No. 18-1154

In The Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC., *et al.*,

Petitioners,

v.

JESSE BUSK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the Nevada Supreme Court decision in *Terry v. Sapphire Gentlemen's Club*, state courts will not rely on a federal law in construing Nevada wage-hours laws if the federal law is "materially different" from the state law.

The questions presented are:

(1) Did the court of appeals err in holding that the limitations of the Portal-to-Portal Act are not incorporated into Nevada Rev. Stat. §§ 608.016, 608.018, or 608.019, or into § 15 of article 16 of the Nevada constitution?

(2) Did the court of appeals err in holding that the petitioners' security screening "clearly does involve exertion" by the employees being screened?

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This appeal concerns the interpretation of three Nevada statutes and one section of the Nevada constitution. Petitioners urge the Court to grant review to use the dispute about those state provisions as a vehicle for deciding questions about the Fair Labor Standards Act and the Portal-to-Portal Act. Petitioners' current proposed construction of those federal statutes is substantially different from the position that petitioner Integrity Staffing[1] took when the controversy about petitioners' practices was before this Court in 2014. *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014) ("*Busk I*").

Petitioners urge this Court to hold that the Portal-to-Portal Act defined the term "work," replacing the broader definition of that term that prevailed prior to the adoption of that Act. "[N]arrowing the Court's pre-1947 definition of 'work' was the whole point of the Portal-to-Portal Act." Pet. 14.[2] The court of appeals erred, petitioners insist, when it held that the Portal-to-Portal Act limited employer liability by imposing a narrow standard regarding what type of

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[1] Petitioner Amazon.com, Inc. was not a defendant at the time of that earlier appeal.

[2] Pet. i ("the court [of appeals] misinterpreted [federal law when it held that] the Portal-to-Portal Act did not actually change the pre-1947 definition of 'work' "), 15 ("[the Portal-to-Portal Act's] categories of preliminary and postliminary activities supplant this Court's pre-1947 definition of 'work' "), 18 ("the Portal-to-Portal Act ... clarif[ied] that the federal definition of 'work' under the FLSA is narrower than this Court's pre-1947 interpretations"), 20-21 ("Congress intended [the Portal-to-Portal Act] to alter the definition of hours worked").

work was compensable, rather than by redefining "work."

But in *Busk I*, petitioner Integrity Staffing took the opposite position, insisting (as the Sixth Circuit later held) that the Portal-to-Portal Act did not contain a definition of "work."

> As Respondents themselves recognize (at [Brief for Respondents,]17-18), the Portal-to-Portal Act did not purport to *define* terms like "work" and "workweek" for FLSA purposes. Rather, the Portal-to-Portal Act sought to address the massive retroactive liability introduced by decisions like [*Anderson v.*] *Mt. Clemens* [*Pottery Co.* 328 U.S. 680 (1946)], by making clear that time spent traveling to and from the place where workers undertook their "principal activities" was *noncompensable*, as was time spent on "activities which are preliminary to or postliminary to said principal activit[ies]." 29 U.S.C. § 254(a).

Reply Brief for Petitioner, 19 available at 2014 WL 4380110 (emphasis added).

The petition insists that the limitations in the Portal-to-Portal Act, restricting employer liability to principal activities and generally excluding preliminary and postliminary activities, are also restrictions on what is "work." "[T]he concepts of postliminary activities and work are inseparable. If security screenings were part of the employees' work, they could not qualify as postliminary." Pet. 18. But five years ago, counsel for Integrity Staffing advised the Court that the two concepts were quite distinct.

> MR. CLEMENT: No, Justice Sotomayor. And I think it's important to get two concepts separate. One is work under the Fair Labor Standards Act. And for purposes of that, all you really do need is things that are required by the employer for the employer's benefit that require a minimum amount of exertion. That's the test from this Court's cases.
>
> But principal activities is a separate and more demanding test under the Portal-to-Portal Act. And the way I'd think about the statute is the Fair Labor Standards Act makes all work presumptively compensable. And then only when you get to something that is arguably postliminary or preliminary do you have to ask a question that involves principal activities. Because if you have compensable work and it's not even arguably preliminary or postliminary, it's compensable without regard to the Portal-to-Portal Act.
>
> But when you get to the Portal-to-Portal Act, then you have to look, is this a preliminary and postliminary activity. And if it is, then it's presumptively noncompensable unless it's integral and indispensable to a principal activity.

Oral Argument, 9-10, available at 2014 WL 7661627. The United States agreed with Integrity Staffing's 2014 position.

> But the idea that this benefits the employer or is required by the employer isn't enough to make it compensable because, as Mr. Clement

> was just saying, that's the test for whether something is work. That's what was the test under Mt. Clemens, and Congress excepted from that a class of activities, preliminary and postliminary activities, that are noncompensable. Travel time and preliminary and postliminary activities like time clocks punching in and punching out, that's required by the employer. It benefits the employer. That's not enough to make it compensable.

Id. at 20-21.

Petitioners' insistence that the Sixth Circuit palpably misconstrued the Portal-to-Portal Act, and in doing so threatened the very foundation of federal wage and hour law, is undermined, at least to some degree, by the fact that the aspect of the Sixth Circuit decision to which petitioners now vehemently object is essentially the same position that Integrity Staffing itself advanced in this Court in 2014.

STATEMENT

Legal Background

This case concerns the interpretation of four provisions of Nevada law, each of which differs in some respect from the Fair Labor Standards Act.

Nev. Rev. Stat. § 608.016 requires an employer to pay an employee "for each hour the employee works." The minimum wage provision of the Fair Labor Standards Act has no comparable requirement; it requires

only that the total wages paid in a week, divided by the hours worked (if 40 or less), exceed $7.25. If an employer paid a worker $30 an hour on Monday, Wednesday and Friday, but nothing on Tuesday and Thursday, that would violate § 608.016, but not the federal minimum wage law.

