No. 11-16892

In the United States Court of Appeals for the Ninth Circuit

JESSE BUSK; LAURIE CASTRO,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

INTEGRITY STAFFING SOLUTIONS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF *AMICUS CURIAE* OF THE RETAIL LITIGATION CENTER IN SUPPORT OF THE PETITION FOR REHEARING

Kenneth D. Sulzer
Laura Reathaford
PROSKAUER ROSE LLP
2049 Century Park East
Los Angeles, CA 90067-3206
(310) 557-2900

Ronald E. Meisburg
Lawrence Z. Lorber
James F. Segroves
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2533
(202) 416-6800

Deborah R. White
RETAIL LITIGATION
CENTER, INC.
1700 N. Moore Street
Arlington, VA 22209
(703) 600-2067

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for the Retail Litigation Center, Inc. ("RLC") certifies that RLC has no parent company and no publicly held corporation owns a 10 percent or greater ownership interest in RLC.

s/Kenneth D. Sulzer
Kenneth D. Sulzer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF INTEREST

The Retail Litigation Center, Inc. ("RLC") is a public policy organization whose members include many of the country's largest and most innovative retailers. The member-entities whose interests are represented by RLC operate throughout the United States, employ millions of individuals, and provide quality goods and services to tens of millions of consumers. Among other things, RLC provides courts with retail industry perspectives on important legal issues and highlights the industry-wide consequences of significant, pending cases such as this one.*

Like most industries in the United States, virtually all segments of the retail industry are subject to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-219, which establishes nationwide minimum-wage, maximum-hour, and overtime requirements. The FLSA creates a cause of action whereby employees may sue employers on be-

---

* Pursuant to Federal Rule of Appellate Procedure 29, RLC certifies that all parties have consented to the filing of this brief. RLC also certifies that no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than RLC, its members, or its counsel made a monetary contribution to its preparation or submission.

half of themselves and similarly situated employees to recover double damages and mandatory attorneys' fees. § 216(b). Importantly, because the FLSA has no intent element, an employer's good-faith belief that it has complied with the statute serves only as a limited defense if subsequent judicial decisions interpret the statute differently. *See* §§ 255(a), 260 (providing that employer's intent affects statute of limitations and award of double damages, but not mandatory attorneys' fees).

Responding to overly expansive interpretations of the statute, Congress narrowed the FLSA's scope by enacting the Portal-to-Portal Act of 1947 ("Portal-to-Portal Act"), 29 U.S.C. §§ 251-262. In relevant part, the Portal-to-Portal Act provides that

> no employer shall be subject to any liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee . . . wages . . . on account of any of the following activities of such employee . . . —
>
> (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. . . .

§ 254(a) (emphasis added). The Portal-to-Portal Act does not define what constitutes a "principal activity," nor does it define what it means for an activity to be "preliminary" or "postliminary." However, the Supreme Court has held that preliminary and postliminary activities are not compensable unless they are an "integral and indispensable part of the principal activities for which" the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

In this case, two plaintiffs filed a nationwide putative collective action alleging that they and hundreds of other former and current employees of Defendant-Appellee Integrity Staffing Solutions, Inc. ("Integrity") were entitled to compensation for time spent undergoing security screening at warehouses in which they filled orders for an online retailer. As explained in detail by Integrity's rehearing petition, the panel's published decision reinstating this action created an intra- and inter-circuit conflict regarding what preliminary and postliminary activities are compensable because they are "integral and indispensable" to an employee's principal activities. RLC will not repeat Integrity's arguments here.

Instead, RLC submits this *amicus curiae* brief in support of the rehearing petition to emphasize the exceptional importance of the core legal question presented by this case: namely, whether the FLSA requires employers to compensate employees for time spent undergoing security screening. Because employee theft has a significant impact on the retail industry generally, most of the nation's leading retailers use security-screening procedures to help reduce employee theft. Therefore, the core legal question on which Integrity seeks rehearing is of particular concern to RLC and its members.

ARGUMENT

I. THE PANEL DECISION IMPERMISSIBLY LOWERED THE LEGAL STANDARD FOR DETERMINING WHAT ARE "INTEGRAL AND INDISPENSABLE" ACTIVITIES REQUIRING COMPENSATION

In determining whether time spent going through security screening is compensable, Supreme Court precedent requires courts to examine whether such security screening is "integral and indispensable" to the employee's "principal activities." *Steiner*, 350 U.S. at 256. As the panel decision acknowledged, to be "integral and indispensable," circuit precedent provides that "an activity must be (1) 'necessary to the principal work performed' and (2) 'done for the benefit of the employer.'"

Slip op. at 10 (quoting *Alvarez v. IBP, Inc.*, 229 F.3d 894, 903 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). The panel decision effectively skipped the first element of the analysis required by circuit precedent, instead focusing almost exclusively on whether the security screening was for the benefit of the employer. Rather than addressing the necessity of the activity to employees' principal work, the panel decision held that liability could be established if security screening was required by the employer's rules or the nature of the work. Slip op. at 11.

