OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: INTEGRITY STAFFING SOLUTIONS, INC., Petitioner v. JESSE BUSK, ET AL.

CASE NO: No. 13-433

PLACE: Washington, D.C.

DATE: Wednesday, October 8, 2014

PAGES: 1-59

ALDERSON REPORTING COMPANY

1155 CONNECTICUT AVE., NW

WASHINGTON, D.C. 20036

(202) 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INTEGRITY STAFFING :

4 SOLUTIONS, INC., :

5 Petitioner :

6 v. : No. 13-433

7 JESSE BUSK, ET AL. :

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9 Washington, D.C.

10 Wednesday, October 8, 2014

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:03 a.m.

15 APPEARANCES:

16 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of

17 Petitioner.

18 CURTIS E. GANNON, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of United States, as amicus curiae, supporting

21 the Petitioner.

22 MARK R. THIERMAN, ESQ., Reno, Nev.; on behalf of

23 Respondents.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 13-433, Integrity Staffing

5 Solutions v. Busk.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAOL D. CLEMENT

8 ON BEHALF OF PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and may it

10 please the Court:

11 Going through security as part of the egress

12 process is a classic postliminary activity that is

13 non-compensable under the Portal-to-Portal Act. It is

14 materially similar to the process of checking out at the

15 end of the day or waiting in line to do so, which is a

16 quintessential postliminary activity under the Act.

17 The Ninth Circuit erred in treating this

18 time as integral and indispensable to a principal

19 activity and Respondent's position that the time is

20 compensable without regard to whether it is an integral

21 or indispensable activity is more problematic still.

22 JUSTICE KAGAN: Mr. Clement -- excuse me --

23 can I give you a hypo?

24 Suppose that there's an employer with cash

25 registers, and there's a very extensive process for

1 closing out the cash registers, and that extensive
2 process is to protect against theft. If it weren't for
3 that concern, you could close out a cash register much
4 more quickly. Or the same for bank tellers or the same
5 for casino dealers, you know, that there's, like, a
6 20-minute process which is essentially an antitheft
7 security process. And it happens at the end of the
8 shift when the cashier goes off duty.
9 What's the difference between that case and
10 going through security in -- at Amazon?
11 MR. CLEMENT: Well, I think one difference
12 is not -- I'm not crystal clear that that time would not
13 be non-compensable because I think that's sort of the
14 winding down period, which is, I think, with -- at least
15 potentially within the ambit of preliminary and
16 postliminary activities.
17 JUSTICE KAGAN: Do you know, by the way? I
18 mean, before you get on to that, do you know how that's
19 treated under the law? Because I guess my assumption
20 was that this kind of period would be treated as
21 compensable. But if that's not right, let me know.
22 MR. CLEMENT: Well, it's a problem with
23 hypotheticals because I don't know that that particular
24 case has arisen. I would think that would be actually a
25 close question under the Act, because you do have the

1 notion under the Portal-to-Portal Act that preliminary
2 activities and postliminary activities are
3 non-compensable. And that, if you go back to Mt.
4 Clemens, which used the term "preliminary," that
5 included the sort of wind up process and might well
6 include this sort of wind down process at the work
7 station.
8 JUSTICE SCALIA: Couldn't you say that
9 closing down the cash register is part of the job?
10 MR. CLEMENT: You could.
11 JUSTICE SCALIA: But getting yourself
12 inspected as you leave -- as you leave the place of
13 business is not part of the job. The other case where
14 it's just part of the job.
15 MR. CLEMENT: You could definitely say that,
16 Justice Scalia, and I meant to say that --
17 JUSTICE SCALIA: You could not only say it;
18 it seems to me true.
19 MR. CLEMENT: Well, all the better, then, to
20 say it, which is that this then becomes an easier case
21 than that because it is part of the egress process,
22 which is really the process of getting from your --
23 JUSTICE KENNEDY: But part of Justice
24 Kagan's hypothetical was that the 20 minutes or the 30
25 minutes is just for antitheft purposes. Or I'll

1 interpret her hypothetical that way. Just for antitheft
2 purposes. Otherwise the cashiers -- the records and so
3 forth are turned up.
4 But just for antitheft protection, you need
5 the 20 or 30 minutes. If I can interpret the
6 hypothetical that way, then it seems to me to be the
7 same.
8 MR. CLEMENT: I don't think it's the same.
9 I think it's an arguable case under the Act that it
10 still might be postliminary, but I think if you look at
11 the cases that are out there, the courts have struggled
12 a bit with the preliminary and postliminary activities
13 that take place at the work station.
14 Where I don't think they've struggled until
15 the Ninth Circuit decision here is when you're talking
16 about time after you've left the primary work station
17 and when you're in the process of going to the doors.
18 JUSTICE KAGAN: That would seem to make it
19 depend on a compete fortuity. You know, if I -- if I
20 have the cashier walk from the -- the -- with her tray
21 to the manager's station and do the same thing there on
22 the way out the door, there would be one answer, and if
23 she does it at the cashier's station, it would be
24 another answer. And that seems not particularly
25 sensible.

1 MR. CLEMENT: Well, there are some not
2 particularly sensible results under the Portal-to-Portal
3 Act because things do turn on where activities take
4 place vis-à-vis walking time. But I do think what makes
5 this an easier case than your hypothetical is the exit
6 screenings are a logical part of the egress process.
7 The other side in this case tries to raise the specter
8 of lawn mowing being uncompensated and car washing being
9 uncompensated, but no employer requires to you take a
10 couple of swipes at a car on your way out the door.
11 JUSTICE GINSBURG: Mr. Clement, is it -- is
12 it irrelevant that we're told here that because there
13 are not enough security checkers and because all the
14 shifts get out at the same time, what could be a
15 five-minute process turns out to be 25 minutes, 25
16 minutes of the workers' time, and 20 of those allegedly
17 would not occur if the employer had -- provided
18 sufficient staffing.
19 MR. CLEMENT: Justice Ginsburg, ultimately,
20 we don't think that allegation is relevant here. Now,
21 it is just an allegation. But the reason that I say
22 that it's not relevant here is twofold. One, the one
23 thing we know from the Portal-to-Portal Act and the
24 pre-Portal-to-Portal Act cases is the pure length of
25 time of something does not take it out of preliminary or

1 postliminary activities.

2 If you go back to the Jewell Ridge case and

3 look at Justice Jackson's dissent, he makes crystal

4 clear that the travel time at issue there was over an

5 hour total, and nonetheless the clear import of

6 Portal-to-Portal Act is to treat that hour as

7 non-compensable time.

8 The second reason why I think this waiting

9 time at the exit would be particularly a bad candidate

10 for treating as compensable just because it was

11 relatively long is because it's not uniform 25 minutes.

12 And so it's directly analogous to the time that was --

13 people had to wait to go in and punch the clock at the

14 pottery factory in Mt. Clemens.

15 And even the Mt. Clemens Court didn't treat

16 the waiting time to punch in as compensable. And I

17 think part of the reason was that it didn't really make

18 any sense. It took eight minutes for everybody to get

19 through, but that would create all sort of anomalies

20 where the first person who got through would get

21 treated -- would get paid for eight more minutes than

22 the last person that got through.

