No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

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BRIEF FOR *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

The National League of Cities, the National Association of Counties, the International City/County Management Association, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the Government Finance Officers Association, the National Public Employer Labor Relations Association, and the International Public Management Association for Human Resources respectfully submit this *amici curiae* brief in support of Petitioner. *Amici* seek to offer additional reasons that this Court should reverse the Ninth Circuit's unduly broad construction of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and gov-

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[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

ernance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is allowed to stand. As *amici* argue below, the Ninth Circuit's decision substantially departs from this Court's precedent, and it has far-reaching consequences for employers struggling to manage the effects of the Great Recession. Unless the Ninth Circuit's decision is reversed, state and local governments, which collectively are the nation's largest employer, might be pushed to the financial brink by unanticipated and unbudgeted claims for compensation for preliminary or post-

liminary activities that are not an "integral" part of their employees' principal work.

SUMMARY OF ARGUMENT

This Court has repeatedly held that only those preliminary and postliminary activities that are "integral and indispensable" to an employee's principal work activities are compensable under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act. The Ninth Circuit interpreted this standard as reaching all activities that are "necessary" and "done for [the employer's] benefit." Pet. Br. 15. As a result, the Ninth Circuit held that the time employees spend in a security screening after their principal work is completed is compensable under the FLSA.

The Ninth Circuit's expansive reading of "integral and indispensable" activities sweeps broadly, encompassing even basic non-principal and indisputably non-compensable activities—like home-to-work commuting. *See* 29 C.F.R. § 785.35 ("Normal travel from home to work is not worktime."). But just as an employer typically does not hire employees to commute to and from work, an employer does not hire employees to pass through security screening. Both home-to-work commuting and passing through security are "necessary" in the sense that they are required to get to or from the workplace at the beginning or end of the workday. Likewise, they both are done for the benefit of the employer. However, neither is "integral" to an employee's principal work activities. As a result, neither should be compensable.

By reducing the "integral and indispensable" test to simply an inquiry into whether the activity is necessary and for the employer's benefit, the Ninth Circuit's analysis strips the "integral" component from what courts widely agree is a bipartite test. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592–93 (2d Cir. 2007); *see also Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). But "'indispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. As with

the activities excluded from compensation by this Court in *Steiner*, security screenings might be "indispensable," in the sense of being necessary to begin or end the workday, but such screenings are not "integral" to principal work activities—that is, they are not "so closely related to other duties performed . . . as to be an integral part thereof." *See Steiner*, 350 U.S. at 252. By eliminating the requirement that the security screening be "integral" to the employees' principal activity, the Ninth Circuit broadens compensable activities to the scope adopted by this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), a scope intentionally *reversed* by Congress through the Portal-to-Portal Act.

The Ninth Circuit's watered-down compensability test is a boon for those employees and lawyers who want to expand the FLSA's reach and extract undue sums from employers despite Congress's clearly expressed intent to shrink employer liability for non-principal work activities under the Portal-to-Portal Act. The decision encourages litigation over even the most mundane and inconsequential tasks, which traditionally have been understood to be non-compensable, on the mere prospect that such activities might be deemed "necessary" and "done for the benefit of the employer."

But neither litigation nor expansion of FLSA coverage is costless. And the burden of these additional and unexpected costs will fall on employers—employers like *amici*'s members and partners, the state and local governments that are, collectively, the nation's largest employer. Yet those entities are already struggling to claw out of prolonged budget crises caused by the Great Recession. With financial obligations continuing to outpace tax revenue, state and local governments face a particular and peculiar risk if the Ninth Circuit's decision is allowed to stand.

Amici therefore respectfully request that this Court reverse the Ninth Circuit's decision and reiterate that the "integral and indispensable" test is a bipartite one. In so doing,

this Court will reassure employers across the country that they will not be on the hook, legally or financially, for the few minutes each day that some employees spend passing through security to enter or leave work.

