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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Respondents acknowledge a "circuit split" on the first question presented—whether the Portal-to-Portal Act left the pre-1947 federal definition of "work" unchanged. Br. in Opp. 28. And the Sixth Circuit's holding on this question conflicts not just with other circuits' decisions but with this Court's precedents as well. *Busk I* made clear that Congress enacted the Portal-to-Portal Act for the very purpose of changing the federal definition of "work." Pet. 15-17; *Integrity Staffing Sols., Inc.* v. *Busk*, 135 S. Ct. 513, 516-517 (2014). And *IBP* is in accord. Pet. 23-24; *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 28 (2005). Instead of disproving these conflicts, respondents speculate that this Court and others "have not paid particular attention" in their descriptions of the Portal-to-Portal Act's purposes and effects. Br. in Opp. 26. Far from providing a reason to deny the petition, respondents' strained theory underscores the need for this Court to grant review and clarify the federal definition of "work."

Nor can respondents explain away the acknowledged circuit split on the second question: the Second and Tenth Circuits hold that exertion is necessary for activities to count as work under the FLSA (setting aside employees on call or on stand-by), while the Third and Ninth Circuits, and now also the Sixth, hold the opposite. Pet. 26-28. This clear split justifies certiorari on its own, and all the more so when the larger side of the split rests on the inappropriate premise that this Court silently overruled its own precedent just months after issuing it, even though the Court has

continued to rely on that precedent after the supposed overruling. *Id.* at 28-30. And beyond that, the Sixth and Tenth Circuits even disagree over what counts as exertion. *Id.* at 27.

These are cleanly presented and purely federal questions. In suggesting otherwise, respondents ignore the Sixth Circuit's unequivocal holding, at the outset of its analysis, that "Nevada law incorporates the federal definition of 'work,'" which it made clear means "the *current* definition of 'work.'" Pet. App. 25-26 (emphasis added); see also *id.* at 21. This Court can and should take as a given the Sixth Circuit's threshold determination that Nevada follows the current federal definition of "work." Had the Sixth Circuit not misinterpreted the current federal definition of "work" by disregarding the Portal-to-Portal Act's modifications and the exertion requirement, it would have ruled in petitioners' favor. Those clear errors of federal law conflict with this Court's holdings and those of other federal courts of appeals, and they warrant this Court's immediate review.

I. The First Question Warrants Review.

Respondents attempt in vain to downplay this Court's past characterizations of the Portal-to-Portal Act and petitioners' security screenings. *Busk I* details how Congress passed the Portal-to-Portal Act to overturn this Court's broad interpretation of the FLSA's concepts of "work" and "workweek." 135 S. Ct. at 516-517; see also 29 U.S.C. § 251. Then *Busk I* rejects the

very test that the Sixth Circuit adopted below, which focuses on whether the screenings are required by the employer and for the employer's benefit. 135 S. Ct. at 519. What matters instead is whether the screenings are activities that the employee is employed to perform or are instead "postliminary" to such activities. *Id.* at 518. These security screenings are not what the employees are employed to do and are not necessary to the employees' ability to complete their work. *Ibid.*

That conclusion cannot be reconciled with the Sixth Circuit's conclusion below, which purported to apply the FLSA's definition of "work." Regardless of whether this Court specifically "adopted a[] definition of 'work,'" Br. in Opp. 29, if activities are not necessary to employees' "ability to complete their work," *Busk I*, 135 S. Ct. at 518, those same activities cannot possibly be *part of* that work.