23 JUSTICE SOTOMAYOR: But that's true -- I'm

24 sorry. That's true of a workday generally. Some people

25 have to close down the shop; others don't. So it takes

1 the people who are closing down the shop longer. I'm
2 not worried about --
3 MR. CLEMENT: Could I stop you there,
4 though? I think that's not really true of the
5 compensable principal time of the workday after the
6 Portal-to-Portal Act, which is whistle to whistle.
7 JUSTICE SOTOMAYOR: Yeah, but could we
8 start -- could we start with that question?
9 MR. CLEMENT: Sure.
10 JUSTICE SOTOMAYOR: What's a principal
11 activity? How is it defined? Because pre or
12 post-activity to a principal activity, you still have to
13 define what a principal activity is. And -- and so I
14 think, isn't a principal activity work that benefits the
15 employer in some way?
16 MR. CLEMENT: No, Justice Sotomayor. And I
17 think it's important to get two concepts separate. One
18 is work under the Fair Labor Standards Act. And for
19 purposes of that, all you really do need is things that
20 are required by the employer for the employer's benefit
21 that require a minimum amount of exertion. That's the
22 test from this Court's cases.
23 But principal activities is a separate and
24 more demanding test under the Portal-to-Portal Act. And
25 the way I'd think about the statute is the Fair Labor

1 Standards Act makes all work presumptively compensable.
2 And then only when you get to something that is arguably
3 postliminary or preliminary do you have to ask a
4 question that involves principal activities. Because if
5 you have compensable work and it's not even arguably
6 preliminary or postliminary, it's compensable without
7 regard to the Portal-to-Portal Act.
8 But when you get to the Portal-to-Portal
9 Act, then you have to look, is this a preliminary and
10 postliminary activity. And if it is, then it's
11 presumptively noncompensable unless it's integral and
12 indispensable to a principal activity.
13 JUSTICE KENNEDY: Well, let's -- let's take
14 Justice Ginsburg's hypothetical. Let's -- let's assume
15 that it takes 25 minutes to check out and that it would
16 be very easy for the employer to hire a few more
17 checkers and make it 5 minutes. Just assume that that's
18 the fact.
19 Why isn't the long line in -- caused by very
20 few checkers for the benefit of the employer? It's for
21 the benefit of the employer to hire fewer checkers.
22 MR. CLEMENT: It might be for the benefit of
23 the employer in that set of circumstances, Justice
24 Kennedy, but that doesn't make it not postliminary
25 activity and not compensable. And if you look at the

1 universe of all noncompensable time under the
2 Portal-to-Portal Act, I think in every instance you
3 could say if the employer only did more, he could
4 reduce -- he or she, it could reduce that time.
5 And so, if you go back --
6 JUSTICE SCALIA: He could move his plant,
7 for example, to be closer to the city where the
8 employees live, right? So it takes him an hour to get
9 to work. It's his fault that it -- that it takes them
10 an hour instead of just 10 minutes. He should move his
11 plant. It's just a matter of cost, right?
12 MR. CLEMENT: That's exactly right, Justice
13 Scalia. And you can ticket from the commuting time to
14 the commuting time internally if you go back to those
15 trams in the -- in the coal mining cases. If the
16 employer added more trams or more tram drivers,
17 presumably, that travel time would be reduced.
18 JUSTICE KENNEDY: Is it -- is it always
19 irrelevant to the analysis that it's for or not for the
20 benefit of the employer?
21 MR. CLEMENT: It is irrelevant for the
22 Portal-to-Portal Act analysis. And as I said, it's not
23 irrelevant to the analysis at all because the fact that
24 it is for the employer's benefit is part of what makes
25 it compensable work presumptively or work under the Fair

1 Labor Standards Act.
2 But when you get to applying the
3 Portal-to-Portal Act, that is activity that even though
4 it's work, even though it's required by the employer,
5 and even though it's for the benefit of the employer, is
6 nonetheless noncompensable by the terms of the
7 Portal-to-Portal Act. And if I could just continue
8 the --
9 JUSTICE SOTOMAYOR: All right. That's --
10 that's not quite right, because if the employer requires
11 you to put on a particular outfit that you can't do the
12 work without, we've said that's compensable.
13 MR. CLEMENT: I don't think you have a
14 case --
15 JUSTICE SOTOMAYOR: So -- and -- but donning
16 generally isn't, so I'm not sure quite how you can take
17 out that element from this analysis.
18 MR. CLEMENT: Justice Sotomayor, I don't
19 think there's a case of this Court that says just
20 because the employer requires something that would
21 otherwise be superfluous that it therefore becomes
22 integral and indispensable. And so I would actually
23 take --
24 JUSTICE SOTOMAYOR: I agree with you. It
25 can't be superfluous. It can't be something that's --

1 for the benefit of the employee. Putting on clothes to
2 keep yourself from being splattered with a nonharmful
3 substance is for the benefit of the employee. But --
4 MR. CLEMENT: But -- but take something
5 where a particular employer has an idiosyncratic view
6 and actually wants their employers -- employees to have
7 a certain color smock or a certain piece of equipment
8 that's not actually particularly integral and
9 indispensable to anything.
10 I don't think anything in this Court's cases
11 would say just because the employer required it, it is
12 therefore compensable.
13 And I think if you go back to the
14 quintessential example of something that is postliminary
15 and noncompensable, the time clocks, the checking out
16 process, all of that is required by the employer and for
17 the employer's benefit.
18 And so I don't think you can meaningfully
19 distinguish the exit screening from those
20 quintessentially postliminary noncompensable things.
21 JUSTICE BREYER: Indispensable.
22 Indispensable. Hardly anything is indispensable.
23 Where -- where does that word come from?
24 MR. CLEMENT: Well, the word comes from this
25 Court's decision in Steiner and it would -- it comes

1 from the Labor Department's --

2 JUSTICE BREYER: The Labor Department

3 says -- they're here saying it's the correct test, which

4 I think is -- well, perhaps more important, is there a

5 close and direct relationship? Which I understand a

6 little bit better. Isn't that labor?

7 MR. CLEMENT: That's their gloss on what

8 integral and indispensable means.

9 JUSTICE BREYER: Oh, I see.

10 MR. CLEMENT: And what I -- what I would

11 say --

12 JUSTICE BREYER: Well, I mean, it can't

13 literally mean indispensable, can it? Because then

14 anything at the end of the day, they're probably five

15 ways of doing it. The cash registers, you can do it

16 this way. You can do it that way. I mean --

17 MR. CLEMENT: Well, I -- with all due

18 respect, Justice Breyer, I do think the test should be

19 indispensable. And I do think there are plenty

20 things --

21 JUSTICE BREYER: If I can think of a way at

22 the end of the day that the employer could have done it

23 by saving a little more time or something like that,

24 then it's postliminary.

25 MR. CLEMENT: Well, if it's otherwise

1 postliminary, it doesn't come outside of that exception
2 and become a principal activity. And I think two points
3 to make here. One is, you know, I think the knife
4 sharpening in King Packing, for example, really is
5 indispensable. You can't run a butchering operation
6 without sharp knives.
7 I think you can perfectly well run a
8 warehouse facility without egress security. So I think
9 these are different.
10 JUSTICE KAGAN: Actually, Amazon, I don't
11 think you can. I mean, what makes it Amazon? It's a
12 system of inventory control that betters everybody else
13 in the business. And what's really important to Amazon
14 is that it knows where every toothbrush in the warehouse
15 is. And that's just as integral to what Amazon does and
16 to what it requires its employees to do as, for example,
17 the -- I'm going back to my hypos -- but the person who
18 closes out the cash register, the person who closes out
19 the bank teller operation, is that this is sort of a
20 necessary part of what -- of what the -- the folks who
21 do all the stocking and the unshelving and shelving do
22 at Amazon.
23 MR. CLEMENT: Well, I guess I would beg to
24 differ, Justice Kagan. I think, certainly, everything
25 in the Amazon facility is barcoded and the like, and

1 everybody knows where everything is, but there's always
2 the possibility that somebody not barcode an incoming
3 item at all and put it in their pocket.
4 Now, if they're doing that, they're not
5 discharging their principal activities, and if they're
6 detected on the way out, I mean, that might help keep
7 the next person on mission, but that doesn't make it
8 integral and indispensable to discharging the primary
9 job duty.
10 JUSTICE SCALIA: I suppose that it is also
11 necessary to Amazon's business that it know how many
12 hours each of its workers has worked, so it knows how
13 much to pay them and doesn't pay them more, right?
14 And -- and yet, there's no doubt whatever, is there,
15 that punching in and punching out is not -- is -- is
16 preliminary and postliminary, right?
17 MR. CLEMENT: I hope there's no doubt about
18 that, Justice Scalia. And I do think that the exit
19 security screenings are just the modern -- modern
20 analogue of that. Not only do they both come at the
21 employer's insistence and for the employer's benefit,
22 but they also have this process of verifying that the
23 employers are essentially behaving in an honest and --
24 and -- way.
25 It's the same way as trying to ensure that a