Nev. Rev. Stat. § 608.019 provides that any employee who works for a continuous period of 8 hours or more must given a meal period of at least one-half hour. "No period of less than 30 minutes interrupts a continuous period of work for the purposes of this subsection." *Id.* If an employer provides an employee a meal period shorter than 30 minutes, that does not interrupt the work day. This provision is enforced under Nev. Rev. Stat. § 608.016. The Fair Labor Standards Act has no comparable provision; if an employer provides a worker with a 25 minute meal period, those 25 minutes would be deducted from the hours worked in the minimum wage calculation, and in determining whether the employee had worked more than 40 hours in a week and was thus entitled to overtime compensation.

Nev. Rev. Stat. § 608.018 requires that certain employees be paid overtime at one and one-half times the employee's regular rate. The overtime requirement of the Fair Labor Standards Act normally applies only if an employee works more than 40 hours a week. Under Nev. Rev. Stat. § 608.018, overtime can also be required when an employee works more than 8 hours in a single workday.

Section 15 of article 16 of the Nevada constitution establishes a minimum wage, calculated in a manner somewhat different than the federal minimum wage. As relevant here, for at least the last several years, the state minimum wage for workers who do not receive certain qualifying health care benefits has been $8.25 per hour, higher than the $7.25 federal minimum wage.

The Portal-to-Portal Act provides that an employer (except in circumstances not relevant here) need not compensate a worker for preliminary and postliminary activities, unless those activities are integral and indispensable to the worker's primary activity. Although most state wage-and-hour laws copy, or expressly incorporate by reference, some provisions of federal wage-and-hour laws, in the 72 years since the enactment of the Portal-to-Portal Act, only two states have adopted into their own statutes language similar to the Portal-to-Portal Act.[3]

Factual Background

Amazon.com is the largest on-line retailer in the United States. It operates a number of warehouses, where workers retrieve and package for shipment items that have been ordered by Amazon customers. Integrity Staffing hires, and then leases to Amazon, many of the employees who do this work. Plaintiffs are a group of such employees, who seek to sue on behalf

[3] W. Va. Code § 21-5C-1 (2018); Mo. Rev. Stat. § 290.505(4) (2018).

of themselves and (as relevant here) a class of similarly situated employees in Nevada.

The claims concern security screenings that occur when workers leave the part of the warehouses where the goods are stored and retrieved. At the end of the day, before departing, employees are required to submit to a TSA-like security screening, during which they remove all items from their person, including wallets, keys and belts, and pass through metal detectors. Because the defendants have chosen to purchase relatively few metal detectors, and to hire too few screeners, employees allege that they are required to wait approximately 25 minutes each day at the end of their shifts before being screened and permitted to leave.

In addition, employees must submit to the same screening if, during their lunch break, they want to leave the work area to eat.

The defendants do not compensate workers for the time they must spend being screened, or for time spent waiting in line to be screened.

Procedural History

Plaintiffs commenced this action in 2010 in the United States District Court in Nevada. Their complaint alleged claims under both the Fair Labor Standards Act and Nevada law. That action was initially brought only against Integrity Staffing. The district court granted the defendant's motion to

dismiss all the claims. 2011 WL 2971265 (D.Nev. 2011). The district court held that the end-of-shift screening was a postliminary activity under the Portal-to-Portal Act, and that the federal claims were thus barred. The court dismissed the state law claims on the assumption that the Portal-to-Portal Act limitations would be applied to Nevada wage-and-hour laws.

On appeal, the Ninth Circuit held that the plaintiffs' federal claims regarding the end-of-shift screenings were not barred by the Portal-to-Portal Act. It reversed the dismissal of the federal claims regarding those screenings, as well as the dismissal of the parallel state law claims. The court of appeals also reversed the dismissal of the employee's claims regarding the lunch-time screenings, noting that the standards under Nevada law might in that regard be different from the standards under the FLSA. *Busk v. Integrity Staffing Solutions, Inc*., 713 F.3d 525 (9th Cir. 2013).

Integrity Staffing successfully petitioned for review of the Ninth Circuit's decision regarding the federal claims. This Court held that the post-shift screenings were noncompensable under the Portal-to-Portal Act because they were postliminary activities that were not integral and indispensable to the workers' primary activity of filling orders. 574 U.S. at 518-19.

On remand, the plaintiffs amended their complaint to add Amazon.com as a defendant, and to set out four distinct state law claims: (1) that the

defendants' failure to compensate them for the time spent waiting for and in the post-shift screening and pre-lunch screening violated the requirement in § 608.016 that they be paid for every hour worked, (2) that the effect of the pre-lunch screening was to deny them the 30 minute meal period required by § 608.019, so that the shorter resulting meal period remained part of the workday for which compensation was required by § 608.016, (3) that the effect of the post-shift screening was to extend their workday beyond (or further beyond) 8 hours, and or their workweek beyond (or further beyond) 40 hours, entitling them to overtime pay under § 608.018, and (4) that the effect of these uncompensated periods was in some instances to reduce a worker's effective per-hour wage below the minimum wage required by § 15 of article 16 of the Nevada constitution. *See* Pet. 11. The case was subsequently transferred to the District Court for the Western District of Kentucky, where pre-trial proceedings in a number of related cases had been consolidated. App. 7.

