperwork about what they had done during

their shift, . . . or obtain assignments for the next shift, such activities would generally be compensable." U.S. Br. 31-32 n.18. If a worker's supervisor stood next to the door, and there received reports or made assignments for the next day, one might describe those end-of-day activities as "ancillary to departing the premises," but they would still be compensable.

Checking out is ordinarily non-compensable because it is part of the process through which compensation is calculated and provided to a worker (like picking up a paycheck), not one of the tasks a worker may be ordered to do to earn that compensation. The basic arrangement between employer and employee is that the employee agrees to engage in activities required by the employer, in return for which the employer provides the worker with compensation. The employer benefit to which *Tennessee Coal* refers are the benefits from those required services. The compensation side of this arrangement will often involve some employee action, such as documenting when he or she was at work or going to pick up a paycheck, and in some situations the employer will require the worker to do that in a particular manner, such as by using a punch clock. Similarly, an employer might require a worker as a condition of enrolling in its health care plan to come to the HR office and fill out a form. But the primary beneficiary of these compensation-related activities are to the employee, and the incidental benefits to the employer—such as the increased administrability of the compensation scheme—are not the benefits with which *Tennessee Coal* is concerned.

C. The Standards Proposed By Integrity And The Government Are Legally Incorrect And Would Lead To Untenable Results

(1) The Government suggests that an employer only has to pay for pre- or post-shift activities that are "directly related" to the work that was done during the paid shift. Gov't Br. 11.[29] That contention is plainly inconsistent with footnote 6 in the Government' brief, which acknowledges that under the Department's regulations employee participation in an employer-required training is compensable "even if the training did not relate directly" to the worker's regular work. U.S. Br. 21 n.6. And it is at odds with the decision in *Dunlop v. City Electric, Inc.*, where the court held, at the behest of the Secretary of Labor, that employees' pre-shift activities "performed at their employer's behest and for the benefit of the business" are principal activities. *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 491 (5th Cir. 1976). "It is . . . irrelevant whether fueling and unloading trucks is 'directly related' to the business of [the electricians in question]; what is important is that such work is necessary to the business and is performed by the employees for the benefit of the employer, in the ordinary course of that business." *Id.*

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29. *See also,* U.S. Br. 8 ("the anti-theft screenings . . . were not closely intertwined with their principal activity of filling orders in the warehouse"), 10 ("[p]etitioner's . . . screenings were not integral and indispensable to the work performed by its warehouse employees"), 11 ("An Otherwise "Preliminary" Or "Postliminary" Activity Must Be Closely Related To An Employee's Principal Activities To Be Integral And Indispensible To Them."), 13 ("a compensable activity is one that bears a close or direct relationship to an employee's principal activities.").

More seriously, such a rule would legalize wholesale evasion of the FLSA overtime requirements. Employers could routinely require workers to work off the clock so long as the required pre- and post-shift activity was not "closely and directly related" or "integral and indispensable" to what the employees did during their shift. At almost every employer there will be tasks that would fit within this loophole. A warehouse worker could be required to mow the lawn or wash the boss's car. A receptionist could be directed to come in early to make coffee or tend to the office plants. That result obviously is not what the FLSA, the Portal-to-Portal Act or the Labor Department regulations provide.

(2) Integrity advances a somewhat more stringent version of the government's proposed "closely related" standard, insisting that pre- and post-shift work is only compensable if it is integral and indispensable to the employee's "primary" duties.[30] A court administering this standard would apparently review what a worker did during the (usually forty) hours for which he or she was being paid, and determine which of those duties were his or her "primary" or "principal" job tasks.[31] The employer would only have to pay an employee for required post-shift work that was integral and indispensable to those primary job duties, and but would not have to pay the employee for

30. "[The proper] inquiry [is] whether the task is integral and indispensable to an employee's *principal job duties*." Pet. Br. 36 (emphasis in original); *see* Pet. Br. 2 ("primary job duties"), 17 ("principal job functions"), 18 ("principal job activities").

31. *See* 29 C.F.R. § 790.b(a) ("The 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 predominate in some way over all other activities engaged in by the employee in performing his job . . . .").

post-shift work if the paid task to which it was integral and indispensable was merely a secondary job duty. For example, if an employee at a meat packing plant spent 38 hours a week cleaning and packaging carcasses, and only 2 hours a week butchering the animals, the employer would not have to pay the employee for time spent sharpening the knives needed for that butchering, because it would not be integral and indispensable to the worker's "principal job function." *But see Mitchell v. King Packing Co.,* 350 U.S. 260 (1956).

