No. 13-433

In the Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
PETITIONER

v.

JESSE BUSK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether time that mail-order-warehouse workers spent undergoing post-shift security screenings to determine whether they had taken merchandise from their workplace was "postliminary" to the principal activities they were employed to perform and was therefore, in the absence of a contrary contract or custom, noncompensable under 29 U.S.C. 254(a)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, of time that warehouse workers must spend undergoing post-shift security screenings to determine whether they have stolen merchandise from their workplace. The Department of Labor's Wage and Hour Division is generally responsible for enforcing the FLSA as amended by the Portal-to-Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department of Labor has issued interpretive regulations that address what kinds of activities are "preliminary" or "postliminary" and therefore not compensable under those statutes in the absence of contrary

contract or custom. See 29 C.F.R. 790.7. The United States also employs many employees who are covered by the FLSA, 29 U.S.C. 203(e)(2)(A), and requires physical-security checks in many settings. The United States accordingly has a substantial interest in the resolution of the question presented.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. a. The FLSA generally requires a covered employer to pay a minimum wage for the hours that its non-exempt employees work and to pay overtime compensation when they work more than 40 hours in a workweek. 29 U.S.C. 206, 207, 213. The FLSA, however, does not define the terms "work" or "workweek." This Court concluded, in a series of cases culminating in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that an employer generally must pay compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* at 690-691.

In *Anderson*, the Court held that "the time necessarily spent" by employees in walking from timeclocks near the factory entrance gate to their workstations was compensable work time. 328 U.S. at 691-692. It further held that, unless the time involved was so "insubstantial and insignificant" as to be *de minimis*, compensation was required for the time that pottery-plant employees spent "pursu[ing] certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping

or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-693.

b. Congress viewed the *Anderson* decision as "creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). In the Portal-to-Portal Act, it amended the FLSA, limiting employers' liability for then-existing claims to circumstances in which compensation had been required by contract or custom and practice. 29 U.S.C. 252(a); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 26 (2005). With respect to claims accruing on or after the date of its enactment, Section 4 of the Portal-to-Portal Act, 29 U.S.C. 254, provided that, in the absence of a contrary contract or custom, an employer is not required by the FLSA to compensate an employee

> for or on account of any of the following activities * * * —
>
> (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). Thus, the 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.

c. In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court addressed the compensability of the time that employees at a car-battery-manufacturing plant spent changing into and out of work clothes and showering after their shift. *Id.* at 248. The Court held that those activities were not "preliminary" and "postliminary" under the Portal-to-Portal Act, because, in light of the hazardous environment within the plant, they were instead "an integral and indispensable part of the principal activities for which [the] workmen [we]re employed." *Id.* at 256. In 2005, 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.

2. Petitioner subcontracts its hourly employees to work in warehouses throughout the United States. Pet. App. 3-4, 20; J.A. 18-19. Respondents were hourly employees of petitioner in two Nevada warehouses, where they filled orders placed by Amazon.com customers by walking throughout the warehouse and retrieving products from the shelves. Pet. App. 3-4; J.A. 17-18, 20. Respondents allege that they "and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day." J.A. 21. When their shifts ended, they "would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Ibid.* The security screenings required them to remove "per-

sonal belongings from their person" and "pass through metal detectors." J.A. 22. Respondents allege that the screening process required them "to wait approximately 25 minutes each day at the end of each shift." J.A. 21. They also allege that the time in question "could have easily been reduced to a de minim[i]s amount by the addition of more security checkers and/or staggering the termination of the shift so people would flow th[r]ough the clearance more quickly." J.A. 27.[1]

As relevant in this Court, respondents claim, in a putative collective action brought on behalf of petitioner's "hourly warehouse employee[s] within the United States," that petitioner violated the FLSA by failing to compensate those employees for the time they routinely spent undergoing and waiting to undergo security screenings as they left the warehouse after their shifts. J.A. 23, 24-28. Respondents seek back pay for that time, and, contending that petitioner's failure to pay was "without substantial justification," they request double damages. J.A. 27; see 29 U.S.C. 216(b), 260. They also request attorney's fees. J.A. 34.

3. The district court granted petitioner's motion to dismiss. Pet. App. 19-35. As relevant here, it held that respondents' allegations did not "demonstrate that the security process is integral and indispensable to their principal activities as warehouse employees fulfilling

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[1] For purposes of a meal-period claim that is not at issue in this Court, respondents allege that, when the warehouse employees "clocked out" for a meal break during their shift, "it would take approximately five minutes for [the employees] to walk to the facility cafeteria and/or pass through security clearances" and then, after their meal, "approximately five minutes to walk from the cafeteria to the time keeping system to clock back in" without going through the security clearance. J.A. 20.

online purchase orders." *Id.* at 27. Instead, the court explained, "these allegations fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks,' 29 C.F.R. § 790.7(g), because [respondents] could perform their warehouse jobs without such daily security screenings." *Id.* at 27-28. The court found its conclusion supported by other cases "concerning preliminary and postliminary security screenings," which show that even when "the necessity of" security screenings has been "great," courts have found that they were "still not integral and indispensable to the principal activities of employment." *Id.* at 28.

