No. 13-433

In the Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC., PETITIONER
v.
JESSE BUSK, ET AL.

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

BRIEF OF THE RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amicus curiae 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 cases.

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in

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[*] No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has filed a blanket consent to the filing of *amicus* briefs. Respondents' written consent to the filing of this brief has been filed with the Clerk. Counsel of record for petitioner and respondents received notice of the *amici*'s intent to file this brief at least 10 days before the due date.

cases that raise issues of concern to the nation's business community.

Amicus curiae Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resource professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resource management practices in the profession, and to (a) be a recognized world leader in human resource management; (b) provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) be the voice of the profession on human resource management issues; (d) facilitate the development and guide the direction of the human resource profession; and (e) establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

Amicus curiae the National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers com-

pete in the global economy and create jobs across the United States.

Collectively, the foregoing *amici* represent a wide cross-section of the employer and human resource community throughout the United States. The *amici* therefore have a significant interest in promoting certainty in the law of the workplace. The vast majority of American employers dedicate considerable time, energy, and resources to achieve compliance with the myriad statutes governing the workplace, while at the same time maintaining and creating much-needed jobs. Legal confusion only complicates those efforts by fostering unnecessary and costly litigation.

Legal uncertainty is especially harmful under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide minimum-wage, maximum-hour, and overtime requirements governing more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 2 (2011). In recent years, the employer community has been inundated by an ever-growing tidal wave of FLSA litigation. For example, a total of 2,035 FLSA actions were commenced in district courts throughout the United States during the 12-month period ending March 31, 2002. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 46 (2002). For the 12-month period ending March 31, 2012, that number had grown to 7,064—a nearly 300 percent increase. Ad-

min. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 49 (2012).

Accordingly, the *amici* have long promoted efforts to remove legal uncertainty under the FLSA so that their respective members can do what most American businesses want to do: comply with the law and avoid costly litigation.

STATEMENT

1. Responding to what it believed were overly expansive interpretations of the FLSA, Congress narrowed the statute'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 "principal activity or activities," nor does

it define what it means for an activity to be "preliminary" or "postliminary." Over half a century ago, however, this Court held that "principal activity or activities" includes all preliminary and postliminary activities that are themselves an "integral and indispensable part" of the principal activities for which the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956).

2. Respondents Jesse Busk and Laurie Castro filed a putative collective action alleging that they and hundreds of other former and current employees of petitioner Integrity Staffing Solutions, Inc. (Integrity) are entitled to compensation for time spent undergoing security screening after the conclusion of their work shifts. The United States District Court for the District of Nevada dismissed that claim with prejudice. Pet. App. 28. Citing regulations promulgated by the Department of Labor over 60 years ago, the district court concluded that the security screening was a postliminary activity for which no compensation was required. *Id.* at 27-28. In doing so, the district court specifically rejected respondents' contention that undergoing security screening was itself a principal activity under *Steiner*'s "integral and indispensable" test. *Id.* Respondents "could perform their warehouse jobs without such daily security screenings," the district court explained. *Id.* at 28. Therefore, undergoing security screening was not an integral and indispensable part of respondents' "principal activities as warehouse employees fulfilling online purchase orders." *Id.* at 27.

3. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 12. In a published opinion, the court of appeals found that *Steiner*'s "in-

tegral and indispensable" test had been satisfied, stating:

> Here, [respondents] have alleged that Integrity requires the security screenings, which must be conducted at work. They also allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. Assuming, as we must, that these allegations are true, [respondents] have stated a plausible claim for relief.

Id. at 11-12. The Ninth Circuit did not address the Department of Labor's regulations upon which the district court relied.

SUMMARY OF ARGUMENT

As explained in detail by Integrity's petition for a writ of certiorari (Pet. 18-23), the Ninth Circuit's decision created a conflict with published opinions previously issued by the Second and Eleventh Circuits holding that security screening is a preliminary or postliminary activity exempted from the FLSA's compensation requirement by the Portal-to-Portal Act. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008) (No. 07-1019); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir.), *cert. denied*, 552 U.S. 1077 (2007) (No. 07-554). That disagreement of appellate authority regarding the interpretation of the Portal-to-Portal Act alone warrants review by this Court to ensure the uniform application of the FLSA.