(3) Integrity[32] and the Government[33] advance another variant of this standard, asserting that pre- and post-

32. Pet. Br. 16 ("the activity in question must be so integral and indispensable to the employee's *productive work* as to be counted among the employee's principal activities.") (emphasis in original), 19-20 ("What matters is . . . whether the task is integral and indispensable to the employee's *productive work*.") (emphasis in original), 22-23 ("An employee's 'principal activities,' . . . include 'work of consequence performed for an employer' and activities that are 'indispensable to the performance of productive work.' 29 C.F.R. § 790.8(a)"), 36 ("the FLSA will apply only to activities that are part and parcel of employees' productive work."), 39 ("The principal activities for which an employee must be compensated include 'work of consequence' performed for the employer and activities that are 'indispensable to the performance of productive work.' 29 C.F.R. § 790.8(a). Here, Respondent's 'work of consequence' and 'productive work' involved *filling customer orders* . . . .")(emphasis in original), 39 ("What matters is . . . whether the activity . . . is 'integral and indispensable['] to the employees' principal *productive work*.").

33. U.S. Br.8 ("Th[e] screenings were required by the employer . . . . But the regulations and this Court's cases required that the activity be 'integral and indispensable' to the employee's productive work . . . ."), 21 ("th[e] screenings do not have a close connection to the performance of the employees' productive work in the warehouse").

shift activity is compensable under section 254(a) only if it is integral and indispensable to the employee's "productive work." In addition to permitting compulsory unpaid work that is unrelated to work done during an employee's shift, this would also permit compulsory unpaid work that was integral and indispensable to shift work if the court concluded that the related shift work itself was not "productive." Integrity appears to suggest that participating in the search in this case was not compensable as such because (on its view) doing so was not "productive work."

But the FLSA refers without limitation to "work" and "workweek", not to work or workweeks that are productive. The regulations classify as compensable work employer-required activities that would not readily be characterized as productive work. *See Reich v. New York City Transit Authority*, 45 F.3d 646, 650-51 (2d Cir. 1995). And the term "productive work" is obviously subjective. In some sense, Integrity must have considered the searches productive, or it would not have spent the money to buy metal detectors and pay screeners in the first place. "Many retail employers use employee security screenings, including employee bag searches, as a loss prevention method." Amicus National Retail Federation ("NRF") Br. 4. In any event, interpreting the FLSA to require overtime pay only for work that is "productive work," or is integral and indispensable to "productive work," would lead to intractable problems and disputes.

Unproductive work is a regrettably common occurrence. Workers waste countless hours every day attending unproductive meetings, reading and writing unproductive memos, and discussing unproductive ideas.

Workers are often required to engage in activities whose purpose is not to produce anything, but merely to prevent something from going wrong. If an employee refused to perform a task assigned by the employer solely because the employee believed it would be unproductive, the employee would be fired for insubordination, and rightly so. Work often is recognized as having been unproductive only long after it was performed. Congress assuredly did not intend that a worker's right to compensation turn on such distinctions.

(4) Each of the standards proposed by Integrity would undermine the core purpose of the FLSA overtime requirement, by permitting an employer in a variety of circumstances to unpaid require pre- and post-shift work. Under all of them

> [a]n employer could impose significant, time-consuming duties on the employee to be performed . . . before and after the main body of the workday . . . and be exempted from payment for those duties because they were not sufficiently related to the employee's principal duties performed during the workday. . . . [S]uch an interpretation would exaggerate the effect of the Portal-to-Portal exemptions, and would substantially undermine the purposes of the Fair Labor Standards Act by creating loopholes capable of significant abuse.

Reich v. New York City Transit Authority, 45 F.3d at 650-51. Indeed, many of these formulations would appear to permit the abuse that was at the very core of the

FLSA overtime provision, requiring workers (before or after their paid shift) to do more of the same work they perform during the shift. A worker's ability to engage in most shift work—filling orders, washing dishes, making widgets—does not depend on whether he does more of the same before or after that shift. A warehouse worker would be able to fill orders between 9 and 5 even if he had not filled other orders (without pay) from 8 to 9 that morning or from 5 to 6 the previous afternoon.

