No. 18-1154

IN THE SUPREME COURT OF THE UNITED STATES

INTEGRITY STAFFING SOLUTIONS, INC., ET AL.,
Petitioners,

v.

JESSE BUSK, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE RETAIL LITIGATION CENTER, INC., THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Retail Litigation Center, Inc. (RLC) is the only public policy organization dedicated entirely to representing the retail industry in the courts and in litigation matters. The RLC's members include many of the country's largest and most innovative retailers. The retail members whose interests are represented by the RLC operate throughout the United States, employ millions of individuals, and provide quality goods and services to tens of millions of consumers. Among other things, the RLC provides courts with retail industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has participated as an *amicus curiae* in nearly 150 proceedings.

Amicus curiae the National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25

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[1] Counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least ten days before the due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Amicus curiae National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including employment-law issues, that are important to the retail industry at large and particularly to NRF's members.

Collectively, the foregoing *amici* have a significant interest in promoting certainty in the law of the workplace. The *amici* represent a wide cross-section of the employer and human-resource community throughout the United States. The vast majority of American employers dedicate considerable time, energy, and resources to achieve compliance with the myriad statutes governing the workplace, while at the same time maintaining and cre-

ating much-needed jobs. Legal confusion complicates those efforts by fostering unnecessary and costly litigation.

The RLC, NAM, and NRF have a strong interest particularly in how the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, is interpreted and enforced. *Amici*'s members employ large numbers of people in the U.S., making them regular targets of the plaintiffs' bar despite their best efforts to comply with the myriad federal, state, and local employment-related laws. As employers, *amici*'s members have been and will continue to be the subject of mass action litigation claiming that they violated various employment laws. One current trend for such litigation stems from the theory that the time employees spend on an employer's premises for security screening of packages or bags brought to work for the employee's convenience is compensable based on the federal interpretation of the FLSA.

This *amicus* brief is intended to provide an added dimension to issues presented by the petition and to enhance the Court's understanding of these issues and how they impact the retail industry.

INTRODUCTION

The Sixth Circuit misconstrued federal law when it held that the FLSA requires a result in this case that contradicts the result this Court reached in *Integrity Staffing Solutions, Inc. v. Busk*, 135

S. Ct. 513, 516-17 (2014) (*Busk I*); *id.* at 520 (Sotomayor, J., concurring) (security screenings are "essentially part of the ingress and egress process" and not "work of consequence"). The circuit court reached this conclusion by creating a novel federal standard that construes the FLSA in isolation from the Portal to Portal Act of 1947, 29 U.S.C. § 251 *et seq*. This new federal standard, the court held, applies to claims brought under Nevada and Arizona law. Illogically and without precedent, the court decided that these laws incorporate *some* federal law under the FLSA but *not* the Portal to Portal Act. In so ruling, the lower court attempted to resurrect a standard that Congress said was wrong from the beginning. This Court should grant the petition to correct the Sixth Circuit's errant ruling on the federal standards governing the FLSA and restore uniformity to this area of federal law.

STATEMENT

In *Busk I*, this Court held that the Portal to Portal Act of 1947, 29 U.S.C. § 251 *et seq*., overturned the Court's "broad[]" construction of the undefined term "work" in the FLSA. *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 516-17 (2014) (*Busk I*). The Court noted that, in enacting the Portal to Portal Act, Congress found that the Court's expansive construction in the 1940s of the term "work" was wrong because it disregarded long-established practices and contracts between employers and employees. *Id.* Indeed, that expansive construction created such "immense" and "wholly unexpected liabilities" on employers as to result in an

"emergency." *Id.* Congress declared that this emergency, if uncorrected, "would bring about the financial ruin of many employers" and bring "windfall payments" to employees. *Id.* at 517.

The Portal to Portal Act therefore annulled this Court's unmoored definitions and created some exceptions to FLSA liability. *See id.* In relevant part, Congress declared that certain "preliminary" and "postliminary" activities were never intended to be captured within the FLSA's liability framework. 29 U.S.C. § 254(a). Accordingly, in *Busk I*, this Court held that the very security screenings at issue here were "noncompensable postliminary activities" that did not create employer liability under the FLSA. 135 S. Ct. at 518.

After this Court's decision, the respondents again amended their complaint to proceed on state-law claims under Nevada and Arizona law, but lost in the district court. Pet. App. 7. The district court dismissed the claims, holding in relevant part that both Nevada and Arizona incorporated the FLSA. Pet. App. 8-9. Therefore, the respondents' claims failed for the same reasons that this Court articulated in *Busk I*. Pet. App. 9.

The United States Court of Appeals for the Sixth Circuit reversed in a divided opinion. Pet. 11. The majority agreed with the district court that both Nevada and Arizona would look to the federal standard under the FLSA. But, contrary to *Busk I*, the majority decided that the relevant federal standard was this Court's understanding of "work" that predated both *Busk I* and the Portal to Portal

Act because the states had incorporated federal law but had not expressly incorporated the Portal to Portal Act. As a result, the Sixth Circuit concluded, contrary to *Busk I*, that the applicable federal standard was the faulty 1940s standard that was subsequently repudiated by Congress. Pet. App. 21-26.