4. The court of appeals reversed in relevant part. Pet. App. 10-13, 17. In determining whether petitioner's screenings were "integral and indispensable" for purposes of Section 254(a), the court applied a two-part test, asking whether they were "(1) 'necessary to the principal work performed' and (2) 'done for the benefit of the employer.'" *Id.* at 10-11 (quoting *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 902-903 (9th Cir. 2003), aff'd on other grounds, 546 U.S. 21 (2005)). It concluded that respondents had "plausibl[y] alleg[ed]" that the screenings at issue "are intended to prevent employee theft." *Id.* at 11. The court observed that petitioner's concern about employee theft "stems from the nature of the employees' work (specifically, their access to merchandise)." *Id.* at 12. It found that "the security clearances are necessary to employees' primary work as warehouse employees" and that they are "done for [petitioner's] benefit." *Id.* at 11-12. As a result, the court held that respondents had stated a plausible claim for relief under the FLSA. *Id.* at 12-13.

The court of appeals addressed cases from other circuits, which had found noncompensable the time that employees spent undergoing security screenings at a nuclear-power plant and at an airport. Pet. App. 12. The court found that those cases were "distinguishable because * * * everyone who entered the workplace had to pass through a security clearance," which indicated that the screenings had not been "put in place because of the nature of the employee's work." *Ibid.* The court further reasoned that the screenings associated with construction workers' access to an airport tarmac "did not benefit" their employer because those screenings were "mandated" by the Federal Aviation Administration. *Ibid.*

SUMMARY OF ARGUMENT

Under the Portal-to-Portal Act, an employer is not required to compensate its employees for time spent in activities that are "preliminary" or "postliminary" to the principal activities they are employed to perform. 29 U.S.C. 254(a)(2). Petitioner's post-shift anti-theft screenings were noncompensable because they were not "integral and indispensable" to the work performed by its warehouse employees. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005).

A. The court of appeals concluded that the purpose of the screenings here, to prevent employee theft, "stems from the nature of the employees' work," which entailed "access to merchandise." Pet. App. 12. But the "integral and indispensable" test requires a closer or more direct relationship between a principal activity and the activity in question before the latter ceases to be "preliminary" or "postliminary" (and therefore noncompensable). The legislative history and the Department of Labor's contemporaneous interpretive regula-

tions reinforce that conclusion by repeatedly referring to such a "close[]" or "direct[]" relationship. See 93 Cong. Rec. 2297 (1947); 29 C.F.R. 790.7(g) n.49, 790.8(c). So do this Court's decisions. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255 (1956).

B. Petitioner's screenings were not integral and indispensable to its warehouse workers' principal activities. There are a few reasonably clear benchmarks established in the legislative history and the regulations, but whether an activity is preliminary or postliminary generally depends on the specific circumstances. The court of appeals applied an unduly spare test when evaluating petitioner's screenings. Those screenings were required by the employer, and undergoing such a screening was thus in one sense "indispensable" to working at the warehouse. But the regulations and this Court's cases require that the activity be "integral and indispensable" to the employee's productive work, and they have not broken that phrase into two wholly separate inquiries. This Court's decisions have found the general test to be satisfied when potentially preliminary or postliminary activities were closely or directly related to the proper performance of the employees' productive work. See *IBP*, 546 U.S. at 40; *Steiner*, 350 U.S. at 248; *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262 (1956). Here, the anti-theft screenings following the completion of the employees' shifts were not closely intertwined with their principal activity of filling orders in the warehouse, and the court of appeals' focus on whether they were done for the employer's "benefit" (Pet. App. 12) was an insufficient proxy for determining whether they were integral and indispensable to a principal activity.

C. In this case, moreover, the regulations, drawing from the legislative history, do furnish a highly relevant benchmark for deciding the issue. The time at issue here is noncompensable under Section 254(a) because respondents' allegations provide no reason to believe that petitioner's screenings can be persuasively distinguished from other noncompensable activities.

1. Petitioner's exit screenings are similar to a requirement that an employee check out after a shift has ended. The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable preliminary or postliminary activities "when performed under the conditions normally present." 29 C.F.R. 790.7(g); see also 29 C.F.R. 790.8(c). The physical act of walking through a metal detector is materially analogous to checking out. The extra scrutiny associated with having a guard, as part of the process of the employee's departure from the premises, look into an employee's bag or look at items removed from the employee's pockets does not fundamentally change the nature of the checking-out process, so as to render it integral to the employee's principal activities. And a check-out requirement may share a similar motive with an anti-theft search: seeking to verify that an employee is not receiving pay for inaccurately recorded work time.

2. Petitioner's post-shift screenings are also materially similar to other common kinds of security searches that have generally not been considered to be compensable, regardless of whether they were conducted at entrances or exits. Several lower-court decisions have found general-purpose security searches to be noncompensable. An opinion letter issued by the Department of Labor in 1951 made no distinction between searches conducted for general-security purpos-

es and those conducted at least in part for anti-theft purposes, finding that both were noncompensable under the circumstances. Respondents have sought to distinguish commonplace security screenings on the ground that they are applied to employees and non-employees alike. But that distinction is not ordinarily material to determining whether an activity is integral and indispensable to the employees' work. Nor are the screenings here distinguishable merely because they occur only at the exits. Respondents allege that petitioner was searching for merchandise "and/or other contraband," J.A. 21, which overlaps with the purpose of an entrance search. And an entrance search could prevent damage to the employer's property from acts of vandalism or sabotage, just as an exit search could prevent property loss through asportation.

