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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION.	
JESSE BUSK; LAURIE CASTRO; SIERRA WILLIAMS; MONICA WILLIAMS; VERONICA HERNANDEZ, *Plaintiffs-Appellants*, v. INTEGRITY STAFFING SOLUTIONS, INC.; AMAZON.COM, INC., *Defendants-Appellees.*	Nos. 17-5784/5785

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
Nos. 3:14-cv-00139; 3:14-md-02504—
David J. Hale, District Judge.

Argued: June 14, 2018

Decided and Filed: September 19, 2018

Before: BATCHELDER and CLAY, Circuit Judges; SARGUS, District Judge.*

COUNSEL

ARGUED: Joshua D. Buck, THIERMAN BUCK LLP, Reno, Nevada, for Appellants. Rick D. Roskelley, LITTLER MENDELSON, Las Vegas, Nevada, for Appellee Integrity Staffing Solutions. Richard G. Rosenblatt, MORGAN, LEWIS & BOCKIUS, LLP, Princeton, New Jersey, for Appellee Amazon.com. **ON BRIEF**: Joshua D. Buck, Mark R. Thierman, THIERMAN BUCK LLP, Reno, Nevada, for Appellants. Rick D. Roskelley, LITTLER MENDELSON, Las Vegas, Nevada, Cory G. Walker, LITTLER MENDELSON, Phoenix, Arizona, for Appellee Integrity Staffing Solutions. Richard G. Rosenblatt, MORGAN, LEWIS & BOCKIUS, LLP, Princeton, New Jersey, for Appellee Amazon.com.

CLAY, J., delivered the opinion of the court in which SARGUS, D.J., joined, and BATCHELDER, J., joined in part. BATCHELDER, J. (pp. 27-28), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Plaintiffs in this purported class action seek compensation under Nevada and

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* The Honorable Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio, sitting by designation.

Arizona law for time spent undergoing or waiting to undergo mandatory onsite security screenings at the Amazon facilities where they worked. The district court granted summary judgment for Defendants on the grounds that time related to security checks is not compensable as "hours worked" under Nevada and Arizona labor law. Because we conclude that time spent undergoing mandatory security checks is compensable under Nevada law, we **REVERSE** the district court's judgment with regard to the Nevada claims and **REMAND** for further proceedings. Because we conclude that the Arizona Plaintiffs have failed to satisfy Arizona's "workweek requirement," we **AFFIRM** the district court's dismissal of Plaintiffs' Arizona claims.

BACKGROUND

Factual Background

Defendant Integrity Staffing Solutions, Inc. ("Integrity"), provides warehouse labor services to businesses throughout the United States where hourly workers fill orders, track merchandise, and process returns. Integrity employs thousands of hourly warehouse employees like Plaintiffs at each of Defendant Amazon.com's ("Amazon") facilities. Some Plaintiffs in this case were hourly employees of Integrity at warehouses in Nevada and Arizona. Other Plaintiffs were directly employed by Amazon. According to Plaintiffs, "Amazon.com exercises direct control over the hours and other working conditions of all Plaintiffs and all similarly-situated hourly shift employees who are paid

on the payroll of Integrity working at all Amazon.Com's [sic] warehouse locations nationwide." (R. 134, Third Amended Compl., PageID # 2351.)

This case concerns a security clearance policy that is enforced by both Integrity and Amazon at all Amazon locations throughout the United States. Under the policy, Plaintiffs and all other hourly paid, non-exempt employees were required to "undergo a daily security clearance check at the end of each shift to discover and/or deter employee theft of the employer's property and to reduce inventory 'shrinkage.'" (*Id*.) The policy worked like this: "At the end of their respective shifts, hundreds, if not thousands, of warehouse employees 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." (*Id.* at PageID # 2352.) Plaintiffs allege that "Defendants' policy of requiring hourly warehouse employees to undergo a thorough security clearance before being released from work and permitted to leave the employer's property was solely for the benefit of the employers and their customers." (*Id.* at PageID # 2351.) Plaintiffs further allege that this screening process took approximately 25 minutes each day. Plaintiffs were also required to undergo the same security clearance prior to taking their lunch breaks, thereby reducing the full thirty-minute break they were supposed to receive. Because employees were required to "clock out" before undergoing the security screening, they were not compensated

for their time spent waiting in line for and then undergoing the screenings. (*Id.* at PageID # 2351, 2352.)

Procedural History

In 2010, Plaintiffs filed a putative class action in the District Court of Nevada against Integrity on behalf of similarly situated employees in the Nevada warehouses for alleged violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and Nevada labor laws. The employees alleged that they were entitled to compensation under the FLSA for the time spent waiting to undergo and actually undergoing the security screenings. They also alleged that the screenings were conducted "to prevent employee theft" and thus occurred "solely for the benefit of the employers and/or their customers." (R. 30-3, First Amended Compl., PageID # 223.)

The district court dismissed Plaintiffs' first amended complaint for failure to state a claim, holding that the time spent waiting for and undergoing the security screenings was not compensable under the FLSA. *Busk* v. *Integrity Staffing Sols., Inc.*, No. 2:10-cv-01854, 2011 WL 2971265 (D. Nev. July 19, 2011). It explained that, because the screenings occurred after the regular work shift, the employees could state a claim for compensation only if the screenings were an integral and indispensable part of the principal activities they were employed to perform. The district court held that these screenings were not integral and indispensable, but instead fell into a noncompensable

category of postliminary activities. As for Plaintiffs' Nevada state law claims for unpaid wages arising from the security checks and shortened meal periods, the Nevada district court found that Plaintiffs had properly asserted a private cause of action under Nev. Rev. Stat. § 608.140 but failed to allege sufficient facts to support their clam. *Id.* at *7.

Plaintiffs appealed to the Ninth Circuit, which affirmed the dismissal of the meal-period claims but reversed as to the security-check claims. *Busk* v. *Integrity Staffing Sols., Inc.*, 713 F.3d 525 (9th Cir. 2013). The Ninth Circuit asserted that post-shift activities that would ordinarily be classified as noncompensable postliminary activities are nevertheless compensable as integral and indispensable to an employee's principal activities if those post-shift activities are necessary to the principal work performed and done for the benefit of the employer. *Id.* at 530. Accepting as true the allegation that Integrity required the security screenings to prevent employee theft, the court concluded that the screenings were "necessary" to the employees' primary work as warehouse employees and done for Integrity's benefit. *Id.* at 531.

The case was then appealed to the Supreme Court, which held that the time related to the security checks was not compensable under the FLSA. *Integrity Staffing Solutions, Inc.* v. *Busk*, 135 S.Ct. 513 (2014) ("*Integrity Staffing*"). Specifically, the Court found that the security screenings were "noncompensable postliminary activities" under the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2). *Id.* at 518. The Portal-to-Portal Act

was enacted as an amendment to the FLSA, and it "narrowed the coverage of the [Act]" by excluding certain "preliminary" and "postliminary" activities from the FLSA's compensation requirements. See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 27 (2005). *Integrity Staffing* clarified that post-shift security screenings are among those noncompensable, "postliminary" activities under federal law. 135 S. Ct. at 518.

Following the Supreme Court's reversal, the Ninth Circuit remanded the remainder of [Plaintiffs'] state law claims to the district court. *Busk* v. *Integrity Staffing Sols., Inc.*, 797 F.3d 756 (9th Cir. 2015). Plaintiffs again amended their complaint, and the case was then transferred to an ongoing multidistrict litigation in the Western District of Kentucky.

Consistent with the Supreme Court's decision, Plaintiffs' third amended complaint eliminates the claims for compensation under federal law and asserts claims under Nevada and Arizona law for unpaid wages and overtime, as well as minimum wage violations. Plaintiffs asserted their claims as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of the following persons:

> **Nevada Class:** All person [sic] employed by Defendants, and/or each of them, as hourly paid warehouse employees who worked for Defendant(s) within the State of Nevada at anytime [sic] within three years prior to the original filing date of the complaint in this action.

> **Arizona Class:** All person [sic] employed by Defendants, and/or each of them, as hourly paid warehouse employees who worked for Defendant(s) within the State of Arizona at any time from within three years prior to the filing of the original complaint until the date of judgment after trial, and shall encompass all claims by such persons for the entire tenure of their employment as provided in A.R.S. 23-364 (G).

(R. 134, Third Amended Compl., PageID # 2353.)

The Nevada plaintiffs allege claims on behalf of themselves and the Nevada Class for failing to pay for all the hours worked (NRS § 608.016), daily and weekly overtime (NRS § 608.018), and a minimum wage claim under the Nevada Constitution (Nev. Const. art. 15, § 16). The Nevada plaintiffs seek continuation wages in the amount of 30-days of additional wages for failing to pay employees all their wages due and owing at the time of separation from employment (NRS § 608.020-.050). The Arizona plaintiffs allege claims on behalf of themselves and the Arizona Class for failing to pay regular and minimum wages (A.R.S. § 23-363). These Plaintiffs also seek continuation wages under A.R.S. § 23-353 *et seq*.

Defendants filed a motion to dismiss the claims, which the district court granted. The district court dismissed the Nevada claims on three grounds: first, there was no private right of action to assert claims under Nevada's wage-hour statutes, NRS Chapter 608; second, Nevada law incorporated the FLSA in relevant

part and Plaintiffs' Nevada state claims were barred by Nevada's incorporation of the Portal-to-Portal Act and the Supreme Court's decision in *Busk*; and third, Plaintiffs' claims for minimum wages failed because they failed to identify any workweek in which they were paid less than the minimum wage. The district court concluded the same with respect to the Arizona claims, holding that Arizona impliedly adopted the Portal-to-Portal Act and thus Plaintiffs "have not demonstrated that they are entitled to compensation under Arizona law for time spent undergoing, or waiting to undergo, security screenings." (R. 236, Order, PageID # 4702.) The court also concluded that Arizona minimum wage claims failed because Plaintiffs had failed to identify a particular workweek in which they were paid less than the minimum wage.

Plaintiffs filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

We review the district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo*. *Puckett* v. *Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 599 (6th Cir. 2016). When reviewing such a grant, "we must 'accept all factual allegations as true,' construing the complaint, 'in the light most favorable to the plaintiff[s].'" *Id.* (quoting *Laborers' Local 265 Pension Fund* v. *iShares Trust*, 769 F.3d 399, 403 (6th Cir. 2014)) (alteration in *Puckett*). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as

true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)).

II. Analysis

A. Nevada employees have a private right of action to pursue unpaid wage and penalty claims

The court's main basis for dismissing Plaintiffs' Nevada law claims was its legal conclusion that there is no private right of action for the recovery of unpaid wages under Nevada law. The court held that "no private right of action exists for violations of Nevada Revised Statutes §§ 608.005-.195 in the absence of a contractual claim." (R. 236, Order, PageID # 4694.)

