No. _____

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

PETITION FOR A WRIT OF CERTIORARI

RICK D. ROSKELLEY
LITTLER MENDELSON P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-7704

CORY G. WALKER
LITTLER MENDELSON P.C.
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
(602) 474-3616

Counsel for Petitioner Integrity Staffing Solutions, Inc.

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6600

Counsel for Petitioner Amazon.com, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The last time this case was here, the Court unanimously held that time spent by employees in post-shift security screenings is not compensable worktime under the Fair Labor Standards Act of 1938 ("FLSA"). That was because of the Portal-to-Portal Act of 1947, which amended the FLSA to overturn case law that interpreted the FLSA's definition of "work" too "broadly." *Integrity Staffing Sols., Inc.* v. *Busk*, 135 S. Ct. 513, 516-517 (2014) (*Busk I*).

After remand, a divided Sixth Circuit panel nonetheless held that the exact same security screenings are compensable under the FLSA's current definition of "work." The court rightly concluded, as a threshold matter, that respondents' state-law claims depend on that definition because it is incorporated without alteration into state law. But the court then misinterpreted the FLSA's definition of "work" in two ways. First, the court held—in conflict with *Busk I* and several circuit courts—that the Portal-to-Portal Act did not actually change the pre-1947 definition of "work." Second, it held—again in conflict with several circuit courts—that "work" does not require physical or mental exertion.

The questions presented are:

1. Whether the Portal-to-Portal Act modified the FLSA's broad, pre-1947 definition of "work."

2. Whether the FLSA's definition of "work" requires exertion beyond the minimal effort involved in passing through a security screening.

PARTIES TO THE PROCEEDING

Petitioners are Integrity Staffing Solutions, Inc., and Amazon.com, Inc., which were defendants-appellees below.

Respondents are Jesse Busk, Laurie Castro, Sierra Williams, Monica Williams, and Veronica Hernandez, who were plaintiffs-appellants below.

In addition, Brooke Bomboy, Scott D. Sampson, and Marissa Hodge were listed as plaintiffs on the Sixth Circuit's docket.

CORPORATE DISCLOSURE STATEMENT

Integrity Staffing Solutions, Inc., and Amazon.com, Inc., have no parent corporations, and no publicly held company owns 10% or more of either petitioner's stock.

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INTRODUCTION

In the decision below, a divided panel of the Sixth Circuit misconstrued this Court's precedents and clear statutory text to reach a result contrary to this Court's decision in *Busk I* and rulings in several other circuit courts. Certiorari is warranted to prevent widespread evasion of *Busk I* and to ensure uniformity over the critically important federal definition of "work."

Last time around, this Court held that respondents were not owed compensation for time spent passing through petitioners' post-shift security screenings because of the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq*. Congress passed the Portal-to-Portal Act to abrogate this Court's 1940s interpretations of the FLSA. *Busk I*, 135 S. Ct. at 516-517. Because Congress felt that the Court had defined "work" too "broadly," *ibid.*, it amended the FLSA to make clear that "preliminary" and "postliminary" activities were not work—and were never intended to be. 29 U.S.C. § 254(a); see also *id.* § 252(a) (applying Portal-to-Portal Act amendments retroactively to extinguish pending claims). *Busk I* determined that "[t]he security screenings at issue here are noncompensable postliminary activities." 135 S. Ct. at 518.

The Sixth Circuit nonetheless held that the same federal law, as incorporated into state law, requires compensation for the screenings. After *Busk I*, respondents were limited to asserting state-law claims. But the court below (like every court to consider the issue in this case) concluded that respondents' state-law

claims depend on federal law. That is because, in the Sixth Circuit majority's words, "Nevada law incorporates the federal definition of 'work.'" App. 26. Yet even while recognizing that Nevada law mirrors federal law in this respect, the majority found *Busk I* irrelevant. It did so on the theory that the "current" federal definition of "work" is found not in the Portal-to-Portal Act but in the very 1940s decisions that the Act abrogated. *Id.* at 21, 25 (citing *Tenn. Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944)). According to the Sixth Circuit, the Portal-to-Portal Act did not "redefine the Supreme Court's earlier definitions of 'work,'" *id.* at 23, and so *Busk I* and its application of the Portal-to-Portal Act could be dismissed out of hand, *id.* at 25.

This Court should grant certiorari to make clear what should have been obvious already. The operative federal definition of "work" today is *not* the fleeting, judicially created definition that Congress decisively rejected and superseded in 1947. And courts are not free to brush aside this Court's latest decisions when applying federal labor law. The Sixth Circuit's reasons for its counterintuitive conclusions to the contrary do not withstand scrutiny and only heighten the conflict with this Court's decisions.

First, the majority emphasized the lack of any textual indication in Section 254(a) that the statute was changing the definition of "work." But that is unremarkable because the pre-1947 statute did not define "work" to begin with. Besides, the majority could have found the textual indication it desired elsewhere in

that section. Section 254(d) expressly recognizes that "preliminary" and "postliminary activities" should not be counted when "determining the time for which an employer employs an employee." 29 U.S.C. § 254(d). And both this Court and the Department of Labor (in its first regulations implementing the Portal-to-Portal Act) have understood Section 254(d) that way. *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1042 (2016) ("[T]he Portal-to-Portal Act * * * *clarified* that compensable work does not include time spent walking to and from the employee's workstation or other 'preliminary or postliminary activities.'") (emphasis added; citation omitted); *General Statement as to the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 12 Fed. Reg. 7655, 7657 (Nov. 18, 1947) (codified as amended at 29 C.F.R. § 790.5(a)).

The majority's second reason exacerbates the conflict further. The majority sought to ground its conclusion in *IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005), and 29 C.F.R. § 785.7. App. 23-24. But far from providing support for the Sixth Circuit's ruling, *IBP* and this regulation refute it. Both observe that the Portal-to-Portal Act did not alter the pre-1947 definition of "work" *except by excluding preliminary and postliminary activities*. *IBP*, 546 U.S. at 28; 29 C.F.R. § 785.7. That means, of course, that the exclusion of preliminary and postliminary activities *does* change the definition of "work," just as other federal circuit courts have concluded.