ARGUMENT

PETITIONER'S POST-SHIFT ANTI-THEFT SCREENINGS WERE NOT INTEGRAL AND INDISPENSABLE TO THE WORK PERFORMED BY ITS WAREHOUSE EMPLOYEES AND WERE THEREFORE NONCOMPENSABLE UNDER 29 U.S.C. 254(a)

The time that petitioner's warehouse employees spent undergoing anti-theft screenings does not need to be compensated under the FLSA in light of the exception that the Portal-to-Portal Act makes for "postliminary" activities. 29 U.S.C. 254(a)(2). The applicability of that exception turns on whether the screenings were "integral and indispensable" to the workers' principal activities. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005).[2] Respondents' allegations do not

[2] Under the "continuous workday rule," which was reaffirmed in *IBP*, 546 U.S. at 29, 40, the time that petitioner's employees spent

plausibly establish that the screenings here were integral and indispensable.

A. An Otherwise "Preliminary" Or "Postliminary" Activity Must Be Closely Related To An Employee's Principal Activities To Be Integral And Indispensable To Them

Under the Portal-to-Portal Act's amendment to the FLSA, an activity that is "preliminary" or "postliminary" to an employee's principal activities is noncompensable in the absence of a contrary contract or custom. 29 U.S.C. 254(a)(2). Twice in the last decade, this Court has described the series of events that precipitated the 1947 enactment of the Portal-to-Portal Act. *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 875 (2014); *IBP*, 546 U.S. at 25-27; see also pp. 2-3, *supra*. In doing so, it has reiterated that an activity becomes compensable under Section 254(a) only when it is "integral and indispensable" to an employee's principal activities. *Sandifer*, 134 S. Ct. at 876 (citation omitted); *IBP*, 546 U.S. at 37.

Here, the court of appeals suggested it was sufficient that the "concern" allegedly underlying petitioner's screenings—preventing employee theft—"stems from the nature of the employees' work." Pet. App. 12. But that is not enough to make an activity compensable. Instead, the statutory text, the legislative history, the 1947 interpretive regulations, and this Court's decisions all demonstrate that the integral-and-indispensable

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waiting to undergo screening would be compensable if the screening time itself were compensable. As embodied in a regulation that is "consistent with [this Court's] prior decisions interpreting the FLSA," the continuous-workday rule "means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *Id.* at 29 (quoting 29 C.F.R. 790.6(b)).

test requires a closer relationship between a principal activity and the activity in question before the latter ceases to be "preliminary" or "postliminary."

1. In the process of excepting certain activities from the scope of the FLSA, the Portal-to-Portal Act specifically identified the time it takes an employee to "travel[] to and from the actual place of performance of the [employee's] principal activity or activities." 29 U.S.C. 254(a)(1). But it also referred, more generically, to the time that employees devote to "activities which are *preliminary* to or *postliminary* to said principal activity or activities." 29 U.S.C. 254(a)(2) (emphases added). Those terms reveal that Congress contemplated that an activity could be related to an employee's principal activities in more than a temporal sense and yet remain noncompensable.

Although the word "preliminary" refers to something that is "previous" or "preceding the main discourse or business," *Webster's New International Dictionary of the English Language* 1950 (2d ed. 1948) (*Webster's Second*), it also carries a further connotation extending beyond that temporal relationship. Something that is preliminary is also "leading to"—or (as the etymology indicates) "at the threshold of"—that which it precedes. *Ibid.* Even though a preliminary activity is separable from the main event, it is by no means unrelated to what follows. Examples in *Webster's Second* include "*preliminary* articles to a treaty" and "*preliminary* measures." *Ibid.* Such preliminaries are related to what follows, in the sense that they lead to it, rather than simply occur earlier in time. In other words, they are "introductory" and "preparatory" to what comes next. 8 *Oxford English Dictionary* 1278 (1933) (*OED*) (defining *preliminary* as "[p]receding

and leading up to the main subject or business; introductory; preparatory"). Thus, nobody expects a preliminary hearing or preliminary injunction to be unrelated to the nature of the underlying lawsuit.

The same is true for "postliminary," which is defined in opposition to "preliminary." *Webster's Second* 1929 ("[d]one or carried on subsequently or as a conclusion; subsequent; — opposed to *preliminary*"); see 7 *OED* 1173 ("opposed to *preliminary*"). That which is "postliminary" is therefore something that follows from and bears some relationship with what went before, not just something that occurs later in time.

2. Both the legislative history and the Department of Labor's contemporaneous interpretive regulations reinforce the conclusion that a compensable activity is one that bears a close or direct relationship to an employee's principal activities.

Section 254 was added to the Portal-to-Portal Act by the Senate Judiciary Committee. See *Steiner* v. *Mitchell*, 350 U.S. 247, 254 (1956). The non-exhaustive list of examples that the Committee's report gave of activities that would *not* be compensable included the time employees spent walking or traveling to the actual place of performance of their principal activities as well as the time spent "[c]hecking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday, such as the preliminary activities which were involved in [*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)]." S. Rep. No. 48, 80th Cong., 1st Sess. 47 (1947) (*Senate Report*). Senator John Sherman Cooper—"a sponsor of the bill and a member of the three-man subcommittee that held

hearings for the Committee," *Steiner*, 350 U.S. at 254 —explained that compensation would, however, continue to be required for "those activities which are *so closely related* and are an *integral* part of the [employee's] principal activity, *indispensable* to its performance, [that they] must be included in the concept of principal activity." 93 Cong. Rec. 2297 (1947) (emphases added).