1 employee is not lying about having worked an eight-hour
2 day. You use the time clocks to verify that. You also
3 use the exit screening for that process. And the other
4 aspect of it that makes it so closely analogous is they
5 are a logical part of the egress process. They are part
6 of getting you from your principal work station to the
7 exit doors at the end of the day, classically
8 postliminary activity.
9 If that's not -- if the Court is to treat
10 that as compensable, then it's not clear what's left of
11 the Portal-to-Portal Act. The Portal-to-Portal Act was
12 Congress's judgment that these kind of preliminary and
13 postliminary activities should not be compensable.
14 It would be perfectly rational to have a
15 system where you compensated employees from portal to
16 portal, and that's basically the regime that this Court
17 created in a series of cases culminating in Mt. Clemens
18 Pottery. But it's just as clear that Congress reversed
19 that result in Portal-to-Portal Act.
20 If I could reserve the balance of my time.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Gannon.
23 ORAL ARGUMENT OF CURTIS E. GANNON
24 FOR THE UNITED STATES
25 AS AMICUS CURIAE, SUPPORTING PETITIONER

1 MR. GANNON: Mr. Chief Justice, and may it
2 please the Court:
3 The Portal-to-Portal Act generally accepted
4 from mandatory compensation the activities that are
5 associated with the process by which employees arrive on
6 the employer's premises at the entrance to portal and
7 get to the place where they perform their principal work
8 activities at the beginning of the day, and then the
9 process by which they leave at the end of the day and
10 get to the exits.
11 We think the security screenings here are
12 noncompensable because they are postliminary activities,
13 and they are not integral and indispensable to the
14 employees' principal work activities.
15 JUSTICE GINSBURG: You said in your brief
16 that there are some security searches that would be
17 compensable. So would you tell us which ones are and
18 which ones aren't?
19 MR. GANNON: Well, I think you're referring
20 to footnote 18 of our brief, Justice Ginsburg.
21 JUSTICE GINSBURG: Yes.
22 MR. GANNON: And there we talk about the
23 fact that the employer can't just require lots of other
24 things to be done at the end of the day and call those
25 things postliminary. I don't think that we have any

1 particular examples of searches in mind. There aren't
2 cases that deal with compensable searches. But I think
3 the question there would be whether the activity has so
4 fundamentally changed the nature of what's going on that
5 it no longer resembles the ordinary process of checking
6 out. The reason why we think --
7 JUSTICE GINSBURG: You can't think of an
8 example, then, where a security check, an exit security
9 check, would be compensable?
10 MR. GANNON: Well, I think it would probably
11 have to be a type of search that is so dramatically
12 different, more intrusive, more time-consuming, the
13 search itself, not just the time waiting in line, that
14 it's fundamentally transformed the nature of the
15 activity. So I think to the extent that some of the
16 examples that are suggested in the briefs, like drug
17 testing, you could analogize that in some way to an
18 anti-theft search. One of the hypotheticals has to do
19 with a person who works in a pharmaceutical
20 manufacturing facility, have they taken the
21 pharmaceuticals. The employer may want to test them on
22 the way out.
23 And I'd say that drug testing is not the
24 type of thing that is normally associated with entering
25 and leaving the property. It's not the ordinary course

1 of checking in and checking out, waiting in line to do
2 so, the types of things that the Labor Department was
3 thinking about in 1947 when it adopted the interpretive
4 regulation that gave those examples.
5 And I also think that drug testing is not
6 the sort of thing that's classically associated with the
7 entrances and the exits. It's the sort of thing that is
8 usually done somewhere else. And that's different from
9 security and safety screenings, most of which I
10 understand Respondents concede are not actually going to
11 be compensable.
12 And so we think that those are the two
13 reasons why in this case this looks like something that
14 is both postliminary -- it happens as part of a process
15 of getting out, it is -- it happens at the door, at the
16 portal or near there -- and it is not integral and
17 indispensable. It is different from the activities that
18 were at issue in Steiner or in King Packing or in IBP,
19 because the employees when they are on the work floor
20 doing their job, surely they do have access to
21 merchandise. It is of course important to Amazon, as
22 you pointed out, Justice Kagan, that they not take the
23 merchandise. Amazon and Integrity Staffing want to know
24 where the merchandise is.
25 But the idea that this benefits the employer

1 or is required by the employer isn't enough to make it
2 compensable because, as Mr. Clement was just saying,
3 that's the test for whether something is work. That's
4 what was the test under Mt. Clemens, and Congress
5 excepted from that a class of activities, preliminary
6 and postliminary activities, that are noncompensable.
7 Travel time and preliminary and postliminary activities
8 like time clocks punching in and punching out, that's
9 required by the employer. It benefits the employer.
10 That's not enough to make it compensable.
11 JUSTICE KAGAN: But is the idea, then,
12 Mr. Gannon, just -- you know, it's basically a door
13 test? I mean, portal to portal. It might make sense
14 just to have a door test, exits and entrances.
15 MR. GANNON: I think that it has -- to be
16 more precise about it, I think that canonically most of
17 the activities are going to be associated with the
18 process of getting in and out. Those were the -- those
19 were the things that were at issue in the
20 Portal-to-Portal Act cases that Congress was effectively
21 reversing when it adopted the Portal-to-Portal Act. And
22 I think it's the continuous workday rule that's going to
23 make it --it makes sure that it happens only at the
24 beginning and the end of the day. I think that, to be
25 more precise about it, though, the way the statute is

1 phrased, it talks about these being activities that
2 occur before the principal work activities begin at the
3 end of the day or after they cease. Something isn't
4 preliminary if you've already started doing your
5 principal activities and it's not postliminary if you
6 haven't already ceased them.
7 So the question is whether this is itself a
8 principal activity by virtue of being integral and
9 indispensable and --
10 JUSTICE KENNEDY: Can we write this case
11 without discussing whether or not this is for the
12 benefit of the employer? Or do we have to address that?
13 MR. GANNON: Well, I think that it's always
14 going to be for the benefit of the employer if it comes
15 up in the context of the Portal-to-Portal Act, because
16 we wouldn't be concerned about whether the exception --
17 JUSTICE KENNEDY: So you're saying that is
18 really not at all helpful or necessary for the analysis?
19 MR. GANNON: I don't think it is, because
20 that's the antecedent question about whether it would
21 have been compensable under the FLSA. If it doesn't
22 benefit the employer, if it's not required by the
23 employer, it wouldn't have been work, you don't need to
24 decide whether it's preliminary and postliminary and
25 therefore excepted from the mandatory compensation

1 requirement.

2 JUSTICE KENNEDY: So you can -- so we assume

3 that it's for the benefit of the employer.

4 MR. GANNON: Yes. I think that it almost

5 certainly is always going to be for the benefit of the

6 employer, just like time clocks are, just like you could

7 say the requirement in Tennessee Coal and Jewell Mining,

8 the mine cases, that employees were required to ride

9 from the face -- from the portal of the mine, down to

10 the face where they are going to be working, they were

11 required to ride in the ore skiff -- in the ore skiff,

12 and presumably that benefitted the employer for all

13 sorts of reasons. They didn't have to make more room

14 for people to walk. They didn't have to worry about

15 employees getting injured by skiffs that were going by.

16 And that's not enough to ensure --

17 JUSTICE KAGAN: Can I give you a different

18 hypo, which is similar to some of the ones that have

19 been floating around in a brief, but it's actually based

20 on real life circumstances. There was a judge ages ago

21 in the Southern District of New York who had his clerks

22 -- all that they did was help him with his opinions and

23 his cases and that was their principal activity, but had

24 his clerks come early in order to cut his grapefruit and

25 otherwise make breakfast for him. And would that be

1 compensable?

2 MR. GANNON: Well, setting aside the

3 question of whether the law clerks were covered by the

4 FLSA to begin with --

5 JUSTICE KAGAN: Yeah, yeah, yeah, yeah,

6 yeah.