And certiorari is also appropriate for a second reason. Below, petitioners argued that even without the Portal-to-Portal Act, the act of passing through

security screenings does not qualify as "work" because it does not involve exertion by the employee. This Court has long defined the core concept of 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." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-692 (1946) (quoting *Tenn. Coal*, 321 U.S. at 598). The one exception is that employees hired to be on call or standby are engaged in work even while they are not exerting themselves. See, *e.g.*, *Tenn. Coal*, 321 U.S. at 599; *Armour*, 323 U.S. at 133. The court below read this exception as swallowing the rule, and implausibly concluded that *Armour* implicitly overruled *Tennessee Coal*'s baseline exertion requirement. App. 26. The court so held even though *Armour* was decided just months after *Tennessee Coal* and did not remotely suggest that the Court intended to overrule *Tennessee Coal*. While the Sixth Circuit's conclusion comports with decisions from the Third and Ninth Circuits, it squarely conflicts with decisions from the Second and Tenth Circuits, which have held that activities involving minimal effort do not qualify as work because they involve no exertion.

On both questions, the Sixth Circuit's ruling conflicts with this Court's case law, and decisions from other circuits, on the federal meaning of "work." The issue of what qualifies as "work" under federal law has profound importance for wage-and-hour disputes nationwide—whether they arise under the FLSA or, as here, state laws that aim to parallel federal law.

Though almost all States incorporate aspects of the FLSA into their laws, almost none have expressly adopted (or rejected) the Portal-to-Portal Act. So in class actions in state and federal courts throughout the country, plaintiffs are sure to embrace and advance the Sixth Circuit's mistaken view of federal law as a path around *Busk I*. Once again, employers would be faced with the same unanticipated "flood of litigation" that the Portal-to-Portal Act was enacted to end. *Busk I*, 135 S. Ct. at 516.

Rather than let that happen, this Court should grant certiorari to vindicate its ruling in *Busk I* and resolve these fundamental disagreements between the circuits over the federal meaning of "work."

OPINIONS AND ORDERS BELOW

The opinion of the Sixth Circuit (App. 1-45) is reported at 905 F.3d 387. The opinion of the district court (App. 48-65) is reported at 261 F. Supp. 3d 789. This Court's previous opinion in this case (App. 68-82) is reported at 135 S. Ct. 513. The Ninth Circuit's opinion is reported at 713 F.3d 525. The original district court opinion is not published in the *Federal Supplement* but is available at 2011 WL 2971265.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its opinion and judgment on September 19, 2018 (App. 1-47) and denied rehearing on November 1, 2018 (App. 66-67). On January 28, 2019, Justice Sotomayor extended the time for filing this petition to March 1, 2019. See No. 18A766. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App. 83-94.

STATEMENT OF THE CASE

A. Statutory Background.

Enacted in 1938, the FLSA established federal minimum wage and overtime requirements. 29 U.S.C. §§ 206(a)(1), 207(a)(1). Both requirements turn on the number of hours the employee works. For each hour worked, an employer must pay the prescribed minimum wage, and for each hour worked beyond 40 during a workweek, an employer must pay a prescribed overtime premium. *Ibid.*

The concept of work is thus the building block of Congress's wage-and-hour regime. To apply the FLSA's minimum wage and overtime requirements,

"[i]t is vital * * * to determine first the extent of the actual workweek." *Tenn. Coal*, 321 U.S. at 598. Because "[n]either 'work' nor 'workweek' is defined in the statute," the Court developed its own definitions. *IBP*, 546 U.S. at 25.

The Court's "early cases defined those terms broadly." *Ibid.* In a 1944 decision, *Tennessee Coal*, the Court concluded that "work" carried its ordinary meaning in the FLSA, which the Court construed 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." 321 U.S. at 598. By 1946, the FLSA "workweek 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*, 328 U.S. at 690-691. That meant that employers, contrary to long-established industry customs, had to compensate employees for "time spent traveling between mine portals and underground work areas" and "time spent walking from timeclocks to work benches." *Busk I*, 135 S. Ct. at 516. A "flood of litigation" followed, with plaintiffs collectively seeking nearly $6 billion in unpaid wages and damages. *Ibid.*

Congress swiftly responded in 1947 by passing the Portal-to-Portal Act. In the statute's opening lines, Congress declared that the FLSA "ha[d] 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."

29 U.S.C. § 251(a). "[I]f [the] Act as so interpreted or claims arising under such interpretations were permitted to stand," Congress believed, the results would be ruinous for employers. *Ibid.* And Congress felt so strongly that these interpretations contravened the original intentions behind the FLSA that it expressly extinguished all pending claims premised on those interpretations. See *id.* § 252(a).

Going forward, the Portal-to-Portal Act ensured that employers would generally not be subject to FLSA claims for "two categories of work-related activities." *Busk I*, 135 S. Ct. at 517. Employers would not be required to pay minimum wages or overtime for time spent "(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" or in "(2) activities which are preliminary to or postliminary to said principal activity or activities" if such time falls outside the employee's workday. 29 U.S.C. § 254(a).

Section 254(d), titled "Determination of time employed with respect to activities," then clarified that the exclusion of the two categories identified in Section 254(a) changes how one calculates hours worked for purposes of the FLSA's minimum wage and overtime requirements:

> [I]n 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 254(a)], 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.

Id. § 254(d). Subsections (b) and (c) in turn require employers to provide compensation for activities otherwise falling within Section 254(a)'s excluded categories if those activities are compensable under contract or custom. *Id.* § 254(b)-(c). So, in short, preliminary and postliminary activities do not qualify as work unless contract or custom provides otherwise.