ARGUMENT

I. ONLY THOSE ACTIVITIES THAT ARE BOTH "INTEGRAL" *AND* "INDISPENSABLE" TO PRINCIPAL WORK ACTIVITIES ARE COMPENSABLE.

1. Just last term, this Court reaffirmed the longstanding rule that activities are compensable under the FLSA only if those activities are "integral and indispensable" to an employee's principal work activities. *Sandifer v. U.S. Steel Corp.*, __ U.S. __, 134 S. Ct. 870, 876 (2014). This formulation is a judicially crafted attempt to draw the line between the "principal activity or activities" of an employee and "activities which are preliminary to or postliminary to said principal activity or activities," the latter of which the statute specifically designates non-compensable. 29 U.S.C. § 254(a)(2); *see also Steiner*, 350 U.S. at 256. If an activity is "'an integral and indispensable part of the principal activities,'" it is fairly encompassed within the term "principal activity or activities." *Steiner*, 350 U.S. at 252-53 (quoting *Steiner v. Mitchell*, 215 F.2d 171, 175 (6th Cir. 1954).

Both aspects of the test—*i.e.*, "integral" and "indispensable"—have independent meaning. This Court made that clear in *Steiner*, where the Court applied the "integral and indispensable" test to hold that battery plant workers who were required to change into protective gear before each shift and shower and change out of the gear at the end of the shift were entitled to compensation. 350 U.S. at 256. This Court explained that Congress intended such activities to be compensable if they were "essential to the principal activities of

the employees"—*i.e.*, "indispensable"—*and* "an integral part of" those activities. *Id*. at 254.

Similarly, in *Mitchell v. King Packing Co.*, the Court determined that knife sharpening by knifemen was compensable. To reach that conclusion, it reasoned that the knives were required to "be 'razor sharp' for the proper performance of the work." *Mitchell*, 350 U.S. at 262. That is, the sharpening of the knives was necessary, or "indispensable." But the Court also concluded that, upon hiring, "it is understood that [a knifeman] will be required to sharpen knives," a task which he is "expected to perform . . . as well as other tasks connected with the job." *Id.* In other words, sharpening knives is an integral part of a knifeman's job.

Finally, in *IBP v. Alvarez*, the Court denied compensation for employees' time "waiting to don . . . integral and indispensable gear" because that waiting time itself was "certainly not 'integral and indispensable' in the same sense that the donning is." 546 U.S. 21, 40 (2005). The Court specifically acknowledged that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *Id*. at 40-41. Instead, because the predonning "waiting" was "two steps removed from the productive activity on the assembly line," it was not compensable. *Id*. at 40, 42.

It is thus no surprise that courts have consistently understood this Court's precedent to dictate that the "integral and indispensable" test is a bipartite one, under which "'[i]ndispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. *See also Bamonte v. City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010) ("[T]here is a difference between an indispensable activity and an integral activity. That an activity is indispensable does not necessarily mean that the activity is integral to the principal work performed."). An activity must be (1) "indispensable" or "necessary," and (2)

"integral," or "so closely related to other duties performed . . . as to be an integral part thereof." *Steiner*, 350 U.S. at 252; *see also, e.g.*, *Musticchi v. City of Little Rock, Ark.*, 734 F. Supp. 2d 621, 630–32 (E.D. Ark. 2010) (holding that an indispensable job duty was not compensable because it was not integral to the plaintiffs' principal duties); *Schwartz v. Victory Sec. Agency, LP*, No. 11-cv-0489, 2011 WL 2437009, at *5 (W.D. Pa. June 14, 2011); *Harvey v. AB Electrolux*, No. C11-3036-MWB, 2014 WL 1696134, at *17 (N.D. Iowa Mar. 28, 2014) ("Courts, however, do not view these two terms as synonymous."); *Bamonte*, 598 F.3d at 1225.