Since briefing was completed in this case, the Nevada Supreme Court issued a decision in *Neville* v. *Eighth Jud. Dist. Ct.*, 406 P.3d 499 (Nev. 2017), which holds exactly the opposite. In *Neville*, the court began its opinion thus: "In this opinion, we clarify that NRS 608.140 explicitly recognizes a private cause of action for unpaid wages." *Id.* at 500. And the court explained as follows:

> Because NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050 do not expressly state whether an employee could privately enforce their terms, Neville may only pursue his claims under the statutes if a private cause of action for unpaid wages is

> implied. The determinative factor is always whether the Legislature intended to create a private judicial remedy. We conclude that the Legislature intended to create a private cause of action for unpaid wages pursuant to NRS 608.140. It would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. See *Bisch* v. *Las Vegas Metro. Police Dep't*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) ("In order to give effect to the Legislature's intent, [this court] ha[s] a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." (internal quotation marks omitted)). The Legislature enacted NRS 608.140 to protect employees, and the legislative scheme is consistent with private causes of action for unpaid wages under NRS Chapter 608.

Id. at 504.

The court's intervening decision thus decides the issue in this case: Plaintiffs *do* have a private cause of action for unpaid wages. The district court's decision to the contrary is reversed.[1]

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[1] In its brief on appeal, Defendants anticipated a decision in *Neville* and argued that even if the Nevada Supreme Court went against them, nothing in that decision would support a private right of action for meal break claims under NRS § 608.019. However, the *Neville* decision provides no basis for distinguishing claims brought under § 608.019 from other claims brought under

B. Time spent undergoing security screenings is compensable under Nevada and Arizona law

In *Integrity Staffing*, the Supreme Court held that the post-shift security screenings at issue in this case were noncompensable postliminary activities under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, as amended by the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq*. 135 S. Ct. at 518-19. The main question on appeal in this case is whether *Integrity Staffing* resolves similar claims brought under Nevada and Arizona law.

"As a federal court applying state law, 'we anticipate how the relevant state's highest court would rule in the case and are bound by controlling decisions of that court.'" *Vance* v. *Amazon.com*, 852 F.3d 601, 610 (6th Cir. 2017) (quoting *In re Dow Corning Corp.*, 419 F.3d 543, 549 (6th Cir. 2005)). Neither the Nevada Supreme Court nor the Arizona Supreme Court have decided whether their states have adopted the federal Portal-to-Portal Act or whether time spent undergoing mandatory security screening is compensable under the respective states' wage laws. Thus, since "'the state supreme court has not yet addressed the issue,' we render a prediction 'by looking to all the available data.'"

Chapter 608 for unpaid wages. Like claims under §§ 608.016, 608.018, and 608.020-.050, § 608.019 is also a claim for unpaid wages: if Plaintiffs were not provided a full half-hour break, there was no interruption of a "continuous period of work" under the statute, and they must be compensated for that time. Thus, we conclude that, under *Neville*, Plaintiffs have a private cause of action to enforce their rights under § [608.019]; hence, Defendants' argument fails.

Id. (quoting *Allstate Ins. Co.* v. *Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2001). Sources of relevant data include the decisions (or dicta) of the state's highest court in analogous cases, pronouncements from other state courts, and regulatory guidance.

Before turning to an analysis of Nevada and Arizona law, we will first explain how the issue is decided under federal law. We will then address whether time spent undergoing security screenings is compensable under Nevada and Arizona law.

1. Time spent undergoing security screenings is noncompensable postliminary activity under federal law

In *Vance*, this Court recently had occasion to explain the background of the Portal-to-Portal Act and the Supreme Court's decision in *Integrity Staffing* as it was relevant to a case arising out of the same multidistrict litigation as the instant case. The Court explained as follows:

> "Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek." *Integrity Staffing*, 135 S.Ct. at 516. "The Act did not, however, define the key terms 'work' and 'workweek.'" *Sandifer* v. *U.S. Steel Corp.*, ___ U.S. ___, 134 S.Ct. 870, 875, 187 L.Ed.2d 729 (2014). Absent congressional guidance, the Supreme Court interpreted these terms broadly. *Integrity Staffing*, 135 S.Ct. at 516. "It defined 'work' as 'physical

or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *Id.* (quoting *Tenn. Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944)). Only months after *Tennessee Coal*, the Court expanded the definition further, "clarif[ying] that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA," for "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *IBP*, 546 U.S. at 25, 126 S.Ct. 514 (quoting *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944)). "Readiness to serve may be hired, quite as much as service itself," and must therefore also be compensated. *Armour*, 323 U.S. at 133, 65 S.Ct. 165.

The Court took a similar approach with "the statutory workweek," which "include[d] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). "That period, *Anderson* explained, encompassed time spent 'pursuing certain preliminary activities after arriving, such as putting on aprons and overalls and removing shirts.'" *Sandifer*, 134 S.Ct. at 875 (quoting *Anderson*, 328 U.S. at 692-93, 66 S.Ct. 1187) (ellipsis and brackets omitted). Per *Anderson*, these preparatory efforts "'are clearly work' under the Act." *Id.*

(quoting *Anderson*, 328 U.S. at 693, 66 S.Ct. 1187).

Together, these holdings led to decisions requiring compensation for nearly every minute an employer required its employees to be on the employer's premises, including "the time spent traveling between mine portals and underground work areas," and "walking from timeclocks to work benches." *Integrity Staffing*, 135 S.Ct. at 516 (citing *Tenn. Coal*, 321 U.S. at 598, 64 S.Ct. 698, and *Anderson*, 328 U.S. at 691-92, 66 S.Ct. 1187). They also "provoked a flood of litigation," including 1,500 FLSA actions filed within six months of the Court's ruling in *Anderson*. *Id.*

"Congress responded swiftly." *Id.* Finding the Court's decisions had "creat[ed] wholly unexpected liabilities" with the capacity to "bring about financial ruin of many employers," it enacted the Portal-to-Portal Act of 1947. *Id.* at 516-17 (quoting 29 U.S.C. § 251(a)-(b)). The Act excepted two activities the Court previously deemed compensable: "walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity." *IBP*, 546 U.S. at 27, 126 S.Ct. 514; see also *Integrity Staffing*, 135 S.Ct. at 516-17 (detailing history). Under the Portal-to-Portal Act then, an employee's principal activities are compensable, while conduct he engages in before and after those activities (i.e., preliminary and postliminary acts) is not.

"[P]rincipal activity" refers to the activity "an employee is employed to perform." *Integrity Staffing*, 135 S.Ct. at 517, 519. "[T]he term principal activity * * * embraces all activities which are an integral and indispensable part of the principal activities." *IBP*, 546 U.S. at 29-30, 126 S.Ct. 514 (internal quotation marks and citation omitted). An activity is "integral and indispensable" to the principal activities an individual is employed to perform "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing*, 135 S.Ct. at 517. In other words, an activity is integral and indispensable to the work an employee was hired to do if it is a component of that work, and he cannot complete the work without it. *Id.*

Applying these terms, the *Integrity Staffing* Court held that post-shift security screenings were neither the principal activity Amazon hired its employees to perform, nor "integral and indispensable" to that activity:

> To begin with, the screenings were not the "principal activity or activities which [the] employee is employed to perform." Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.

> The security screenings also were not "integral and indispensable" to the employees' duties as warehouse workers * * * * The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work.
>
> *Id.* at 518 (citation omitted). The screenings were therefore "postliminary" to the employees' principal activities and excluded from compensation pursuant to the Portal-to-Portal Act.

852 F.3d at 608-09.

Thus, Plaintiffs' claims for compensation would fail and have failed under federal law. The question on appeal is whether they also fail under Nevada and Arizona state law.

2. Interpreting Statutes under Nevada and Arizona State Law

a. Nevada

In Nevada, the first rule in construing statutes "is to give effect to the legislature's intent." *Salas* v. *Allstate Rent-A-Car, Inc.*, 14 P.3d 511, 513 (Nev. 2000) (citing *Cleghorn* v. *Hess*, 853 P.2d 1260, 1262 (Nev. 1993)). "In so doing, we first look to the plain language of the

statute. Where the statutory language is ambiguous or otherwise does not speak to the issue before us, we will construe it according to that which 'reason and public policy would indicate the legislature intended.'" *Id.* at 513-14 (quoting *State, Dep't of Mtr. Vehicles* v. *Lovett*, 874 P.2d 1247, 1249-50 (Nev. 1994)). "In such situations, legislative intent may be ascertained by reference to the entire statutory scheme." *Id.* at 514 (citation omitted).

"When a federal statute is adopted in a statute of this state, a presumption arises that the legislature knew and intended to adopt the construction placed on the federal statute by federal courts. This rule of [statutory] construction is applicable, however, only if the state and federal acts are substantially similar and the state statute does not reflect a contrary legislative intent." *Century Steel, Inc.* v. *State, Div. of Indus. Rel., Occupational Safety and Health Section*, 137 P.3d 1155, 1158-59 (Nev. 2006) (adopting a federal construction where the "state and federal statutes [were] nearly identical" and "the state statute [did] not reflect a legislative intent contrary to the federal statute").

Thus, when interpreting state provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is "materially different" from or inconsistent with federal law. *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892, 900-01 (9th Cir. 2013); see *Terry* v. *Sapphire Gentlemen's Club*, 336 P.3d 951, 955-56 (Nev. 2014) (endorsing the rule in *Rivera*). Nonetheless, the Nevada Supreme Court "has signaled its willingness to part

ways with the FLSA where the language of Nevada's statutes has so required." *Terry*, 336 P.3d at 955-56.

b. Arizona

Similarly, when interpreting Arizona law, "one of the fundamental goals of statutory construction is to effectuate legislative intent." *Canon Sch. Dist. No. 50* v. *W.E.S. Const. Co.*, 869 P.2d 500, 503 (Ariz. 1994) (citing *Automatic Registering Mach. Co.* v. *Pima County*, 285 P. 1034, 1035 (Ariz. 1930)). "Yet, '[e]qually fundamental is the presumption that what the Legislature means, it will say.'" *Id.* (quoting *Padilla* v. *Industrial Comm'n*, 546 P.2d 1135, 1137 (Ariz. 1976)). "For this reason, [Arizona courts] have often stated that the 'best and most reliable index of a statute's meaning is its language,' and where the language is plain and unambiguous, courts generally must follow the text as written." *Id.* (quoting *Janson* v. *Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991)).

Arizona courts may look to federal interpretations for guidance where an Arizona statute is "patterned after" a federal statute and where "Arizona courts have not addressed the issue presented." See *Rosier* v. *First Fin. Capital Corp.*, 889 P.2d 11, 13-14 (Ariz. Ct. App. 1994).

3. Time spent undergoing security screenings is "work" under Nevada and Arizona law

Plaintiffs brought claims under Nev. Rev. Stat. §§ 608.016, 608.018, 608.140, 608.020-.050, and the Nevada Constitution. They also brought claims under Ariz. Rev. Stat. § 23-363 *et seq.*, the statutory codification of the Raise the Arizona Minimum Wage for Arizonans Act, and Ariz. Rev. Stat. § 23-353 *et seq*. Each of these claims turns on whether Plaintiffs were uncompensated for some "work" they performed. See, *e.g.*, NRS § 608.016 ("An employer shall pay to the employee wages for each hour the employee works.").

Plaintiffs contend that "[t]here has never been any dispute that the time spent undergoing the anti-theft security screening is 'work' under either federal or the various state wage-hour laws." (Brief for Appellants at 12.) Defendants, however, argue that "there absolutely *has* been such a dispute throughout the entirety of the case, because time spent passing through security screening *is not work* under either federal, Nevada, or Arizona law." (Brief for Appellees at 6 (emphasis in original).)