B. Procedural History.

1. The first chapter of this case centered on the proper application of Section 254(a) to petitioners' post-shift warehouse security screenings. "Integrity Staffing Solutions, Inc., provides warehouse staffing to Amazon.com throughout the United States." *Busk I*, 135 S. Ct. at 515. Employees working in these Amazon warehouses are required to pass through security screening at the end of each day. *Ibid.* Several such employees filed this lawsuit as a putative class action, arguing that time spent in these screenings is compensable worktime under the FLSA and parallel Nevada labor laws. *Ibid.*

The Nevada district court rejected the employees' arguments. It concluded that the security screenings were postliminary activities excluded by Section 254(a) and so were not compensable under either the FLSA or Nevada law. 2011 WL 2971265, at *4, *7.

The Ninth Circuit reversed, stressing that Section 254(a) does not exclude activities that are "integral and indispensable" to an employee's principal activities. 713 F.3d at 530. The court concluded that petitioners' security screenings qualify as "integral and indispensable" because they were required by Integrity and for Integrity's benefit. *Id.* at 530-531.

This Court granted certiorari and reversed. While agreeing that "integral and indispensable" activities qualify as work under the Court's precedents, it disagreed with the second step in the Ninth Circuit's analysis. Contrary to what the Ninth Circuit had concluded, "[t]he security screenings at issue here are noncompensable postliminary activities" and not "integral and indispensable" to the principal activities these employees were employed to perform. *Busk I*, 135 S. Ct. at 518. The Ninth Circuit had erred by focusing on whether the employer required the activity and whether the activity was for the employer's benefit. *Id.* at 519. Focusing on those considerations "would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address." *Ibid.*

2. The second chapter of this case begins after *Busk I*. On remand, the case made its way to multidistrict litigation proceedings in the Western District of Kentucky. C.A. App. 108-111. The complaint had been amended to add Amazon.com, Inc., as a co-defendant, to add new co-plaintiffs and claims, and to eliminate the FLSA claims. See Third Amended Complaint, *Busk* v. *Integrity Staffing Sols.*, No. 3:14-cv-139-DJH (W.D. Ky. July 21, 2015), ECF No. 91.

The district court dismissed respondents' Third Amended Complaint for several independent reasons.[1] App. 48-65. As relevant here, the district court concluded that Nevada wage-and-hour law generally tracks federal law unless statutory language requires otherwise, and that plaintiffs had not identified any Nevada law in conflict with the Portal-to-Portal Act. *Id.* at 53-55. Hence there was "no indication that Nevada courts would reject the Supreme Court's reasoning as to whether time spent on security screenings is compensable." *Id.* at 56.

A divided Sixth Circuit panel reversed in relevant part. App. 1-42. After noting that respondents' Nevada-law claims "turn[] on whether Plaintiffs were uncompensated for some 'work' they performed," *id.* at 20, the majority (Clay, J., joined by Sargus, D.J., sitting by designation) agreed that Nevada labor law generally tracks federal law and in particular relies on the federal definition of "work," *id.* at 21, 26. Then, resurrecting that portion of *Tennessee Coal* that the Portal-to-Portal Act long ago abrogated, the majority determined that "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.'" *Id.* at 21 (citation omitted). Much like the Ninth Circuit before *Busk I*, the majority found petitioners' security screenings compensable because they were "required by the employer" and "for

[1] Respondents' Third Amended Complaint invoked the court's jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). See Third Amended Complaint, ¶¶ 1-2.

[their] benefit." *Ibid.* (citation omitted). It then rejected petitioners' arguments that those features were insufficient. It disagreed with petitioners' contention that "the Portal-to-Portal Act amended the FLSA to exclude postliminary activities from the federal definition of work." *Ibid.*; see also *id.* at 22-25. And it disagreed with petitioners' alternative contention that the security screenings would not even satisfy the pre-Portal-to-Portal definition of "work" because they involved no meaningful degree of exertion by the employees. *Id.* at 25-26.[2]

Judge Batchelder dissented. In her view, the security screenings were noncompensable because Nevada's statutes and state supreme court decisions support defining "work" in harmony with federal law. App. 43-45. That means federal law as it exists now, not as it existed for a few fleeting years in the mid-1940s before the congressional clarification in the Portal-to-Portal Act. *See id.* at 45.

Petitioners sought en banc rehearing before the full Sixth Circuit. The court, noting the recusal of three judges, denied that petition on November 1, 2018. App. 66-67.

[2] In a footnote, the majority also revived respondents' meal-break claims, again on the premise that "time spent undergoing the security screenings is 'work.'" App. 26 n.3. Separately, it affirmed the dismissal of respondents' Arizona-law claims for reasons not relevant here, but not before concluding that Arizona law uses the same definition of "work" as Nevada. *Id.* at 40-42.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for two separate reasons. First, the Sixth Circuit's conclusion that the broad, pre-1947 definition of "work" remains in force today conflicts with this Court's decision in *Busk I* and other federal circuit court decisions, all of which make clear that the Portal-to-Portal Act changed the federal definition of "work." Second, the Sixth Circuit's rejection of a meaningful exertion requirement deepens a split among the circuits and likewise misconstrues this Court's case law.