In addition, the Ninth Circuit's contrary decision presents a nationally significant legal question that begs for timely resolution by this Court. The Ninth Circuit's decision has created substantial legal uncertainty and enormous potential financial liability for thousands of employers throughout the United States. The ramifications of the Ninth Circuit's decision extend far beyond the geographic boundaries of the Ninth Circuit. The FLSA's collective-action device allows plaintiff's counsel to convert a lawsuit involving a single named employee with a relatively small claim into a lawsuit of nationwide scope involving tens of thousands of employees and tens of millions of dollars in claims. The FLSA also grants plaintiffs wide discretion in deciding where to file suit, which permits forum shopping. The Ninth Circuit's decision has already served as a magnet for plaintiff's lawyers seeking to take advantage of the Ninth Circuit's departure from long-established regulatory interpretations and preexisting precedent. That forum shopping has continued unabated since Integrity filed its petition in this Court.

The Ninth Circuit's decision also has immediate real-world implications. It would require thousands of employers to modify their time-keeping systems or eliminate security screening altogether. The latter option is untenable in today's world. The former option cannot be achieved overnight or without considerable cost. If such costs are to be imposed on the employer community nationwide through a judicial interpretation of the "integral and indispensable" test established by this Court in *Steiner*, it should only come from a decision of this Court, not the Ninth Circuit.

Accordingly, the Court should grant the petition in order to resolve the important question of federal law presented by this case.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CREATES SIGNIFICANT LEGAL UNCERTAINTY AND ENORMOUS POTENTIAL FINANCIAL LIABILITY FOR THOUSANDS OF EMPLOYERS THROUGHOUT THE NATION

For over half a century, the Department of Labor has advised employers that employee waiting time is generally noncompensable under the FLSA. *See* 29 C.F.R. §§ 790.7(g) & 790.8(c) (explaining, in guidance first promulgated shortly after the Portal-to-Portal Act's enactment, that checking in and out of work, waiting in line to do so, and waiting in line to receive pay checks are generally considered preliminary or postliminary activities). Moreover, prior to the Ninth Circuit's decision in this case, federal appellate and district courts had uniformly held that undergoing security screening is a preliminary or postliminary activity in a wide variety of settings. *See, e.g.*, *Gorman*, 488 F.3d at 593-94 (power plant); *Bonilla*, 487 F.3d at 1344-45 (airport); *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (food-processing plant); *Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-cv-01868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013) (distribution center); *Sleiman v. DHL Express*, No. 5:09-cv-00414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009) (mail-sorting center). Even cases involving federal workplaces had reached the same conclusion. *See Whalen v. United States*, 93 Fed. Cl. 579, 601 (2010) (air traffic control center); *U.S. Dep't of Justice, Fed. Bureau of Prisons*, *Fed.*

Corr. Inst., Allenwood, Pa., 65 FLRA 996, 999-1000 (2011) (prison).

The Ninth Circuit's decision constitutes a radical departure from this long-standing regulatory interpretation and well-established precedent. That, in turn, creates the potential for significant and completely unanticipated financial liability for thousands of employers throughout the United States who either use security screening themselves or who have employees who must otherwise undergo such screening. In this case alone, respondents' counsel has asserted that the security-screening issue presents more than $100 million in potential liability. *See* Spencer Soper, *The High Cost of Theft Prevention?*, Morning Call (Allentown, Pa.), Apr. 29, 2013, at A1. To understand why that assertion cannot be disregarded as mere puffery, one must understand two things about FLSA litigation.

First, the FLSA's collective-action device allows plaintiff's counsel to leverage a lawsuit involving a single employee's claim into a lawsuit of nationwide scope involving tens of thousands of employees. *See* 29 U.S.C. § 216(b) (providing that employees may sue on behalf of themselves "and other employees similarly situated"). 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. *See* 1st Am. Compl. ¶ 21, *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854 (D. Nev. Dec. 15, 2010) (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 employee who sought to sue on behalf of thousands of similarly situated employees throughout the United States).