Thus, and perhaps unsurprisingly, the first step for this Court in determining whether time spent undergoing mandatory security screenings is compensable is to determine whether such time constitutes "work" under Nevada and Arizona state law.

a. Nevada

Under the Nevada Administrative Code, "hours worked" includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code § 608.115(1). However, the Nevada legislature has not defined what constitutes "work." Thus, in this instance, it is appropriate to look to the federal law for guidance. See *Rivera*, 735 F.3d 900-01; *Terry*, 336 P.3d 955-56. Under the FLSA, work is defined broadly as any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); see *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944).

Putting aside the Portal-to-Portal Act for a moment, time spent waiting in line and then undergoing mandatory security screenings clearly seems to fit the federal definition of "work." The screenings surely are "required by the employer," and Plaintiffs have alleged that the screenings are "solely for the benefit of the employers and their customers." (R. 134, Third Amend. Compl., PageID # 2351.)

Nonetheless, Defendants put forth two arguments for why time spent undergoing mandatory security screenings is not "work" under Nevada law: (1) the Portal-to-Portal Act amended the FLSA to exclude postliminary activities from the federal definition of "work;" and (2) for an activity to be considered work, it

must involve "exertion" and Plaintiffs have not alleged any exertion. We find neither argument persuasive.

First, Defendants misread what the Portal-to-Portal Act accomplished. Defendants argue that it amended the Supreme Court's definition of "work." (See, *e.g.*, Brief for Appellees at 12.) ("Congress had swiftly disagreed with that Supreme Court holding and clarified that the term 'work' in the FLSA excluded, among others, preliminary and postliminary activities.") But that is not so.

The Portal-to-Portal Act provides, in relevant part, as follows:

> [N]o employer shall be subject to any liability * * * under the Fair Labor Standards Act * * * on account of the failure of such employer to pay an employee 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.

29 U.S.C. § 254(a); 29 C.F.R. § 785.50.

As we read this language, the Portal-to-Portal Act excludes certain work activities from being compensable; it does not, however, redefine the Supreme Court's earlier definitions of "work."[2] This view finds some support in the Supreme Court's decision in *IBP, Inc.*, where it explained:

> Other than its express exceptions for travel to and from the location of the employee's "principal activity," and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms "work" and "workweek," or to define the term "workday." A regulation promulgated by the Secretary of Labor shortly after its enactment concluded that the statute had no effect on the computation of hours that are worked "within" the workday.

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[2] Defendants, at least on some level, seem to recognize the intuitive appeal of this reading. Indeed, before this Court they argue that "[t]he Portal-to-Portal Act and its exclusion of what otherwise might be considered 'work' under federal and state law is not even implicated in this case unless and until a determination is made that the underlying activity at issue rises to the level of 'work.' " (Brief for Appellees at 33.)

IBP, Inc. v. *Alvarez*, 546 U.S. 21, 28 (2005). This view also seems to comport with 29 C.F.R. § 785.7, which provides:

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

> *provide an exception for preliminary and postliminary activities.* See § 785.34.

29 C.F.R. § 785.7 (emphasis added).

Nothing in the Supreme Court's decision in *Integrity Staffing* changed this definition of "work" or the recognition in *IBP, Inc.* and § 785.7 that the Portal-to-Portal Act did not change the Court's longstanding definition of "work." Instead, *Integrity Staffing* was solely concerned with whether undergoing security screenings fell within the Portal-to-Portal Act's exception for "postliminary" activity; it did not opine on whether such activity constituted work. In short, the Portal-to-Portal Act excludes some "work" from its bucket of what is compensable activity, but that does not mean it is not "work."

Second, Defendants argue that time spent waiting to undergo security screenings is not "work" because "it involves no exertion." (Brief for Appellees at 7.) This argument is highly dubious for a number of reasons, not the least of which is that undergoing security screening clearly does involve exertion. Further, it is not at all clear that Nevada and Arizona's definitions of "work" require "exertion" even if they incorporate the federal definition because even the federal definition no longer requires "exertion." See 29 C.F.R. § 785.7.

Defendants cite to the Supreme Court's decision in *Tennessee Coal*, which, in addition to providing the current definition of "work," held that in order for an activity to be "work" it must involve "physical or mental

exertion (whether burdensome or not)." 321 U.S. at 598. However, as this Court recognized in *Vance*, "[o]nly months after *Tennessee Coal*, the Court expanded the definition further, 'clarif[ying] that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA,' for 'an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.'" *Vance*, 852 F.3d at 608 (quoting *IBP, Inc.*, 546 U.S. at 25.) It may "strain the bounds of reason to argue that the Supreme Court in *Armour* somehow overruled *Tennessee Coal* (decided only 9 months earlier) without saying it was doing so," (Brief for Appellees at 34), but on this particular point, that is precisely what the Supreme Court has recognized. See *IBP, Inc.*, 546 U.S. at 25 (explaining that "[t]he same year [as *Tennesse Coal*], in *Armour & Co.* v. *Wantock* * * * we clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA."). Thus, "Appellants completely ignore[d] this 'physical or mental exertion' requirement," (Brief for Appellees at 33), because there is no such requirement.

In sum, Nevada law incorporates the federal definition of "work," and this broad definition encompasses the type of activity at issue in this case.[3]

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[3] Before proceeding to a discussion of Arizona law and whether the Portal-to-Portal Act applies to these state claims, we can decide whether Plaintiffs state a claim under Nevada law based on their allegations that the mandatory security screenings robbed them of their full lunch time. Plaintiffs alleged that the security screenings that they were required to undergo before taking their lunch breaks resulted in them being "significantly delayed and [] unable to take a full 30-minute uninterrupted

b. Arizona

Like Nevada, Arizona also fails to define "work." Therefore, it is again appropriate to turn to the federal law for a definition of "work." See *Rosier*, 889 F.2d at 13-14. And, as the analysis above shows, time spent undergoing mandatory security screenings is "work" under federal law and, thus, under Arizona law. But the case under Arizona law may be even stronger.

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lunch period." (R. 134, Third Amend. Compl., PageID # 2352.) Under Nevada law, "[a]n employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour." Nev. Rev. Stat § 608.019. The law further provides that "no period of less than 30 minutes interrupts a continuous period for work for the purposes of this subsection." *Id.* Thus, because time spent undergoing the security screenings is "work," the Nevada plaintiffs were required to work during their lunch break; thus, they were not given an uninterrupted half-hour, and they should have been paid for their lunch.

The district court dismissed all of Plaintiffs' Nevada wage claims on the grounds that they were noncompensable under the Portal-to-Portal Act. However, even if the Portal-to-Portal Act does apply to Nevada wage claims generally, it does not apply to Plaintiffs' claims relating to their pre-meal security screenings. This is because "[a]s the statute's use of the words 'preliminary' and 'postliminary' suggests, § 254(a)(2), and as our precedents make clear, the Portal-to-Portal Act of 1947 is primarily concerned with defining the beginning and end of the workday." *Integrity Staffing*, 135 S. Ct. at 520 (Sotomayor, J., concurring) (citing *IBP, Inc.*, 546 U.S. at 34-37). On this reasoning, the Portal-to-Portal Act does not apply to claims that employees were uncompensated for time spent *during* the workday. Therefore, if undergoing security screenings is "work" under Nevada law, then the district court erred in dismissing the Nevada plaintiffs' claims relating to their shortened meal-periods.

Arizona law also provides a definition for "hours worked," which states as follows: " 'Hours worked' means all hours for which an employee covered under the Act is employed and required to give to the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work." Ariz. Admin. Code R20-5-1202(19). "On duty," in turn, means "time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee's own purpose." Ariz. Admin. Code R20-5-1202(22).

Arizona's broad definition of "hours worked" makes it even clearer than Nevada law that time spent undergoing mandatory security screenings is "work."

4. Neither Nevada nor Arizona incorporate the federal Portal-to-Portal Act

a. Nevada

Upon concluding that time spent undergoing mandatory security screenings is "work" under Nevada law, the next question is whether the Nevada legislature has exempted this "work" from being deemed "compensable" under their state wage-hour statutes, as Congress did in enacting the Portal-to-Portal Act.

The district court dismissed both Plaintiffs' Nevada statutory claims and Nevada constitutional claims on the grounds that Nevada had adopted the Portal-to-Portal Act. It concluded that Nevada had adopted the Portal-to-Portal Act because Plaintiffs were unable to

"identify any Nevada law that is irreconcilable with the Portal-to-Portal Act." (R. 236, Order PageID # 4695.) The district court reasoned that because Nevada and Arizona wage-hour statutes do not define "work," it must turn to the federal law for a determination of what is "compensable work" and this included the Portal-to-Portal Act. But there is the error of the district court's analysis: it conflated two independent questions, which we have tried to separate: (1) whether time spent undergoing mandatory security screenings is work, and (2) whether such time is compensable.

Plaintiffs argue that it was appropriate for the district court to look to the federal law's definition of "work," for the reasons we have given above. (Brief for Appellants at 20.) But Plaintiffs also argue that it was inappropriate for the district court to look to the Portal-to-Portal Act to decide the compensability of certain activities. We agree. Absent any affirmative indication that the Nevada legislature intended to adopt the Portal-to-Portal Act, there is no reason to assume that it did.

As mentioned above, the Portal-to-Portal Act provides as follows:

> [N]o employer shall be subject to any liability * * * under the Fair Labor Standards Act * * * on account of the failure of such employer to pay an employee 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—

> (3) 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
>
> (4) 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).

Plaintiffs argue that Nevada has not adopted "the Portal-to-Portal Act or any comparable legislation." (Brief for Appellants at 13.) Their primary piece of evidence is the absence of evidence that the Nevada legislature did so. They argue that "[t]he problem for Amazon and the District Court is that there are no 'portal-to-portal like' statutes, regulations, or constitutional amendments under Nevada and/or Arizona wage-hour law" and "[t]his fact alone should be the end of the inquiry." (*Id.* at 22-23.)

But Plaintiffs also identify several Nevada laws that they claim are "in direct conflict with the Portal-to-Portal Act." (*Id.* at 23.) For instance, NRS § 608.016 provides that "an employer shall pay to the employee wages for each hour the employee works" and "[a]n employer shall not require an employee to work without

wages during a trial or break-in period." Pursuant to this section, Nevada's administrative regulations further provide that "[a]n employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code § 608.115.

Further, the Nevada legislature expressly included references to federal regulations in multiple parts of NRS Chapter 608. See, *e.g.*, NRS § 608.060(3) (referring to 29 C.F.R. §§ 541.1, 541.2, [541.3], § 541.5, 152); NRS § 608.018(3)(f) (referring to the Motor Carrier Act of 1935); NRS § 608.0116 (29 C.F.R § 541.302; see also NAC § 608.100(3)(c) (stating that the Nevada minimum wage provisions do not apply to "[a] person employed as a trainee for a period not longer than 90 days, as described [in] the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act"). That the Nevada legislature expressly adopted some federal regulations indicates that its failure to adopt others was intentional. See *State Dep't of Taxation* v. *DaimlerChrysler*, 119 P.3d 135, 139 (Nev. 2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional.").

There are two Nevada statutes or regulations that bear some resemblance to provisions in the Portal-to-Portal Act. Upon closer examination, however, they are entirely distinct. The first is NRS § 608.200, which limits the 8-hour work requirement to "time actually employed in the mine and does not include time consumed for meals or travel into or out of the actual worksite."