And respondents appear to agree that petitioners offer the best reading of this Court's characterization of the Portal-to-Portal Act in *IBP*. As petitioners explained, the passage in *IBP* confirms that the statute carved postliminary activities (like these security screenings) out of the federal definition of "work." Pet. 23-24 (citing *IBP*, 546 U.S. at 28). Respondents instead hope to convince this Court that it, and other courts, "have not paid particular attention to the manner in which they [have] described" the Portal-to-Portal Act. Br. in Opp. 26. But respondents ignore that the Sixth Circuit *relied on* this passage from *IBP*, Pet. App. 23,

and thus respondents implicitly admit that such reliance was error.[1]

Besides, this Court does not choose its words carelessly, and did not do so in *IBP*. Its characterization of the Portal-to-Portal Act's effect on the federal definition of "work" is fully consistent not just with *Busk I*, but also with 29 U.S.C. § 254(d) and its implementing regulation, 29 C.F.R. § 790.5, both of which respondents ignore. These provisions confirm that the Portal-to-Portal Act excludes postliminary (and preliminary) activities from the definition of "work" unless the activities are compensable by contract or custom. Pet. 20-23. In the words of the regulation, which has remained in force since the year of the Portal-to-Portal Act's enactment, preliminary and postliminary activities must be "excluded in computing hours worked under the law as changed by [the Portal-to-Portal Act]"—even if those activities would have qualified as "time worked within the meaning of the [FLSA] if the [Portal-to-Portal] Act had not been enacted" (unless the activities are compensable under relevant contract or custom). 29 C.F.R. § 790.5. *IBP* itself quotes another, contemporaneous regulation recognizing that "'preliminary' or 'postliminary' activities are excluded from hours worked." 546 U.S. at 28 n.3 (quoting 29 C.F.R.

[1] Respondents groundlessly claim (at 26) that *IBP* is self-contradictory. But there is no tension in *IBP*'s recognition that (a) the Portal-to-Portal Act modified the judicially created federal definition of "work," (b) neither the FLSA nor the Portal-to-Portal Act defines "work" expressly, and (c) employers need not provide compensation for non-working time unless contract or custom require otherwise. See *IBP*, 546 U.S. at 26-28.

§ 790.6(a)). For the Sixth Circuit to have been right below, these regulations must be wrong, and this Court's decisions must be wrong.

Other courts must be wrong, too. Respondents evidently concede that two circuits construe the Portal-to-Portal Act as changing the federal definition of "work." Br. in Opp. 27; see also Pet. 18-19 (citing *Reich* v. *N.Y.C. Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995), and *Adair* v. *ConAgra Foods, Inc.*, 728 F.3d 849, 851 (8th Cir. 2013)). At most, respondents deny that two other circuits are on the same side of this question, and contend that four other circuits align with the court below. Br. in Opp. 27 & n.7. Petitioners do not agree with respondents' reading of those cases, but that is beside the point. Whatever its exact size, this significant circuit conflict calls out for this Court's resolution, especially in light of the manifest errors in the decision below.

Respondents nonetheless insist that "[t]his is not a circuit split that warrants action by this Court," on the ground that it will not change the outcome of cases presenting FLSA claims only. *Id.* at 28.[2] But

[2] Given their attempt to minimize the first question presented for FLSA claims, it is curious that respondents devote greater attention to the language used by Integrity Staffing's counsel in *Busk I* than they devote to this Court's opinion in *Busk I*. Compare Br. in Opp. 2-4, 29-30, with *id.* at 29. (It is doubly curious because one petitioner, Amazon.com, Inc., was not a party in *Busk I*.)

In any event, respondents distort prior counsel's arguments. The *Busk I* reply brief's uncontroversial observation that the Portal-to-Portal Act (like the FLSA) does not expressly define

they cannot deny that the split is outcome-determinative in countless cases, like this one, involving FLSA and state-law claims concerning the federal definition of "work."

Here, the Sixth Circuit majority's view that the Portal-to-Portal Act left the federal definition of "work" unchanged was crucial to its ruling on respondents' claims. After describing the general principles for interpreting Nevada law, Pet. App. 17-19, the Sixth Circuit first concluded that "it is appropriate to look to the federal law for guidance" in defining "work" because "the Nevada legislature has not defined what constitutes 'work,'" *id.* at 21. In drawing that conclusion, the court relied on the very Nevada case that respondents spotlight. *Ibid.* (citing *Terry* v. *Sapphire Gentlemen's Club*, 336 P.3d 951, 955-956 (Nev. 2014)). Then, at the end of this discussion, the court reiterated: "Nevada law incorporates the federal definition of 'work.'" *Id.* at 26. Because of this conclusion about Nevada law, "whether the [Portal-to-Portal] Act * * * limited employer liability by defining 'work' to exclude preliminary and postliminary activities" was a "threshold"