Unless this Court grants review and reverses, the decision below offers a clear path around this Court's unanimous holding in *Busk I*. By foisting an anachronistic federal definition of "work" onto the many States that design their wage-and-hour regimes to parallel the FLSA, the decision below revives the judicial interpretations that spurred Congress to action. And nothing about the decision is confined to Nevada. The Sixth Circuit did not rest its decision on the specifics of Nevada law,[3] but on its mistaken understanding of federal law and the mere fact that the State had not adopted the Portal-to-Portal Act expressly. The same is true of almost every State in the country, which is

[3] Because the Sixth Circuit determined that Nevada's Supreme Court would adopt "the current definition of 'work' " under federal law, App. 21, 25-26, this petition does not ask the Court to revisit the Sixth Circuit's interpretation of the Nevada case law, statutes, and regulations. Instead, it presents the purely federal questions—which divide the circuits—of whether the Portal-to-Portal Act changed the federal definition of "work" and whether that definition includes a meaningful exertion requirement.

unsurprising because few States would see any reason to enact legislation affirmatively abrogating pre-1947 decisions that Congress itself abrogated long ago. If the Sixth Circuit's erroneous federal definition of "work" stands, it threatens to make *Busk I* and Congress's amending legislation irrelevant in state wage-and-hour class actions from coast to coast—all in the name of (incorrectly construed) federal law. And the entrenched circuit split over exertion will persist, creating disparate outcomes for state-law and FLSA claims alike, based solely on where the case is litigated.

To vindicate *Busk I* and restore uniformity among the circuits on these foundational questions of federal labor law, the Court should grant the petition for certiorari.

I. The Sixth Circuit's Decision Conflicts With *Busk I* And This Court's Earlier Portal-To-Portal Act Precedents.

The principles enunciated in *Busk I* and previous decisions leave no room for the Sixth Circuit's view that the Portal-to-Portal Act left the federal definition of "work" unchanged. On the contrary, narrowing the Court's pre-1947 definition of "work" was the whole point of the Portal-to-Portal Act. The statutory text and regulations of the U.S. Department of Labor prove the same.

A. The Sixth Circuit's Construction Of The Portal-To-Portal Act Conflicts With This Court's Holding In *Busk I*.

The Sixth Circuit majority's decision cannot be squared with *Busk I*. There, the Ninth Circuit had required compensation for petitioners' security screenings because they were (1) required by the employer and (2) for the benefit of the employer. *Busk I*, 135 S. Ct. at 519. Below, the Sixth Circuit repeated the same, since-rejected analysis, again requiring compensation for petitioners' security screenings because they were (1) "required by the employer" and (2) "for the benefit of the employer[]." App. 21 (citation omitted). The Sixth Circuit reached that result by applying what it mistakenly characterized as "the current definition of 'work'" under federal law. *Id.* at 25 (citing *Tenn. Coal*, 321 U.S. at 598). Having determined that current federal law governs, the court had no basis for adopting the exact test that *Busk I* rejected.

After *Busk I*, there is no disputing that petitioners' security screenings qualify as postliminary activities under Section 254(a) of the Portal-to-Portal Act. *Busk I*, 135 S. Ct. at 518. The only possible dispute is whether Section 254(a)'s categories of preliminary and postliminary activities supplant this Court's pre-1947 definition of "work." The Sixth Circuit thought the answer to that question is no, see App. 23, but *Busk I* shows otherwise.

Busk I recounts that Congress expressly enacted the Portal-to-Portal Act because it disagreed with the way that the Court had interpreted the FLSA. 135

S. Ct. at 516-517. The statute says that Congress disapproved of the way that the FLSA "ha[d] been interpreted judicially." 29 U.S.C. § 251(a). And *Busk I* also explains that the unsatisfactory judicial interpretations were interpretations of the statutorily undefined terms "work" and "workweek." In the Court's words, "the FLSA did not define 'work' or 'workweek,' and this Court interpreted those terms broadly." *Busk I*, 135 S. Ct. at 516.

Of particular note is the Court's final decision before the Portal-to-Portal Act, *Anderson* v. *Mt. Clemens*, 328 U.S. 680, which "may well have been the proximate cause of the enactment of the Portal-to-Portal Act." *IBP*, 546 U.S. at 34. In *Anderson*, the Court concluded that "preliminary activities" such as changing clothes and preparing equipment and the work area "are clearly work." 328 U.S. at 690-691, 692-693. This classification of "preliminary activities" as "work" was a departure from how the Fifth and Sixth Circuits had previously understood the concept of work.[4]

Congress acted "swiftly" to correct this Court's broad interpretation of the FLSA's concept of work, including *Anderson*'s view that preliminary activities count as "work." *Busk I*, 135 S. Ct. at 516. In the statute's opening lines, Congress explained that, "if such interpretations 'were permitted to stand,'" the results

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[4] See *Tenn. Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 135 F.2d 320, 323 (5th Cir. 1943) (concluding that time spent "checking in and out and procuring and returning tools * * * should not be computed as work-time"), aff'd on other grounds, 321 U.S. 590; *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 465 (6th Cir. 1945) (endorsing Fifth Circuit's reasoning), rev'd, 328 U.S. 680.

for the national economy would be disastrous. *Id.* at 516-517 (quoting 29 U.S.C. § 251(a)). Congress rejected those interpretations, and it even did so retroactively, by extinguishing live claims in pending litigation. 29 U.S.C. § 252(a). The only possible conclusion, then, is that the Portal-to-Portal Act eliminated *Anderson*'s overly broad definition of "work." In doing so, the statute carved out not only the "preliminary" activities that had been deemed "work" in *Anderson*, but "postliminary" activities as well. See *id.* § 254(a).

Read against this backdrop, *Busk I*'s ruling that petitioners' security screenings are postliminary activities necessarily answers the question of whether those screenings are "work" under the FLSA. If the security screenings had been work employees were employed to perform, they could not have qualified as postliminary activities. But Integrity "did not employ its workers to undergo security screenings." *Busk I*, 135 S. Ct. at 518. Those screenings are "not 'integral and indispensable' to the employees' duties as warehouse workers," and Integrity could "eliminate[] the screenings altogether without impairing the employees' ability to complete their work." *Ibid.* In short, "undergoing security screenings [is] not itself *work* of consequence that the employees perform[] for their employer." *Id.* at 520 (Sotomayor, J., concurring) (emphasis added).[5]

[5] The Solicitor General took a similar position in *Busk I*, arguing that these security screenings did not have a sufficiently "close connection to the performance of the employees' productive work in the warehouse" to require compensation. 13-433 U.S. Br. 21.