Nev. Rev. Stat. § 608.200. But, significantly, this provision applies only to mineworkers, and it includes no mention of "preliminary" and "postliminary" activities. The second is NAC § 608.130, which generally provides payment for travel and training but excludes time the employee spends traveling between work and home. Nev. Admin. Code § 608.130(2)(b). This regulation also omits any reference to "preliminary" and "postliminary" activities. Thus, neither of these provisions can be read to imply that the Nevada legislature intended to adopt the Portal-to-Portal Act. Indeed, if it had adopted the Act, there would be no need to pass NRS § 608.200 or for the Commissioner to issue the regulation § 608.130(2)(b) to exclude time spent traveling to or from a place of work.

Defendants make multiple references to places where Nevada wage-hour law parallels the FLSA, and they refer the Court to cases holding that Nevada courts will interpret a provision of Nevada law the same as its parallel provision in the FLSA. None of that is surprising. But this reasoning is simply irrelevant where Nevada law has no provision parallel to a particular FLSA provision.

Defendants also argue that "there is no Nevada law * * * obviating the Portal-to-Portal amendments to the FLSA." (Brief for Appellees at 23.) True enough. But there is no reason to think such a law would be necessary. Instead, the Nevada legislature has chosen not to affirmatively adopt the law anywhere in the Nevada state code. If, at some point, the Nevada

legislature decides to explicitly incorporate the Portal-to-Portal Act into its Code, it can do so.

Furthermore, despite the apocalyptic implications that Defendants seem to believe rejecting the Portal-to-Portal Act in the state of Nevada would have, both California and Washington have declined to incorporate it into their state codes and they seem to be doing fine. See, *e.g.*, *Morillion* v. *Royal Packing Co.*, 995 P.2d 139 (Ca. 2000) (finding that state labor codes and wage orders "do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act" and holding that "[a]bsent convincing evidence of the [Industrial Wage Commission]'s intent to adopt the federal standard of determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication"); *Anderson* v. *State, Dep't of Soc. & [Health] Servs.*, 63 P.3d 134, 136 (Wash. Ct. App. 2003) ("We are not persuaded that the Legislature intended to adopt the Portal to Portal Act; and we do not hold that it was adopted.").

In sum, because there is no reason to believe that the Nevada legislature intended to adopt the Portal-to-Portal Act, we are reluctant to infer an entirely unsupported legislative intent.

b. Arizona

As for Arizona, Plaintiffs argue that it too has not "adopted the Portal-to-Portal Act or any comparable

legislation." (Brief for Appellants at 13.) The district court, however, held that "[t]he Arizona plaintiffs' claims fail for similar reasons" as the Nevada plaintiffs, (R. 236, Order, PageID # 4699), namely, that Plaintiffs were unable to "identify any [Arizona] law that is irreconcilable with the Portal-to-Portal Act." (*Id.* at PageID # 4695.) As with the Nevada claims, Plaintiffs' argument is that there is no evidence that the Arizona legislature adopted the Act. Indeed, nothing in the Arizona code seems to parallel or incorporate the Portal-to-Portal Act.

Arizona law also seems inconsistent with the Portal-to-Portal Act. For instance, the Industrial Commission[4] has promulgated regulations that state that "no less than the minimum wage shall be paid for *all hours worked*, regardless of the frequency of payment and regardless of whether the wage is paid on an hourly, salaried, commissioned, piece rate, or any other basis." See Ariz. Admin. Code R20-5-1206(A) (emphasis added). And as explained above, "hours worked" is defined under Arizona law as "all hours for which an employee covered under the Act is employed and required to give the employer, including *all time during which an employee is on duty or at a prescribed work [place] and all time the employee is suffered or permitted to work."* Ariz. Admin. Code R.20-5-1202(9) (emphasis added). And "on duty," means "time spent working or waiting that the employer controls and that the employee is not permitted to use for the employee's own purpose."

[4] The Arizona Industrial Commission is the agency tasked with enforcing and implementing Arizona's wage statute.

Ariz. Admin. Code R20-5-1202(12). Plaintiffs thus characterize the Arizona Commission's definitions as creating something of an "'anti' portal-to-portal act." (Brief for Appellants at 29.) Whether or not this is a fair characterization, the language of the regulations strongly suggests that Arizona law is more inclusive than the Portal-to-Portal Act in the types of work it compensates.

Defendants point to an advisory statement from the Commission as evidence that Arizona has adopted the FLSA. As cited by Defendants, that statement reads:

> For purposes of enforcement and implementation of [the Arizona Wage Act], in interpreting and determining "hours worked" under this Act * * * the Industrial Commission of Arizona will be guided by ***and rely upon*** 29 CFR Part 785—Hours Worked Under the Fair Labor Standards Act * * * *

(Brief for Appellees at 26 (alteration and emphasis in Appellee's brief).) Part 785 includes subpart 785.50, which is the codification of the federal Portal-to-Portal Act. 29 C.F.R. § 785.50. But Defendants' version of the statement omits important qualifying language. Indeed, the ellipses Defendants introduce after the word "Act" and before "the" obscure the full meaning. The unaltered statement reads as follows:

> For purposes of enforcement and implementation of this Act, in interpreting and determining "hours worked" under this Act, *and where consistent with A.A.C. R20-5-1201 et*

> *seq. (Arizona Minimum Wage Act Practice and Procedure)*, the Industrial Commission of Arizona will be guided by and rely upon 29 CFR Part 785—Hours Worked Under the Fair Labor Standards Act of 1938.

Substantive Policy Statement Regarding Interpretation of "Hours Worked" For Purposes of the Arizona Minimum Wage Act, available at https://www.azica.gov/labor-substantive-policy-hours-worked.aspx (last visited May 31, 2018) (emphasis added). The unaltered statement, rather than adopting the FLSA's interpretation in its [entirety], merely sets forth the same principle discussed above: namely, that Arizona, like Nevada, looks to the federal law for guidance where it has parallel provisions. Where Arizona law does not have a parallel provision, this statement is not a license to create one.

In sum, there is nothing to suggest that the Arizona legislature intended to adopt the federal Portal-to-Portal Act into its Code. As with Nevada, we refuse to read-in such a significant statute by inference or implication.

C. The Fair Labor Standards Act's "workweek requirement"

The district court dismissed Plaintiffs' Nevada and Arizona claims for the additional reason that they "do not allege that there was a week for which they were paid less than minimum wage." (R. 236, Order, PageID # 4698 (citing *Richardson* v. *Mountain Range*

Restaurants LLC, No. CV-14-1370-PHX-SMM, 2015 WL 1279237 (D. Ariz. March 20, 2015).) Again, the district court based its conclusion largely on the assumption that Nevada and Arizona incorporate the FLSA.

"The FLSA mandates that '[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce' a statutory minimum hourly wage." *Stein* v. *HHGREGG, Inc.*, 873 F.3d 523, 530 (6th Cir. 2017) (citing 29 U.S.C. § 206(a)). "In addition, if an employee works in excess of forty hours a week, the employee must 'receive[ ] compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.'" *Id.* at 536 (quoting 29 U.S.C. § 207(a)). "The 'regular rate' is 'the hourly rate actually paid the employee for the normal, nonovertime workweek for which he is employed,' and is 'computed for the particular workweek by a mathematical computation in which hours worked are divided into straight-time earnings for such hours to obtain the statutory regular rate.'" *Id.* at 536-37 (quoting 29 C.F.R. § 779.419). "Assuming a week-long pay period, the minimum wage requirement is generally met when an employee's total compensation for the week divided by the total number of hours worked equals or exceeds the required hourly minimum wage, and the overtime requirements are met where total compensation for hours worked in excess of the first forty hours equals or exceeds one and one-half times the minimum wage." *Id.* at 537 (citing *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572,

580 n.16 (1942); *United States* v. *Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960)).

Thus, under federal law, Plaintiffs would be required to identify a particular workweek in which, taking the average rate, they received less than the minimum wage per hour. Plaintiffs argue that Nevada and Arizona law does not calculate the wage requirement in the same way, but that, instead, they only require a plaintiff to allege an hour of work for which she received less than the statutory minimum wage. We agree that there is no basis for concluding that Nevada incorporates the federal workweek requirement. However, we also conclude that Arizona does have an analogous requirement that bars Plaintiffs' claims for minimum wage violations under Arizona law.

1. Nevada Law

The district court held that Plaintiffs' Nevada minimum-wage claims failed for the additional reason that "[u]nder the FLSA, 'the workweek as a whole, not each individual hour within the workweek, determines whether an employer has complied with' the minimum-wage requirement; 'no minimum wage violation occurs so long as the employer's total wage paid to an employee in any given workweek divided by the total hours worked in the workweek equals or exceeds the minimum wage rate.'" (R. 236, Order, PageID # 4697 (quoting *Richardson*, 2015 WL 1279237, at *13-14).) The district court rejected Plaintiffs' argument there

was a relevant difference between FLSA and Nevada law.

But there is no basis for the conclusion that Nevada has adopted the FLSA's workweek requirement. Indeed, Nevada's statutes would seem to be inconsistent with such a requirement. NRS § 608.016, for example, provides that an employee must be paid "wages of each *hour* the employee works." Nev. Rev. Stat. § 608.016 (emphasis added). Or Nevada's overtime statute, NRS § 608.018(1)(b), provides that an employer shall pay 1 ½ times an employee's regular wage whenever an employee works "[m]ore than 8 hours in any workday." Nev. Rev. Stat. § 608.018. Further, although Nevada regulations require an employer to "pay an amount that is at least equal to the minimum wage when the amount paid to the employee in a pay period is divided by the number of hours worked by the employee during the pay period," which looks like the FLSA standard, that section explicitly applies only to employees paid "by salary, piece rate or any other wage rate *except for a wage rate based on an hour of time."* Nev. Admin. Code § 608.115(2). The import of § 608.115(2) is clearly that only the minimum wages of *non-hourly* paid employees may be calculated on a per-pay-period basis to determine whether there is a minimum wage violation. Such a regulation is completely inconsistent with the FLSA's workweek requirement.

The cases cited by Defendant for the proposition that Nevada incorporates the federal workweek requirement are not availing. For instance, *Levert* v.

Trump Ruffin Tower I, LLC, No. 2:14-cv-01009-RCJ-CWH, (D. Nev. Jan. 9, 2015), actually does not address claims brought under Nevada law. Instead, it holds that Plaintiffs could not bring their FLSA claims because they failed to satisfy the workweek requirement, and then it declined to exercise supplemental jurisdiction over the Nevada claims. *Id.* at *5. It is not surprising that one needs to satisfy the FLSA's requirements to bring an FLSA claim, but that is hardly relevant here. In *Johnson* v. *Pink Spot Vapors, Inc.*, No. 2:14-CV-1960 JCM (GWF), 2015 WL 433503 (D. Nev. Feb. 3, 2015), another unpublished district court decision, the court dismissed the plaintiff's FLSA claims for failing to satisfy the workweek pleading requirement and then found that "its analysis of plaintiffs' FLSA claims [was] also applicable" to the plaintiff's state claims. *Id.* at *6. Although this decision nominally supports Defendants' argument, the district court did not give any explanation as to why the FLSA's workweek requirement applied to Nevada state claims.