7 MR. GANNON: -- I take the point that that

8 would be compensable, and I think there we're talking

9 about a kind of activity that isn't preliminary or

10 postliminary. We do think that those words have

11 independent meaning. As we discuss in our brief --

12 JUSTICE BREYER: The one question I have for

13 your side is this. I would -- perhaps no one else

14 would, but I a pay a lot of attention to the Labor

15 Department.

16 MR. GANNON: So do we, Justice Breyer.

17 JUSTICE BREYER: Yes, I understand that.

18 But this is a dismissal of a complaint and

19 it seems to me normally what happens is you debate these

20 facts on the summary judgment. I don't know if they

21 want to introduce something else. I mean, in my own

22 mind, I can think of five things I'd like to know about

23 the activity and about other activities and, you know,

24 is it more like the cash register, is it more like this

25 or that. So shouldn't we send it back so if they wanted

1 to develop the record further, they can?
2 MR. GANNON: I think, as the facts are
3 alleged here, we know enough to know that these
4 activities are not --
5 JUSTICE BREYER: No matter what? I mean,
6 suppose it turns out that the warehouse thing -- you
7 look all over the country and this kind of warehouse
8 employee, of course they have security checks and they
9 have a special kind of security checks, other people
10 don't have them. This is just normal that a warehouse
11 employee does have a security check at the end of the
12 day, and, boy, it begins to look a little bit more
13 integral. It begins to look like part of the job, just
14 as he has to put the books back on the shelf. He has to
15 put the books back on the shelf and he has to get a
16 security check.
17 MR. GANNON: Putting books back on the
18 shelf, closing out the cash register, taking the cash
19 car to the supervisor, all of those things we think are
20 compensable. Those are not --
21 JUSTICE BREYER: Then what's different about
22 this? What you do is you put it back on the shelf, you
23 go get your security checked, and there we are.
24 MR. GANNON: Because those are still the
25 activities that the employee is paying you to perform,

1 and so that is the job that you are doing. You're still
2 handling the money, you're still --
3 JUSTICE KAGAN: I guess I just don't
4 understand that, Mr. Gannon, because, as Justice Kennedy
5 said, the point of my hypo was that it's not part of the
6 job. It's actually an antitheft mechanism.
7 MR. GANNON: But it's part of the job
8 because it's things that have to be done in order to --
9 I mean, the employer has set up the procedure in order
10 to manage the cash. The cash has to be taken somewhere
11 at the end of the day. When you're doing all of that --
12 JUSTICE KAGAN: The cash could be taken
13 somewhere much more quickly and much more easily if the
14 employer were not worried about the employee pocketing
15 some of it, you know. I mean, you could just put it in
16 a big bag, versus going through this very, very careful
17 sort of inventory control.
18 MR. GANNON: I don't think the purpose is
19 enough to distinguish. And we discuss at the end of our
20 brief about how there are safety and security searches,
21 that the purposes overlap a lot here, whether the
22 employer is trying to protect its time when it requires
23 somebody to do punching in or punching out or protect
24 its property. I think the purpose is very difficult to
25 make that the distinguishing factor.

1 But there we think that those activities are
2 still what the employer is paying you to do. They're
3 not -- when you're done with the cash drawer, when
4 you've turned in the cash and then you're done, you've
5 ceased your principal activities for the day, now you
6 need to walk out the door. And if at the door, they
7 want to look in your purse, we think that that doesn't
8 transform the time it took you from being done with your
9 job to getting off the property into being compensable
10 any more than it would with the donning and doffing
11 cases.
12 Once you had finished taking off the garb,
13 you were done, and then if you still had to walk you
14 weren't getting paid. In IBP, this Court held that when
15 you were waiting in line to put on the equipment in the
16 morning, if the employer decides that they're just a
17 Nervous Nellie and they want you to be wearing all sort
18 of extra security equipment that nobody really thinks is
19 important but the employer demands that you do, and they
20 think it benefits them, then you're going to have to get
21 paid for the time it takes to put that on, but not the
22 time you are waiting in line to do so.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Mr. Thierman.
25 ORAL ARGUMENT OF MARK R. THIERMAN

1 ON BEHALF OF THE RESPONDENTS

2 MR. THIERMAN: Mr. Chief Justice, and may it

3 please the Court:

4 We agree that there are levels of analysis

5 and the first level is, is this work; and under 785.7 of

6 the regs this is work because it's an activity required

7 for the benefit of the employer. Having said it's work,

8 the question then becomes, is it a principal activity.

9 Not whether it is integral and indispensable, but is it

10 a principal activity, because we never get to integral

11 and indispensable, we never get to postliminary and

12 preliminary, if it is a standalone or a principal

13 activity. And to answer that question --

14 JUSTICE ALITO: Just -- before you get to

15 that, to understand the structure of your argument, if

16 we were to disagree with you on the question of whether

17 it's a principal activity that means you would lose this

18 case? You haven't argued that this is integral and

19 indispensable, have you?

20 MR. THIERMAN: The Ninth Circuit has taken

21 the position it's integral and indispensable. We have

22 not argued that. We have argued that the Ninth Circuit

23 test -- there are two tests. There's --

24 JUSTICE ALITO: Have you abandoned that

25 argument?

1 MR. THIERMAN: No, I think we've basically
2 put the argument in a different place.
3 JUSTICE ALITO: Where in your brief do I
4 find your argument on integral and indispensable?
5 MR. THIERMAN: We adopt the same test as the
6 Ninth Circuit. We just say that it proves principal
7 activity. We don't say it proves integral and
8 indispensable. So we have the same test --
9 JUSTICE ALITO: So a principal activity is
10 something that's integral and indispensable and then a
11 postliminary activity could be compensable if it's also
12 integral and indispensable?
13 MR. THIERMAN: No. A principal activity is
14 something that the employer tells to you do for the
15 benefit of the employer that's not carved out by one of
16 the exceptions, the exceptions being travel under
17 254(a)1, checking in and checking out and --
18 JUSTICE SCALIA: Cutting grapefruit for the
19 judge would be a separate principal activity.
20 MR. THIERMAN: It would, because the judge
21 told to you do it.
22 CHIEF JUSTICE ROBERTS: Yes, but this is --
23 no one's principal activity is going through security
24 screening. The employer doesn't hire somebody, I need
25 somebody to go through employee screening. He hires

1 them to do something else and then the employee
2 screening is certainly not the principal.
3 MR. THIERMAN: But no one hired the clerks
4 of this Court to wear morning jackets, yet it is a
5 requirement of the job. Would they be -- are they
6 required to do it? Yes. If they are required to do it
7 on site, that is you require the changing on site by the
8 regulations, it must be compensable. You could have
9 waiters wear uniforms if you required --
10 JUSTICE SCALIA: I think you hire them to
11 wear proper attire. Of course, you do. You could hire
12 a policeman to wear police uniforms --
13 MR. THIERMAN: Then you hire warehousemen
14 not to steal merchandise.
15 JUSTICE SCALIA: No, that's not part of
16 their job as a warehouseman. That isn't what they are
17 hired for. Policemen are hired to look like policemen
18 and act like policemen. And people who argue for the
19 Solicitor General are hired to speak like lawyers and
20 dress like members of the SG's office. I think that's
21 the difference between a principal activity and
22 something that's postliminary or preliminary.
23 MR. THIERMAN: Well, it depends on the view
24 you take of their job, if you look at the tasks they are
25 performing or do you look at their overall function.