That is incorrect. *Alvarez* did not simply turn on whether the donning and doffing of safety equipment was required by the employer or the nature of the work. Rather, the *Alvarez* Court also considered whether the safety equipment being donned and doffed *was necessary to the performance of the work itself*, finding that it was. *See Alvarez,* 339 F.3d at 903 (explaining that "[s]afety goggles are, like metal-mesh leggings, required by [the employer], and they are, like metal-mesh leggings, *necessary to the performance of the principal work*," which the Court characterized as the slaughter and processing of meat) (emphasis added).

The panel conducted no similar analysis or discussion of the work performed in this case. Instead, the panel decision seemed to restrict its analysis to the fact that the security measures were required by Integrity, without ultimately determining whether the security measures were necessary to the performance of the employees' principal work itself. The panel decision instead held that time spent at security screenings was compensable simply because Integrity requires security screening in order to address "a concern that *stems from* the nature of the employees' work (specifically, their access to merchandise)." Slip op. at 12 (emphasis added). That analysis is flawed for at least two reasons.

First, the panel decision creates another intra-circuit conflict when it departs from *Alvarez*'s "necessity to the principal work performed" requirement, replacing it with the much lower standard that the activity merely "stems from the nature of the employees' work." As the Second Circuit recognized in *Gorman v. Consolidated Edison Corp.*, "necessary" means "indispensable." 488 F.3d 586, 592 (2d Cir. 2007) (internal quotation marks and citation omitted), *cert. denied*, 553 U.S. 1093 (2008). However, by imposing liability simply because security screening "stems from" a purported principal activity, the panel deci-

sion diluted the first prong of the "integral and indispensable" test required by binding precedent, arguably making anything that simply "arises from" the principal activity compensable (e.g., purchasing clothing outside the workplace to comply with an employer's dress code or commuting to and from work).

Second, assuming the panel decision meant to characterize "access to merchandise" as the principal activity, that, too, is incorrect as a matter of law and in direct contravention of longstanding regulatory guidance. "Principal activities" are those that employees are "employed to perform." 29 C.F.R. § 790.8(a). As this Court explained in *Rutti v. Lojack Corp.*, the term "principal activities" includes "any work *of consequence* performed for an employer." 596 F.3d 1046, 1055 (9th Cir. 2010) (emphasis added). While having "access to merchandise" is a consequence of an employee's work, it is not "work of consequence." For example, employees in a variety of industries have access to merchandise, information, or some other form of employer property. A warehouse custodian arguably has the same access to merchandise as other warehouse employees. However, mere access is not "work of consequence" to the employer; "work of consequence" refers to the activities

that each person was "employed to perform" such as cleaning and pulling products to fulfill customer orders.

While security screening undeniably serves the purpose of protecting against theft, this would be true in virtually every industry—irrespective of the employees' principal activities—rendering the "integral and indispensable" requirement established by Supreme Court precedent effectively meaningless. Thus, should the panel decision be left undisturbed, thousands of employers with operations in this Circuit will be subject to potential FLSA liability, irrespective of their employees' principal work.

II. THE PANEL DECISION CREATES SIGNIFICANT LEGAL UNCERTAINTY AND ENORMOUS POTENTIAL FINANCIAL LIABILITY FOR THOUSANDS OF EMPLOYERS

For over half a century, federal interpretative guidance has explained that employee waiting time is generally not compensable under the FLSA. *See* 29 C.F.R. §§ 790.7(g) & 790.8(c) (explaining, in guidance first promulgated in 1947, that checking in and out of work and waiting in line to do so are generally not compensable). Moreover, prior to the panel decision in this case, other federal appellate courts had determined that time spent waiting at security screenings is not com-

pensable. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir.), *cert. denied*, 552 U.S. 1077 (2007). District courts, including the district court in this case, had reached the same conclusion. *See, e.g.*, *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009); *Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-cv-01868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013); *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854, 2011 WL 2971265, at *4 (D. Nev. July 19, 2011); *Sleiman v. DHL Express*, No. 5:09-cv-00414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009).

The panel decision contravenes long-established regulatory guidance and well-settled precedent, and thus creates the potential for monumentally significant and unanticipated financial liability for thousands of employers who either use security screening themselves or who have employees who must otherwise undergo such screening. *See* Spencer Soper, *The High Cost of Theft Prevention?*, Morning Call (Allentown, Pa.), Apr. 29, 2013, at A1 (citing plaintiffs' counsel as asserting that this case involves more than $100 million in potential liability). Such unpredictability in the law adversely affects employers for

the very same reasons cited by Congress when enacting the Portal-to-Portal Act 66 years ago. *See* 29 U.S.C. § 251(a) (explaining the FLSA had been misinterpreted, "creating wholly unexpected liabilities" that would "bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, [and] curtailing employment").