On balance, we conclude that there is insufficient reason to hold that Nevada adopted the federal workweek requirement.

2. Arizona Law

As for the Arizona plaintiffs, however, we conclude that Arizona does apply a "workweek requirement" analogous to that provided by the FLSA.[5] The district

[5] Additionally, the district court dismissed the Arizona plaintiffs' claims for the recovery of overtime pay under Arizona law on

court noted that there was a "dearth of precedent" on whether Arizona adopted the federal workweek standard. (R. 236, Order, PageID # 4701.) However, the regulation is clear:

> (B) If the combined wages of an employee are less than the applicable minimum wage for a work week, the employer shall pay monetary compensation already earned, and no less than the difference between the amounts earned and the minimum wage as required under the Act.
>
> (C) The workweek *is the basis for determining an employee's hourly wage.* Upon hire, an employer shall advise the employee of the employee's designated workweek. Once established, an employer shall not change or manipulate an employee's workweek to evade the requirements of the act.

Ariz. Admin. Code R20-5-1206 (emphasis added).

Guidance from the Arizona Industrial Commission is also unhelpful to the Arizona plaintiffs. On its website answering the question, "Is an employer subject to Arizona's minimum wage laws required to pay

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the grounds that Arizona provides no mechanism for the recovery of overtime pay. (R. 236, Order, PageID # 4699) (citing *Reyes* v. *Lafarga*, No. CV-11-1998-PHX-SMM, 2014 WL 5431172 (D. Ariz. Nov. 20, 2013) ("Arizona does not have an overtime law; consequently, the only overtime protections for Arizonan employees come from the FLSA."). And Plaintiffs have failed to address this issue in their briefs on appeal. Therefore, they have forfeited their claims for overtime pay under Arizona law.

at least minimum wage for all hours worked?," the Commissioner responds as follows:

> Yes. Minimum wage shall be paid for all hours worked regardless of the frequency of payment *and regardless of whether the wage is paid on an hourly*, salaried, [commission], piece rate, or any other basis. If in any *work-week* the *combined wages* of an employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage.

Industrial Commission of Arizona, Frequently Asked Questions, available at: https://www.azica.gov/frequently-asked-questions-about-wage-and-earned-paid-sick-time-laws (last visited May 31, 2018) (emphasis added).

Thus, because the Arizona plaintiffs have failed to allege a workweek in which they failed to receive the minimum wage, they have failed to plead a violation of Arizona minimum wage law.

CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's dismissal of Plaintiffs' Arizona claims and **REVERSE** the district court's judgment with regard to the Nevada claims in part and **REMAND** for further proceedings consistent with the opinion of this court.

CONCURRING IN PART AND DISSENTING IN PART

ALICE M. BATCHELDER, Circuit Judge, concurring in part and dissenting in part. "As a federal court applying state law, we anticipate how the * * * state's highest court would rule in the case and * * * [i]f [that] court has not yet addressed the issue, * * * render a prediction by looking to all the available data." *Vance* v. *Amazon.com*, 852 F.3d 601, 610 (6th Cir. 2017) (quotation marks and citations omitted). In this case, I would expect the Nevada Supreme Court to find that Nevada's wage-and-hour statutes do not differ materially from the FLSA, so they implicitly incorporate the Portal-to-Portal Act's exclusions, and therefore time spent undergoing security checks is not compensable. Because the majority sees this differently, I must respectfully dissent from its analysis of the Nevada-law claims. I otherwise concur in the judgment.

In deciding wage-and-hour issues, Nevada courts look to the FLSA unless Nevada's statutory language is materially different from or inconsistent with it. *Terry* v. *Sapphire Gentlemen's Club*, 336 P.3d 951, 955-56 (Nev. 2014); *id.* at 958 (harmonizing a state minimum wage law with the FLSA because "the [Nevada] Legislature has not clearly signaled its intent * * * [to] deviate from the federally set course"). To be sure, the Nevada Supreme Court "has signaled its willingness to part ways with the FLSA where the language of

Nevada's statutes has so required," *id.* at 956, but it appears to limit that willingness to situations in which it finds "substantive reason to break with the federal courts," *id.* at 957. I find no such reason here.

In *Csomos* v. *Venetian Casino Resort, LLC*, 381 P.3d 605, *3 (Nev. 2012) (Table), the Nevada Supreme Court found that NRS § 608.018 tracks the FLSA, and has since 2005, because, in amending the provision, the Nevada Legislature expressly intended to "mirror federal law"; citing to comments at the bill's public hearing in 2005 (including "comments from the [Nevada] Labor Commissioner that the exceptions under NRS 608.018 generally track the exceptions that are in the Fair Labor Standards Act"), a Nevada Attorney General Opinion, and further comments during public hearing on a subsequent amendment in 2009. Thus, as the *Csomos* Court put it, NRS § 608.018's "legislative history demonstrates that, although the 2005-2009 version of the statute [wa]s not as clearly worded as the [subsequent] version, the Nevada legislature intended [its overtime law] to track federal law beginning in 2005." *Id.*

Also, in *Rite of Passage* v. *Nevada Department of Business and Industry*, No. 66388, 2015 WL 9484735, at *1 (Nev. Dec. 23, 2015), the Nevada Supreme Court considered the meaning of the term "work" in NRS § 608.016 and began by citing *Terry*, 336 P.3d at 955-56, for the proposition that, because "Nevada law provides little guidance on this issue, we turn to the federal courts' interpretation of hours worked under the [FLSA]." Consequently, the Nevada Supreme Court

decided the meaning of "work" based on the FLSA and federal case law. *Id.*

I recognize that, pursuant to Nevada's Rules of Court, unpublished Nevada Supreme Court opinions do not establish mandatory precedent, Nev. R. App. P. 36(2), and that a party could not even cite *Csomos* or *Rite of Passage* for its persuasive value, *id.* at 36(3). But given that this court is not a "party," and therefore not strictly subject to that limitation, and that our peculiar task is to anticipate or predict the Nevada Supreme Court's opinion "by looking to all the available data," see *Vance*, 852 F.3d at 610, these cases—or at least the underlying support and reasoning therein, even without their explicit holdings—are certainly informative. Regardless, even ignoring them, *Terry* is likely sufficient on its own to establish that the Nevada Supreme Court would follow the FLSA on this issue rather than differentiate it.

For these reasons, I respectfully dissent from the majority's decision as to the Nevada law claims and would instead affirm the judgment of the district court in its entirety.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-5784/5785

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION.

JESSE BUSK; LAURIE CASTRO; SIERRA WILLIAMS; MONICA WILLIAMS; VERONICA HERNANDEZ,

Plaintiffs - Appellants,

v.

INTEGRITY STAFFING SOLUTIONS, INC.; AMAZON.COM, INC.,

Defendants - Appellees.

Before: BATCHELDER and CLAY, Circuit Judges; SARGUS, District Judge.*

* The Honorable Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio, sitting by designation.

JUDGMENT

(Filed Sep. 19, 2018)

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's dismissal of the Arizona Plaintiffs' claims is AFFIRMED. IT IS FURTHER ORDERED that the district court's judgment with regard to the Nevada Plaintiffs is REVERSED in part and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION	Master File No. 3:14-md-2504 MDL Docket No. 2504
THIS DOCUMENT RELATES TO: *Busk* v. *Integrity Staffing Solutions, Inc.*,	Case No. 3:14-cv-139-DJH

* * * * *

MEMORANDUM OPINION AND ORDER

(Filed Jun. 6, 2017)

The plaintiffs in this purported class action allege that they were unlawfully denied compensation for time they spent waiting in line to undergo mandatory security checks at their places of employment. After the United States Supreme Court held that they could not recover under the Fair Labor Standards Act, the plaintiffs amended their complaint to assert only state-law claims. (Docket No. 91) Defendants Integrity Staffing Solutions, Inc. and Amazon.com, Inc. now seek dismissal of those claims, arguing that the plaintiffs have failed to state a plausible claim for relief under Nevada or Arizona law. (D.N. 97, 98) The Court agrees and will therefore grant the motions to dismiss.

I. BACKGROUND

This action was filed in the District of Nevada in October 2010. (D.N. 1) That court dismissed the plaintiffs' first amended complaint for failure to state a claim, agreeing with Integrity Staffing Solutions (which was then the only defendant) that time spent going through security screenings or walking to and from lunch was not compensable work time under the Fair Labor Standards Act. (D.N. 20, PageID # 215-17) As to the plaintiffs' claims under Nevada law for unpaid wages arising from the security checks and shortened meal periods, the Nevada district court found that the plaintiffs properly asserted a private cause of action under Nevada Revised Statutes § 608.140 but failed to allege sufficient facts to support their claim. (See *id.*, PageID # 219)

The plaintiffs appealed to the Ninth Circuit, which affirmed the dismissal of the meal-period claims but reversed as to the security-check claims. *Busk* v. *Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (9th Cir. 2013). The Supreme Court disagreed, holding that the time related to the security checks was not compensable under the FLSA. *Integrity Staffing Solutions, Inc.* v. *Busk*, 135 S. Ct. 513 (2014). Specifically, the Court found that the security screenings were "noncompensable postliminary activities" under the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2). *Busk*, 135 S. Ct. at 518. Following that decision, the plaintiffs again amended their complaint. The third amended complaint asserts claims under Nevada and Arizona law for unpaid wages and overtime, as well as

minimum-wage violations. (D.N. 91, PageID # 1020-26) The defendants seek dismissal of all four claims. (See D.N. 97, 98)

II. ANALYSIS

To survive a motion to dismiss for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Factual allegations are essential; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and the Court need not accept such statements as true. *Id.* A complaint whose "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct" does not satisfy the pleading requirements of Rule 8 and will not withstand a motion to dismiss. *Id.* at 679.

A. Nevada Plaintiffs

1. Statutory Claims

Integrity and Amazon primarily assert that there is no private cause of action for recovery of unpaid wages under Nevada law. (See D.N. 97-1, PageID # 1064-65; D.N. 98-1, PageID # 1090-1100) According

to the plaintiffs, this argument is barred by the law of the case. They point to the District of Nevada's previous determination that a private cause of action for unpaid wages exists under § 608.140, and they contend that this Court may not reconsider the issue. (D.N. 99, PageID # 1137-38; see D.N. 20, PageID # 219) The Court disagrees.

The law-of-the-case doctrine provides that "findings made at one stage in the litigation should not be reconsidered at subsequent stages of that same litigation." *Burley* v. *Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016) (quoting *Dixie Fuel Co., LLC* v. *Dir., Office of Workers' Comp Programs*, 820 F.3d 833, 843 (6th Cir. 2016)). It "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912)). "A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstances, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* (quoting *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983)). The Court finds that extraordinary circumstances exist here.