1 Their overall function is to move merchandise without
2 losing it. If they don't -- if they ship to the wrong
3 address, if they drop it in the wrong bin and it can't
4 be received, it's not there the next day they look for
5 that particular item in that particular bin, then they
6 haven't done their job. And if they steal, it's the
7 same thing.
8 CHIEF JUSTICE ROBERTS: Well then, I guess I
9 don't understand what "principal" means. You're saying
10 everything that is related somehow to the job is
11 principal. I would have thought principal has to do
12 with things that are more significantly related.
13 You would say, typically, if somebody asked
14 what do you do, if you were one of these people, you
15 would say, oh, I fill orders for Amazon. I mean, it may
16 be part of that that you go through security at the end
17 of the day, but that doesn't make it a principal
18 activity.
19 MR. THIERMAN: The term "principal" doesn't
20 mean that it's overwhelmingly important. It means it's
21 one of your job tasks. And just like making the
22 grapefruit --
23 CHIEF JUSTICE ROBERTS: Then I don't know
24 why don't you say "activities" rather than "principal
25 activities"?

1 MR. THIERMAN: The statute uses the word
2 "principal activity."
3 CHIEF JUSTICE ROBERTS: I know you say it
4 because you want to fit under the statute, but I'm
5 saying I don't understand. It seems to me you're just
6 saying anything that is required for the benefit of the
7 employer is a principal activity.
8 MR. THIERMAN: We are saying that anything
9 that is required -- a person is hired to do what they
10 are told to do. That's your job. It's not whether it
11 exists in some kind of abstract job function or abstract
12 flow chart. The worker isn't sitting there deciding,
13 well, gee, is this a principal activity?
14 CHIEF JUSTICE ROBERTS: The workers are
15 told: You've got to check out. It's something they
16 are told they have to do.
17 MR. THEIRMAN: That's right.
18 CHIEF JUSTICE ROBERTS: And under your
19 theory that would be a principal activity.
20 MR. THIERMAN: No. Workers are told they
21 have to return their tools, which they have to pay for;
22 they have to punch out or check out; and then after
23 that, and 20 minutes after that, they have to be
24 searched. So the idea that this is just a part of
25 checking out is wrong, factually, in this case.

1 It is also wrong that when you -- for
2 example, roll calls. Roll calls for -- are a checking
3 in function, but yet because there's more to it than
4 just checking in it's compensable, whereas just saying,
5 hi, I'm here, is not compensable.
6 JUSTICE SCALIA: Just as the employer does
7 not hire somebody to check in, that's not the job. I
8 want to employ you to check in? Of course not.
9 So also, an employer does not hire somebody
10 in order to be inspected when he leaves. I don't see
11 how you can call it a principal activity.
12 MR. THIERMAN: If the employer --
13 JUSTICE SCALIA: And it's not indispensable
14 to the taking care of the material in the warehouse.
15 It's indispensable to -- it's important to the employer
16 and he requires it just as he requires punching in and
17 punching out. But that doesn't make it part of the job.
18 MR. THIERMAN: It's indispensable to keeping
19 your job. If you don't go through the security --
20 JUSTICE SCALIA: Well, that's true, but so
21 is punching in and punching out.
22 MR. THIERMAN: And there is this carveout
23 for checking in and checking out, which we acknowledge.
24 It is a separate, discrete function and it is a -- it is
25 not a work of consequence, which is actually the second

1 part of the definition under --

2 JUSTICE KAGAN: The other way to look at

3 this is that the reason why checking in and checking out

4 is not compensable is because it does have to do with

5 this going in and going out. You know, it's all about

6 ingress and egress, and that's what the Portal-to-Portal

7 Act was about. And if I make you go through a security

8 gate as part of getting out of a factory, then it just

9 becomes part of this -- the principal design of the

10 Portal-to-Portal Act was about going in and going out

11 and this is part of that.

12 MR. THIERMAN: But I can't have an assembly

13 line where you start at one end and at the end of the

14 assembly line, you're done for the day and say

15 everything along the way since it leads to your exit is

16 going to be a part of the egress process.

17 JUSTICE BREYER: What you have here which

18 you could address in this is -- he's quite right,

19 Mr. Clement. Steiner uses the words three or four

20 times, the integral and indispensable, but they qualify

21 activities that take place outside of regular work

22 hours. I think here it's conceded that it takes place

23 outside regular work hours, it's indeed after checkout,

24 etcetera. So the question becomes integral and

25 indispensable and they have gloss on that and so forth.

1 Okay.

2 So I'm in the situation probably I'd say go

3 with the Labor Department. They are the ones who are in

4 charge of this. And they are saying you lose. They

5 point to something in 1951. And I have two questions.

6 The first one is, is there anything else you want to put

7 in besides this very detailed complaint? And the second

8 question is, okay, why don't you lose? What am I

9 supposed to do with that opinion? It's sitting there --

10 MR. THIERMAN: It's not reasoned. It

11 doesn't --

12 JUSTICE BREYER: Well, that's true, but it's

13 never seen in ad law in this area that -- okay, you can

14 cite Skidmore et cetera. But --

15 MR. THIERMAN: They don't even rely on it.

16 It's not an interpretation of the regulations. I think

17 what happened is is the bundle --

18 JUSTICE BREYER: But they are telling us

19 now.

20 MR. THIERMAN: They are telling us now, but

21 I think it's bundled. The question is, do we bundle

22 this process or do we unbundle it. We say, just like

23 the cashier -- by the way, we represent a lot of

24 employees who sue casinos for the fact that they punch

25 out, go downstairs, count their bank and then tally up,

1 it takes 15 to 20 minutes, and then they go out a
2 special door for casino employees, and is all that
3 egress or is that a separate act?
4 JUSTICE BREYER: Well, the answer to the
5 first question, which was yes or no, there isn't
6 anything else you want to put in the record. You are
7 perfectly content with our deciding this on the facts
8 that are in the complaint?
9 MR. THIERMAN: I would put in the record
10 just what I just told Justice Kagan. That is, that
11 this is a discrete act. This is not a wait -- they
12 punch out first. They don't punch out at the end. They
13 don't punch out during. They punch out -- the checking
14 in and checking out function is completely finished.
15 They hand in their tools. They hand in, which they're
16 paid for because that the Department of Labor says you
17 have to be paid for, and the regulations don't -- none
18 of the briefs talk about the 7 -- the 785 series of
19 regulations which define work. And the 785 series
20 define work as basically when you're under the control
21 and doing what the employer tells to you do. And there
22 are --
23 JUSTICE GINSBURG: And how do you explain
24 that you're not compensated for the time you are on the
25 line waiting to don your protective gear? Protective

1 gear, donning it itself, that's a required part of the
2 job, and you're compensated for that. But you're not
3 compensated for the wait to do that.
4 MR. THIERMAN: Because it's a way in versus
5 a way out. You're leaving. So the continuous workday
6 works in favor of the employee in this time. The
7 continuous workday starts at the donning part, it ends
8 at the doffing part. And in the Steiner case and
9 Alvarez the doffing, the wait to doff, was covered
10 because it was part of the continuous work day. It --
11 it -- so it's the mirror image of when coming in. We're
12 not saying they should get paid for waiting on line to
13 come in. We're saying they should get paid waiting on
14 line to be searched. They are already checked out.
15 It's to be searched, and drug testing is compensable.
16 When they send to you a physical to get drug tested or a
17 physical to do a job, that's compensable time.
18 CHIEF JUSTICE ROBERTS: All of this is
19 subject to collective bargaining. In other words,
20 you're sitting down and you say we want it to be $15 an
21 hour and you're asking for a dollar raise and you'll
22 say, look, one reason we should get it is because we
23 have to wait a half hour to get out or whatever, and
24 that's -- whether it's compensable time or not, that can
25 certainly be a factor that goes into the collective

1 bargaining.

2 MR. THIERMAN: Well --

3 CHIEF JUSTICE ROBERTS: This comes out

4 because it's after the fact. And after it's all taken

5 place, you go back and say we should get -- what are

6 these, double damages or --

7 MR. THIERMAN: Liquidated damages are

8 discretionary, it's --

9 CHIEF JUSTICE ROBERTS: But going forward,

10 they can always say, oh, we're not going -- the court

11 says we're not going to get compensated for this time so

12 we're going to insist on a higher amount of the hourly

13 wage for the 8 hours that we do get compensated for.

14 MR. THIERMAN: Well --

15 JUSTICE KAGAN: Are these employees

16 unionized?