III. The Purpose of the FLSA (Untouched By The Portal-to-Portal Act) Is Not Only To Compensate Workers For Working More Than 40 Hours In A Workweek, But Also To Encourage Employers To Implement Efficiencies And Spread Work In Order To Reduce Employee Overtime

Although Integrity and amicus NRF complain about the cost of compliance with the FLSA if search time is declared compensable, they both understand that the cost involved would be only the modest expense of making the search process sufficiently efficient that the search and related waiting time become *de minimis*. Integrity could simply hire additional screeners or stagger the shift times to eliminate the waiting period that consumes most of the worker time at issue in this case. Creating an incentive for such measures is well within the purpose of the FLSA. The goals of section 7 were not only to compensate workers if they had to work more than 40 hours in a week, but also to motivate employers to adopt measures that would shorten the employee's workweek to 40 hours, such as hiring additional workers rather than burden their existing workforce.

> By this requirement [of compensation for overtime at one and one-half times the normal hourly rate], although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. "A fair day's pay for a fair day's work" was the objective stated in the Presidential message which initiated the legislation. That message referred to a 'general maximum working week', "longer hours on the payment of time and a half for overtime" and the evil of "overwork" as well as "underpay." The message of November 15, 1937, calling for the enactment of this type of legislation referred again to protection from excessive hours. [The] Senate Report . . ., the companion House Report and the Conference report all spoke of maximum hours as a separately desirable object.

Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942) (internal footnotes omitted). The passage of the Portal-to-Portal Act did not change that legislative purpose. *See* 29 C.F.R. § 790.2. *Bay Ridge Operating Co. v. Aaron*, reiterated that the purpose of section 7 "was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of

extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost ...." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948). But if, as Integrity maintains, the search and related waiting times are noncompensable, Integrity can skimp on hiring more screeners, deploying more metal detectors and using other line-shortening and time-saving devices or techniques, and instead waste as much of the workers' time as it pleases.

IV. The Court Should Not Adopt A Per Se Rule Regarding Whether "Security Screening" Is Work Under The FLSA Or A Principal Activity Under The Portal-to-Portal Act

Integrity urged this Court to grant review in this case to adopt a "uniform rule" regarding the compensability of "security screenings." Pet. Br. 42. But the definition of work under the FLSA and the contours of the exclusions in section 254(a) are too complex to permit a per se rule in this area, and the practices that might be characterized as "security screenings "take a variety of forms . . . [a] nd serve a variety of purposes." Pet. Br. 43; *see* 29 C.F.R. § 790.7(b) ("Activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities.").

The phrase "security screening" is not part of the text of the FLSA, the Portal-to-Portal Act, or any of the regulations interpreting those statutes. It is far from clear what types of practices would be encompassed by a per se rule regarding "security screenings." The term "security" suggests that the purpose of such a practice would be to stop some deliberately harmful or otherwise

illegal action, such as by preventing a dangerous person (a terrorist or thief) or object (a gun or a bomb) from entering a building, or preventing the forbidden departure of something (a dangerous substance) or someone (an inmate). But a person might be scrutinized on entry to avoid an unintended accident (excluding matches from a munitions factory) or on departure to determine if an accident had occurred (monitoring for radioactive contamination of the clothes of a nuclear plant worker). Upon entering the work site, workers might be checked to ensure that they had not inadvertently forgotten to bring something to work, or upon leaving, to confirm they were not inadvertently taking something home (e.g., the keys to a company truck). Access to a building might be limited merely to avoid gawking tourists in the hall, or to prevent non-customers from using the restrooms. These purposes might or might not be described as involving security. If an employer adopted a practice for several reasons, a court would have to decide how to resolve a mixed motive case.

It is also unclear what action would constitute a "screening." "Screening" suggests a relatively brief and unintrusive process of scrutiny which a person must complete before being permitted to enter or leave a building. But what if a departing worker were required to submit to a search of the contents of his or her locker, car, or cell phone, or to take a polygraph test regarding whether he or she had stolen anything? A pharmaceutical company concerned that workers were using narcotics available in a plant might order employees, prior to leaving, to submit a blood or urine sample. In the wake of the theft of a valuable item from a particular department, each worker in that unit might be subjected at the end of his or her shift to a detailed and aggressive interrogation by company

officials. Not all of those practices would necessarily be described as mere "screening"; at some point "screening" becomes a euphemism for an investigation.