First, the District of Nevada appears not to have considered whether the private right of action provided by § 608.140 applies only to claims based on employment contracts, as the defendants argue here. (See

D.N. 20, PageID # 218-19; D.N. 97-1, PageID # 1064-66; D.N. 98-1, PageID # 1090-91) Second, the bulk of authority since the District of Nevada's July 19, 2011 decision supports the defendants' position. See, *e.g.*, *Sargent* v. *HG Staffing, LLC*, No. 3:13-CV00453-LRH-WGC, 2016 U.S. Dist. LEXIS 5621, at *12-*14 (D. Nev. Jan. 12, 2016); *Johnson* v. *Pink Spot Vapors Inc.*, No. 2:14-CV-1960 JCM (GWF), 2015 U.S. Dist. LEXIS 13499, at *12-*15 (D. Nev. Feb. 3, 2015); *Cardoza* v. *Bloomin' Brands, Inc.*, No. 2:13-cv-01820-JAD-NJK, 2014 U.S. Dist. LEXIS 103874, at *4-*13 (D. Nev. July 30, 2014); *Descutner* v. *Newmont U.S.A. Ltd.*, No. 3:12-cv-00371-RCJ-VPC, 2012 U.S. Dist. LEXIS 156656, at *5-*15 (D. Nev. Nov. 1, 2012). While these decisions are not binding, they represent the considered opinions of no fewer than four District of Nevada judges as to how the Nevada Supreme Court would rule on the issue, and the Court agrees with their reasoning.[1]

Finally, Amazon did not become a defendant in this case until more than two years after the Nevada court's decision. (See D.N. 20, 47) It thus should not be barred from relying on what is now the majority rule. See 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.5 (2d ed. 2016) ("[A] party joined in * * * action after a ruling has been made should be free to reargue the matter without the

[1] The plaintiffs cite several District of Nevada cases holding that § 608.140 does create a private right of action for violations of Nevada labor statutes (see D.N. 99, PageID # 1139-40); however, only two of those decisions were issued after Judge Hunt's order in this case, and one of those two was an oral ruling. (See *id.*)

constraints of law-of-the-case analysis."). And it would be unjust to deny dismissal to Integrity on law-of-the-case grounds while dismissing the claims against Amazon on the ground that no private right of action exists. In sum, given the significant shift in precedent since the prior decision and the addition of Amazon as a defendant, the Court finds that "extraordinary circumstances" warrant reconsideration of—and deviation from—that decision. *Christianson*, 486 U.S. at 817. For the reasons explained in *Descutner*, *Cardoza*, and similar cases, the Court concludes that no private right of action exists for violations of Nevada Revised Statutes §§ 608.005-.195 in the absence of a contractual claim.[2] See *Sargent*, 2016 U.S. Dist. LEXIS 5621, at *12-*14 (collecting cases); *Sheffer* v. *US Airways, Inc.*, 107 F. Supp. 3d 1074, 1077-78 (D. Nev. 2015); *Dannenbring* v. *Wynn Las Vegas, LLC*, 907 F. Supp. 2d 1214, 1219 (D. Nev. 2013). As the Nevada plaintiffs do not allege that they had employment contracts with Integrity or Amazon, their claims under Nev. Rev. Stat. §§ 608.020-050, .016, .018, and .140 are not viable.

Even if a private right of action existed, the Nevada plaintiffs' claims would fail because the plaintiffs are not owed wages for time related to the security screenings. In deciding wage-and-hour issues, Nevada

[2] One of the statutes relied on by the plaintiffs expressly states that when an employer fails to pay discharged employees "the amount of any wages or salary at the time the same becomes due and owing to them *under their contract of employment*, * * * each of the employees may charge and collect wages in the sum *agreed upon in the contract of employment* for each day the employer is in default." Nev. Rev. Stat. § 608.050(1) (emphasis added).

courts look to federal law unless the state statutory language is "materially different" from or inconsistent with federal law. *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892, 900-01 (9th Cir. 2013); see *Terry* v. *Sapphire Gentlemen's Club*, 336 P.3d 951, 955-56 (Nev. 2014). The Nevada Supreme Court "has signaled its willingness to part ways with the FLSA where the language of Nevada's statutes has so required," *Terry*, 336 P.3d at 955-56, but there is no statutory language requiring such a departure here. Indeed, the Nevada Supreme Court, in a recent unpublished decision, "turn[ed] to the federal courts' interpretation of hours worked under the federal Fair Labor Standards Act" after finding "little guidance" in Nevada law on this issue. *Rite of Passage* v. *Nevada*, No. 66388, 2015 Nev. Unpub. LEXIS 1561, at *3 (Nev. Dec. 23, 2015) (citing *Terry*, 336 P.3d 951). And Judge Hunt—whose private-right-of-action conclusion the plaintiffs are eager to make binding—dismissed their state-law claims on the ground that the security screenings and meal travel time were not compensable under the FLSA. (See D.N. 20, PageID # 219-20)

The plaintiffs do not identify any Nevada law that is irreconcilable with the Portal-to-Portal Act.[3]

[3] Not cited by either side is Nevada Administrative Code § 608.130, which provides that "travel * * * between the home of the employee and the place of work of the employee" does not constitute compensable "time worked." While this regulation appears to embrace at least part of the Portal-to-Portal Act, cf. 29 U.S.C. § 254(a), the Court finds it to be of minimal significance given the narrow focus of most administrative regulations and the

Instead, they cite Nevada statutes containing explicit references to federal regulations as evidence that "the Nevada Legislature is very capable of including references to federal regulations when it intends to do so." (D.N. 99, PageID # 1132) They also cite a Nevada statute imposing an eight-hour workday for mineworkers, Nev. Rev. Stat. § 608.200, which they contend shows that the Portal-to-Portal Act is inapplicable under Nevada law. (D.N. 99, PageID # 1132) Specifically, they point to the statute's provision that "[t]he 8-hour limit applies only to time actually employed in the mine and does not include time consumed for meals or travel into or out of the actual work site." Nev. Rev. Stat. § 608.200(1). In the plaintiffs' view, this provision would have been unnecessary if the Portal-to-Portal Act were otherwise applicable. (D.N. 99, PageID # 1133)

The Court agrees with the defendants that § 608.200, which is specific to the mining industry and does not pertain to overtime or minimum wage, is of little relevance here. (See D.N. 100, PageID # 1232) In fact, as Amazon and Integrity observe, the statute may undermine the plaintiffs' position by indicating that meal and travel time are not considered "time actually employed." (*Id.*, PageID # 1233)

Finally, the plaintiffs cite cases from California and Washington to show that "[c]ourts in other states * * * have rejected the argument that state wage and hour law should follow the federal limit on

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legislature's apparently limited involvement in the rulemaking process. See Nev. Rev. Stat. § 233B.040.

compensable time." (D.N. 99, PageID # 1133; see *id.*, PageID # 1133-34 (citing *Morillion* v. *Royal Packing Co.*, 995 P.2d 139 (Cal. 2000); *Anderson* v. *Dep't of Soc. & Health Servs.*, 63 P.3d 134, 136 (Wash. Ct. App. 2003))) But as the defendants note, the Northern District of California, applying *Morillion*, recently held that security-screening time is not compensable under California law, see *Frlekin* v. *Apple Inc.*, No. C 13-03451 WHA, 2015 U.S. Dist. LEXIS 151937 (N.D. Cal. Nov. 2015), and the court in *Anderson*, while declining to hold that the Washington legislature had adopted the Portal-to-Portal Act, found it "unnecessary" to decide that question. 63 P.3d at 136. These cases thus add little to the plaintiffs' argument.

In sum, the Court sees no indication that Nevada courts would reject the Supreme Court's reasoning as to whether time spent on security screenings is compensable. There is no material difference between Nevada statutes and the FLSA on this point, and Nevada courts look to federal wage-and-hour law where state precedent is lacking. See *Rite of Passage*, 2015 Nev. Unpub. LEXIS 1561, at *3. Thus, regardless of whether a private right of action is available, the Nevada plaintiffs have failed to state a plausible claim for relief with respect to overtime or unpaid wages.

2. Claim under Nevada Constitution

This leaves the plaintiffs' claim under the Nevada Constitution, which the defendants do not directly

address. Article 15, section 16 of the Nevada Constitution, known as the Minimum Wage Amendment, provides that "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in" the Amendment and that "[a]n employee claiming violation of" the Amendment "may bring an action against his or her employer" to enforce it.

As the Court has just explained, the security screenings are not compensable under the FLSA and, by extension, Nevada law. The plaintiffs thus are not owed wages of any kind for time related to the screenings. Their minimum-wage claim fails for an additional reason, however. Under the FLSA, "the workweek as a whole, not each individual hour within the workweek, determines whether an employer has complied with" the minimum-wage requirement; "no minimum wage violation occurs so long as the employer's total wage paid to an employee in any given workweek divided by the total hours worked in the workweek equals or exceeds the minimum wage rate." *Richardson* v. *Mountain Range Restaurants LLC*, No. CV-14-1370-PHX-SMM, 2015 U.S. Dist. LEXIS 35008, at *13-*14 (D. Ariz. Mar. 20, 2015). Because the plaintiffs do not allege that they were paid below the minimum wage during any particular workweek, Integrity and Amazon argue, they fail to state a plausible minimum-wage claim. (D.N. 97-1, PageID # 1065; D.N. 98-1, PageID # 1101-08)

The plaintiffs insist that there are crucial differences between Nevada law and the FLSA. Specifically,

they argue that Nevada imposes no workweek standard but instead evaluates minimum-wage claims on a per-hour basis. (D.N. 99, PageID # 1154) In support, they cite the Minimum Wage Amendment's reference to payment of "hourly rates."[4] (*Id.*) They further assert that Nevada Administrative Code § 608.115 "prohibit[s] an employer from calculating the minimum wage requirement on a workweek basis." (*Id.*) Neither argument is persuasive.

First, the FLSA, like the Minimum Wage Amendment, imposes an hourly wage requirement. See 29 U.S.C. § 206(a). There thus is no material difference in terminology suggesting that Nevada's minimum-wage law would not be interpreted in accordance with FLSA precedent. See *Terry*, 336 P.3d at 956. And although § 206 "speaks of an hourly wage, an employer's failure to compensate an employee for particular hours worked does not necessarily violate the minimum wage provision," because violations are measured by workweek. *Richardson*, 2015 U.S. Dist. LEXIS 35008, at *13 (citing *Dove* v. *Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985)).

Nor does the Nevada Administrative Code support the plaintiffs' position. Section 608.115 provides, in relevant part:

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[4] The plaintiffs also cite Nev. Rev. Stat. § 608.016's provision that an employer "pay to the employee wages for each *hour* the employee works." (D.N. 99, PageID # 1154) As explained above, however, they cannot pursue a claim for violation of § 608.016. See *supra* Part II.A.1.

> 1. An employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee.
>
> 2. If an employer pays an employee by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, the employer shall pay an amount that is at least equal to the minimum wage when the amount paid to an employee in a pay period is divided by the number of hours worked by the employee during the pay period.

Nev. Admin. Code § 608.115. According to the plaintiffs, the phrase "any other wage rate except for a wage rate based on an hour of time" means that hourly employees are exempt from the workweek standard. (See D.N. 99, PageID # 1154-55) But the regulation is more logically read as simply providing an hourly wage measurement for non-hourly employees—it is immediately obvious whether an hourly employee's pay satisfies minimum-wage requirements; the same determination requires some math for an employee not paid by the hour. Section 608.115(2) provides the formula for that calculation. In short, the Court does not read the regulation as excluding hourly employees from the workweek standard, as the plaintiffs contend. Thus, even if time spent waiting for or undergoing security screenings were compensable under Nevada law, the Nevada plaintiffs' minimum-wage claim would fail because they do not allege that there was a week for which they were paid less than minimum

wage. See *Richardson*, 2015 U.S. Dist. LEXIS 35008, at *13-*14.