SUMMARY OF ARGUMENT

The Sixth Circuit's misconception of federal law conflicts with and risks eroding this Court's decision in *Busk I*. The decision below purports to identify a federal standard for compensable "work" under the FLSA *independent* of the Portal to Portal Act. But as this Court held in *Busk I*, that federal standard cannot be properly understood in isolation from the Portal to Portal Act, as that statute was enacted precisely to alter this Court's 1940s understanding of "work" under the FLSA. Quite simply, the Sixth Circuit has created a dueling understanding of federal law that squarely conflicts with this Court's instruction. Indeed, the decision below rendered the very security screenings that this Court held were *not* compensable under federal law to be *compensable* under the version of federal law that, in the Sixth Circuit's view, exists peculiarly in states like Nevada and Arizona.

In addition to conflicting with *Busk I*, the majority's resuscitation of a federal standard that Congress repudiated 72 years ago in the Portal to Portal Act also presents a legal question of national significance. The Sixth Circuit premised its unique

interpretation on its observation that, while Nevada and Arizona follow federal law, they have not expressly adopted the Portal to Portal Act. But many, if not most, states have wage and hour statutes that, like Nevada and Arizona, import federal law but do not expressly adopt the Portal to Portal Act. *See infra* at 10.

If the Sixth Circuit's interpretation of federal law is allowed to stand, it may propagate nationwide. States that have not expressly adopted the Portal to Portal Act may, like Nevada and Arizona, be held to have implicitly *rejected* that Act and have foisted upon them an anachronistic federal standard that Congress and this Court have both pointed out was wrong from its inception. For the plaintiffs' bar, this might be an attractive way to circumvent *Busk I* and reverse the recent trend of declining FLSA claims. For employers, it presents the Hobson's Choice of incurring significant liability or significantly revamping their procedures to try to avoid that liability. This Court can and should intervene promptly to forestall any further spread of this mistaken view of federal law.

ARGUMENT

I. This Court Should Grant Review Because the Sixth Circuit's Decision Undermines *Busk I*.

When it enacted the FLSA in 1938, Congress did not define the term "work," an omission that had significant and undesirable consequences. *Busk I*,

135 S. Ct. at 516. In a series of decisions culminating in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-92 (1946), this Court interpreted the term broadly and expansively. *Busk I*, 135 S. Ct. at 516. Plaintiffs' attorneys took immediate advantage of *Anderson* with a torrent of lawsuits under the FLSA. *Id.*

Congress acted quickly and decisively with the Portal to Portal Act of 1947 to repudiate the Court's construction of the FLSA as having been wrong from the beginning. In the Act, Congress found that the judicial construction disregarded "long-established customs, practices, and contracts between employers and employees" and created "immense" and "wholly unexpected" liabilities on employers while providing a windfall to plaintiffs. *Id.* at 517 (quoting 29 U.S.C. § 251(a)). Congress therefore declared an "emergency" because, if the Court's erroneous interpretations were permitted to stand, the liability would be ruinous for many employers. *Id.*

As part of the Portal to Portal Act's mission to overturn the Court's earlier misconstruction of the FLSA, Congress expressly eliminated liability for two categories of activities: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities" if these activities fall outside the workday. 29 U.S.C. § 254(a).

In *Busk I*, this Court held that, in light of the Portal to Portal Act, employers faced no liability

under the FLSA for the same security screenings at issue now. *Busk I*, 135 S. Ct. at 519. This Court reversed the Ninth Circuit, which had held that the security screenings were compensable simply because the respondents were required to undergo them by the petitioners for the benefit of the petitioners. *Id*. In *Busk I*, the Court held that this was error because it would sweep within FLSA liability "the very activities that the Portal-to-Portal Act was designed to address." *Id*.

The Sixth Circuit decision tries to bypass *Busk I* by holding that a version of federal law that exists in Nevada and Arizona does not have to take the Portal to Portal Act into account. Pet. App. 21, 26. But there is only one federal standard, and under *Busk I*, that standard must incorporate the Portal to Portal Act. *Busk I*, 135 S. Ct. at 516-17. If Nevada and Arizona have chosen to follow the federal standard, as the Sixth Circuit held, they must follow what this Court set forth in *Busk I*. If a different standard applies in Nevada and Arizona, that is no longer *the* federal standard. The Sixth Circuit's conclusion that states can follow federal law without applying the same standard as federal law makes no sense, and severely undermines this Court's authority.

II. The Decision Below Has Implications That May Propagate Across the Country.

The Sixth Circuit's errant framework may have far-reaching national implications. The same reasoning that underlies the Sixth Circuit's novel view

can be applied in other states. Numerous states incorporate federal law into their wage and hours laws but are silent as to the Portal to Portal Act.[2] Few states have any statutory law expressly adopting or rejecting the Portal to Portal Act.[3] If the Sixth Circuit's view is allowed to stand and propagate, it will erase *Busk I* as if the case had never been decided.