The district court granted the defendants' motion to dismiss all the state claims. It held that Nevada did not provide a private cause of action to enforce the provisions at issue. App. 50-51. The district court also concluded that Nevada courts would incorporate the limitations of the Portal-to-Portal Act into state law, and that this Court's interpretation of that Act in *Busk I* thus barred all of plaintiffs' state law claims. While the case was pending on appeal, the Nevada Supreme

Court held that state law did provide a private cause of action to enforce that state's wage-and-hour provisions. *Neville v. Eighth Jud. Dist. Ct.*, 406 P.3d 499 (Nev. 2017); *see* App. 10-12 and n.1.

With regard to the merits, the Sixth Circuit recognized that, because of the Portal-to-Portal Act and this Court's decision in *Busk I*, "[p]laintiffs' claims for compensation would fail and have failed under federal law." App. 17. In assessing whether the Nevada courts would treat that state's wage-and-hour laws as incorporating the limitations in the Portal-to-Portal Act, the court of appeals concluded that under the Nevada Supreme Court decision in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 130 Nev. 879 (2014), federal law would not be incorporated into or used to construe Nevada law if the federal provision at issue was "materially different" from the state law. App. 18.

Recognizing that under the Portal-to-Portal Act the post-shift screening was "noncompensable postliminary activity" under federal law (App. 13), the Sixth Circuit assessed as a threshold matter whether the Act had limited employer liability by defining "work" to exclude preliminary and postliminary activities, or by establishing a more restrictive standard of compensability than had existed prior to the Act. The court of appeals concluded that the limitation was not on the definition of work, but in the standard of compensability. App. 21-25.

The Sixth Circuit then considered whether the Portal-to-Portal Act limitation on compensability should be imported into Nevada law. The court of appeals concluded on several grounds that Nevada law did not incorporate that limitation.

The court of appeals pointed out that "the Nevada legislature expressly included references to federal regulations in multiple parts of NRS Chapter 608." App. 31. The opinion noted that three provisions in Chapter 608 (Nev. Rev. Stat. §§ 608.060(3), 608.018(3)(f), 608.0116) and one regulation (Nev. Admin. Code § 608.100(3)(c)) expressly incorporated by reference six federal regulations and two federal statutes. "That the Nevada legislature expressly adopted some federal regulations indicates that its failure to adopt others was intentional." App. 31. In addition, the Sixth Circuit pointed out that one state statute (Nev. Rev. Stat. § 608.200), and a state regulation (Nev. Admin. Code § 608.130(2)(b)), would have been superfluous "if [the Nevada legislature] had adopted the [Portal-to-Portal] Act...." App. 32. Finally, the court reasoned that although there were Nevada decisions (relied on by the defendants) holding that "Nevada courts will interpret a provision of Nevada law the same as its parallel provision in the FLSA" (App. 32), those precedents were irrelevant because "Nevada law has no provision parallel" to the Portal-to-Portal Act.

The defendants argued that the security screenings and the time waiting for them were not "work" because they did not involve exertion. App. 25. The Sixth Circuit rejected that argument on two distinct

grounds. First, it held "that undergoing security screening clearly does involve exertion." App. 25. Second, the court of appeals concluded that under the Fair Labor Standards Act exertion is not a necessary element of work. App. 25-26.

The court of appeals upheld the plaintiffs' meal-period claim on two distinct grounds. First, the court reasoned that because participation in the pre-lunch screenings was work, that time would have to be deducted in determining whether a worker was accorded the required 30 minute lunch period. App. 26-27 n.3. Second, it held that "even if the Portal-to-Portal Act does apply to Nevada wage claims generally," that still would not bar the meal-period claim, because the Act only limits liability for preliminary activities (before the start of the workday) and postliminary activities (after the end of the workday), but not liability for activities in between. *Id.*

One judge dissented. She, like the majority, applied the *Terry* "materially different" standard. App. 43. The dissenting judge believed that the Nevada Supreme Court would find that federal law does not differ materially from the Nevada wage-and-hours laws. *Id*. The dissent relied in part on two unreported state court decision, although acknowledging that under Nevada's Rules a party could not cite those decisions, even for their persuasive value. App. 45, citing Nev. R. App. P. 36(2).

REASONS FOR DENYING CERTIORARI

I. The Petition Repeatedly Ignores Important Portions of The Sixth Circuit Opinion

The most fundamental problem with the petition is that it repeatedly ignores key portions of the court of appeals opinion.

The petition leads the reader to believe the court of appeals held that, solely because the activities in question were "work," it necessarily followed that those activities were compensable. "The Sixth Circuit's *whole* justification for departing from *Busk I* was its holding that the Portal-to-Portal Act left the federal definition of 'work' unchanged." Pet. 25 (emphasis added). Referring to the Fair Labor Standards Act, petitioners assert that "[t]he Sixth Circuit ... held that the ... federal law, as incorporated into state law, requires compensation for screenings." Pet. i. Quoting from the Sixth Circuit's definition of work, the petition repeatedly states that "the Sixth Circuit ... require[d] compensation for petitioners' security screenings *because* they were (1) 'required by the employer' and (2) 'for the benefit of the employer[ ].'" Pet. 15 (quoting App. 21) (citation omitted) (emphasis added); *see* Pet. 11-12 (same). The petition opens with the assertion that "[the] panel ... held that the ... security screenings are compensable under the FLSA's current definition of 'work'." Pet. i. The petition's description of the opinion below sets out a detailed summary of the Sixth Circuit's discussion of what constitutes work (Pet. 11-12, citing App. 21-26), and then skips to a discussion of the

dissent. Pet. 12, citing App. 43-45. The petition simply ignores the key additional six-page section in between, which discusses whether Nevada law incorporates the Portal-to-Portal Act. App. 28-33.