B. Arizona Plaintiffs

The Arizona plaintiffs' claims fail for similar reasons. (See D.N. 91, PageID # 1023-26) At the outset, the Court notes that although the complaint demands payment of "wages at the applicable regular or overtime rate" (D.N. 91, PageID # 1025), there is no mechanism for recovery of overtime pay under Arizona law. *Reyes* v. *Lafarga*, No. CV-11-1998-PHX-SMM, 2013 U.S. Dist. LEXIS 192798, at *3 (D. Ariz. Nov. 20, 2013) ("Arizona does not have an overtime law; consequently, the only overtime protections for Arizonan employees come from the FLSA."). The Court's discussion will therefore be limited to the Arizona plaintiffs' claims for minimum wage and unpaid wages. (See D.N. 91, PageID # 1024-26)

In support of their minimum-wage claim, the Arizona plaintiffs rely on an administrative regulation stating that "no less than the minimum wage shall be paid for all hours worked, regardless of the frequency of payment and regardless of whether the wage is paid on an hourly, salaried, commissioned, piece rate, or any other basis." Ariz. Admin. Code § R20-5-1206(A). The regulation continues: "If the combined wages of an employee are less than the applicable minimum wage for a work week, the employer shall pay monetary compensation already earned, and no less than the difference between the amounts earned and the minimum

wage as required under the Act." Ariz. Admin. Code § R20-5-1206(B). Finally, subsection C states that "[t]he workweek is the basis for determining an employee's hourly wage." Ariz. Admin. Code § R20-5-1206(C).

Contrary to the plaintiffs' assertion, nothing suggests that these latter provisions apply only to non-hourly workers. (See D.N. 99, PageID # 1155-56) And the reference to "all hours worked" does not materially distinguish the Arizona rule from the FLSA minimum-wage provision, which—as discussed above—also sets an hourly wage requirement and follows the workweek standard. See *supra* Part II.A.2.

The Industrial Commission of Arizona, which is charged with enforcing and implementing Arizona's minimum-wage statute, has declared that in interpreting the term "hours worked," the agency "will be guided by and rely upon" FLSA regulations so long as the state's own regulations do not conflict. *Substantive Policy Statement Regarding Interpretation of "Hours Worked" for Purposes of the Arizona Minimum Wage Act* (Aug. 16, 2007), https://www.azica.gov/labor-substantive-policy-hours-worked. The FLSA regulations, found at 29 C.F.R. §§ 785.1-.50, incorporate and interpret the Portal-to-Portal Act. See, *e.g.*, 29 C.F.R. §§ 785.24 (discussing preliminary and postliminary activities), .50 (quoting Portal-to-Portal Act in its entirety).

The plaintiffs, however, insist that Arizona has adopted "an *anti* portal-to-portal act." (D.N. 99, PageID # 1135) The state's administrative code defines "hours

worked" as "all hours for which an employee covered under the Act is employed and required to give to the employer, including all time during which an employee is on duty or at a prescribed work place and all time the employee is suffered or permitted to work." Ariz. Admin. Code § R20-5-1202(12). According to the Arizona plaintiffs, this definition, in combination with § R20-5-1206, means that employees are entitled to be paid for any time they are on the employer's premises, "regardless of whether the employee is even working." (D.N. 99, PageID # 1135) They maintain that the security checks occurred "at a prescribed work place" and that time related to the checks therefore constitutes "hours worked" for which they are entitled to be paid. (See *id.*)

The Court views this interpretation of the "hours worked" definition with some skepticism. As the defendants observe, the plaintiffs' reading would require compensation for, say, riding the elevator to and from one's job on the twentieth floor of a building. (See D.N. 100, PageID # 1234) Such a reading is illogical, and the plaintiffs have offered no authority to support it.[5]

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[5] The Court acknowledges that the defendants likewise have little precedent in their favor; they merely offer a single decision from the Arizona Court of Appeals addressing an overtime statute not at issue here. (See D.N. 100, PageID # 1234 (citing *Prendergast* v. *City of Tempe*, 691 P.2d 726, 729 (Ariz. Ct. App. 1984))) However, their position makes more sense than that of the plaintiffs, whose interpretation assumes a broad definition of "prescribed work place" not found in the administrative code or supported by case law. See *Anderson*, 328 U.S. at 690-91. The Industrial Commission's embrace of FLSA regulations reinforces

Notably, the language of § R20-5-1202(12) tracks the Supreme Court's definition of "statutory workweek" in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), with a significant exception: that definition included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place," *id.* at 690-91; the Arizona regulation, contrary to the plaintiffs' interpretation, does not mention time spent "on the employer's premises." *Id.*; cf. Ariz. Admin. Code § R20-5-1202(12). The Supreme Court's separate use of the two terms in *Anderson* indicates that "at a prescribed work place" and "on the employer's premises" are not equivalent in meaning.

The plaintiffs assert that Integrity and Amazon's view of Arizona law would lead to "absurd" results whereby an employer "could require employees to work without any compensation for hours so long as the hourly pay was sufficiently above the minimum wage to cover the unpaid hours worked." (D.N. 99, PageID # 1156) Yet the same is true of the FLSA's minimum-wage provision. See 29 U.S.C. § 206(a); *Richardson*, 2015 U.S. Dist. LEXIS 35008, at *13-*14. And though there is a dearth of precedent on this point, the District of Arizona has applied the workweek standard to claims under the Arizona Minimum Wage Act on at least one occasion. See *Wagner* v. *ABW Legacy Corp.*, No. CV-13-2245-PHX-JZB, 2016 U.S. Dist. LEXIS 29376, at *47-*48 (D. Ariz. Mar. 8, 2016) (finding "a

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the Court's conclusion that Arizona courts would follow federal law on this point.

genuine issue of material fact as to whether Defendant's internal reports determined whether Plaintiff was paid at least the minimum wage each week" and denying summary judgment to defendant on claims under Arizona Minimum Wage Act where evidence showed that "during the three pay periods identified, Plaintiff's gross pay divided by the number of hours worked equals an hourly rate less than the Arizona minimum wage in effect at the time"). In short, the plaintiffs have not demonstrated that they are entitled to compensation under Arizona law for time spent undergoing, or waiting to undergo, security screenings.

III. CONCLUSION

The third amended complaint fails to state a plausible claim for relief under Nevada or Arizona law. Accordingly, and the Court being otherwise sufficiently advised, it is hereby

ORDERED as follows:

(1) Amazon's motion to dismiss (D.N. 97) is **GRANTED**.

(2) Integrity's motion to dismiss (D.N. 98) is **GRANTED**.

(3) All claims having been resolved, this matter is **DISMISSED** with prejudice and **STRICKEN** from the Court's docket. The motion for hearing (D.N. 101)

and motion for status conference (D.N. 103) are **DENIED** as moot.

[SEAL]

/s/ David J. Hale
David J. Hale, Judge
United States
District Court

June 7, 2017

Nos. 17-5784/5785

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION.	
JESSE BUSK; LAURIE CASTRO; SIERRA WILLIAMS; MONICA WILLIAMS; VERONICA HERNANDEZ, Plaintiffs-Appellants, v. INTEGRITY STAFFING SOLUTIONS, INC.; AMAZON.COM, INC., Defendants-Appellees.	ORDER (Filed Nov. 1, 2018)

BEFORE: BATCHELDER and CLAY, Circuit Judges; SARGUS, District Judge.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then

* Judge Edmund A. Sargus, Jr., Chief United States District Judge for the Southern District of Ohio, sitting by designation.

was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

* Judges Cook, White, and Thapar recused themselves from participation in this ruling.

INTEGRITY STAFFING SOLUTIONS, INC., Petitioner

v.

Jesse BUSK et al.

No. 13–433.

Argued Oct. 8, 2014.

Decided Dec. 9, 2014.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which KAGAN, J., joined.

Paul D. Clement, Washington, DC, for Petitioner.

Curtis E. Gannon, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Mark R. Thierman, Reno, NV, for Respondents.

Neil M. Alexander, Rick D. Roskelley, Roger L. Grandgenett II, Cory Glen Walker, Littler Mendelson, Las Vegas, NV, Paul D. Clement, Counsel of Record, Jeffrey M. Harris, Barbara A. Smith, Bancroft PLLC, Washington, DC, for Petitioner.

Mark R. Thierman, Counsel of Record, Joshua D. Buck, Thierman Law Firm, P.C., Reno, NV, Eric Schnapper, University of Washington School of Law, Seattle, WA for Respondents.

For U.S. Supreme Court briefs, see:

2014 WL 4380110 (Reply.Brief)

2014 WL 3866627 (Resp.Brief)

2014 WL 2506624 (Pet.Brief)

Justice THOMAS delivered the opinion of the Court.

The employer in this case required its employees, warehouse workers who retrieved inventory and packaged it for shipment, to undergo an antitheft security screening before leaving the warehouse each day. The question presented is whether the employees' time spent waiting to undergo and undergoing those security screenings is compensable 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, § 251 *et seq*. We hold that the time is not compensable. We therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

I

Petitioner Integrity Staffing Solutions, Inc., provides warehouse staffing to Amazon.com throughout the United States. Respondents Jesse Busk and Laurie Castro worked as hourly employees of Integrity Staffing at warehouses in Las Vegas and Fenley, Nevada, respectively. As warehouse employees, they retrieved products from the shelves and packaged those products for delivery to Amazon customers.

Integrity Staffing required its employees to undergo a security screening before leaving the warehouse at the end of each day. During this screening, employees removed items such as wallets, keys, and belts from their persons and passed through metal detectors.

In 2010, Busk and Castro filed a putative class action against Integrity Staffing on behalf of similarly situated employees in the Nevada warehouses for alleged violations of the FLSA and Nevada labor laws. As relevant here, the employees alleged that they were entitled to compensation under the FLSA for the time spent waiting to undergo and actually undergoing the security screenings. They alleged that such time amounted to roughly 25 minutes each day and that it could have been reduced to a *de minimis* amount by adding more security screeners or by staggering the termination of shifts so that employees could flow through the checkpoint more quickly. They also alleged that the screenings were conducted "to prevent employee theft" and thus occurred "solely for the benefit of the employers and their customers." App. 19, 21.

The District Court dismissed the complaint for failure to state a claim, holding that the time spent waiting for and undergoing the security screenings was not compensable under the FLSA. It explained that, because the screenings occurred after the regular work shift, the employees could state a claim for compensation only if the screenings were an integral and indispensable part of the principal activities they were employed to perform. The District Court held that

these screenings were not integral and indispensable but instead fell into a noncompensable category of postliminary activities.

The United States Court of Appeals for the Ninth Circuit reversed in relevant part. 713 F.3d 525 (2013). The Court of Appeals asserted that postshift activities that would ordinarily be classified as non-compensable postliminary activities are nevertheless compensable as integral and indispensable to an employee's principal activities if those postshift activities are necessary to the principal work performed and done for the benefit of the employer. *Id.*, at 530. Accepting as true the allegation that Integrity Staffing required the security screenings to prevent employee theft, the Court of Appeals concluded that the screenings were "necessary" to the employees' primary work as warehouse employees and done for Integrity Staffing's benefit. *Id.*, at 531.