Despite all this, the Sixth Circuit found this Court's analysis of the security screenings' "postliminary" nature to be irrelevant to whether the screenings are "work" under the FLSA. App. 25. But the analysis in *Busk I* shows that the concepts of postliminary activities and work are inseparable. If security screenings were part of the employees' work, they could not qualify as postliminary. The Sixth Circuit's contrary view conflicts with *Busk I* and should be reversed.

B. The Sixth Circuit's Construction Of The Portal-To-Portal Act Conflicts With Decisions From Other Federal Courts Of Appeals.

In addition to conflicting with this Court's earlier decision in this very case (*Busk I*) and other cases, the Sixth Circuit's holding that the Portal-to-Portal Act had no effect on the federal definition of "work" under the FLSA also conflicts with decisions from the Second, Eighth, Ninth, and Federal Circuits.

Each of these federal courts of appeals has construed the Portal-to-Portal Act as clarifying that the federal definition of "work" under the FLSA is narrower than this Court's pre-1947 interpretations. See, *e.g.*, *Reich* v. *N.Y.C. Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995) ("The Portal-to-Portal Act * * * represented an attempt by Congress to delineate *certain activities which did not constitute work*, and therefore did not require compensation.") (emphasis added); *Adair* v. *ConAgra Foods, Inc.*, 728 F.3d 849, 851 (8th Cir. 2013) (Section 254 "*excludes from the workday* time spent

'walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which [an] employee is employed to perform,' and time spent performing 'activities which are preliminary to or postliminary to said principal activity or activities.'") (quoting 29 U.S.C. § 254(a)) (emphasis added); *Dep't of Treasury* v. *Fed. Labor Relations Auth.*, 521 F.3d 1148, 1153 (9th Cir. 2008) ("The [Portal-to-Portal] Act *pared back the definition of 'workweek'* set forth in *Anderson*.") (emphasis added); *Adams* v. *United States*, 471 F.3d 1321, 1325 (Fed. Cir. 2006) ("The [Portal-to-Portal] Act *pared back the broad definition of compensable work* initially promulgated by the Supreme Court in *Anderson*.") (emphasis added).

The decision below cannot be reconciled with these other circuits' interpretation of the Portal-to-Portal Act, and the conflict created by the decision below warrants this Court's review.

C. The Sixth Circuit's Construction Of The Portal-To-Portal Act Is Manifestly Wrong.

Even if one ignores *Busk I* and the conflict with other circuits' construction of the Portal-to-Portal Act, the Sixth Circuit's construction of the Act is irredeemably flawed. The Sixth Circuit's construction ignores key portions of the Act and authoritative regulations, while misstating the few authorities on which it relies.

1. The Statute And Contemporaneous Federal Regulations Confirm That Postliminary Activities Are Not Work.

The Sixth Circuit inferred that the Portal-to-Portal Act did not modify the federal definition of "work" because—reading Section 254(a) in isolation from other parts of the statutory scheme—it could not spot language expressly addressing the definition of "work." App. 23. The majority therefore inferred that Section 254(a) left the pre-1947 definition untouched and simply afforded immunity to employers that failed to compensate employees for certain categories of work. *Ibid.* On this view, even after the Portal-to-Portal Act, there is a category of activities that continues to count as "work" under the FLSA and yet need not be compensated.

It is unclear why the Sixth Circuit was looking for an express modification of the FLSA's definition of "work." "Neither 'work' nor 'workweek' is defined in the statute" to begin with. *IBP*, 546 U.S. at 25. So there was no statutory definition for Section 254(a) to modify. Rather than amending a definition that is not found anywhere in the FLSA's express terms, Congress clarified that this Court's pre-1947 "judicial interpretations" of those terms contradicted Congress's intent. 29 U.S.C. § 251(a). The Sixth Circuit's understanding of Section 254 attributes to Congress a strangely roundabout strategy for accomplishing its stated goal.

And Section 251(a) is not the only statutory provision that runs against the Sixth Circuit's view. Section 254 itself shows that Congress intended to alter the

definition of hours worked. Although the Sixth Circuit myopically focused on Subsection (a), Subsection (d) directly answers the court's question. Titled "Determination of time employed with respect to activities," Subsection (d) states that the categories of "preliminary [and] postliminary activities described in subsection (a)" alter how one should calculate time worked when applying the FLSA's core "minimum wage and overtime compensation provisions." 29 U.S.C. § 254(d). Preliminary and postliminary time should be included "in determining the time for which an employer employs an employee" if, and only if, it is compensable by contract or custom. *Ibid.*

In this way, Section 254(d) expressly recognizes that time spent in preliminary and postliminary activities (absent countervailing contracts or customs) does not count as employment or work. (Under the FLSA, as in ordinary language, "employment" and "work" are effectively synonyms. See *id.* § 203(g); *New Prime, Inc.* v. *Oliveira*, 139 S. Ct. 532, 539-540 (2019).) And that is just how this Court has interpreted Section 254—as "*clarif[ying]* that compensable *work* does not include time spent walking to and from the employee's workstation or other 'preliminary or postliminary activities.'" *Tyson Foods*, 136 S. Ct. at 1042 (quoting 29 U.S.C. § 254(d)) (emphases added).

That interpretation has long been shared by the U.S. Department of Labor as well. In its first set of post-Portal-to-Portal regulations, issued just six months after the statute's enactment, the Labor Department extensively addressed the relationship between the Portal-to-Portal Act and the FLSA. It emphasized that

the later statute's effect on the FLSA "must necessarily be determined by viewing the two acts as interrelated parts of the entire statutory scheme." 12 Fed. Reg. at 7656 (codified as amended at 29 C.F.R. § 790.2(a)). To that end, one regulatory section focuses on the "[e]ffect of [the] Portal-to-Portal Act on [the] determination of hours worked." *Id.* at 7657 (codified as amended at 29 C.F.R. § 790.5). It recognizes that Section 254(d) determines "whether time spent in such 'preliminary' or 'postliminary' activities * * * must be included or excluded in computing *time worked*":

> 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, then the 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 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 [25]4*; otherwise it must be included as worktime in calculating minimum or overtime wages due.