Petitioners assert that "[t]he only possible dispute is whether Section 254(a)'s categories of preliminary and postliminary activities supplant this Court's pre-1947 definition of 'work.'" Pet. 15. But the court of appeals, in an analysis the petition never mentions, discusses a second dispute. "Upon concluding that the time spent undergoing mandatory security screenings is 'work' under Nevada law, *the next question* is whether ... this 'work' [is compensable]." App. 28 (emphasis added). The Sixth Circuit's holding that the activities constituted work did not end its analysis; rather, that holding particularized the overall issue (whether the Portal-to-Portal Act is incorporated into Nevada wage-and-hour law) into a more specific question (whether the Portal-to-Portal Act limitation is incorporated into the Nevada standard regarding compensability).

The petition characterizes the Sixth Circuit as attaching conclusive significance to whether the activities in question were work, "so [that once work was defined] ... the application of the Portal-to-Portal Act could be dismissed out of hand. [App.] 25." Pet. 2. But the court of appeals' discussion of the applicability of the Portal-to-Portal Act to Nevada law does not end at page 25 of the Appendix; it continues at pages 28-33, which the petition does not discuss.

The petition repeatedly asserts that Nevada wage-and-hour laws automatically incorporate federal law. Nevada, it asserts, "chooses to follow federal law." Pet. 34; *see* Pet. 1-2 ("the court below ... concluded that respondents' state-law claim depends on federal law"), 4 ("here ... state law[] ... aim[s] to parallel federal law."), 11 ("[the majority] agreed that Nevada labor law generally tracks federal law"). The petition never refers to the Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d at 955-56, or to the *Terry* standard cited by the majority opinion (App. 18), the dissenting opinion (App. 43), and the district court (App. 54), under which Nevada courts will *not* use federal law in construing state law where the federal law is "materially different" from Nevada law.

The petition insists that "[t]he Sixth Circuit did not rest its decision on the specifics of Nevada law." Pet. 13 (footnote omitted).[4] But that is precisely what the court of appeals did, in an analysis not described in the petition. In concluding that Nevada's standard of compensability does not incorporate the Portal-to-Portal Act limitations, the court of appeals relied on and discussed five Nevada statutes (Nev. Rev. Stat. §§ 608.060(3), 608.018(3)(f), 608.0116, 608.100(3)(c), and 608.200) and a state regulation. Nev. Admin. Code § 608.130(2)(b); *see* App. 31-32.

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[4] *See* Pet. 13 ("[Sixth Circuit analysis] rest[s] ... on the mere fact that the State had not adopted the Portal-to-Portal Act expressly.").

Petitioners urge the Court to grant review to decide whether the FLSA standard of "work" requires that there have been exertion on the part of the employee. Petitioners argue that the court of appeals erred when it held that *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), to the extent that it described work as involving exertion ("whether burdensome or not"), had been superseded by the decision in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). Pet. 28-30; *see* App. 28-30. But the court of appeals below held that the activity in question in this case "clearly does involve exertion." App. 25. The petition does not mention that finding. A case concerning activity that *does* involve exertion is not an appropriate vehicle for deciding whether the absence of exertion would, under federal or state law, preclude an activity from constituting work.

The petition asserts that the court of appeals decision upholding plaintiffs' meal period claim rested on the Sixth Circuit's reasoning regarding the definition of wage under the Nevada wage-and-hour laws. Pet. 12 n.2, citing App. 26-27 n.3. But the Sixth Circuit's decision regarding the meal period claim actually rested on two independent grounds. The court of appeals also held that the Portal-to-Portal Act simply does not apply to activity that occurs in the middle of the workday. App. 26-27 n.3. So even if, under Nevada law, work excludes preliminary activities (before the workday begins) and postliminary (after the workday ends) activities, that would not affect the plaintiffs' claims regarding activities in between. That holding, which

petitioners do not mention or challenge in this Court, provides an independent ground for the meal period claim, which would survive regardless of whether the Court holds, as petitioners urge, that preliminary and postliminary activity are not work under federal and Nevada law.

II. There Is No Appellate Conflict Regarding The Meaning of The Four Nevada Provisions At Issue Here

The decision below construes sections 608.016, 608.018, and 608.019 of the revised Nevada Revised Statutes, and § 15 of article 16 of the Nevada constitution. That construction does not conflict with the interpretation of any of those provisions by another United States Court of Appeals, or by any state court of last resort. Sup. Ct. Rule 10(a). Nor is there even a contrary trial court or intermediate state court decision. Ordinarily, that would be the end of the matter.

The Sixth Circuit reasoned that the Nevada courts, if asked to construe any of the provisions at issue, would apply the "materially different" standard in *Terry*. Neither another United States Court of Appeals, nor any state court of last resort, has adopted a different standard for determining whether to incorporate federal law into a Nevada statute or constitutional provision. Petitioners expressly disavow any intention to raise in this Court any state law issues. "[T]his petition does not ask the Court to revisit the Sixth Circuit's

interpretation of the Nevada case law, statutes, and regulations." Pet. 13 n.3.

Petitioners note that district courts in Pennsylvania and Kentucky have held that the wage-and-hour laws in those states do incorporate the limitations of the Portal-to-Portal Act. Pet. 31 n.8. But that provides no basis for reviewing the Sixth Circuit interpretation of Nevada law. Because the terms of state wage-and-hour statutes and regulations differ, and because state standards regarding incorporation of federal law vary, it is to be expected that some states will incorporate the limitations of the Portal-to-Portal Act, while others will not. State law on this issue diverged even before the decision below, as petitioners recognize. Pet. 31 nn.10 and 11.

Because this case was transferred to the District Court in Kentucky, and thus appealed to the Sixth Circuit, it is possible that at some point in the future a case might reach the Ninth Circuit regarding the interpretation of the Nevada provisions at issue, or about the "materially different" standard in *Terry*. But even if the Ninth Circuit in the years ahead were to disagree with the Sixth Circuit about any of those matters, that would not be important enough to warrant review by this Court.