Second, the FLSA grants plaintiffs wide discretion in deciding where to file suit, which permits forum shopping. *See* 29 U.S.C. § 216(b) (providing FLSA suits may be filed in "any" federal court of "competent jurisdiction").

Therefore, the legal uncertainty and potential financial liability created by the Ninth Circuit's decision extends nationwide. Unsurprisingly, the Ninth Circuit's decision has already attracted litigants seeking to take advantage of the fact that most large and medium-sized employers—the principal targets of putative collective actions under the FLSA—do business somewhere within the expansive geographic boundaries of the Ninth Circuit. In addition to the cases cited by Integrity (Pet. 26-27), plaintiffs seeking to represent nationwide classes have recently filed several copycat security-screening cases within the Ninth Circuit. *See, e.g.*, Compl. ¶ 35, *Roberts v. TJX Cos.*, No. 3:13-cv-04731 (N.D. Cal. Oct. 10, 2013) (putative collective action filed by one former employee seeking to represent "[a]ll current and former [hourly] employees [of the defendants] who have worked in the United States at [the defendants'] retail store[s] at any time during the last three years"); Compl. ¶ 27, *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013) (putative collective action filed by one employee seeking to represent "[a]ll Hourly Employees who worked in an Apple, Inc. re-

tail store in the United States, who are or were employed within the three years preceding the filing of this action"); Compl. ¶ 14, *Cortez v. Ross Dress for Less, Inc.*, No. 5:13-cv-01298 (C.D. Cal. July 24, 2013) (putative collective action filed by two former employees seeking to represent all of the defendant's hourly employees "in and outside of California" who were employed by the defendant "at any time during the three years prior to the date of the filing of this Complaint").

Accordingly, the Ninth Circuit's decision has created nationwide legal uncertainty and enormous potential financial liability for thousands of employers. Regardless of whether this Court ultimately agrees or disagrees with the Ninth Circuit's decision on the merits, employers throughout the United States need a timely and final resolution of the security-screening question. This Court has acted to remove legal uncertainty under the FLSA in circumstances similar to this case. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005) (explaining review was granted to address one-to-one circuit split on FLSA issue); *Steiner*, 350 U.S. at 248-49 (same). It should do so again here.

II. THE NINTH CIRCUIT'S DECISION HAS IMMEDIATE REAL-WORLD IMPLICATIONS

Given the widespread view in the employer community that security screening is a preliminary or postliminary activity excluded from the requirements of the FLSA (a legitimate view created by the long-standing regulatory guidance and preexisting precedent discussed above), compliance with the novel legal requirement established by the Ninth Circuit cannot be achieved overnight, nor can it be

achieved without employers having to incur the expense that accompanies dedicating the human resources and capital investment necessary to ensure compliance with that legal requirement. In 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 employees, can make the difference between profit and loss (with devastating consequences for employers and employees alike).

Simply calculating those increased costs may prove challenging for many employers. 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 workplace settings. For example, employee theft in the retail industry—known in industry parlance as "shrinkage"—causes billions of dollars in losses each year, resulting in higher prices for consumers. To combat employee theft, many retailers use loss-prevention programs that include visually examining employee bags after the conclusion of employee work shifts. 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.

As demonstrated by the workplaces at issue in this case and those at issue in the security-screening cases decided prior to the Ninth Circuit's decision, the effects of the Ninth Circuit's decision extend far beyond the retail industry. For example, most employers doing business in high-security environments (e.g., airports, skyscrapers, and government build-

ings) cannot move their time-keeping systems outside of tight security perimeters, which usually coincide with a building's or a facility's physical boundaries.

Therefore, unless this Court provides timely guidance, the Ninth Circuit's decision may require thousands of employers to take immediate and potentially costly proactive action in an effort to protect themselves against the type of copycat suits that are already being spawned by the Ninth Circuit's decision. As respondents' own counsel admitted to a national legal publication shortly after the Ninth Circuit's 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).

CONCLUSION

For the foregoing reasons and those contained in the petition, the petition should be granted.

Respectfully submitted.

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