Furthermore, the sort of per se rule urged by Integrity is not necessary to avoid calling into question most typical security practices. In many circumstances, overtime claims related to ordinary security screenings will be precluded by the *de minimis* doctrine. If a worker punches out on a time clock and is able to promptly walk through a metal detector and out the door, the screening itself would take only a moment, and would not give rise to a colorable claim under the FLSA. Integrity dismisses the idea of a *de minimis* exception to FLSA claims as "barely adumbrated" Pet. Br. 35-36 n.8, as if this were some novel and inchoate legal concoction. To the contrary, "the roots of the *de minimis* doctrine stretch to ancient soil, [and] its application in the . . . context [of the FLSA] began with [the 1944] decision in [*Mt.Clemens*]." *Sandifer v. US Steel*, 134 S.Ct. at 880.[34] The *de minimis* doctrine has for

34. *Mt. Clemens*, 328 U.S. at 692:

> The workweek contemplated by s 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

decades been an established part of FLSA jurisprudence. *See* 29 C.F.R. § 785.47; 1 Ellen Kearns, ed., The Fair Labor Standards Act (2d ed. 2010), 8-81 to 8-93 (citing cases). In a number of cases, employers have asserted the *de minimis* doctrine as a defense to an overtime claim based on a security screening.[35]

Many security screenings also fall outside the FLSA because they are directed at the public as a whole, not at employees. In the common situation in which everyone entering a government building, including members of the general public, is required to go through a metal detector, that requirement could not fairly be described as an obligation imposed by the government agency on its employees. This is, rather, a requirement imposed on everyone by the agency acting as the proprietor of the premises, not acting as an employer, which incidentally affects employees only because they are being treated like everyone else.[36] If a TSA worker going on vacation had to pass through security at an airport, no one would say that the vacationer had been required to do so by his or her employer, even though TSA is operating that screening system. In that type of circumstance, participating in a search would not be work within the scope of *Tennessee Coal* or the FLSA.

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35. *E.g., Alvarado v. Costco Wholesale Corp.*, 2008 WL 2477393 at *3-84 (N.D. Cal. June 18, 2008); *Whalen v. United States*, 93 Fed.Cl. 579, 601 n.26 (Fed. Cl. 2010).

36. An employer could not "evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies to employees only." U.S. Br. 30.

In many instances, security screening is either directed at everyone entering the premises, or is actually intended for non-employees, with employees being affected only incidentally. Employees may be given special passes (or use of separate entrances) as a convenience to permit them to avoid the more rigorous and time-consuming screening practices imposed on members of the general public; screening at the employee entrance may be limited to steps needed to assure that members of the public are not using that particular door. *Bonilla v. Baker Concrete Construction, Inc.,* 487 F.3d 1340, 1345 (11th Cir. 2007) (employee access card system used to prevent members of the public from accessing airport tarmac.). In many cases involving security screenings by the government, the screening at issue was directed at the public at large. *See* Pet. Br. at 31, 37; *see also*, *Ceja-Corona v. CVS Pharmacy, Inc.*, 2013 WL 3282974 (E.D. Cal. July 2, 2013) (discussing the differences between the security screenings in this case and those in *Gorman v. Consolidated Edison* and *Bonilla v. Baker Concrete Services, Inc.* in light of the decision of the Court of Appeals in *Busk v. Integrity Staffing Solutions, Inc.*).

In some instances a search would not be a job requirement at all. An employer could, for example, prohibit employees from bringing bags to work; it might instead, as a convenience to the workers, permit bags, but only provided that workers who do bring bags will be subject to a bag search on the way out. In that circumstance the search would be not a job requirement, but a condition of an employer-afforded convenience; a worker would be free to avoid the search simply by choosing not to bring a big

to the plant or office.[37] That would be analogous to a plant at which the employer for the convenience of employees provided (but did not require use of) work clothes, on the condition that at the end of the day a worker could not leave his or her dirty work clothes on the changing room floor, but would have to return them to a laundry room. But in the search in this case was not merely the condition appurtenant to such an employer-afforded convenience; it was a job requirement.