Most significantly, the Nevada Supreme Court, not this Court, is the ultimate arbiter of the meaning of that state's statutes and constitution. If this Court were to grant review and hold that the Nevada statutes or constitution do incorporate the Portal-to-Portal

Act, the Nevada Supreme Court could the next day moot this Court's decision by construing those provisions otherwise. Even in the absence of a contrary decision by the state's highest court, the views of this Court as to the meaning of Nevada law would only be controlling in the lower federal courts. Except to the extent that a subsidiary issue of federal law is involved, a decision by this Court regarding Nevada law would not bind even a small claims court of that state.

III. This Court Should Not Grant Review Merely To Decide Whether The Portal-To-Portal Act Restricts Employer Liability by Defining "Work" Rather Than by Limiting Compensability

A. Everyone agrees that the Portal-to-Portal Act generally[5] bars employer liability under the Fair Labor Standards Act for activities that are preliminary or postliminary. As both courts below put it, in a phrase used by petitioners in the courts below, preliminary and postliminary activities are not usually "compensable work." App. 29, 49. The Sixth Circuit described the historical origins of that restriction in terms similar to those in the petition. App. 13-17. Much of the petition is devoted to a somewhat theoretical discussion of precisely how the Act brought about that agreed-upon result. The Sixth Circuit concluded that the Act imposes

[5] Activities that were otherwise preliminary or postliminary would be compensable if they were integral and indispensable to a worker's principal activity. *Busk I*, 574 U.S. at 517. That distinction is not relevant here.

that restriction by limiting what activities are compensable (App. 28-33), which was the position advanced by Integrity Staffing at the time of *Busk I*. *See* pp. 1-2, *supra*. Petitioners now contend instead that the Act imposes the restriction by redefining "work," and urges this Court to grant review to sort this all out. But because the existence of the restriction itself is not in dispute, the variation in the explanations of how the Act created that limitation is a distinction with little if any real practical difference.

Petitioners do not claim that in an action under the Fair Labor Standards Act itself it would matter *how* the Portal-to-Portal Act bars employer liability for preliminary or postliminary activities. The substantive limitation created by the Portal-to-Portal is the same, without regard to how that limitation is imposed. One could hypothesize a highly atypical Fair Labor Standards Act case in which this could matter, such as if an employer had stipulated that all work is compensable, and thus was forced to argue only that preliminary or postliminary activity is not work. But petitioners do not identify any action under the Fair Labor Standards Act in which an employer was foolish enough to do that.

Petitioners suggest that the difference between whether the Portal-to-Portal Act affected the standard of compensability rather than the definition of work could matter because "[m]any circuits have construed the wage-and-hour laws in various states to mirror the FLSA so that state-law claims stand or fall with FLSA claims." Pet. 30 (footnote omitted). But, if under state

law a state-law claim stood or fell with a Fair Labor Standards Act claim, then a state-law claim seeking wages for preliminary or postliminary activities would fall, precisely because such activities clearly are not compensable in a federal action. Petitioners' point seems to be that if a state court following federal law were to use the Sixth Circuit's (allegedly mistaken) definition of work, the court would then improperly permit an award of wages for preliminary or postliminary activities. But that suggestion simply ignores the fact that a state court, even if using that definition, would still have to decide whether work, so defined, was compensable. In this case, the Sixth Circuit, applying the *Terry* "materially different" standard, did not read the Portal-to-Portal Act into the Nevada standard of compensability. But a state which "mirror[ed]" its compensability standard on federal law would necessarily conclude that such activities were noncompensable, because that is what the Act provides.

Petitioner objects that the Sixth Circuit decision "binds its whole circuit to a mistaken view of federal law." Pet. 34. But all the decision below does is to bind courts in that circuit to focus on the issue of compensability in determining whether the Act is incorporated into state law. The Sixth Circuit's decision in *Vance v. Amazon.com, Inc.*, 852 F.3d 601 (6th Cir. 2017), demonstrates why the decision in the instant case regarding Nevada law does not mean that courts in that circuit must hold that the Portal-to-Portal Act is not incorporated into the laws in any other states. *Vance*,

like the decision below, held that the Portal-to-Portal Act "after all 'does not purport to change th[e] Court's earlier descriptions of the terms 'work' and 'workweek'." 852 F.3d at 614 (quoting *IBP v. Alvarez*, 546 U.S. 21, 28 (2005)). But the Sixth Circuit nonetheless held in *Vance* that the Portal-to-Portal Act *is* incorporated into the laws of Kentucky. 852 F.3d at 814. The Sixth Circuit reasoned that under Kentucky caselaw the burden is on the party objecting to application of federal standards to demonstrate why they should not be used in construing state law, 852 F.3d at 611. In addition, Kentucky regulations already incorporated the key Portal-to-Portal Act concept of "principal activity." 852 F.3d at 613. Thus, regardless of whether a court in the Sixth Circuit starts with the assumption that the Portal-to-Portal Act altered the compensability standard rather than the definition of "work," different circumstances can result in differing results in construing the law of states other than Nevada.