We granted certiorari, 571 U.S. ___, 134 S.Ct. 1490, 188 L.Ed.2d 374 (2014), and now reverse.

II

A

Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek. §§ 6(a)(1), 7(a)(3), 52 Stat. 1062–1063. An employer who violated these provisions could be held civilly

liable for backpay, liquidated damages, and attorney's fees. § 16, *id.*, at 1069.

But the FLSA did not define "work" or "workweek," and this Court interpreted those terms broadly. It defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944). Similarly, it defined "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 690–691, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Applying these expansive definitions, the Court found compensable the time spent traveling between mine portals and underground work areas, *Tennessee Coal*, *supra*, at 598, 64 S.Ct. 698, and the time spent walking from timeclocks to work benches, *Anderson*, *supra*, at 691–692, 66 S.Ct. 1187.

These decisions provoked a flood of litigation. In the six months following this Court's decision in *Anderson*, unions and employees filed more than 1,500 lawsuits under the FLSA. S.Rep. No. 37, 80th Cong., 1st Sess., pp. 2–3 (1947). These suits sought nearly $6 billion in back pay and liquidated damages for various pre-shift and postshift activities. *Ibid.*

Congress responded swiftly. It found that the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers." 29 U.S.C. § 251(a). Declaring the situation to be an "emergency," Congress found that, if such interpretations "were permitted to stand, * * * the payment of such liabilities would bring about financial ruin of many employers" and "employees would receive windfall payments * * * for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay." §§ 251(a)-(b).

Congress met this emergency with the Portal–to–Portal Act. The Portal–to–Portal Act exempted employers from liability for future claims based on two categories of work-related activities as follows:

> "(a) Except as provided in subsection (b) [which covers work compensable by contract or custom], no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer * * * to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—
>
> "(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." § 4, 61 Stat. 86–87 (codified at 29 U.S.C. § 254(a)).

At issue here is the exemption for "activities which are preliminary to or postliminary to said principal activity or activities."

B

[1] This Court has consistently interpreted "the term 'principal activity or activities' [to] embrac[e] all activities which are an 'integral and indispensable part of the principal activities.'" *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29–30, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005) (quoting *Steiner* v. *Mitchell*, 350 U.S. 247, 252–253, 76 S.Ct. 330, 100 L.Ed. 267 (1956)). Our prior opinions used those words in their ordinary sense. The word "integral" means "[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." 5 Oxford English Dictionary 366 (1933) (OED); accord, Brief for

United States as *Amicus Curiae* 20 (Brief for United States); see also Webster's New International Dictionary 1290 (2d ed. 1954) (Webster's Second) ("[e]ssential to completeness; constituent, as a part"). And, when used to describe a duty, "indispensable" means a duty "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected." 5 OED 219; accord, Brief for United States 19; see also Webster's Second 1267 ("[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory"). An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. As we describe below, this definition, as applied in these circumstances, is consistent with the Department of Labor's regulations.

Our precedents have identified several activities that satisfy this test. For example, we have held compensable the time battery-plant employees spent showering and changing clothes because the chemicals in the plant were "toxic to human beings" and the employer conceded that "the clothes-changing and showering activities of the employees [were] indispensable to the performance of their productive work and integrally related thereto." *Steiner*, *supra*, at 249, 251, 76 S.Ct. 330. And we have held compensable the time meatpacker employees spent sharpening their knives because dull knives would "slow down production" on the assembly line, "affect the appearance of the meat as well as the quality of the hides," "cause waste," and

lead to "accidents." *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262, 76 S.Ct. 337, 100 L.Ed. 282 (1956). By contrast, we have held noncompensable the time poultry-plant employees spent waiting to don protective gear because such waiting was "two steps removed from the productive activity on the assembly line." *IBP*, *supra*, at 42, 126 S.Ct. 514.

The Department of Labor's regulations are consistent with this approach. See 29 CFR § 790.8(b) (2013) ("The term 'principal activities' includes all activities which are an integral part of a principal activity"); § 790.8(c) ("Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance"). As an illustration, those regulations explain that the time spent by an employee in a chemical plant changing clothes would be compensable if he "c[ould not] perform his principal activities without putting on certain clothes" but would not be compensable if "changing clothes [were] merely a convenience to the employee and not directly related to his principal activities." See § 790.8(c). As the regulations explain, "when performed under the conditions normally present," activities 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" are "'preliminary'" or "'postliminary'" activities. § 790.7(g).

III

A

[2] The security screenings at issue here are noncompensable postliminary activities. To begin with, the screenings were not the "principal activity or activities which [the] employee is employed to perform." 29 U.S.C. § 254(a)(1). Integrity Staffing did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.

The security screenings also were not "integral and indispensable" to the employees' duties as warehouse workers. As explained above, an activity is not integral and indispensable to an employee's principal activities unless it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform those activities. The screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. And Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work.

The Solicitor General, adopting the position of the Department of Labor, agrees that these screenings were noncompensable postliminary activities. See Brief for United States 10. That view is fully consistent with an Opinion Letter the Department issued in 1951. The letter found noncompensable a preshift security search of employees in a rocket-powder plant "'for matches, spark producing devices such as cigarette

lighters, and other items which have a direct bearing on the safety of the employees,'" as well as a postshift security search of the employees done "'for the purpose of preventing theft.'" Opinion Letter from Dept. of Labor, Wage and Hour Div., to Dept. of Army, Office of Chief of Ordnance (Apr. 18, 1951), pp. 1–2 (available in Clerk of Court's case file). The Department drew no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft—neither were compensable under the Portal–to–Portal Act.

B

[3] The Court of Appeals erred by focusing on whether an employer *required* a particular activity. The integral and indispensable test is tied to the productive work that the employee is *employed to perform.* See, *e.g.*, *IBP*, 546 U.S., at 42, 126 S.Ct. 514; *Mitchell*, *supra*, at 262, 76 S.Ct. 337; *Steiner*, 350 U.S., at 249–251, 76 S.Ct. 330; see also 29 CFR § 790.8(a) (explaining that the term "principal activities" was "considered sufficiently broad to embrace within its terms such activities as are indispensable to *the performance of productive work*" (internal quotation marks omitted; emphasis added)); § 790.8(c) ("Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable *to its performance*" (emphasis added)).

If the test could be satisfied merely by the fact that an employer required an activity, it would sweep into "principal activities" the very activities that the

Portal–to–Portal Act was designed to address. The employer in *Anderson*, for instance, required its employees to walk "from a time-clock near the factory gate to a workstation" so that they could "begin their work," "but it is indisputable that the Portal–to–Portal Act evinces Congress' intent to repudiate *Anderson's* holding that such walking time was compensable under the FLSA." *IBP*, *supra*, at 41, 126 S.Ct. 514. A test that turns on whether the activity is for the benefit of the employer is similarly overbroad.

Finally, we reject the employees' argument that time spent waiting to undergo the security screenings is compensable under the FLSA because Integrity Staffing could have reduced that time to a *de minimis* amount. The fact that an employer could conceivably reduce the time spent by employees on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform. These arguments are properly presented to the employer at the bargaining table, see 29 U.S.C. § 254(b)(1), not to a court in an FLSA claim.

* * *

We hold that an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities. Because the employees' time spent waiting to undergo and undergoing Integrity Staffing's security screenings does not meet

these criteria, we reverse the judgment of the Court of Appeals.

It is so ordered.

Justice SOTOMAYOR, with whom Justice KAGAN joins, concurring.

I concur in the Court's opinion, and write separately only to explain my understanding of the standards the Court applies.

The Court reaches two critical conclusions. First, the Court confirms that compensable "'principal'" activities "'includ[e] * * * those closely related activities which are indispensable to [a principal activity's] performance,'" *ante*, at 518 (quoting 29 CFR § 790.8(c) (2013)), and holds that the required security screenings here were not "integral and indispensable" to another principal activity the employees were employed to perform, *ante*, at 518. I agree. As both Department of Labor regulations and our precedent make clear, an activity is "indispensable" to another, principal activity only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively. Thus, although a battery plant worker might, for example, perform his principal activities without donning proper protective gear, he could not do so safely, see *Steiner* v. *Mitchell*, 350 U.S. 247, 250–253, 76 S.Ct. 330, 100 L.Ed. 267 (1956); likewise, a butcher might be able to cut meat without having sharpened his knives, but he could not do so

effectively, see *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262–263, 76 S.Ct. 337, 100 L.Ed. 282 (1956); accord, 29 CFR § 790.8(c). Here, by contrast, the security screenings were not "integral and indispensable" to the employees' other principal activities in this sense. The screenings may, as the Ninth Circuit observed below, have been in some way related to the work that the employees performed in the warehouse, see 713 F.3d 525, 531 (2013), but the employees could skip the screenings altogether without the safety or effectiveness of their principal activities being substantially impaired, see *ante*, at 518.

Second, the Court holds also that the screenings were not themselves "'principal * * * activities'" the employees were "'employed to perform.'" *Ibid.* (quoting 29 U.S.C. § 254(a)(1)). On this point, I understand the Court's analysis to turn on its conclusion that undergoing security screenings was not itself work of consequence that the employees performed for their employer. See *ante*, at 518. Again, I agree. As the statute's use of the words "preliminary" and "postliminary" suggests, § 254(a)(2), and as our precedents make clear, the Portal–to–Portal Act of 1947 is primarily concerned with defining the beginning and end of the workday. See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34–37, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005). It distinguishes between activities that are essentially part of the ingress and egress process, on the one hand, and activities that constitute the actual "work of consequence performed for an employer," on the other hand. 29 CFR § 790.8(a); see also *ibid.* (clarifying that a principal

activity need not predominate over other activities, and that an employee could be employed to perform multiple principal activities). The security screenings at issue here fall on the "preliminary * * * or postliminary" side of this line. 29 U.S.C. § 254(a)(2). The searches were part of the process by which the employees egressed their place of work, akin to checking in and out and waiting in line to do so—activities that Congress clearly deemed to be preliminary or postliminary See S.Rep. No. 48, 80th Cong., 1st Sess., 47 (1947); 29 CFR § 790.7(g). Indeed, as the Court observes, the Department of Labor reached the very same conclusion regarding similar security screenings shortly after the Portal–to–Portal Act was adopted, see *ante,* at 518–519, and we owe deference to that determination, see *Christensen* v. *Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

Because I understand the Court's opinion to be consistent with the foregoing, I join it.

29 U.S.C. § 251. Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities 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, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in;

(6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise

to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

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29 U.S.C. § 254

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), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the

Walsh-Healey Act, or the Bacon-Davis Act, 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 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) 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), 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, of the Walsh-Healey Act, or of the Bacon-Davis Act, 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.

29 C.F.R. § 785.7

Judicial construction.

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

29 C.F.R. § 785.9

Statutory exemptions.

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. The use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered "principal" activities when meeting the following conditions: The use of the employer's 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 the representative of such employee. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his

"principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin* v. *National Biscuit Co.*, 82 F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F.2d 963 (C.A. 2, 1949))

(b) Section 3(o) of the Fair Labor Standards Act. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

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29 C.F.R. § 790.5

Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

* * * 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 section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4(b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the

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[26] The full text of section 4 of the Act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract

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[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10

between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

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[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296–2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297–2298. See also Senate Report, p. 48.

[33] See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.