2. The Ninth Circuit veered sharply from this bipartite approach in its analysis of whether the security screening at issue in this case is "integral and indispensable" to the principal work activities of the warehouse employees who "fill[] orders placed by Amazon.com customers." Pet. Br. 12. Although it recited the "integral and indispensable" standard, the court pared the inquiry to only one of the two relevant questions, asking whether the security screening was "necessary" and done for the "benefit of the employer." Pet. Br. 13. Noticeably absent from this analysis is any consideration of whether the security screen is "so closely related" to the warehouse employees' principal activities "as to be an integral part thereof." *Steiner*, 350 U.S. at 252.

With the "integral" prong thus excised, the Ninth Circuit's test closely parallels the test adopted in *Anderson* and superseded by the Portal-to-Portal Act. *Anderson* held that the time employees spent walking to their stations was compensable precisely because that walking was compelled "by the necessities of the employer's business" and was "'pursued necessarily and primarily for the benefit of the employer and his business.'" *Anderson*, 328 U.S. at 691-92 (quoting *Tenn. Coal Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)). The Portal-to-Portal Act repudiated this approach, and *Steiner* replaced it with the two-prong "integral and in-

dispensable" standard that the Ninth Circuit failed to properly apply. *See IBP*, 546 U.S. at 34–35.

3. The significance of the Ninth Circuit's elimination of the "integral" requirement is evident in the fact that it found the security screening here compensable, after well-reasoned decisions from the Second and Eleventh Circuits found security screenings *not* compensable. The Second and Eleventh Circuits both read *Steiner* and the Portal-to-Portal Act narrowly and gave due weight to the "integral" component of the bipartite test. *Gorman*, 488 F.3d at 591; *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007); *see also Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011).

In *Gorman*, the Second Circuit held that time spent traversing security screening is not compensable because "'[i]ntegral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole,'" and time the employees spent passing through security "while arguably indispensable," or "necessary," was "not integral" because such activities are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." 488 F.3d at 592-93.

In *Bonilla*, the Eleventh Circuit, like the Second Circuit in *Gorman*, emphasized that a claim of "necessity" does not suffice to demonstrate that an activity is integral and indispensable, because "[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Bonilla*, 487 F.3d at 1244.

The Ninth Circuit sidestepped *Gorman* and *Bonilla*, finding that the determinative fact here is that the security screening is to reduce "shrinkage," and so it is done for In-

tegrity's "benefit." Pet. Br. 13. In other words, if the purpose of security screening is to reduce theft, the time spent passing through security is compensable. But if the purpose is to ensure safety and security, the time is not compensable.

But neither the term "integral" nor the term "indispensable" incorporates an intent requirement. An employee's activity is no more "necessary" to, or an integral part of, that employee's principal activity simply because of the reason the activity is undertaken. *See Gorman*, 488 F.3d at 593 (recognizing that the scope of the Portal-to-Portal Act "does not depend on the *purpose* of any preliminaries" or postliminaries) (emphasis added).[1]

Moreover, focusing on intent would lead to absurd results. Under such an approach, two employees who work in different buildings, but for the same employer and doing the same principal activities, might be compensated differently for an identical preliminary or postliminary activity. For example, a clerical worker in a county's procurement facility, who passes through a security screening to prevent shrink-

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1 Nor does it matter whether or not everyone entering the workplace, or just those handling the Amazon.com products, went through the security screening. The Ninth Circuit attempted to distinguish *Gorman* and *Bonilla* on this ground, stating that in those cases, "everyone who entered the workplace had to pass through a security clearance." Pet. Br. 40. But the ubiquity of security screenings is of no consequence: an activity is either so much a part of, and necessary to, a principal activity to be "integral and indispensable," or it is not. Moreover, even if ubiquitous security screenings were less "integral and indispensable" to principal duties than targeted screenings, Respondent has not established that *only* members of the putative class–and not others leaving the warehouse floor–were subject to the security screenings here. In fact, the Class Action Complaint does not make this allegation. *See also* Pet. Br. at 41 ("Tellingly, neither the Ninth Circuit nor the Respondents cite *anything* in support of their suggestion that only certain employees are subject to security screenings.") (emphasis in original).

age, would be compensated. But a clerical worker in the county's courthouse, who must clear a security screening designed to ensure the safety and security of a sensitive facility, would not. In both scenarios, the employer benefits: the "shrinkage" screening protects its financial resources; the "safety" screening protects its people.