There is, moreover, no particular reason to assume that state courts, in determining whether the Portal-to-Portal Act is incorporated into state wage-and-hour laws, would bother to distinguish between limitations on compensability and narrowing of the definition of work. Until now, state court decisions rejecting incorporation have not touched on this distinction. California will not use a federal standard that "eliminates substantial protections to employees" unless there is "convincing evidence of [an] intent to adopt the federal standard" *Morillion v. Royal Packing Co.*, 995 P.2d 139, 150 (Cal. 2000). Washington courts hold that the

burden of persuasion is on the defendant to establish that the Legislature intended to impose on state wage-and-hour laws a limitation that appears only in the federal statute, which is the opposite of the Kentucky rule applied in *Vance*. *Anderson v. State Dep't of Soc & [Health] Servs.*, 63 P.2d 134, 136 (Wash. Ct. App. 2003) ("We are not persuaded that the Legislature intended to adopt the Portal to Portal Act...."). In New Mexico, "when the language of the [state wage-and-hour law] and the FLSA differ, [the courts] treat federal case law differently [and] decline[ ] to rely on cases interpreting the FLSA...." *Segura v. J.W. Drilling, Inc.*, 355 P.3d 845, 848 (N.M. 2015). Under Maryland law an activity is compensable even if it is only "'related' in some way" to the worker's principal activity. *Dept. of Public Safety and Correctional Servs. v. Palmer*, 389 Md. 443, 451 (Ct. App. 2005).

Petitioners assume that, if this Court were to grant review and hold that the Portal-to-Portal Act restrictions define "work," the Sixth Circuit would automatically import that more limited federal definition into Nevada law. "The court [of appeals] rightly concluded, as a threshold matter, that respondents' state-law claims depend on [the FLSA] definition [of work] because it is incorporated without alteration into state law." Pet. i. But under *Terry*, as the Sixth Circuit noted, whether a federal standard is incorporated into state law depends on whether that federal law is "materially different" from state law. *Terry* applies to all instances in which a party seeks to invoke a federal standard in construing Nevada law; there is no exception from the

"materially different" rule for cases in which the issue is the definition of work. So if this Court were to hold that the Portal-to-Portal Act indeed defines "work," the Sixth Circuit on remand would still have to apply the *Terry* standard. There is little doubt that the Sixth Circuit would hold that *Terry* bars importing such a restrictive federal definition into Nevada law. The Sixth Circuit's existing application of the "materially different" standard did not turn on the fact that compensability, rather than the definition of "work," was at issue. The court of appeals reasoned, for example, that references to numerous federal laws and regulations, but not to the Portal-to-Portal Act, were "included ... in multiple parts of NRS Chapter 608." App. 31. And the court noted that "the Nevada legislature has chosen not to affirmatively adopt the [Portal-to-Portal Act] in the Nevada state code." App. 32. That reasoning would be equally applicable to a dispute about whether a restrictive federal definition of work was materially different from state law.

Petitioners warn, darkly, that "[u]nder the ruling below, courts across the country have a new roadmap for minimizing the importance of the Portal-to-Portal Act." Pet. 30; *see id*. 1 ("Certiorari is warranted to prevent widespread evasion of *Busk I*...."). But there is no reason to assume that the decision of the Sixth Circuit will cause federal or state judges to be any less diligent in their efforts to accurately construe state wage-and-hour laws. Petitioners insist that the Sixth Circuit decision "threatens to make *Busk I* and Congress's amending legislation irrelevant to state wage-and-hour class actions from coast to coast." Pet. 14. No, it

does not. The decision below, insofar as it holds that the Portal-to-Portal Act modified the standard of compensability rather than the definition of work, merely reframes (but does not answer) the question to focus on whether state law incorporates that federal compensability standard. Insofar as the decision below holds that federal law is materially different than Nevada law, it applies only to the state of Nevada, from the Utah border to the California border.

Petitioners object that "[i]t would be a bitter irony if corrective legislation like the Portal-to-Portal Act merely led to a return to 1946 but in the form of state-by-state class actions." Pet. 34. Bitter to employers, perhaps, but not a result Congress intended to preclude. As petitioners themselves correctly note, "States are free to create wage-and-hour laws that are more favorable to employees than the FLSA." Pet. 33. Section 218 of the Fair Labor Standards Act expressly provides that federal law does not preclude states and cities from creating labor standards more generous than that Act or the Portal-to-Portal Act. 29 U.S.C. § 218(a). States may require employers to compensate workers for preliminary or postliminary activities, and may enforce that right through such means as they deem appropriate, including class actions. As the Sixth Circuit correctly observed, despite "the apocalyptic implications that Defendants seem to believe the rejection 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 do doing fine." App. 33.

Although Congress has decided to establish a national minimum wage of only $7.25 per hour, states and localities are permitted to adopt a higher minimum wage, as many have. *See* Pet. 33 ("States often impose minimum wages that are higher than under federal law."). It would not be a "bitter irony" if, despite the lower federal minimum wage, higher state and local minimum wages became commonplace, or if, in response to violations of such, those higher minimum wage standards were enforced in state-by-state class actions.

B. Precisely because the limitation imposed by the Portal-to-Portal Act is the same, regardless of whether the limitation is a restriction on compensability or a definition of work, the federal courts have not paid particular attention to the manner in which they described how the Act creates that limitation. This Court is no exception. Petitioners rely on a passage in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), which they argue implies that the Portal-to-Portal Act defined "work." Pet. 23-24 (quoting *IBP*, 546 U.S. at 28). But two pages earlier in *IBP* the Court commented that "[l]ike the original FLSA, ... the Portal-to-Portal Act omits any definition of the term 'work.' " 546 U.S. at 26. On the same page, the opinion describes the Portal-to-Portal Act as delineating "the working time that *is* compensable" (*id.*) (emphasis added), which clearly indicates that there is some time that is "working time" and yet not compensable under the Act.