Ibid. (emphases added; footnotes omitted).

This regulation is still in effect today. In fact, as the Solicitor General pointed out in *Busk I*, Congress "effectively ratified the 1947 interpretive regulations" in 1949 legislation, which stated that those regulations

were to "remain in effect" unless the Labor Department decided to rescind them. 13-433 U.S. Br. 15-16 (quoting Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920). This authoritative administrative interpretation of the Portal-to-Portal Act could not be clearer. Under federal "law as changed by" the Portal-to-Portal Act, preliminary and postliminary activities are generally "excluded in computing time worked." 29 C.F.R. § 790.5(a).

The statutory text, this Court's cases, and the Labor Department's consistent understanding of the Portal-to-Portal Act all contradict the Sixth Circuit's view that the federal definition of "work" was unaffected by Congress's 1947 amendments. Much like the pre-1947 definition that the Sixth Circuit revitalized, the Sixth Circuit's decision should not be permitted to stand.

2. The Sixth Circuit's Cited Authorities Further Undermine Its Conclusion.

Aside from reading Section 254(a) in isolation, the Sixth Circuit emphasized a passage in this Court's *IBP* decision and a regulation that the Labor Department issued in 1961. App. 23-25; see *Hours Worked*, 26 Fed. Reg. 190, 191 (Jan. 11, 1961). But, read fairly, both of these authorities actually support petitioners.

First, the relevant passage of *IBP* confirms that Section 254(a)'s exclusion of preliminary and postliminary activities alters the federal definition of "work." The Court observed:

> 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."

IBP, 546 U.S. at 28. Though it quoted this passage in full, the Sixth Circuit effectively disregarded the first clause. The rest of the passage, to be sure, recognizes a limit on the extent to which the Portal-to-Portal Act changed the federal definition of "work." But before that, the sentence recognizes that the "exceptions for travel" and "preliminary and postliminary" activities changed the federal definition of "work." *Ibid.* No one hears, "Other than the ending, the screenwriters didn't change the story from the book," and concludes that the screenwriters did not change the story from the book.

The 1961 regulation has the same structure. After recounting the 1940s decisions that established the broad definitions that prompted the Portal-to-Portal Act, the regulation says, "The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities." 26 Fed. Reg. at 191 (codified as amended at 29 C.F.R. § 785.7). Once again, the exception confirms that preliminary and postliminary activities no longer count as work. And if that confirmation were too subtle, Section 785.9(a) is explicit. It says that "[t]he Portal-to-Portal Act eliminates from working time certain walking time and

other similar 'preliminary' and 'postliminary' activities." 26 Fed. Reg. at 191 (codified as amended at 29 C.F.R. § 785.9(a)) (citation omitted). The regulations on which the Sixth Circuit relied expose the court's mistake.

* * *

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. That conclusion is inconsistent with *Busk I* itself; the decisions of several other circuits; the statutory text, history, and purpose; and the relevant Labor Department regulations, including the set of regulations that the Sixth Circuit invoked. The Court should grant certiorari to vindicate *Busk I*, restore uniformity among the circuits, and correct the Sixth Circuit's misunderstanding of this foundational issue within federal labor law.[6]

II. The Sixth Circuit's Decision Deepens An Entrenched Circuit Split Over Whether Work Generally Requires Exertion.

While the foregoing considerations already provide ample reason to grant certiorari, the Sixth Circuit's decision provides an additional reason: the decision deepens a conflict between the circuits on the

[6] Petitioners respectfully suggest that the Sixth Circuit's error is so clear that the Court would be justified in summarily reversing.

significance of exertion to the federal definition of "work."

As a fallback to their main argument about the import of the Portal-to-Portal Act, petitioners contended below that the mere act of passing through security screenings would not qualify as work even if one ignored the 1947 statute. Pet. C.A. Br. 32-35. With one limited exception, federal law has long required physical or mental exertion before counting an employee's activity as work, and the act of passing through a security screening does not involve such exertion.

The Sixth Circuit disagreed. On its view, "the federal definition no longer requires 'exertion,'" and "undergoing security screening clearly does involve exertion" in any case. App. 25-26. These conclusions conflict with holdings of the Second and Tenth Circuits. This Court's review is warranted to resolve this conflict as well.

First, in *Reich* v. *IBP, Inc.*, the Tenth Circuit held that donning and doffing standard safety equipment—including hard hats, safety glasses, earplugs, and safety shoes—was "not work within the meaning of the FLSA." 38 F.3d 1123, 1125 (10th Cir. 1994). That was because "[w]ork is '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.'" *Ibid.* (quoting *Tenn. Coal*, 321 U.S. at 598). And "[w]hile the use of the standard safety equipment may have met the second prong of this test"—that is, it may have been required by the employer and for the employer's benefit—"it

fail[ed] the first." *Id.* at 1125-1126. Since no material physical or mental exertion was involved, the donning and doffing was best viewed as "not work at all." *Id.* at 1126 n.1. Donning and doffing hard hats, glasses, earplugs, and safety shoes require at least as much effort and exertion as removing items from pockets and passively proceeding through petitioners' metal detectors. Cf. *Busk I*, 135 S. Ct. at 515. If the Sixth Circuit had applied the Tenth Circuit's exertion rule in this case, it would have reached the opposite result.

The Second Circuit also applied an exertion requirement in *Reich* v. *New York City Transit Authority*, 45 F.3d 646. Citing the same *Tennessee Coal* definition, it concluded that time that police dog handlers spent commuting with their canine colleagues did not qualify as work unless the commutes involved the "actual duties of care, feeding, training, walking or cleaning up," because otherwise "exertion" was not involved. *N.Y.C. Transit*, 45 F.3d at 651-652.