17 MR. THIERMAN: These are non-union

18 employees. They are all non-union employees.

19 CHIEF JUSTICE ROBERTS: Well, a lot of the

20 employees covered by this are union employees, right?

21 MR. THIERMAN: Actually, the -- the

22 Petitioner makes a big deal about this avalanche of

23 things happening, but so far out of the 7,000 or so FLSA

24 work -- lawsuits that are filed every -- every year,

25 there are only five or six defendants who have ever been

1 hit with this in the last ten years. And no, they are
2 mostly non-union companies.
3 You are talking about 3.0, and the clothes
4 changing is a separate exception. But in fact, the reg
5 on that says if it was required by law or the employer
6 and it's not covered by the union contract, then it is
7 compensable. So it is the requirement that the employer
8 tell you to do it that, I think is the linchpin to make
9 something a principal activity.
10 If the employer didn't have a mandate, if
11 the employer says to Justice Scalia, well, I don't
12 really care how you get here but you better show up at
13 8 o'clock, get here at 7:30, you can get here at 7:45.
14 You take the risk you're going to be late. That's a
15 different story. That's a different standard. That's
16 the integral and indispensable.
17 JUSTICE SCALIA: What if the employer says I
18 have to take a particular employer-owned trolley to get
19 to the place where I work?
20 MR. THIERMAN: It's covered by a specific
21 exception under the 254(a)(1). It's the travel.
22 Mt. Clemens was the furthest extension of work we have.
23 They rolled back Mt. Clemens. They rolled back a part
24 of Tennessee Coal, which was the travel time, but when
25 they rolled back Mt. Clemens, they only rolled back a

1 portion of it. They rolled back the going from the
2 portal to your work station part of it. They didn't
3 roll back everything that was in Mt. Clemens.
4 Even though it's in the briefs, I'm sure the
5 Petitioner would not want to the de minimus rule to be
6 eviscerated. It is a rule for their favor. That's in
7 Mt. Clemens. There's lots of stuff in Mt. Clemens that
8 still survives on both sides. But Mt. Clemens rolled
9 back -- was rolled back by the Portal-to-Portal Act by
10 the concept of you're on the property, you're in the
11 employ. I mean, where -- Nevada has one of the -- is --
12 actually has that kind of sense of employment as opposed
13 to the Federal employment, which is a much more
14 employee -- employer directed. You do what you're told.
15 Your day starts when your first command comes down.
16 Here's -- the last command is to be
17 searched. And it doesn't take 2 minutes; it takes
18 20 minutes, because they don't want to open up more
19 kiosks and -- and -- or use some kind of queueing theory
20 and shorten the lines. That's their choice.
21 It's also a way of enforcing a -- a policy
22 or a way of -- there are other ways to make sure people
23 don't steal things. They could use cameras. They could
24 use -- they could use a tally. They could make people
25 stand by their bench at the end of the day and they go

1 through every bin. Certainly that would be compensable.
2 It's -- the fact is they chose this method.
3 It's an employer's choice to do it, because it's the
4 cheapest method to do it, to discourage employee theft.
5 And if is the merchandise isn't there at the -- at the
6 end of the day or the beginning of the next shift, you
7 can't do your job. So in that sense, it is
8 indispensable. You need that merchandise not to be
9 stolen so you can fill your orders.
10 But just the command itself, unless it's a
11 carveout, which we have a carveout for changing -- for
12 checking in, checking out. We have a carveout for
13 travel, community-type travel. It's work because you're
14 told to do it and it's not an employee's position to
15 say, gee, I don't think this is work or I don't think
16 this is compensable. They used the example of sneaking
17 out the back door. We don't want employees to be going,
18 oh, well, I'm not getting paid for this, so I'm going to
19 sneak out the back door.
20 Now, when it's a non-mandated -- employer
21 non-mandated task, then we have a whole set of different
22 rules. That's when we use integral and indispensable.
23 Then we say: Is it necessary? Is it indispensable?
24 Was he doing it for his own convenience or was he doing
25 it for the employer's because he couldn't do the job

1 without it?

2 If we have a situation where we're -- we're

3 told to do it and he doesn't do it, he's fired, I think

4 that's -- that's ipso facto indispensable to his job,

5 whether it makes sense or not from the employer's point

6 of view. I mean, employers make people do all kinds of

7 things that don't make sense.

8 Anyway, the fact is that there are lots of

9 examples in the regs of things that are just not -- that

10 are not standalone jobs that are principal activities.

11 And if the -- if the definition of a principal activity

12 requires it to be related to something else --

13 JUSTICE SOTOMAYOR: I think you -- I think

14 you may have misspoke. There aren't standalone --

15 standalone jobs that are not principal activities.

16 MR. THIERMAN: I'm sorry. I did it

17 backwards. There are jobs that are not standalone, that

18 are portions of the day that are principal activities.

19 The grapefruit would be one. You don't make grapefruit

20 all day long for the judge. There are -- so the concept

21 that it has to be a job in and of itself that you can

22 have somebody else to do it is wrong.

23 The changing clothes, the engage to wait.

24 If you look in the -- if you look in the legislative

25 history and you look in the regulations, there are two

1 scenarios that Senator Cooper says explains everything.
2 The first one is waiting -- is you've got to come in and
3 oil your machine before you can do your job. That's
4 integral and indispensable. But the second one is
5 laying out work for other people. Now, we don't even
6 know what that particular person's job is. For all we
7 know, they could be the coffee maker or the -- or the
8 gofer or whatever, but they have a task that has been
9 assigned by their employer that they must be paid for
10 doing, the laying out the work of other people. That's
11 not integral and indispensable to their job. But it's a
12 specific task. It's a principal activity. And
13 that's -- and that's what I think the legislation
14 contemplates.
15 JUSTICE ALITO: Those are all things that
16 somebody might pay somebody to do individually. So if
17 the -- if the law clerk didn't prepare the grapefruit,
18 the judge might hire somebody else to come in and
19 prepare the grapefruit. But this is different, isn't
20 it? Because nobody would -- you wouldn't pay anybody
21 just to come in and go through a security --
22 MR. THIERMAN: And nobody would pay anyone
23 to have their changing into a uniform to be a waiter.
24 But if you require the changing on site, it's
25 compensable. No one --

1 JUSTICE ALITO: All I'm saying is that the
2 examples you gave are -- are quite different because
3 those are like mowing the lawn, things like that, those
4 are things you would pay somebody. If you didn't have
5 this employee do it, you could -- you might hire
6 somebody else to do it.
7 MR. THIERMAN: The problem is waiting to
8 receive instructions. Okay. That is clearly engaged to
9 wait; you're waiting to receive instructions. If you
10 aren't going to do anything with those instructions,
11 that's not a job. You don't say if someone's a
12 professional instruction-receiving person. That's not a
13 job. Yet it's a principal activity. You are engaged to
14 wait. And it doesn't matter whether you're engaged to
15 wait because the employer wants you there on the ready
16 for something to happen or the employer just says, you
17 know, I feel like having the factory full on Tuesday.
18 Maybe -- whatever the employer wants to do, assuming
19 it's not illegal --
20 JUSTICE ALITO: No, I understand that, but
21 it's -- that enables you to do the thing that the
22 employer is paying you for. It's different from the
23 examples that you gave.
24 MR. THIERMAN: It is if you're not -- if it
25 does, in fact, lead to that. But there are employers

1 who say -- they're OCD, they want everyone there till
2 8 o'clock, even if you have nothing to do. I'm paying
3 you to stay till 8:00 o'clock, you stay till 8:00
4 o'clock. There's nothing that is coming out of that,
5 but yet you are told to stay, so you stay. And there's
6 no -- there's no function to it. I mean, the employers
7 do things like that or they do it for reasons that we
8 don't know or we won't understand and we don't care
9 because that's our system. They are allowed to run
10 their business that way. And a corollary of that is
11 that they tell people what to do. And, you know, the
12 old rule in the union shop is obey and grieve. If you
13 don't like, do it and then grieve it later.
14 The same thing here. It doesn't make sense
15 what we're doing, but we're going to do it. And
16 that's -- and, you know, maybe it's a slow day and he
17 just wants to make his -- the employer wants to keep the
18 people busy. Whatever it is, if the employer tells to
19 you do it and it's not within these carveouts, it -- it
20 is compensable.
21 And the drug testing is another example.
22 The drug testing is compensable. Why? Because your
23 freedom -- you're giving up your time. Your freedom
24 isn't -- and you're doing it because the employer told
25 told you to do it.