Six months after enactment of the Portal-to-Portal Act, the Department of Labor issued interpretive regulations addressing, *inter alia*, Section 254's references to compensable "principal activities" and noncompensable "preliminary" and "postliminary" activities. See 12 Fed. Reg. 7658-7660 (Nov. 18, 1947). The regulations—which are still in effect today, see 29 C.F.R. 790.7, 790.8—stated that principal activities include those that are "an integral part of a principal activity," providing illustrations tied to preparing machines or items for work (such as by oiling, greasing, or cleaning a machine, or installing a new cutting tool in it; or being required to report before other employees to distribute items to work benches and "get[] machines in readiness for operation"). 29 C.F.R. 790.8(b)(1)-(2). The regulations also stated that "[a]mong the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance." 29 C.F.R. 790.8(c).

The regulations explained that "[n]o categorical list of 'preliminary' and 'postliminary' activities except those named in the Act can be made," because the same activities may be preliminary or postliminary "under one set of circumstances" but principal activities "under other conditions." 29 C.F.R. 790.7(b). Drawing upon the legislative history, however, the regulations

identified some activities (in addition to walking and traveling) that "would be considered 'preliminary' or 'postliminary'" "when performed under the conditions normally present," including "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks." 29 C.F.R. 790.7(g) & n.49 (citing *Senate Report* 47). The regulations noted that "[w]ashing up after work, like the changing of clothes, may in certain situations be *so directly related* to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity'." 29 C.F.R. 790.7(g) n.49 (emphasis added); see also 29 C.F.R. 790.8(c).[3] They also recognized that if an employee is required to report at a particular hour at the place where he performs his principal activity, but no work is yet available for him to do, then he has been "engaged [by the employer] to wait," and such "waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. 790.7(h).

In 1949, when Congress added another provision to the FLSA dealing with washing and clothes-changing (see 29 U.S.C. 203(*o*)), it effectively ratified the 1947 interpretive regulations, stating that "[a]ny * * * interpretation of the Administrator of the Wage and Hour Division" then in effect "shall remain in effect * * * except to the extent that [it] may be inconsistent with [the 1949 amendments], or may from time

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[3] Similarly, the Office of Personnel Management—which administers the FLSA's application to most employees of the United States, 29 U.S.C. 204(f)—has promulgated a regulation stating that "[a] preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity." 5 C.F.R. 551.412(b).

to time be amended, modified, or rescinded by the Administrator." Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920.[4]

3. In 1956, this Court decided two cases concerning the scope of Section 254(a). In *Steiner*, *supra*, it held that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions * * * if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section [254](a)(1)." 350 U.S. at 256. *Steiner* relied on the portions of legislative history quoted above, including the statement of Senator Cooper (which it reprinted in an appendix to the opinion, *id.* at 256-257). The Court also noted that the 1949 Congress had been made aware of the Wage and Hour Administrator's interpretation of the statute as providing for compensation of "certain preparatory activities closely related to the principal activity and indispensable to its performance." *Id.* at 255. *Steiner* involved employees in a car-battery-manufacturing plant who were regularly exposed to chemicals, including lead dust and sulphuric acid, that could be hazardous to their health and even that of their families if "brought home in the

[4] Even without that unusual statutory ratification, the Department's longstanding interpretive regulations would be entitled to deference because they reflect the considered views of the agency charged with enforcing the FLSA, and they have been left undisturbed by Congress in its many intervening reexaminations of the FLSA. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the Wage and Hour Administrator's interpretations of the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

workers' clothing or shoes." *Id.* at 249-250, 255. The Court concluded that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id.* at 256.

In *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), which was decided on the same day as *Steiner*, the Court held that the time that employees at a meat-packing plant spent sharpening their knives, before their shifts began, was "an integral part of and indispensable to the various butchering activities for which [the workers] were principally employed." *Id.* at 263.

In 2005, the Court reaffirmed that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'" *IBP*, 546 U.S. at 37. At the same time, it acknowledged that something may "comfortably qualify as a 'preliminary' activity" and not be "integral and indispensable." *Id.* at 40. That is how the Court described time that employees in a poultry-processing plant spent waiting to put on "integral and indispensable gear." *Ibid.* The time it took to don the gear was compensable. *Ibid.* Although the antecedent time waiting to don the gear at the beginning of the workday was "necessary for employees to engage in their principal activities," *ibid.*, the Court nevertheless held that that time was noncompensable. *Id.* at 40-42. The Court found such time analogous to "the time that employees must spend waiting to check in or waiting to receive their paychecks," which is noncompensable under the Department of Labor's regulations. *Id.* at 41 (citing 29 C.F.R. 790.7(g)). And the Court said it could identify "no limiting principle" that would distinguish the waiting time from the time necessary to "walk[] from a timeclock near the factory gate to a work-

station"—time that Congress plainly intended the Portal-to-Portal Act to render noncompensable. *Ibid.*

B. Petitioner's Screenings Were Not Integral And Indispensable To Its Workers' Principal Activities

Both the Senate Judiciary Committee's report on the Portal-to-Portal Act and the Department of Labor's regulations recognized the impossibility of compiling a comprehensive or categorical list of activities that would be noncompensable in light of Section 254(a). See *Senate Report* 48-49; 29 C.F.R. 790.7(b). There are a few longstanding and reasonably clear benchmarks, including one of particular relevance to this case: that the time spent checking in and out and waiting in line to do so is noncompensable under normal conditions. 29 C.F.R. 790.7(g), 790.8(c); see pp. 15, 17, *supra*. As a general matter, however, "[w]hether an activity is characterized as * * * 'an integral and indispensable part' of the employee's principal activities (as distinguished from preliminary or postliminary to those activities), is a question of fact to be determined from all of the circumstances." Laurie E. Leader, *Wages and Hours: Law & Practice* § 6.03[7], at 6-28 (June 2014); see *Ciemnoczolowski* v. *Q.O. Ordnance Corp.*, 228 F.2d 929, 934 (8th Cir. 1955) ("Whether a preliminary or postliminary activity, necessary to the performance of the 'principal activity', is an integral part of the principal activity is a question of fact to be determined from all the relevant evidence."), opinion adhered to on reh'g, 233 F.2d 902 (8th Cir. 1956), cert. denied, 352 U.S. 927 (1956); 29 C.F.R. 790.7(h) ("[A]n activity which is a 'preliminary' or 'postliminary' activi-

ty under one set of circumstances may be a principal activity under other conditions.").[5]