What should control is "common sense and the general concept of work or employment." *Hultgren v. Cnty. of Lancaster, Neb.*, 913 F.2d 498, 504 (8th Cir. 1990). A construction of "integral and indispensable" that makes some security screenings compensable and others non-compensable distorts the traditional notion of work, and it defies common sense.

4. When evaluated for satisfaction of the "integral" requirement, rather than simply the "indispensable" requirement, the security screenings here fail to meet the test. There is nothing about removing personal belongings from one's pockets and walking through a metal detector that can be characterized as "organically joined or linked" to retrieving items from inventory and filling customers' online orders. *See Gorman*, 488 F.3d at 592. The screenings are certainly not "*always* essential if the [warehouse worker] is to do his job." *IBP*, 546 U.S. at 40 (emphasis in original). Nor would it be naturally "understood" by a newly hired employee that passing through security screening was a logical part of a job filling customer orders in the same way that a newly hired knifeman would be well aware his knife must be sharpened. *See Mitchell*, 350 U.S. at 262.

If the metal detectors used to conduct the security screenings malfunctioned, the workday surely would not end. *Accord Musticchi*, 734 F. Supp. 2d at 631 ("[U]nlike a butcher sharpening a knife or an x-ray technician powering and testing an x-ray machine, [ ] officers can successfully perform their jobs without polishing and cleaning their uniform and equipment.").

Although "necessary" and done for Integrity's "benefit," the after-hours, off-floor security screenings—like the "pre-donning waiting" in *IBP*—are "two steps removed from the productive activity" in the warehouse, "and thus not "integral" to the plant workers' principal activities. *See IBP*, 546 U.S. at 40, 42. This Court should apply the narrow, bipartite test articulated in *Steiner*, and reaffirmed in *Mitchell*, *IBP*, and *Sandifer*. Doing so would inexorably lead to one conclusion: security screenings are not "integral and indispensable" to warehouse workers' principal activities. The Ninth Circuit's decision cannot stand.

II. A WATERED DOWN TEST FOR "INTEGRAL AND INDISPENSABLE" ACTIVITIES WILL HURT EMPLOYERS AND CAUSE A FLOOD OF FLSA LITIGATION.

The Ninth Circuit's decision poses a significant and immediate threat to employers: the cost of defending against the flood of litigation that will inevitably follow combined with the cost of unprecedented FLSA exposure. Because many FLSA suits are filed as collective actions representing hundreds or thousands of plaintiffs, each new suit represents millions or hundreds of millions of dollars in potential liability and litigation expenses for employers.

Respondents' counsel estimates that this case alone represents "hundreds of millions of dollars" in potential liability.[2] This projection is not farfetched. In 2009, the average compensatory award, excluding attorneys' fees, in all federal court employment cases was more than $490,000, a 45% increase since 2000. Today, "[i]n any employment case filed

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[2] John Zappe, *Supreme Court to Decide if Security Check Time is Compensable*, ERE (Mar. 4, 2014), http://www.ere.net/2014/03/04/supreme-court-to-decide-if-security-check-time-is-compensable/.

in federal court, there is a 16% chance the award (excluding attorney fees) will exceed $1 million, and a 67% chance that the award will exceed $100,000."[3] The cost of settling can be equally devastating, as it has "tripled during the past five years, to an average of more than $300,000."[4] Many cases result in far more liability, such as recent collective action settlements ranging from $65 million to $640 million.[5]

Cases litigated to final judgment have had similar results. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1285 (11th Cir. 2008) (affirming a final judgment of more than $35 million against Family Dollar Stores in a FLSA collective action brought by 1,424 store managers seeking overtime compensation); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2005 WL 3941313, at *1 (E.D. Wash. Dec. 20, 2005) (awarding plaintiffs over $9 million in damages, costs, and attorneys' fees).