1 JUSTICE SCALIA: Suppose the employer has
2 enough stations that it just takes a minute to go
3 through. Would you still be making the argument that
4 that's compensable?
5 MR. THIERMAN: If the -- if the employees go
6 through in a minute, it's de minimis. And that's -- and
7 that's the safety valve or the escape valve. First we
8 decide if it's work; second we decide if it's within the
9 postliminary and preliminary carveout; and third we
10 decide if it's de minimis.
11 JUSTICE SCALIA: Gotcha. Okay. Five
12 minutes?
13 MR. THIERMAN: The Ninth Circuit uses a
14 ten-minute rule. It -- it varies. I mean, it -- it --
15 if it's constantly done every day for ten minutes
16 exactly, it gets close. But three minutes, it's
17 trivial.
18 But we're not talking trivial here. We're
19 talking 20, 25 minutes. And it's 20 to 25 minutes not
20 necessary to be done if they didn't have the screening,
21 if they didn't have that -- that type of screening. You
22 know, you take off your clothes, you take off your
23 shoes, you put your jacket down, you empty your pockets.
24 And then the metal detector goes off anyway and they
25 take you aside and they do another screening. That's

1 not de minimis. That's a whole long process. If you go
2 through the airport, we know it.
3 The funny thing is, you ask about the -- we
4 do this on the way into an airport. Nobody screens you
5 on the way out of an airport. I don't think the
6 government very often screens people on the way out of a
7 building. It could be an exception, I know. But -- but
8 generally speaking, people are screened on the way in,
9 and that's because it's not for the benefit of the
10 employer, it's for the benefit of the public, for their
11 security and safety.
12 This is not a security check. This is not
13 patting you down for weapons or taking out nuclear
14 secrets or anything like that. This is why -- this is
15 only a theft deterrent mechanism. In fact, one could
16 argue that the -- that the search itself, whether they
17 find anything or not, has an effect on every other
18 employee who knows it's happening. It's a --
19 JUSTICE BREYER: What would the rule be --
20 suppose there weren't a special section about clothing.
21 Suppose that didn't exist and -- and suppose you had to
22 change into a uniform. Would that be compensable or
23 not?
24 MR. THIERMAN: Well, the way the -- the way
25 the history --

1 JUSTICE BREYER: What is the history?
2 MR. THIERMAN: The way the history is, it
3 says if it's necessary for the job and then they
4 distinguish between changing on site and changing off
5 site. So we're not talking about protective clothing.
6 We're talking about decorative clothing. Okay? And
7 the -- and the argument is you change once in the
8 morning when you go to work. That you do on your own
9 time. And if the employer says, I want you to wear a
10 blue shirt instead of a pink shirt or a yellow shirt,
11 he's not really adding to your burden. All he's doing
12 is selecting your clothes for you.
13 JUSTICE BREYER: But if it's a uniform --
14 MR. THIERMAN: But if it's -- even if it's a
15 uniform, if you could wear it to work -- and this
16 happens with police officers. If they can wear their
17 uniform to work and the -- and the locker room at work
18 is just for the convenience of the officers, it's not
19 compensable. But if they have to change on site for
20 whatever reason -- in clean rooms they have to change on
21 site because they need those uniforms to be pressed. In
22 one of our cases we have involving a casino, they don't
23 want their image diluted by seeing uniform outside --
24 JUSTICE BREYER: So you're saying if you
25 didn't have that special section, this is compensable.

1 If it were a change of clothing, it had to take place on
2 site.
3 MR. THIERMAN: Exactly.
4 JUSTICE BREYER: And so this isn't really
5 different from that.
6 MR. THIERMAN: That's right. It's not
7 different from that because they're telling you you have
8 to stay on site.
9 JUSTICE BREYER: You're on site and it's no
10 -- it's the same kind of burden that you might have to
11 have protective clothes or some kind of special thing
12 that you change into on site.
13 MR. THIERMAN: Right. They -- the employer
14 requires it for the employer's convenience and it
15 doesn't fall in the travel exception. It's not checking
16 in and checking out because, as I've said, the checking
17 in and checking out, first of all, is a very, very minor
18 task.
19 JUSTICE BREYER: What's the example that you
20 you found that's the closest to this that favors you?
21 MR. THIERMAN: Drug testing.
22 JUSTICE BREYER: Hmm?
23 MR. THIERMAN: Drug testing.
24 JUSTICE BREYER: Drug testing.
25 MR. THIERMAN: Because drug testing you can

1 do on the way out or you can do it on the -- on the way
2 in or -- and -- and if they want to test you on the way
3 out because they want you to go -- I mean, there are
4 ways of defeating a drug test by taking other chemicals.
5 So they escort you to the bathroom, they make somebody
6 sit there and watch you while you -- while you -- while
7 you give them a sample and then they go test it, and
8 they won't let you leave until you're done testing it --
9 until they're done testing it and they have a result.
10 That's a close example. And yet --
11 JUSTICE BREYER: I mean, is that well
12 established?
13 MR. THIERMAN: There's DOL memo of 1997,
14 September 15, and it says drug testing is compensable.
15 Physical exams for truck drivers and other types of
16 people are compensable. Fueling the truck when you're
17 done with your trip is compensable.
18 JUSTICE SCALIA: Is waiting to put on
19 protective gear compensable?
20 MR. THIERMAN: Waiting to put on, no;
21 waiting to put off, yes.
22 JUSTICE SCALIA: Say it -- say it again?
23 MR. THIERMAN: Waiting to put on, no.
24 JUSTICE SCALIA: No.
25 MR. THIERMAN: Waiting to put off, yes.

1 See, we're -- we're dealing with a continuous workday
2 rule and we're on the other end of it. Most of the
3 cases everyone is talking about are preliminary to work.
4 We're talking postliminary if -- or principal activity.
5 And on the way out, it's the continuous workday rule
6 works in favor of the employee. On the way in, it works
7 in favor of the employer because the clock hasn't
8 started. Anyway --
9 JUSTICE SOTOMAYOR: All of the examples
10 you've just been giving and what you say the rules
11 are --
12 MR. THIERMAN: Yes.
13 JUSTICE SOTOMAYOR: -- are they part of the
14 labor regulations?
15 MR. THIERMAN: Yes. They're -- they're --
16 JUSTICE SOTOMAYOR: So I can find them?
17 MR. THIERMAN: Yes. They're in -- they're
18 in the -- what the -- what the government and Petitioner
19 don't discuss is the 785 series. The 785 series is
20 what's work. The 785 series says that if you are
21 required to take a -- a seminar, even if it's nothing to
22 do with what you -- what you are employed to do, it's
23 compensable.
24 If it's a voluntary seminar, then it -- then
25 there's a -- a kind of a test. Well, is it related to

1 your work, not related to your work, is it going to
2 advance your work or not advance it. But if it's
3 totally unrelated to your work, but you're required to
4 take the seminar, whether it's after hours or right
5 after class -- or right after the work, it's
6 compensable. There are a whole series of --
7 JUSTICE SCALIA: Unless it's covered by the
8 Portal-to-Portal Act. And the Portal-to- Portal Act is
9 an exception to that.
10 MR. THIERMAN: No. The regulations point
11 blank say it's covered. There's no Portal-to-Portal Act
12 argument on those regulations.
13 JUSTICE SCALIA: The notion that if it is
14 compensable work it's covered, there is an exception
15 to -- there's an exception to what the employer
16 requires. He can require some things and yet not be
17 liable for, under -- under the Act, to pay for those
18 things. That's what the Portal-to-Portal Act is about.
19 MR. THIERMAN: The -- and we say those
20 exceptions that he's not required to pay for or the
21 transportation to and from the mine, which is (1)(a) --
22 or (a)(1) of the Portal -- 254(a)(1), and then you don't
23 get to (a)(2) if it's a -- if it's a principal activity.
24 And the regulations on attending seminars does not
25 discuss any exemption about way in or way out. It