A similar inconsistency can be found in decisions in the courts of appeals. Petitioners cite a Ninth Circuit

decision which they contend describes the Portal-to-Portal Act as altering the definition of workweek. Pet. 19 (quoting *Dep't of Treasury v. Fed. Labor Relations Auth.*, 521 F.3d 1148, 1153 (9th Cir. 2008)). But both before and after that decision, the Ninth Circuit described the Portal-to-Portal Act as limiting compensability, not as (re)defining "work." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (quoting *Tennessee Coal* definition of "work" and then commenting "[t]hat ... activity is 'work' as a threshold matter does not mean without more that the activity is necessarily compensable. The Portal-to-Portal Act ... relieves an employer of responsibility for compensating employees for [certain preliminary and postliminary activities]"); *Bamonte v. City of Mesa*, 698 F.3d 1217, 1220-21 (9th Cir. 2010) (quoting *Alvarez*). Petitioners point to decisions in two other circuits that characterized the Act as defining work. Pet. 18-19.[6] But another group of appellate decisions describes the Portal-to-Portal Act as instead modifying the standard of compensability.[7]

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[6] Petitioners also quote *Adams v. United States*, 471 F.3d 1321, 1325 (Fed. Cir. 2006), which describes the Act as having "pared back the broad definition of *compensable* work initially promulgated by the Supreme Court in *Anderson*." Pet. 19 (emphasis added). The use of the term "compensable" leaves unclear whether what was pared back was the definition of work or the standard of compensability.

[7] *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 279 (1st Cir. 2004) (quoting the *Tennessee Coal* definition of work and commenting that "even when an activity is properly classified as 'work,' the Portal-to-Portal Act ... exempts from compensation activities which are preliminary or postliminary"); *De Ascencio v. Tyson Foods, Inc.*, 500 F.3d 361, 368 (3d Cir. 2007) (quoting *Alvarez*);

This is not a circuit split that warrants action by this Court, because the Portal-to-Portal Act has precisely the same impact in Fair Labor Standards Act claims regardless of which characterization is used.

C. If it mattered whether the restriction on liability in the Portal-to-Portal Act is a limitation on compensability rather than a redefinition of work, the Sixth Circuit (and Integrity Staffing in 2014) correctly concluded the restriction concerns compensability.

The text of section 254(a) lacks the traditional terminology of a definition, such as the noun "definition" or the verb "means." The term "work" is never used in the statute. The words "compensable" and "compensability" appear seven times. 29 U.S.C. §§ 254(a) ("Activities not compensable"), 254(b) ("Compensability by contract or custom"; "[employer liable if] activity is compensable [by custom or practice]), 254(c)

Perez v. Mountaire Farms, Inc., 650 F.3d 350, 363 (4th Cir. 2011) (quoting *Tennessee Coal* definition of work, then commenting that "[a]lthough the FLSA requires that an employer compensate an employee for 'work,' the Portal-to-Portal Act ... relieves employers of the obligation to compensate an employee for [certain preliminary and postliminary activities]"); *Chambers v. Sears Roebuck and Co.*, 428 Fed.Appx. 400, 409 (5th Cir. 2011) (quoting *Tennessee Coal* definition of work, then commenting that "[t]he Portal-to-Portal Act narrows the scope of compensable activities by excepting two categories of activities that had been compensable under prior Supreme Court precedent"); *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1286-87 (10th Cir. 2006) (quoting *Tennessee Coal* definition of work, and the holding in *IBP* that the "[Portal-to-Portal] Act does not change this Court's earlier descriptions of the term 'work,' " and then explaining that under the Act "[e]mployers are ... not required to compensate employees for [certain preliminary and postliminary activities]").

"Restriction on activities compensable under contract or custom"; "an activity shall be considered as compensable"; portion of the day with respect to which activity is "compensable" under contract or custom), 254(d) (referring to period of time during which employee engages in activity "compensable" under custom or contract).

Busk I cannot fairly be construed to have adopted any definition of "work"; the decision on its face is about compensability. "The question presented is whether the employees' time [at issue] ... is compensable under the Fair Labor Standards Act ... , as amended by the [Portal-to-Portal Act].... We hold that the time is not compensable." 574 U.S. at 515. The Court's opinion repeatedly refers to the standard regarding when an activity is "compensable" (a term used 14 times) or "noncompensable" (a term used 6 times). In determining whether the activities at issue were compensable, the Court analyzed the meaning of "principal activity," "preliminary" and "postliminary" in section 254(a), and of the phrase "integral and indispensable," from the Court's earlier decision in *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956). 574 U.S. at 517-19. The decision never refers to any issue about whether the activity in question should be labeled "work." The Court's analysis was consistent with the key thrust of the argument advanced by Integrity Staffing in *Busk I*, quoted above, that the standard of compensability under the PTPA is different from and narrower than the definition of "work" under the FLSA. *See* p. 3, *supra*.

Petitioners rely in part on the position of the Solicitor General in *Busk I*. Pet. 17 n.5. But the

government's brief in that case never described the question before the Court as concerning the definition of work. Rather, the Solicitor General consistently characterized the issue as whether the "activities" involved were "compensable." *E.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, i (describing the question presented as "[w]hether time that ... workers spent undergoing post-shift security screenings ... was ... noncompensable...."). Various permutations of the term "compensable"—including "noncompensable" and "compensability"—appear 48 times in the government's brief. At the oral argument in *Busk I*, the government correctly insisted that whether an activity is work is different than whether the activity is compensable under the Portal-to-Portal Act. *See* p. 3, *supra*.

IV. This Case Is Not An Appropriate Vehicle for Deciding Whether Work Under The Fair Labor Standards Act Requires Proof of Exertion

Petitioners urge the Court to grant review to decide whether the FLSA standard of work requires that there have been exertion on the part of the employee. This case is not an appropriate vehicle for resolving that issue.

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), described 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." The court of appeals held that

> [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."