1. In this case, the court of appeals inquired only whether the screening activities were (1) "necessary to employees' primary work as warehouse employees" and (2) "done for [the employer's] benefit." Pet. App. 11-12. That is an unduly spare test for determining whether petitioner's screenings were integral and indispensable to the employees' productive work.

To the extent that the security screenings were required by petitioner, they were "indispensable" in the sense that they were "[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory." *Webster's Second* 1267; see 5 *OED* 219 (defining "indispensable," when used to describe a "duty," as referring to one "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected"); see also 29 C.F.R. 790.8(c) & n.65 (noting that it may be that an employee "cannot perform his principal activities without putting on certain clothes," when "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work"). But the phrase "integral and indispensable"—which has not been broken into two separate inquiries by this Court or the regulations—requires more than is encompassed in the court of appeals' analysis. It requires a close or direct relationship to the actual performance of the employee's productive work.

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[5] Such circumstance-specific analysis is consistent with that required in other FLSA contexts, such as determining whether an individual is an employee or individual contractor. See *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947) ("[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.").

Something is "integral" when it is "[e]ssential to completeness." *Webster's Second* 1290; see 5 *OED* 366 (defining an "integral" part as one that is "[b]elonging to or making up an integral whole; constituent, component; *spec*[*ifically*] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage"). The legislative history and the regulations give the example of oiling, greasing, or cleaning a lathe, or installing a new cutting tool, as "an integral part of the principal activity" of operating the lathe. *Senate Report* 48; 29 C.F.R. 790.8(b)(1). That example is akin to the knife-sharpening in *King Packing*, which was a constituent part of effective butchering. 350 U.S. at 262. As the Court explained, the knife-sharpening activities were integral and indispensable to "various butchering operations" in a meat-packing plant, because "[a]ll of the knives * * * *must* be 'razor sharp' for the proper performance of the work," as "a dull knife would slow down production * * *, affect the appearance of the meat as well as the quality of the hides, cause waste[,] and make for accidents." *Ibid.* (emphasis added).

Similarly, in *Steiner*, the Court explained that the principal activities of the employees in a car-battery-manufacturing plant involved "extensive use of dangerously caustic and toxic materials," and the employees were "*compelled by circumstances*, including vital considerations of health and hygiene, to change clothes and to shower." 350 U.S. at 248 (emphasis added). The clothes-changing and showering activities were accordingly integral and indispensable to safely manufacturing car batteries. And, in *IBP*, the Court found that "the donning of certain types of protective gear" was

"*always* essential if the [poultry-processing-plant] worker [were] to do his job." 546 U.S. at 40. Thus, in all of those cases, the activities found compensable were closely or directly related to the actual performance of the employees' productive work.

Here, by contrast, petitioner's screenings may or may not be a reasonable response to a concern about employee theft. But those screenings do not have a similarly close connection to the performance of the employees' productive work in the warehouse. 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). Moreover, its use of "the plural form 'activities' in the statute makes it clear that in order for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job." *Ibid.*[6] But the anti-theft screenings following the completion of the employees' shifts were not closely intertwined with their principal activity (*i.e.*, retrieving merchandise from the warehouse shelves to fill customers' orders). Instead, as discussed below, the screenings were essentially a form of (or closely akin to) the ordinary process of checking out while leaving the premises after the employees' principal activities had ended. Accordingly, the court of appeals' focus on whether the

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[6] Thus, for instance, an employer's requirement that employees undergo certain mandatory training would be a compensable principal activity even if the training did not relate directly to the employees' ability to perform the physical tasks that were more obviously part of their work of consequence for the employer. See 29 C.F.R. 785.27, 785.28.

screenings were "done for [the employer's] benefit" (Pet. App. 12) was an insufficient proxy for determining whether they were integral and indispensable to the employees' principal activities.

2. The court of appeals also described petitioner's "concern" about employee theft as something that "stems from the nature of the employees' work (specifically, their access to merchandise)." Pet. App. 12. But that, too, was insufficient to demonstrate that the screenings were integral and indispensable to the work. As described above (see pp. 13-16, *supra*), the legislative history and regulations from which the Court derived the integral-and-indispensable test require the act in question to be "closely related" to the employees' principal activities—not just somehow originating from them. See *Steiner*, 350 U.S. at 255; 93 Cong. Rec. at 2297; 29 C.F.R. 790.8(c).

C. Petitioner's Screenings Cannot Be Persuasively Distinguished From Other Noncompensable Activities

As discussed above, petitioner's post-shift screenings are not comparable to the activities that this Court determined to be integral and indispensable in *Steiner*, *King Packing*, and *IBP*. But the conclusion that the time spent undergoing those screenings is noncompensable under Section 254(a) perhaps follows even more strongly from another consideration—that respondents' allegations provide no reason to believe that petitioner's screenings can be persuasively distinguished from other noncompensable activities, like a requirement that employees check out when they leave the employer's premises or that they undergo other common kinds of security searches. Cf. *IBP*, 546 U.S. at 41 (finding pre-donning waiting time noncompensable because "no limiting principle" could distinguish it from

the inarguably noncompensable time spent "walking from a timeclock near the factory gate to a workstation").