These figures capture only a small fraction of the actual expense associated with defending against FLSA suits. A report prepared by the Dunlop Commission, at the behest of

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3 Elizabeth Erickson & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, BLOOMBERG LAW REPORTS (2009), http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf.

4 *Id.*

5 *I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime*, N.Y. TIMES (Nov. 23, 2006), http://www.nytimes.com/2006/11/23/technology/23IBM.html; *Smith Barney to Settle Brokers' Overtime Suit*, L.A. TIMES (May 24, 2006), http://articles.latimes.com/2006/may/24/business/fi-wrap24.2; Margaret Cronin Fisk, *Wal-Mart Will Pay Up to $640 Million in Settlement*, BLOOMBERG (Dec. 23, 2008, 6:57 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX6vHzFR2avg; *Craig v. Rite Aid Corp.*, 13 N.W. Pers. Injury Litig. Rep. 53, 2013 WL 1397751 (M.D. Pa. Jan. 7, 2013 (reporting a $20.9 million settlement of a FLSA collective action and state law class action).

the Secretary of Labor and the Secretary of Commerce, found that, in employment litigation cases, "[f]or every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims."[6] And that does not include the costs borne by employers to ensure they are FLSA compliant: "employers often dedicate significant sums to designing defensive personnel practices . . . to minimize their litigation exposure." *Id.*

By defining "integral and indispensable" so expansively that the Respondents here may advance a claim that has been uniformly rejected in other circuits, the Ninth Circuit opened the floodgates to a new torrent of FLSA litigation. In fact, in the six months following the Ninth Circuit's decision, at least ten FLSA collective actions seeking compensation for time spent in security screenings were filed in federal courts. *See, e.g., Frlekin v. Apple, Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Vance v. Amazon.com, Inc.*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013)*; Kilker v. Apple, Inc.*, No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013); *Allison v. Amazon.com, Inc.*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); *Suggars v. Amazon.com, Inc.*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Johnson v. Amazon.com, Inc.*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Davis v. Amazon.com, Inc.*, No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013); *Gibson v. Amazon.com, Inc.*, No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013);

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6 U.S. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS–FINAL REPORT 49 (Dec. 1, 1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

Rosenthal v. Amazon.com, Inc., No. 1:13-cv-1701 (D. Del. Oct. 15, 2013).

If past is prologue, this consequence should have been expected. The Portal-to-Portal Act surely did not curb FLSA litigation, despite being intended to "limit" employer liability. Not only has the number of FLSA lawsuits filed each year increased by 514 percent since 1991, but FLSA lawsuits also constitute a larger portion of all federal lawsuits than in past years. For example, in 1991 FLSA lawsuits made up 0.6 percent of all civil lawsuits. But, by 2012, "FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent."[7] Between 2010 and 2012 alone, FLSA claims filed in federal court increased by almost 1,000.[8] And a record 8,148 FLSA lawsuits were filed in federal district courts in 2012.[9] If the Court does not reaffirm the bipartite "integral and indispensable" test, a deluge of additional FLSA litigation is sure to come. The flood will sink some employers.

III. STATE AND LOCAL GOVERNMENT WILL FACE PARTICULAR HARM UNLESS THE BIPARTITE TEST IS REAFFIRMED.

The Ninth Circuit's decision exposes countless employers to unexpected FLSA liability. But one type of employer is particularly vulnerable to new FLSA liabilities under the

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7 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDELINES 6 (2013), *available at* http://www.gao.gov/assets/660/659772.pdf.

8 *FLSA Cases in Federal Court*, SEYFARTH SHAW LLP (2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf.

9 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 7, at 6.

collapsed construction of the "integral and indispensable" test: state and local governments.

As of March 2011, state and local governments employed roughly 19.3 million people.[10] By comparison, in 2013, the nation's largest private employer employed 2.2 million people globally, and only 1.3 million people in the United States.[11] As the nation's largest employer, state and local governments have a significant interest in the outcome of any case that has the potential to greatly expand employer liability. And they have a particularly acute interest in this case because many states,[12] cities,[13] and counties[14] maintain

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10 DEIRDRE BAKER, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2011 2–3 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

11 Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249.