App. 26 (quoting *Vance v. Amazon.com*, 852 F.3d 601, 608) (6th Cir. 2017) (quoting *IBP, Inc.*, 546 U.S. at 25)). The post-*Tennessee Coal* decision to which the court below referred was *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). Petitioners object that "it was inappropriate for the Sixth Circuit ... to conclude that *Armour* overruled a basic part of *Tennessee Coal sub silentio*. It is solely this Court's prerogative to overrule its past decisions...." Pet. 29.

Petitioners urge this Court to grant review to hold that exertion is indeed a necessary element of work under the Fair Labor Standards Act. "Federal law has long required physical or mental exertion before counting an employee's activity as work." Pet. 26. "[T]he court [of appeals] ... misinterpreted the FLSA's definition of 'work' ... [in holding] that 'work' does not require physical or mental exertion." Pet. i. Petitioners assert that there is "an entrenched circuit split over whether work generally requires exertion." Pet. 25 (capitalization and bold omitted). "The Sixth Circuit['s] ... view [that] 'the federal definition no longer requires

"exertion"' ... conflict[s] with the holdings of the Second and Tenth Circuits." Pet. 26. "Two other circuits have taken the Sixth Circuit's view that exertion is not part of the federal definition of 'work.'" Pet. 27. Subsequent to *Armour*, petitioners argue, "the Court repeatedly returned to *Tennessee Coal*'s general, exertion-requirement definition." Pet. 30.

This case is not an appropriate vehicle for deciding whether such a requirement exists. The Sixth Circuit held that taking part in the screenings "clearly does involve exertion." App. 25. Petitioners do not seek review of (or discuss) that determination. So the outcome in this case would be the same regardless of whether this Court were to grant review and impose an exertion requirement.

Scattered through the petition are a few references to a different issue. Despite the comment in *Tennessee Coal* that the exertion involved in work need not be "burdensome," the petition variously suggests that to constitute work the exertion must be "material" (Pet. 27), or "meaningful" (Pet. 13 n.3) or involve more than a "minimal effort." Pet. i, 4. What each of these possible standards might mean, and whether they are all the same, petitioners do not say. The most petitioners have to offer about this (or these) possible additional requirement(s) is that the exertion must be greater than the effort needed to don and doff a hard hat, glasses, ear-plugs and safety shoes. Pet. 27.

The decisions on which petitioners rely do not come close to establishing a conflict about the existence

vel non of such an exertion-plus rule. The Sixth Circuit did not announce any standard regarding the amount of exertion that would constitute exertion under *Tennessee Coal*. Petitioners do not claim in this regard that there is a conflict in the articulated legal standards set out in these cases, but assert only that the facts in this case (if one disregards the time spent waiting to be screened) involve less effort than the facts of the donning and doffing case, *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994). Such a fact-specific dispute is not the stuff of a circuit conflict warranting review by this Court.

The petition describes the holding in *Reich v. IBP, Inc.* in the following terms. "Since no material physical or mental exertion was involved, the donning and doffing was best viewed as 'not work at all.' [38 F.3d] at 1126 n.1." Pet. 27. But the term "material" does not appear anywhere in this decision. And what footnote 1 actually states is that the donning was not work because it was "purely preliminary in nature," a Portal-to-Portal Act issue, "like requiring a baseball player to show up in uniform." The Second Circuit decision in *Reich v. New York City Transit Authority*, 45 F.3d 646 (2d Cir. 1995), on which petitioners also rely, has been repeatedly described by decisions in that circuit as an application of the *de minimis* rule, a body of law distinct from the definition of work, and one which petitioners have not invoked. *See Reich*, 45 F.3d at 652-53 (describing *de minimis* standard); *Singh v. City of New York*, 524 F.3d 361, 367-69 and n.6 (2d Cir. 2008); *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594

(2d Cir. 2007); *Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 719 (2d Cir. 2001).

V. Respondents' Meal Period Claim Rests On An Independent Ground That Is Outside The Scope of The Questions Presented

Petitioners suggest that the Sixth Circuit reinstated respondents' meal period claim on only one ground. "In a footnote, the majority also revived respondents' meal-break claims, again on *the* premise that 'time spent undergoing the security screenings is "work."'" Pet. 12 n.2 (emphasis added). If the reinstatement of the meal period claim rested solely on that ground, that claim would turn on the resolution of the first question presented.

However, the Sixth Circuit actually set out two independent grounds for reviving this claim. Wholly apart from whether the Portal-to-Portal Act was incorporated into Nevada wage-and-hour claims, the court explained, the Act itself simply did not apply to the screening-shortened meal periods, because those periods occurred in the middle of the workday, not at the beginning or the end.

> [E]ven 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, 126 S.Ct. 514). On this reasoning, the Portal-to-Portal Act does not apply to claims that employees were uncompensated for time spent *during* the workday.

App. 27 n.3 (emphasis in original).

In *IBP*, this Court noted that "[a] regulation promulgated by the Secretary of Labor shortly after [the] enactment [of the Portal-to-Portal Act] concluded that the statute had no effect on the computation of hours that are worked 'within' the workday." 546 U.S. at 28. That regulation states:

> [s]ection 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 an employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities."

29 C.F.R. § 785.9(a).[8] Even if the end-of-shift screening were a postliminary activity, the pre-meal screening obviously is not a preliminary activity (because it occurs after the workday has begun), a postliminary

[8] *See* 29 C.F.R. § 790.6(a) ("to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of ... section [4 of the Portal-to-Portal Act] have no application").

activity (because it occurs before the workday ends), or a meal period (because the workers are not eating while being screened).

The quoted portion of the Sixth Circuit opinion provides an independent basis for upholding respondents' meal period claim. That ground is clearly outside the scope of the questions presented.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

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