1 simply says that if the employer mandates you take a
2 seminar, no matter what it's on, they have to pay you
3 for the time.
4 So there's no Portal-to-Portal Act issue if
5 it's a principal activity. And what the regulations of
6 78 -- 785 say, these are lists of things that are
7 compensable because the employer told you to do it. And
8 it's -- whether it's fueling the truck at the end of the
9 day -- you don't need to have the truck fueled at the
10 end of the day because you're already done driving, so
11 it's not integral and indispensable to anything. Those
12 are the kind of things that the Portal-to-Portal Act
13 doesn't cover because they're principal activities.
14 I -- I could -- I could -- sexual harassment
15 training, another one. We require employees to go
16 through sexual harassment training. Is that a part of
17 their job? It's a task. It's required of them.
18 JUSTICE BREYER: What about checkout?
19 MR. THIERMAN: Checking out meaning?
20 JUSTICE BREYER: Well, they say this is like
21 checkout. You go -- you go check out, put your time
22 card in, check out.
23 MR. THIERMAN: Yes. That is, punching in,
24 punching out is an exception. Checking in and checking
25 out is an exception.

1 JUSTICE BREYER: Why? What's the theory? I
2 mean, what's the theory?
3 MR. THIERMAN: Well, the theory, I think --
4 I -- I think that in 1947, that's what they -- they
5 thought it was such a -- I don't want to use the word
6 "de minimis" because it has whole other meaning,
7 but it's --
8 JUSTICE BREYER: But they're thinking --
9 see, the other side says, well, this is like checking
10 out, you know.
11 MR. THIERMAN: But it's not. And that's --
12 and isn't that a factual question for a jury? But it's
13 not. It's not like checking out because they've already
14 checked out and you don't check out twice. I mean, you
15 don't. You don't check out twice. And the difference
16 between checking in -- because, like, I don't have a
17 checkout example -- but the difference in checking in
18 and a roll call -- and -- and you must get paid for roll
19 calls -- is that the employer tells you to be there at a
20 certain time and do this thing where -- and that's
21 compensable. But if a -- so if you guild or if you put
22 the one straw on top of the checking out, you break the
23 camel. And -- and it's a very, very small exception,
24 because generally speaking, we want people not to work
25 off the clock, because this is what this case is all

1 about. It's about --

2 CHIEF JUSTICE ROBERTS: Thank you. Thank

3 you, counsel.

4 MR. THIERMAN: -- working off the clock.

5 Thank you, Your Honors.

6 CHIEF JUSTICE ROBERTS: Mr. Clement you have

7 four minutes.

8 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF THE PETITIONER

10 MR. CLEMENT: Thank you, Mr. Chief Justice.

11 Just a few points in rebuttal.

12 I'd like to start with what is the linchpin

13 of principal activities. Principal activities is

14 obviously a term introduced to the Act by the

15 Portal-to-Portal Act. The regulations define that as

16 work of consequence. Now, my friend would like you to

17 say that the linchpin is whether it's required. Here's

18 why that makes no sense at all. Whether you get into

19 the Fair Labor Standards Act in the first instance is

20 determined by whether it's required. Now, it doesn't

21 much -- do much good for Congress to say, don't worry

22 about that, employers. We have an exception for you.

23 But the exception is also never satisfied as long as

24 it's required. That would give the exception no --

25 JUSTICE BREYER: That isn't really, I think,

1 their main point. I think this is -- this isn't really
2 like they say, just checking out. What it is more like
3 is drug testing. You heard the argument. Drug
4 testing --
5 MR. CLEMENT: I heard their argument.
6 JUSTICE BREYER: -- a seminar that you'd
7 have on the thing about sexual harassment, da, da, da.
8 Okay. So what is your response?
9 MR. CLEMENT: Especially as my friend
10 describes drug testing, it doesn't sound like any
11 logical part of the egress process. And I think that's
12 why those things are not covered. They're not covered
13 not because --
14 JUSTICE KAGAN: But you, certainly,
15 Mr. Clement, make it part of the egress process. I
16 mean, if this is just ingress/egress and I -- I -- seems
17 as though that's part of what the Portal-to-Portal Act
18 does. Why not make it part of the egress process and
19 then there would be a wholly different outcome; is that
20 right?
21 MR. CLEMENT: Well, no, I don't think so. I
22 think at some point, the Court can obviously take --
23 police employers that want to lard on things that have
24 nothing to do with the egress process and say you've got
25 a wash my car on the way out. And as he describes the

1 drug testing process, you're actually diverted from your
2 process of exiting. You're escorted -- escorted to --
3 to the restroom and monitored while you do it. It
4 doesn't sound anything like an egress process.
5 And those activities are covered not because
6 they are postliminary activities that are integral and
7 indispensable. Those activities are covered because
8 they're work under the FLSA and the portal-to-portal
9 exceptions for postliminary and preliminary activity
10 simply don't apply. And that covers car washing; it
11 covers drug testing; it covers also these videos. It
12 really is quite different. But the checkout process,
13 which is part of the egress process, really does make
14 this very close.
15 One other point of clarification on this,
16 Justice Scalia, you were exactly right when you said the
17 785 series, which they want to rely on, are about hours
18 worked under the Fair Labor Standards Act. They say
19 what's in the universe of things that are potentially
20 subject to the exceptions of the Portal-to-Portal Act.
21 The principal activities is defined in the
22 regulations in the 790 series, which is all about the
23 Portal-to-Portal Act and 790.A is helpfully entitled
24 principal activities. What are principal activities?
25 Not anything that the employer requires, but work of

1 consequence and that gets you to this concept that work
2 of consequence is things like cutting grapefruit or
3 preparing every work station in the facility or driving
4 the bus that gets people to the mine. Work of
5 consequence is not checking in and checking out. It is
6 not going through security. Nobody gets paid to go
7 through security all day. Now, it also -- nobody gets
8 paid take a bath all day either. And so that's why --
9 that's not a complete test. You still have to ask the
10 final question, which is whether it's integral and
11 indispensable to the principal activities.
12 Now, my friends really don't want to talk
13 about that, I think, with good reason because this
14 clearly is not integral and indispensable. And I don't
15 think you can make not stealing indispensable to the
16 workday; otherwise, all these employees could stay home
17 away from the -- the merchandise and they'd never steal
18 a thing and that would be their work function. It just
19 doesn't work. The work function is to fulfill the
20 orders.
21 I want to say one last thing about your
22 opening hypothetical, Justice Kagan. There is another
23 difference between your hypothetical and this situation,
24 which at least as I understood your hypothetical, if an
25 employee has to stay at their work station and while a

1 20-minute process goes on, that's the employer requiring
2 them to be on the premises for an extra 20 minutes.
3 That's much more like being engaged to wait than waiting
4 to engage.
5 JUSTICE KAGAN: I gave it to you two ways.
6 And one was at your work station and the other was an
7 employer, who knowing that there was this ingress/egress
8 rule, made it part of the ingress/egress process. So
9 that's my other question repeated again.
10 MR. CLEMENT: But -- but even as to the
11 modified hypothetical, if you have to stay on the
12 employer's premises for an extra 20 minutes, that's
13 closer to being engaged to wait as opposed to waiting to
14 engage. The allegations here are not that this process
15 takes 25 minutes. It can take up to 25 minutes if
16 you're in the very back of the line. And I think one of
17 the many reasons not to adopt their rule is you don't
18 want to create an incentive for every employee to try to
19 get to the back of the line, which is hardly going to
20 speed things up.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.
23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)
25

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: INTEGRITY STAFFING SOLUTIONS, INC., Petitioner v. JESSE BUSK, ET AL., and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Raymond R. Heer III

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