This creates the potential for significant and unanticipated financial liability for thousands of employers not just in Nevada and Arizona but across the country. Until the Ninth Circuit's decision that this Court reversed in *Busk I*, federal appellate and district courts had uniformly held that security screenings were not compensable. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir.), *cert. denied*, 522 U.S. 1077 (2007); *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009); *Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-cv-01868, 2013 WL 796649,

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[2] *See, e.g.*, Alaska Admin. Code tit. 8, § 15.105 (2019); Haw. Rev. Stat. § 387-1 *et seq.* (2018); Kan. Stat. § 44-314 (2019); Kan. Admin. Regs. § 49-30-3 (2019); Neb. Rev. Stat. § 48-1201 *et seq.* (2019); R.I. Gen. Laws § 28-12-1 (2019); Vt. Stat. Ann. tit. 21, § 381 *et seq.* (2018).

[3] Missouri and West Virginia appear to expressly incorporate the Portal to Portal Act, *see* Mo. Rev. Stat. § 290.505.4 (2018); W. Va. Code § 21-5c-1(h) (2018), while the District of Columbia has expressly rejected it, *see* D.C. Code § 32-1002(10) (2019).

at *9 (E.D. Cal. Mar. 4, 2013); *Sleiman v. DHL Express*, No. 5:09-cv-00414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009). In addition, for more than half a century, the Department of Labor had advised employers that employee waiting time is generally noncompensable under the FLSA. 29 C.F.R. §§ 790.7(g) & 790.8(c). The widespread view among employers, created and supported by this longstanding precedent, is that security screenings are not compensable under the FLSA. In reversing the Ninth Circuit's contrary holding, *Busk I* reaffirmed this longstanding precedent.

The Sixth Circuit's decision and its potential ripple effects across the country create a new risk to this long-settled understanding. The steps that employers would need to take to reduce their litigation exposure as a result are neither easy nor inexpensive—and not just because of the compensation that might be owed. Many employers would need to spend substantial sums to reconfigure their bag search methods—sums that would be particularly difficult for smaller employers to absorb—or else risk losing one of the most effective tools for reducing employee theft. For example, searches would need to be accomplished before employees clock out, which would mean relocating time clocks. That would be an expensive task involving substantial capital investment, as well as a counterproductive one because screenings should occur outside the envelope where merchandise is located to be effective at catching and deterring employee theft. These reconfigured searches also create congestion problems, and may impede customers and sales if

screening occurs in otherwise public areas. Moreover, employers who do business in highly secured environments, such as airports, skyscrapers, and government buildings, cannot move their time clocks outside the security perimeter because their operations are confined to the secure area and because that secure area is usually the entire building or facility.

Nor will the effects of the decision below be limited to bag checks or even to the specific context of security screenings. The breadth of the Sixth Circuit majority's opinion could encompass any and all activities—no matter how mundane or inconsequential the tasks—that are necessitated before or after shifts. It may, therefore, create liability in the Sixth Circuit and elsewhere in spite of this Court's holding in *Busk I* that preliminary and postliminary activities of this nature are not compensable work. This includes other security and customer-convenience measures, such as a requirement that employees park vehicles in spaces farthest from the store to allow customers to have the desirable parking spaces closer to the store. It also includes other activities, such as donning and doffing gear or clothing, travel time, and walking time. Depending on how widely the Sixth Circuit's reasoning is applied, it could be as if *Busk I* were never decided.

These concerns are magnified by class-action procedures available under state law. Unlike the FLSA's collective-action device, which is an *opt-in* mechanism, 29 U.S.C. § 216(b), state class-action procedures generally proceed from a different rule, requiring employees to *opt out*, similar to Fed. R.

Civ. P. 23(b)(3) classes. Such class actions can be far larger than a collective action, as this Court noted in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1043 (2016). And, while the statute of limitations is tolled only *after* a plaintiff has filed a consent to opt in to an FLSA collective action, 29 U.S.C. § 256(b), the statute of limitations is generally tolled for all members of a putative state-law class upon the filing of the complaint. In this way, liability may be expanded beyond the often already-longer state statutes of limitation. Pet. 33.

The practical implications of the Sixth Circuit's decision thus are not difficult to foresee. The Sixth Circuit's decision will resurrect the flood of litigation that Congress enacted the Portal to Portal Act to stem. *Busk I* reinforced this approach and FLSA actions began to decline, going from 8,781 in 2015 to 7,600 in 2018. Administrative Office, Judicial Business of the United States Courts 2018, Table C-2A (Sept. 30, 2018); TRAC Reports, Inc., Fair Labor Standards Act Lawsuits Down From 2015 Peak (Jan. 24, 2018), available at https://trac.syr.edu/tracreports/civil/498. However, this trend is in danger of being reversed if courts are encouraged to believe that they can ignore the Portal to Portal Act when considering the appropriate standard for federal law that is incorporated into state statutes.

This result is entirely avoidable, and will be avoided, if this Court intervenes to vindicate its decision in *Busk I*. Setting aside the Sixth Circuit's decision will restore the nationwide uniformity

that *Busk I* championed and avoid a patchwork result where federal law means something different across the many states.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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