The legal uncertainty and potential financial liability created by the panel decision extends far beyond just the geographic boundaries of this Circuit. As evidenced by the amended complaint filed in this case, plaintiffs in putative collective actions under the FLSA often seek to represent all of an employer's current and former employees, regardless of their geographic location. 2 ER 194 (defining the "FLSA Class" as "[a]ll persons employed by [Integrity] as hourly warehouse employees within the United States at any time within three years prior to" this action's filing); *see also Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) (addressing putative collective action filed by former nurse who sought to sue on behalf of thousands of similarly situated employees throughout the United States); *Rutti*, 596 F.3d at 1050 (ad-

dressing putative collective action filed by former technician who sought to sue on behalf of all current and former technicians employed by a national company). As a result, if the panel decision is left undisturbed, the district courts in this Circuit can soon expect their already-significant FLSA caseloads to increase even further as litigants seek to take advantage of the fact that most large and medium-sized employers—the principal targets of putative collective actions such as this one—do business within this Circuit.

III. THE PANEL DECISION HAS SIGNIFICANT, REAL-WORLD IMPLICATIONS

Finally, the real-world implications of the new legal requirement adopted by the panel decision also support granting rehearing in order to further consider the core legal question presented by this case. Given the widespread view in the employer community that security-screening time is not compensable (a legitimate view created by the long-standing regulatory guidance and preexisting precedent discussed above), compliance with the legal requirement established by the panel decision cannot be achieved overnight, nor can it be achieved without thousands of employers having to incur the expense that accompanies dedicating the human resources and capital investment necessary to ensure com-

pliance with that legal requirement. In retail and non-retail industries where productivity is critical, margins are thin, and employee wages usually constitute an employer's largest expense, even slight increases in cost, when multiplied by thousands of workers, can make the difference between profit and loss.

Simply calculating those increased costs may prove challenging for many employers. For example, one panel member expressed concern at oral argument regarding the practical ramifications of a legal rule deeming security-screening time compensable. After plaintiffs' counsel conceded that such a rule would create a financial incentive for employees to lengthen the screening process and that the amount of time it would take an employee to go through security would vary everyday, the Court asked:

> THE COURT: So that each day you have a different person in a different place and that same person would be in a different place the next day, and in some way, in your view, somebody has to do the bookkeeping and compensate? Isn't that your view?
>
> COUNSEL: I think it is, Your Honor . . . .

Oral Arg. Recording 1:31 to 2:04, *Busk v. Integrity Staffing Solutions, Inc.*, No. 11-16892 (9th Cir. Feb. 12, 2013).[†]

The suggestion that all employers need do is move the security-screening process or their preexisting time-keeping systems fails to recognize the practical reality in many retail settings. For example, advancing the time and location of security screening so that it occurs *before* employees depart from store areas containing merchandise susceptible to theft would significantly weaken the effectiveness of such screening. Moreover, most retailers doing business in high-security environments (e.g., airports and government buildings) cannot move their time-keeping systems outside of tight security perimeters, the boundaries of which usually coincide with a building's physical boundaries. One cannot put a time clock in the middle of a public street.

Therefore, unless the Court acts, the panel decision may require thousands of employers to take immediate and potentially costly action in an effort to comply with the new legal requirement established by the

---

[†] *Available at* http://cdn.ca9.uscourts.gov/datastore/media/2013/02/12/11-16892.wma (last visited May 13, 2013).

panel decision. As the plaintiffs' lead counsel explained to one national legal publication following the panel decision, the security-screening issue makes this a "huge case for the real world, and not just the legal world." Benjamin James, *FLSA Actions Can Coexist With State Class Claims: 9th Circ.*, Law360 (Apr. 12, 2013).

[*Remainder of Page Intentionally Blank*]

CONCLUSION

For the foregoing reasons and those contained in the rehearing petition, the Court should grant the petition and bring much-needed clarity on the question whether time spent undergoing security screening is compensable under the FLSA.

Dated: May 13, 2013

Respectfully submitted,

PROSKAUER ROSE LLP

By: s/Kenneth D. Sulzer

Kenneth D. Sulzer
Laura Reathaford
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206
(310) 557-2900
(310) 557-2193 (fax)
ksulzer@proskauer.com
lreathaford@proskauer.com

Ronald E. Meisburg
Lawrence Z. Lorber
James F. Segroves
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2533
(202) 416-6800
(202) 416-6899 (fax)
rmeisburg@proskauer.com
llorber@proskauer.com
jsegroves@proskauer.com

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae Retail Litigation Center, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that the Brief *Amicus Curiae* of the Retail Litigation Center in Support of the Petition for Rehearing contains 2,560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced, roman typeface (14-point New Century Schoolbook) using Microsoft Word 2003.

s/Kenneth D. Sulzer
Kenneth D. Sulzer

CERTIFICATE OF SERVICE

The undersigned certifies that on this thirteenth day of May, 2013, he electronically filed the Brief *Amicus Curiae* of the Retail Litigation Center in Support of the Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Kenneth D. Sulzer
Kenneth D. Sulzer