12 *See, e.g.*, NAT'L ASS'N OF ST. PROCUREMENT OFFICIALS, http://www.naspo.org (last visited May 31, 2014); TENN. DEP'T OF GEN. SERVS., CENT. PROCUREMENT OFF., http://tn.gov/generalserv/cpo (last visited May 31, 2014); OKLA. CENT. PURCHASING DIV., http://www.ok.gov/DCS/Central_Purchasing (last visited May 31, 2014).

13 *See, e.g.*, CITY OF GARLAND, PURCHASING, http://www.ci.garland.tx.us/gov/lq/purchasing/default.asp (last visited May 31, 2014); CITY OF SCOTTSDALE, PURCHASING, http://www.scottsdaleaz.gov/departments/adminservices/purchasing (last visited May 31, 2014); CITY OF SAVANNAH, PURCHASING, http://savannahga.gov/index.aspx?nid=491 (last visited May 31, 2014).

14 *See, e.g.*, MADISON CNTY., ALA., PURCHASING DEP'T., http://madisoncountyal.gov/about/org/CoDepts/Purchasing.shtml (last visited May 31, 2014); SALT LAKE CNTY., CONTRACTS AND PROCUREMENT, http://admin.slco.org/contracts/puSurplusWarehouseInfo.aspx (last visited May 31, 2014); TARRANT CNTY., PURCHASING DEP'T, https://www.tarrantcounty.com/ePurchasing/site/default.asp (last visited May 31, 2014).

procurement offices and operate warehouses. Like the Petitioner in this case, these entities have a strong interest in using security screening at the end of the workday to prevent and detect theft. Many state and local government buildings—such as capitols, courthouses, office buildings, and correctional facilities—require employees to pass through security screening on a daily basis.[15]

Florida, for example, demands that "[a]ll employees and contract staff [of the Department of Corrections] shall be subject to some form of metal detection system search, and items in their possession or on their person shall be inspected prior to gaining entry to an institution or facility of the Department [of Corrections]." Fla. Admin. Code R. 33-208.002.

Similarly, Tennessee requires that "[p]eriodic routine searches for contraband shall be made of all employees of the department [of corrections] prior to the entrance of the persons inside the confines of a state correctional facility." Tenn. Code Ann. § 41-1-102.

These examples are just the tip of the iceberg. The Ninth Circuit's liberal interpretation of "integral and indispensable" has extraordinary implications for other state and local government employees whose commute to and from work might be interrupted, prolonged, or delayed by any activity that "benefits" the employer.

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15 *See e.g.*, Merced Cnty. Super. Ct. R. 418(A) ("All persons entering the courthouse or courtroom shall be subject to cursory search . . . ."); Washington Courthouse Mun. Ct. Local R. 54.1 ("All persons entering the court facility are subject to search.").

State and local governments currently spend approximately $70.5 billion each month on payroll.[16] If the Ninth Circuit's opinion increases payroll expenses by only 0.25%, it will increase state and local governments' payroll expenses by an additional $176,250,000 each month, or over $2.1 billion each year.[17] This does not account for expenses associated with litigating these cases, the cost of ensuring FLSA compliance, or the fact that any additional compensation would most likely be calculated at overtime rates. Now is certainly not the time to create unanticipated and unbudgeted liabilities for state and local governments. Many remain in dire financial straits, with full recovery from the Great Recession not yet in sight.

In June of 2012, thirty-one states had projected budget gaps totaling $55 billion for fiscal year 2013,[18] and four of

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16 BAKER, *supra* note 10, at 2–3.