Two other circuits have taken the Sixth Circuit's view that exertion is not part of the federal definition of "work," acknowledging their divergence from the exertion-is-necessary circuits. See *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901, 911 & n.13 (9th Cir. 2004) (rejecting *Reich* v. *IBP* on the ground that "'work' includes even non-exertional acts" when required by the employer and for the employer's benefit); *De Asencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 372-373 (3d Cir. 2007) (same). Despite these other courts' criticisms, the Second and Tenth Circuits have continued to apply *Reich* v. *IBP* and *New York City Transit Authority*. See, *e.g.*,

Singh v. *City of New York*, 524 F.3d 361, 367-369 & n.6 (2d Cir. 2008); *Smith* v. *Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (10th Cir. 2006).

This entrenched circuit split is one that only this Court can resolve. And the split should be resolved in petitioners' favor because the Third, Sixth, and Ninth Circuits have misunderstood this Court's decisions on this issue. To conclude, as those three courts have done, that exertion no longer matters in defining work, one must conclude that this Court announced a general definition of "work" in *Tennessee Coal* and identified "exertion" as a threshold requirement, but then overruled that exertion requirement only months later without saying so. The decision below shows such reasoning in action: the Sixth Circuit decided that this Court implicitly "overruled *Tennessee Coal* * * * on this particular point" later the same year in *Armour & Co.* v. *Wantock*, 323 U.S. 126. App. 26 (citation omitted).

But *Armour* and *Tennessee Coal* are consistent. *Armour* addressed a particular scenario in which firefighters were "on duty" and "required to stay in the fire hall, to respond to any alarms." 323 U.S. at 127. The Court rejected the argument that this time was not "work" according to *Tennessee Coal*. *Id.* at 132-133. Emphasizing that "words of [the Court's] opinions are to be read in the light of the facts of the case under discussion," the Court observed that employers "may hire a man to do nothing, or to do nothing but wait for something to happen." *Id.* at 133. These firefighters were employed "in a stand-by capacity" of that sort, and the time they spent on call "was working time." *Id.* at 133-134.

Tennessee Coal was not to the contrary. As *Armour* stressed, it involved materially different facts, with employees who were coal miners, not firefighters. And in fact it anticipated *Armour*'s holding by recognizing that "employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call" are "entitled to the benefits of the [FLSA]." *Tenn. Coal*, 321 U.S. at 599 (footnotes omitted). Together, *Tennessee Coal* and *Armour* recognize that work generally requires exertion unless the nature of the job requires being "on call" or "stand-by," in case action becomes necessary.

In rejecting the exertion component of *Tennessee Coal*'s definition, the Sixth Circuit believed it was following this Court's instructions in *IBP* and the Labor Department's view in 29 C.F.R. § 785.7. App. 25-26. But *IBP* and the cited regulation merely recounted the holding of *Armour*, which is that exertion is unnecessary in the on-call or standby scenario, in which the employer has "hire[d] a man to do nothing, or to do nothing but wait for something to happen." *IBP*, 546 U.S. at 25 (quoting *Armour*, 323 U.S. at 133); see also 29 C.F.R. § 785.7. These authorities therefore do not undermine *Tennessee Coal* any more than *Armour*.

Given the lack of any conflict between *Tennessee Coal* and *Armour*, it was inappropriate for the Sixth Circuit and other courts 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, and lower courts must not assume that later

decisions overrule earlier ones by implication. See, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998); *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). Here, the suggestion of implicit overruling is especially off-base: in the two years after *Armour*, the Court repeatedly returned to *Tennessee Coal*'s general, exertion-requiring definition. See *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U.S. 161, 163-166 (1945); *Anderson*, 328 U.S. at 691-692. And since then, the Court has continued to quote the *Tennessee Coal* definition—as recently as *Busk I*, 135 S. Ct. at 516—without mention of any overruling. That definition clearly survived *Armour*.

There is now a 3–2 circuit split and significant confusion over the interplay between this Court's decisions on the relationship between exertion and work. For this reason, too, the Court should grant review.

III. The Court's Review Is Needed Now.

Under the ruling below, courts across the country have a new roadmap for minimizing the importance of the Portal-to-Portal Act and this Court's definitive interpretations of it. This is not an issue limited to the law of one State. Many 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.[7] In this multidistrict litigation alone,

[7] *Llorca* v. *Sheriff, Collier Cty.*, 893 F.3d 1319, 1328 (11th Cir. 2018) (Florida law); *Kellar* v. *Summit Seating Inc.*, 664 F.3d 169, 178 (7th Cir. 2011) (Indiana law); *Hall* v. *DIRECTV, LLC*,

the district court has already ruled that four different States follow federal law in relevant part and would adopt *Busk I*,[8] and a similar case involving yet another State is pending elsewhere.[9] The Sixth Circuit has now reversed the MDL district court's conclusion for two States, and if that decision stands it may be just the beginning.

Like Nevada, virtually no State has a statute unequivocally adopting the Portal-to-Portal Act.[10] And virtually no State has unequivocally rejected the Portal-to-Portal Act, either.[11] In nearly every State, the applicability of the Portal-to-Portal Act is a largely open question. See generally Bloomberg BNA, *Wage and Hour Laws: A State-by-State Survey* (Gregory K.

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846 F.3d 757, 775 n.10 (4th Cir. 2017) (Maryland law); *Kuebel* v. *Black & Decker Inc.*, 643 F.3d 352, 357 n.2 (2d Cir. 2011) (New York law); *Musch* v. *Domtar Indus., Inc.*, 587 F.3d 857, 859 (7th Cir. 2009) (Wisconsin law).