CONCLUSION

This action was occasioned by an uncommon problem, a post-shift search process conducted so inefficiently that employees at Amazon.com warehouses allegedly waited 25 minutes each day before they could leave the building where they worked. None of the amici supporting Integrity asserts that it, or even a single one of its members, engages in a similar practice. Integrity does not contend that such time consuming searches are or ever were standard practice at the nation's plants and offices. No one suggests that warehouses and stores could not survive if they had to avoid this sort of delay. Wasting worker time in under-staffed post-shift searches is not essential to the financial viability of Amazon.com or any other employer; it is just a little bit cheaper.

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37. *See Frlekin v. Apple, Inc.*, 2014 WL 2451598 at *4 (N.D.Cal. May 30, 2014); *Alvarado v. Costco Wholesale*, 2008 WL 2477393 at *3 (N.D. Cal. June 18, 2008). Workers who did not bring bags should be allowed to use a separate line so that they do not have to wait for the bag check of others.

Integrity reports that the decision below has spawned 13 nationwide class-action[38] lawsuits against Amazon.com and its staffing companies. Pet. Br. 46-47. But that pattern reflects only different plaintiffs and lawyers attempting to bring the same basic lawsuit on behalf of the same workers against the same company and its affiliates. Integrity notes with alarm that in litigation against Amazon.com and its staffing companies "the putative class includes more than 400,000 plaintiffs." Pet. Br. 47. But Congress did not choose to exempt the nation's largest companies from the obligations imposed on smaller employers by the Fair Labor Standards Act. And Congress did not provide that employers which deny legally required overtime payments to many thousands of workers should be entitled on that account to greater solicitude than would be accorded to employers which violate the rights of only a handful of victims.

Integrity suggests that a requirement that employees work several hours a week without pay is merely among that "factors that employees must weigh and consider in choosing whether to take a particular job." Pet. Br. 45. Top ranked graduates of the nation's most prestigious law schools may have the luxury of "weigh[ing]" and "consider[ing]" such "factors" in choosing whether to take a particular job. But tens of millions of less fortunate workers have to take any job they can get. The Fair Labor Standards Act was intended to protect the working conditions of those who lack the bargaining power in the labor market to protect themselves.

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38. An FLSA lawsuit seeking relief for a large number of employees is a collective action, not a class action. If any of the lawsuits referred to by Integrity are class actions, the class claim would be based on state law.

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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REGULATIONS INVOLVED

1. 29 C.F.R. §785.7 provides:

> **Judicial Construction.** The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "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 Co.* v.*Muscoda Local No. 123,* 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co.* v. *Wantock,* 323 U.S. 126 (1944); *Skidmore* v. *Swift,* 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (*Anderson* v. *Mt. Clemens Pottery Co.,*328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

2. 29 C.F.R. § 785.16(a) provides:

> **Off Duty.** (a) *General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.
>
> (b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washingtion, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift,* 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage,* 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman,* 6 W.H.

Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty,* 40 Supp. 279 (D. Md. 1941))

3. 29 C.F.R. § 785.19 provides:

> **Meal.** (a) *Bona fide meal periods***.** Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.,* 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.,* 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.,*183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.,* 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.,* 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.,*36 Labor Cases para. 65, 198, 14 W.H. Cases 38

(S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.,*145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

4. 29 C.F.R. § 785.23 provides:

Employees residing on employer's premises or working at home. An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (*Skelly Oil Co.* v. *Jackson,* 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; *Thompson* v. *Loring Oil Co.,* 50 F. Supp. 213 (W.D. La. 1943).)

5. 29 C.F.R. § 785.26 provides:

> **Section 3(o) of the Fair Labor Standard Act** Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

6. 29 C.F.R. § 785.27 provides:

> **General** Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> **(a)** Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

7. 29 C.F.R. § 785.28 provides:

Involuntary attendance. Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

8. 29 C.F.R. § 785.29 provides:

Training directly related to employee's job. The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working

hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

9. 29 C.F.R. § 785.30 provides:

> **Independent training** Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

10. 29 C.F.R. § 785.31 provides:

> **Special situations.** There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

11. 29 C.F.R. § 785.43 provides:

> **Medical Attention.** Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

12. 29 C.F.R. § 785.44 provides:

> **Civic and charitable work.** Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

13. 29 C.F.R. § 785.45 provides:

> **Suggestion systems.** Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counter as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered time worked.