17 The Ninth Circuit's opinion would increase payroll by 0.25% if state and local governments were required to compensate employees amounting to 10% of payroll expenses for one additional hour per week based on a 40 hour work week: $(1 \div 40) \times 0.1 = 0.0025$ or 0.25%. Respondents' attorney estimates that nationally hundreds of thousands of people employed as warehouse workers spend 20 to 30 minutes every day clearing employer mandated security screening. *9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time*, BUSINESS WIRE, (Apr. 12, 2013 6:57 PM), http://www.businesswire.com/news/home/20130412005934/en/9th-Circuit-Court-Appeals-Amazon%E2%80%99s-Warehouse-Workers. This amounts to approximately two additional compensable hours for every five days worked. Therefore, even if security screening conducted by state and local governments is twice as fast as the security screening at issue in this case, it would still lead to one additional hour of compensable time for every five days worked by affected employees.

18 Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

the five largest municipal bankruptcies in history were filed in the past three years, with Detroit, Michigan ($18 billion) filing in 2013, Stockton, California ($1 billion) and San Bernardino County, California ($500 million) filing in 2012, and Jefferson County, Alabama ($4 billion) filing in 2011.[19] As of April 2013, municipal bond credit rating downgrades outnumbered credit rating upgrades for sixteen consecutive quarters, the longest period this has occurred since Moody's Investor Services began collecting data.[20] And in early 2014, the State Budget Crisis Task Force concluded that "[t]he ability of state and local governments to meet their obligations to public employees, to creditors, and, most critically, to the education and well-being of the public is deteriorating," and noted that "[t]he fiscal course of many states and their local governments remains unsustainable."[21]

Congress has long recognized that the goals of the FLSA must be balanced against "the particular needs and circumstances of the states and their political subdivisions." S. Rep. No. 99-159, at 7 (1985). It abided this directive by passing the Fair Labor Standards Amendments of 1985, which delayed the FLSA's application to state and local governments,

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19 *Biggest Municipal Bankruptcies in U.S. History*, FORBES, http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipal-bankruptcies-in-u-s-history/ (last visited Oct. 30, 2013).

20 Jake Zamansky, *Investors Face Potential Municipal Bond Armageddon*, FORBES (Apr. 25, 2013, 11:03 AM), http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bond-armageddon.

21 STATE BUDGET CRISIS TASK FORCE, FINAL REPORT, 8 (2014); *see also* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK APRIL 2013 UPDATE 1 (2013), *available at* http://www.gao.gov/assets/660/654255.pdf. (noting that "the state and local sector faces a gap between revenue and spending and long-term fiscal challenges that grow over time.").

Pub L. No. 99–150, 99 Stat. 787 (1985), by creating different maximum hour rules for public fire protection or law enforcement employees, 29 U.S.C. § 207(k), and by allowing public employers to provide compensatory time off in lieu of overtime compensation. 29 U.S.C. § 207(o). Such action was necessary because "local governments are in many cases not in a position to 'pass along' additional financial requirements to the taxpayer." 131 Cong. Rec. 4191-01 (1985) (statement of Rep. John P. Hammerschmidt conveying local government officials' concern regarding the impact of *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985)).

The Ninth Circuit's decision will pile additional liabilities on state and local governments that are still struggling to overcome the effects of the Great Recession. These unbudgeted liabilities will push our nation's state and local governments even closer to insolvency. It is therefore imperative that this Court correct the Ninth Circuit's expansive interpretation of "integral and indispensable" activities and rein in the reach of compensable preliminary and postliminary activities.

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Security screenings have become unavoidable in this country after 9/11. They are practically mandatory before entry into, and frequently egress from, sensitive buildings like state capitols, government offices, courthouses, and correctional facilities. Public-sector employees who work in these buildings pass through security screenings each and every day. Collapsing the "integral" and "indispensable" analyses to make these screenings compensable under the Portal-to-Portal Act would open the floodgates of FLSA litigation and wreak havoc on employers throughout the country. The unanticipated surge in cognizable claims will have an immediate and devastating impact on employers, particu-

larly state and local governments still struggling to fully recover from the Great Recession.

CONCLUSION

For all of these reasons, the Court should reverse the judgment below.

Respectfully submitted.

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