[8] App. 48-65 (Arizona and Nevada law); *Vance* v. *Amazon.com, Inc.*, No. 14-md-2504, 2016 WL 1268296, at *3 (W.D. Ky. Mar. 31, 2016), aff'd, 852 F.3d 601 (6th Cir. 2017) (Kentucky law); *Heimbach* v. *Amazon.com, Inc.*, No. 14-cv-204-DJH, 2018 WL 4148856, at *3 (W.D. Ky. Aug. 30, 2018), appeal filed, No. 18-5942 (6th Cir.) (Pennsylvania law).

[9] *Vaccaro* v. *Amazon.com.dedc, LLC*, No. 18-18852 (D.N.J.) (New Jersey law).

[10] The two potential counterexamples are Missouri's overtime statute, which expressly refers to the Portal-to-Portal Act, see Mo. Rev. Stat. § 290.505(4) (2018), and West Virginia's statute, which includes language that tracks the Portal-to-Portal Act, see W. Va. Code § 21-5C-1(h) (2018).

[11] California and the District of Columbia have rejected the Portal-to-Portal Act. See *Morillion* v. *Royal Packing Co.*, 995 P.2d 139, 151 (Cal. 2000); D.C. Code § 32-1002(10) (2019).

McGillivary ed., 3d ed. Supp. 2018) (conducting nationwide survey of state laws' adoption of the Portal-to-Portal Act in the wake of *Busk I* and finding the issue unaddressed almost everywhere).

That means the Sixth Circuit's approach to these issues could get a lot of traction in future litigation. As courts and commentators have observed, the number of "hybrid" wage-and-hour actions, which simultaneously press state and federal claims, has skyrocketed in recent decades.[12] State-law claims are typically more attractive to the plaintiffs' bar, even where they track federal law in substance.

One major reason is that it is easier to aggregate large numbers of state-law claims. FLSA claims are aggregated through the statute's distinctive, opt-in, collective action mechanism. 29 U.S.C. § 216(b). But parallel state claims are governed by ordinary class action procedures and the opposite default rule: instead of opt-in classes, Rule 23(b)(3) classes include all employees unless they affirmatively opt out. Unsurprisingly, such state-law classes are often dramatically bigger, as this Court has witnessed. See, *e.g.*, *Tyson Foods*, 136 S. Ct. at 1043 ("A total of 444 employees joined the [FLSA] collective action, while the Rule 23

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[12] See, *e.g.*, *Kuncl* v. *Int'l Bus. Machs. Corp.*, 660 F. Supp. 2d 1246, 1250 (N.D. Okla. 2009); *Ellis* v. *Edward D. Jones & Co.*, 527 F. Supp. 2d 439, 460 n.19 (W.D. Pa. 2007); Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 Am. U. L. Rev. 515, 518, 524 & n.64 (2009).

class [for Iowa-law claims] contained 3,344 members.").

Apart from class size, state-law claims may generate larger amounts of damages. Such claims may be governed by longer statutes of limitations, and States often impose minimum wages that are higher than under federal law. See, *e.g.*, *Calderone* v. *Scott*, 838 F.3d 1101, 1105 n.4 (11th Cir. 2016).

Between these factors and the larger class sizes, "[c]ases brought under * * * state laws usually offer greater potential recoveries by judgment or settlement to plaintiff employees and greater risk to defendant employers." Noah A. Finkel, *State Wage-and-Hour Law Class Actions: The Real Wave of "FLSA" Litigation?*, 7 Emp. Rts. & Emp. Pol'y J. 159, 161 (2003). So even though litigation of state claims will typically be restricted to plaintiffs in a single State, the threatened liability is still tremendous—particularly where, as here, the defendants are subject to suit in many States throughout the country. Before this Court's ruling in *Busk I*, respondents' counsel claimed that petitioners' potential liabilities nationwide "could run between $100 million and $300 million."[13]

Of course, States are free to create wage-and-hour laws that are more favorable to employees than the FLSA. See 29 U.S.C. § 218(a). But if States choose to

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[13] Brent Kendall, *Supreme Court to Consider Employee Pay for Security Screenings*, Wall St. J., Mar. 3, 2014, https://www.wsj.com/articles/supreme-court-to-consider-worker-pay-while-undergoing-security-screenings-1393858635.

apply the federal standard, they must apply that standard correctly. Cf. *Kansas* v. *Carr*, 136 S. Ct. 633, 641 (2016). And federal courts, most of all, should be sure not to do what the Sixth Circuit did here: impute the incorrect federal rule to a State that chooses to follow federal law.

Nor should this Court shy away from granting review of such decisions. Even when a federal question arises through a state-law claim, misapplication of the relevant federal-law principle undermines "the integrity and uniformity of federal law." *Kansas* v. *Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). That is true even where, unlike here, the erroneous interpretation of federal law comes from a state court and thus has no binding force on any federal court. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983). The problem is only more acute where a federal appellate court can issue a decision that binds its whole circuit to a mistaken view of federal law.

It 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. From one court to the next, and even in the same court, there would be two diverging bodies of federal law—one for the FLSA claims, and one for parallel state claims that are supposed to mirror the FLSA. Such a state of affairs would forsake the principle that "federal labor-law principles" be "uniform throughout the Nation." *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). And were this Court to turn "a blind eye" to such decisions, they "would change the

uniform 'law of the land' into a crazy quilt." *Carr*, 136 S. Ct. at 641-642 (citation omitted). This Court's review is needed to preserve *Busk I* and restore a uniform definition of "work" under federal law.

CONCLUSION

For all these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICK D. ROSKELLEY
LITTLER MENDELSON P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-7704

CORY G. WALKER
LITTLER MENDELSON P.C.
2425 East Camelback Road, Suite 900
Phoenix, AZ 85016
(602) 474-3616

Counsel for Petitioner Integrity Staffing Solutions, Inc.

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540
(609) 919-6600

Counsel for Petitioner Amazon.com, Inc.

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