1. Petitioner's exit screenings are similar to a requirement that employees check out when departing the premises

a. There is no dispute that, barring unusual circumstances, a required checking out after a shift has ended is noncompensable. The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable preliminary or postliminary activities "when performed under the conditions normally present." 29 C.F.R. 790.7(g); see also 29 C.F.R. 790.8(c) ("activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities"). In that regard, they directly track the Senate Judiciary Committee's discussion of Section 254. See *Senate Report* 47.

b. The physical act of walking through a metal detector while exiting a facility is materially analogous to checking out—whether the latter is done by filing past a guard who checks an employee's identity and notes that the employee is leaving; or by signing a serial attendance log; or by swiping an electronic badge past a sensor and proceeding through a turnstile; or by punching a timeclock.[7] The act itself may take only a

[7] An employer may require employees to punch a timeclock without then using the corresponding times for computing their actual hours of work. Such practices were not uncommon when the Portal-to-Portal Act was enacted. See *Lasater* v. *Hercules Powder Co.*, 171 F.2d 263, 264 (6th Cir. 1948) ("The records made by the time clocks were not used to calculate the hours worked but to check the presence of employees."). Indeed, the paradigmatic activity made

few seconds for each employee, but the process of lining up will generally take longer. Cf. *Anderson*, 328 U.S. at 683 (explaining that "an average of 25 employees can punch the clock per minute" but it takes "a minimum of 8 minutes" for all the employees in a shift "to get by the time clock[s]"). The same guard who checks an employee's identity may, as part of the same process, also look into the employee's purse, briefcase, or bags, or glance at items removed from the employee's pockets. That extra scrutiny, ancillary to departing the premises, does not fundamentally change the nature of the checking-out process so as to render it integral to the employee's principal activities.

c. In addition, the motivation for a requirement that employees check in and out will often be similar, at least in part, to the motivation for anti-theft screenings. To the extent that requirements to check in and out are driven by a need to confirm whether an employee is present for his shift, they are rooted in a recognition of the value of applying verification procedures to all employees to ensure that an employee does not receive pay for hours that he did not work—whether because he missed a shift, he took an overlong lunch, or his supervisor inaccurately recorded his hours. Because checking in and out before and after shifts and meal breaks would make inaccurate reporting of hours less likely, the requirement to do so could be characterized as an "anti-theft" measure.[8]

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noncompensable by the statute is "walking from a timeclock near the factory gate to a workstation." *IBP*, 546 U.S. at 41; cf. 29 C.F.R. 785.48(a) (noting that "[m]inor differences between the clock records and actual hours worked cannot ordinarily be avoided").

[8] See John P. Clark & Richard C. Hollinger, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Theft by Employees in Work Organizations:*

d. A requirement to check in and out may also be driven by the employer's reasonable desire to have a record, for various purposes, of who is on the premises at any given time. For that reason, the requirement may be enforced at the doors to the building, or at a gate in a surrounding fence, or at the vehicular entrance and exit to the employee parking lot. And an employee could be required to undergo the process of badging in and out even when he is not reporting for work and is on the premises only to pick up a pay check or do some other non-work act.

There is no evident reason why the noncompensability of "checking in and out and waiting in line to do so" (29 C.F.R. 790.7(g)) should depend on whether those acts occur closer to or farther from the places where the employees actually perform their principal activities. Nor should it depend on whether the employer is seeking to confirm that employees are present to work, or simply to confirm that they are present, or both. Similarly, there is no reason why the noncompensability of screenings that are in essence checking out, or are part of the process of departing the premises (and thus closely analogous to checking out), should turn on the location or precise reason for the screening.

2. Petitioner's screenings are materially similar to other common kinds of security searches

The post-shift screenings at issue here are also materially similar to other common kinds of security searches that have generally not been considered to be compensable.

Executive Summary 6 (1983) (*Clark & Hollinger*) (noting that employee theft may involve time as well as property).

a. Theft, or pilferage, by employees has long been considered a serious problem.[9] And there is at least anecdotal evidence dating back decades that some employers have required employees to show packages for inspection as they leave work (and are off the clock).[10]

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[9] See, *e.g.*, *Clark & Hollinger* i, 2 (noting mid-1970s estimate that employee pilferage accounted for annual losses in the United States of $5 to $10 billion); *In re Montgomery Ward & Co.*, 23 War Lab. Rep. 249, 258 (1945) (noting that 500 to 600 employees of mail-order company's Chicago warehouse were apprehended annually for theft of merchandise); Bureau of Labor Statistics, U.S. Dep't of Labor, *Collective Bargaining Provisions: Discharge, Discipline, and Quits; Dismissal Pay Provisions, Bulletin No. 908-5*, H.R. Doc. No. 658, 80th Cong., 2d Sess. 4 (1948) (listing "pilferage" as reason for just-cause discharge in collective-bargaining agreements).