"work" does not imply that the statute has no effect on the judicially created definition. Nor does the reply brief's observation that preliminary and postliminary activities are noncompensable. At oral argument, both attorneys were simply explaining that the test for a "principal activity" under the Portal-to-Portal Act is more demanding than the test for work under pre-1947 cases, like *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). But the Court can ignore these distractions because petitioners squarely presented their argument on this issue below, as the Sixth Circuit recognized. Pet. App. 20.

determination for the Sixth Circuit majority, as even respondents admit. Br. in Opp. 10. If the majority below had accepted petitioners' argument that the Portal-to-Portal Act modified the federal definition of "work," it would have ruled in petitioners' favor.

And there is every reason to believe that the proper federal definition of "work" will be dispositive in many cases. Petitioners and amici observed that hybrid actions presenting both FLSA and state-law claims are increasingly common, and many state laws mirror the FLSA without expressly adopting or rejecting the Portal-to-Portal Act. Pet. 30-32; Amici Br. 9-10. Respondents do not disagree. See Br. in Opp. 6. Nor do they deny that state-law class actions threaten much greater liability for the structural reasons (opt-out vs. opt-in procedures and higher minimum wages) that petitioners and amici identified. See Pet. 32-33; Amici Br. 12-13.

Respondents insist (at 25-26) that States are permitted to depart from federal law. But that is not the issue. Nevada, like many States, does *not* depart from federal law's definition of "work." It adopts that definition, which the court below misconstrued. Federalism cannot possibly justify foisting an erroneous federal definition onto a State that wishes to follow the actual federal definition. And federal definitions must remain uniform throughout the land, including when States adopt those definitions without change. Pet. 33-35.

II. The Second Question Warrants Review.

The Sixth Circuit's other misinterpretation of the federal definition of "work" presents another important question. The next threshold determination made by the majority below was that the federal definition of "work" does not include any exertion requirement. Pet. App. 25-26. The Second and Tenth Circuits hold otherwise. *N.Y.C. Transit Auth.*, 45 F.3d at 651 (holding that police-dog handlers were not working during their commute where the commute did not involve exertion); *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1125-1126 & n.1 (10th Cir. 1994) (holding that donning and doffing of standard safety equipment was not work because it did not involve exertion). As these cases show, the relationship between exertion and the federal definition of "work" can be dispositive whether the case arises under state law or the FLSA.

Respondents halfheartedly dispute (at 33) whether these cases establish a circuit split on the exertion requirement. But they never address the Third and Ninth Circuits' *express* rejection of the Tenth Circuit's exertion requirement in *Reich* v. *IBP*. *De Asencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 372 (3d Cir. 2007); *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901, 911 & n.13 (9th Cir. 2004). The circuit courts themselves recognize the split on this question.[3]

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[3] Respondents attempt to portray *Reich* v. *IBP* as a case about "preliminary" activities. Br. in Opp. 33. But the court made clear that the employer could not rely on the Portal-to-Portal Act because donning and doffing the safety equipment was "integral or indispensable" to the workers' primary activities. *Reich* v. *IBP*, 38 F.3d at 1125. Instead, "any time spent on [those] items [was]

Facing this acknowledged split, respondents resort to false accusation. They accuse petitioners of ignoring the majority's conclusion that passing through a security screening demands exertion. Br. in Opp. 16, 32. But petitioners explicitly acknowledged that ruling. See Pet. 26 (quoting Sixth Circuit's statement that "undergoing security screening clearly does involve exertion") (citation omitted).