[10] See *In re Lake Park*, 83 Lab. Arb. Rep. (BNA) 27, 31 (1984) (upholding employee's discharge for refusing to submit to inspection of purse; noting that "the common sense of the situation" permits searches "as employees depart the work place" and that "[t]he time clock here (as I think is customary) is located inboard of the exi[t] and security station," making it reasonable for search to be conducted "near where employees leave the work place and *after* they have clocked out"); *In re McGraw-Edison Co., Nat'l Elec. Coil Div.*, 76 Lab. Arb. Rep. (BNA) 249, 250, 253 (1981) (upholding manufacturing company's policy of searching all lunch boxes and packages as employees exited through gate in chain-link fence between plant and parking lot); *In re Aldens, Inc.*, 51 Lab. Arb. Rep. (BNA) 469, 470-471 (1968) (upholding discharges of employees who refused to comply with orders that their purses be searched after they had clocked out, pursuant to mail-order company's policy responding to its "serious problem" with merchandise theft); see also *In re Curtis Mathes Mfg. Co.*, 73 Lab. Arb. Rep. (BNA) 103, 105, 107 (1979) (finding that one-time post-shift visual search of employees' handbags was *de minimis* and noncompensable, but noting that, despite the employer's Portal-to-Portal Act arguments, the result would "likely" have been different if such searches were routine; further noting evidence that employer had previously conducted searches, sometimes on a daily basis); p. 29, *infra* (describing entry and exit

Such searches are similar to other common security searches, performed at the entrances and exits to employers' premises, which have not been found to be compensable under the FLSA and the Portal-to-Portal Act. Although there are not many cases addressing security searches, previous judicial and administrative decisions have considered various permutations. Some involved searches that were conducted only at entrances, such as when construction workers gained access to a civilian airport tarmac,[11] when correctional officers reported for duty at a federal prison,[12] or when employees entered a gate outside a chicken-processing-plant.[13] Others also involved exit searches, such as

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searches conducted at ordnance plant operated by federal contractor in 1951). Two arbitrators applying a circumstance-specific analysis found that one-time post-shift searches of all employees' vehicles for missing property were compensable under the relevant contracts. See *In re Safeway Stores, Inc.*, 84 Lab. Arb. Rep. (BNA) 1193, 1194-1195 (1985) (finding employer's failure to compensate for 30-minute delay was an "unreasonable" invocation of its right to inspect vehicles on its property; ordering each employee to be paid for six minutes at their overtime rates); *In re Marine Corps Supply Ctr.*, 65 Lab. Arb. Rep. (BNA) 59, 60, 62-63 (1975) (requiring compensation in light of FLSA principles, without mentioning Portal-to-Portal Act's exception for postliminary activities).

[11] *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1340-1341, 1344 (11th Cir. 2007) (holding noncompensable the time construction workers spent "pass[ing] through a single security checkpoint" before reaching tarmac), cert. denied, 552 U.S. 1077 (2007).

[12] *United States Dep't of Justice Fed. Bureau of Prisons Fed. Corr. Inst. Allenwood, Pa.* v. *American Fed'n of Gov't Emps. Local 4047*, 65 F.L.R.A. 996, 1000 (2011) (finding that "passing through the security screening is not compensable as a principal activity" for correctional officers at a federal prison).

[13] *Anderson* v. *Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (holding noncompensable the time spent walking

when workers (and visitors) exited a nuclear power plant,[14] an Air Force base,[15] or a mail-sorting facility.[16]

The Department of Labor has identified only one opinion letter of its Wage and Hour Division addressing security or anti-theft searches. Significantly, that opinion letter did not distinguish between those two purposes and concluded that employees did not need to be compensated for the time they spent complying with a regime comprising both kinds of searches. See Opinion Letter from Wm. R. McComb, Adm'r, Wage & Hour Div., Dep't of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army

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through gate in chain-link fence, displaying company identification cards to guard—who could, but normally did not, search belongings—and then walking from security area to timeclock).

[14] *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586, 592-593 & n.2 (2d Cir. 2007) (screening upon entry to nuclear-power plant involved radiation detector, x-ray machine, and explosive metal detector; screening upon exit involved "many of these things," including radiation test; holding that those processes were "required and serve[d] essential purposes of security" but were "not integral to principal work activities" of plant employees), cert. denied, 553 U.S. 1093 (2008).

[15] *Whalen* v. *United States*, 93 Fed. Cl. 579, 601 (2010) ("The security inspections plaintiffs must undergo to enter and leave Edwards [Air Force Base] are not integral to their principal activities as air traffic controllers."); cf. *United States Dep't of Air Force* v. *FLRA*, 952 F.2d 446, 452-453 (D.C. Cir. 1991) (treating time that employees at Robins Air Force Base spent waiting to exit through gates in security fence as postliminary and "not closely related to principal work activities").

[16] *Sleiman* v. *DHL Express*, No. 09-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) (holding that time mail workers spent waiting for and going through security after being randomly selected for the process upon entry or egress is noncompensable in part because there is "no clear link between Class Members' principal activities and their procession through security").

(Apr. 18, 1951). The letter, which dates from only four years after the Portal-to-Portal Act, recounted the requester's description of the procedures to be followed by employees of a federal contractor at a facility that produced explosive powder for the Army. *Id.* at 1-2. Workers were required to "go through a 'badge alley'" to obtain their badge and time card, then walk 150 to 300 feet to a fence where they were searched for spark-producing devices and "other items which have a direct bearing on the safety of the employees and the Ordnance Works," and then walk to a bus that would carry them ¾ to 1½ miles to their work sites. *Id.* at 1. The badge alley was described as "essentially a security matter" because it kept "the record of hours worked," and the "match inspection" was described as "essentially for safety reasons." *Id.* at 2. The post-shift procedure for leaving was "basically the same," except that the "outgoing inspection" at the fence was "also made for the purpose of preventing theft." *Ibid.* After recounting that description, the Administrator concluded, without analysis, that "under the circumstances described the time spent in the badge alley and security checks, and the travel to and from work places in this situation need not be counted" as compensable "in the absence of a written or nonwritten contract or of a custom or practice." *Ibid.*

b. Respondents themselves have not contended that all security screenings are compensable. To the contrary, they have sought—at considerable length (Br. in Opp. 6-18)—to distinguish the anti-theft screenings here from other security-related searches, contending in particular (*id.* at 24) that "the commonplace searches at the entrances of government buildings would not be compensable activity under the standard in any cir-

cuit." Like the decision below (Pet. App. 12), they rely on the fact that most searches in high-security environments apply to "everyone entering an office or plant," without regard to whether they are employees. Br. in Opp. 23-24. But respondents' complaint does not even allege that petitioner's screening requirement applies only to its hourly warehouse employees. See Pet. Br. 41; J.A. 21 (alleging that "[p]laintiffs and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day").

In any event, that purported distinction does not withstand scrutiny. An activity can be integrally related to an employee's principal activities even if others must also engage in it. Otherwise, an employer could evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies only to employees. Conversely, an act—such as checking in or out, or walking to the place of principal work activities—is noncompensable if it is not integral and indispensable to the employees' principal activities, whether or not anyone else is required (or has occasion) to engage in that act.

c. Nor does the location of petitioner's screenings (at the exit but not at the entrance), or one of their alleged purposes (anti-theft), distinguish them for present purposes from other common security searches. An exit search is not necessarily confined to anti-theft purposes. It may serve instead as a double-check for items, like contraband or weapons, that may be the subject of an entrance search. It may also help confirm that forbidden items are not somehow finding their way to employees after they enter the facility. Indeed, respondents' own allegations indicate that petitioner's

screenings had, at least in part, such a purpose. They allege that petitioner was "search[ing] for possible warehouse items taken without permission *and/or other contraband*." J.A. 21 (emphasis added); see also *ibid.* (describing petitioner's "search for possible contraband or pilferage of inventory"); J.A. 35 (letter from respondents' counsel providing notice, for state-law purposes, of demand that petitioner pay for the time warehouse employees "spent waiting for and undergoing security checks and searches for theft or contraband").

By the same token, an entrance search may, like an exit search, be intended to prevent loss of the employer's property by intercepting items that could be used to damage the premises or inventory through acts of vandalism or sabotage rather than asportation.[17] There is accordingly no clear-cut distinction—either in terms of purpose or effect—between petitioner's screenings and those that are routine at countless government and private-sector buildings.

* * * * *

As in *IBP*, the absence of a "limiting principle" (546 U.S. at 41) that distinguishes between petitioner's screenings and other typically noncompensable activities—checking out and undergoing common security searches—strongly supports the conclusion that the time spent undergoing those screenings (and waiting to undergo them) is noncompensable in the absence of a contract or custom providing otherwise.[18]

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[17] See *Clark & Hollinger* 5 ("Not all worker behavior directed against the property of the organization must involve its physical removal from the premises.").

[18] This is not to say that all other end-of-shift requirements, or even searches, would be treated the same. For instance, if employees were required to complete paperwork about what they had

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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done during their shift, transport equipment to a central location, or obtain assignments for their next shift, such activities would generally be compensable. Cf. *Chao* v. *Akron Insulation & Supply, Inc.*, 184 Fed. Appx. 508, 511 (6th Cir. 2006) (holding compensable the "shop time" of employees engaged in off-site installation, who were required to report "well before the 'official' start time of 7:30 a.m." to "receive[] assignments, assemble[] work crews, and load[] trucks with material and equipment"; at the end of the day, they "would return to the shop to return equipment and report to [the company president] about the job and receive arrival times for the following day"); *Herman* v. *Rich Kramer Const., Inc.*, 163 F.3d 602 (8th Cir. 1998) (Table), 1998 WL 664622, at *1, *2 (holding compensable the "shop time" of construction foremen who "loaded trucks, received crew assignments, and studied blueprints" before driving to job site and, at the end of the day, "filled out time-sheets, unloaded and locked the trucks, and secured equipment"); *Dunlop* v. *City Elec., Inc.*, 527 F.2d 394, 397, 400-401 (5th Cir. 1976) (holding compensable various pre-shift activities of electricians, including "filling out of time sheets, material sheets, and supply and cash requisition sheets," as well as "fueling, loading, and cleaning out" trucks used to travel from shop to "various jobsites").

APPENDIX

1. 29 U.S.C. 254 provides:

Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act[1], on account of the failure of such employer to pay an employee minimum wages, or 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. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an

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[1] See References in Text note below.

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.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act[1], in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

2. 29 C.F.R. 790.6 provides:

Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that

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[1] See References in Text note below.

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

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[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If 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 reports 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. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

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[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

3. 29 C.F.R. 790.7 provides:

"Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of

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[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, trav-

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[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities

el by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

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which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

(d) An employee who walks, rides or otherwide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the per-

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[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

formance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, 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.[51] 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.[52]

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to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

4. 29 C.F.R. 790.8 provides:

"Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

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 predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activi-

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[53] See §§ 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. 2d 553 (C.C.A. 8, 1933).

ties which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

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[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) 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 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, regardless of contrary custom or contract.[63]

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[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be

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given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

regarded as integral parts of the principal activity or activities.[67]

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.