What is more, petitioners explained why that ruling does not diminish the need for this Court's review: if putting on standard safety equipment while walking into the workplace does not count as exertion, as the Tenth Circuit held in *Reich* v. *IBP*, neither does removing one's keys or belt on the way out of the workplace. Pet. 27. Respondents quibble with the fact that the Tenth Circuit did not use the specific word "material." Br. in Opp. 33. But that is an accurate characterization of the Tenth Circuit's standard:

> The placement of a pair of safety glasses, a pair of earplugs and a hard hat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration. Such items can easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things. Similarly, safety shoes can be worn to and from work and require little or no

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not work" because donning and doffing those items involved no exertion: it took "all of a few seconds and require[d] little or no concentration" and "little or no additional effort." *Id.* at 1126.

> additional effort to put on as compared to most other shoes. Thus, although essential to the job, and required by the employer, any time spent on these items is not work.

Reich v. *IBP*, 38 F.3d at 1126. If that conduct is not exertion, neither is emptying one's pockets. Pet. 27.

Where, as here, a case's outcome will vary from one circuit to another—based solely on the circuits' diverging views about federal law—this Court's review is needed.

III. Issues That Are Not Before This Court Do Not Weigh Against Review.

Respondents prefer to focus on issues that are not before this Court. In particular, respondents devote many pages to discussing the Sixth Circuit's analysis of scattered Nevada statutory or regulatory provisions and the Sixth Circuit's footnote on respondents' meal-break claims. Br. in Opp. 13-19, 34-36. None of this discussion supplies reason to deny the petition.

First, as respondents are forced to admit (at 17-18), petitioners expressly disavowed any request that this Court wade into the details of Nevada wage-and-hour law. Pet. 13 n.3. But the reason why such review is unnecessary is that the Sixth Circuit majority determined, as a threshold matter, that "Nevada law incorporates the federal definition of 'work.'" Pet. App. 26; see also *id.* at 21. That was step one in a three-step analysis:

1. Nevada law incorporates the federal definition of "work." *Id.* at 21, 26.

2. Petitioners' two claims about the federal definition of "work" are mistaken. *Id.* at 21-26.

3. Nevada's statutes and regulations do not adopt the Portal-to-Portal Act separately from the definition of "work." *Id.* at 28-33.

Consistent with its usual practice, this Court can, and should, take the majority's threshold conclusion about state law (step one) as its point of departure. See, *e.g.*, *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1415 n.3 (2019) ("[T]his Court's ordinary approach * * * 'accord[s] great deference' to the courts of appeals in their interpretation of state law.") (citation omitted); *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1150 (2017) (adhering to Court's "customary practice" of following courts of appeals' interpretation of state law unless it is "clearly wrong") (citation omitted); *Cort* v. *Ash*, 422 U.S. 66, 72 n.6 (1975) ("[O]ur practice of deference to [state-law] determinations should generally render unnecessary review of their decisions in this respect."). Then this Court should correct the Sixth Circuit's mistaken resolution of the federal questions (step two), obviating any need to reach the final part of the Sixth Circuit's reasoning (step three).

And there is no reason to doubt the Sixth Circuit's threshold conclusion that Nevada adopts the federal definition of "work." Respondents do not ask the Court to revisit that determination, waiving any such argument in this Court. See Sup. Ct. R. 15.2. Besides, the

Sixth Circuit's determination rests on the very "*Terry* standard" that respondents repeatedly emphasize. Compare Br. in Opp. 15 (citing *Terry*, 336 P.3d at 955-956), with Pet. App. 21 (same).

Similarly misguided is respondents' preoccupation with the Sixth Circuit's footnote on the meal-break claims. Br. in Opp. 34-36. Respondents cannot deny that petitioners have not raised any question specific to those meal-break claims. See Pet. 12 n.2. At most, respondents dispute that the Sixth Circuit's analysis rested on its view of the federal definition of "work." Respondents are wrong about that. They block-quote a passage from the second paragraph of the Sixth Circuit's footnote but omit the final sentence, which confirms that the preceding statements hinge on the majority's definition of "work": "*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." Pet. App. 27 n.3 (emphasis added); cf. Br. in Opp. 34-35. Regardless, the parties' disagreement about what the exact implications would be—for one small part of the case—is no reason for this Court not to grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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