No. 18-5942

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL HEIMBACH, *et al.*,
Plaintiffs-Appellants,
v.

AMAZON.COM, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Kentucky
Honorable David J. Hale
Master File No. 14-md-2504-DJH
MDL Docket No. 2504
Case No. 3:14-cv-204-DJH

BRIEF OF PLAINTIFFS/APPELLANTS

Dated: April 3, 2019

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I. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs/Appellants Neil Heimbach and Karen Salasky ("Plaintiffs") believe oral argument is warranted if this Court does not grant Plaintiffs' pending motion for certification of the question to the Pennsylvania Supreme Court. This Court previously heard oral argument in the companion MDL cases arising under Arizona, California, Kentucky, and Nevada law, *see* Case Nos. 16-5533 (argued December 7, 2016), 17-5784/5785 (argued June 14, 2018), and 17-5790 (argued June 14, 2018), and presumably benefited from the arguments of counsel. Moreover, oral argument may be especially helpful where, as here, the appeal addresses the interpretation of a statute enacted by a state located outside of the Sixth Circuit.

II. STATEMENT OF JURISDICTION

Fed. R. App. P 28(a)(4)(A) – Basis for the District Court's Subject Matter Jurisdiction: Plaintiffs originated this action in the Philadelphia (PA) Court of Common Pleas. *See* Complaint, RE 1-1, Page ID # 36.[1] Defendants/Appellees Amazon.com, Inc., Amazon.com.DEDC, LLC, Amazon.com.DEDC, Inc., and Integrity Staffing Solutions, Inc. (together "Amazon") removed the action to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441, alleging that subject matter jurisdiction was proper under the 28 U.S.C. § 1332(d)(2) because the Plaintiffs and Amazon were citizens of different states and the classwide damages exceeded $5,000,000.00. *See* Notice of Removal, RE 1, Page ID # 4. Thereafter, on February 27, 2014, the United States Judicial Panel on Multidistrict Litigation ("JPML") transferred the action to the United States District Court for the Western District of Kentucky pursuant to JPML Rule 7.1 and 28 U.S.C. § 1407.

Fed. R. App. P 28(a)(4)(B) – Basis for this Court's Jurisdiction: This Court's jurisdiction is proper under 28 U.S.C. § 1291 because Plaintiffs' appeal from the district court's August 30, 2018 Memorandum Opinion and Order

[1] Because the underlying proceedings fall within an MDL, the filed documents appear in both the "Master File" docket (Civil Action No. 3:14-md-2504-DJH) and in the *Heimbach* docket (Civil Action No. 3:14-cv-204-DJH). All Page ID references in this motion are from the *Heimbach* docket.

granting summary judgment in Amazon's favor. *See* Opinion RE 86, Page ID # 2355; *see also* Judgment, RE 87, Page ID # 2364. This order constitutes a final order under 28 U.S.C. § 1291.

Fed. R. App. P 28(a)(4)(C) – Filing Dates Establishing the Timeliness of the Appeal: On September 6, 2018, Plaintiffs filed a Notice of Appeal form the August 30, 2018 Memorandum Opinion and Order. *See* Notice of Appeal, RE 88, Page ID # 2365.

Fed. R. App. P 28(a)(4)(D) – Assertion that the Appeal is From a Final Order or Judgment: Plaintiffs assert that the August 30, 2018 Memorandum Opinion and Order that is the subject of this appeal constitutes a final order.

III. STATEMENT OF ISSUES

Whether the Pennsylvania Supreme Court would hold that the district court erred by granting summary judgment in Amazon's favor based on the district court's legal conclusion that the United States Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk*, __ U.S. __, 135 S. Ct. 513, 190 L. Ed. 2d 41 (2014), controls the outcome of Plaintiffs' claim for unpaid wages under the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.101, *et seq.*?[2]

[2] In the February 22, 2019 Order addressing Plaintiffs' motion for certification of the question, this Court characterized "the district court's grant of summary judgment" as being "based on its conclusion that the Supreme Court's decision in [*Integrity Staffing*] controls." Doc. 20-1; *see also Busk v. Integrity Staffing Solutions, Inc.*, 905 F.3d 387, 395 (6th Cir. 2018) ("The main question on appeal in this case is whether *Integrity Staffing* resolves similar claims brought under Nevada and Arizona law."); *Vance v. Amazon.com,, Inc.*, 852 F.3d 601, 606 (6th Cir. 2017) ("At issue here is whether *Integrity Staffing* resolves a similar claim under [Kentucky law].").

IV. STATEMENT OF THE CASE

A. Amazon subjected Plaintiffs and their co-workers to mandatory, post-shift security screenings that resulted in 12,343,546 minutes (or 205,725 hours) of unpaid time during the class period.

Amazon operates a warehouse in Breinigsville, PA,[3] and Mr. Heimbach and Ms. Salasky worked there.[4] Mr. Heimbach earned $12.50-$13.50/hour,[5] while Ms. Salasky earned $12.25/hour.[6] It was grueling work.[7] The warehouse was very hot,[8] and "people were passing out on a daily basis."[9]

At the end of each shift, the employees were required to "clock-out" at time clocks located in the warehouse.[10] Their pay was based on these clock-out times.[11]

After clocking-out,[12] the employees were required to participate in an anti-theft screening process.[13] No employee could leave the warehouse without

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[3] *See* Amazon S.J. Brief, RE 59-1, Page ID # 1691.
[4] *See id.*
[5] *See* Heimbach Dep., RE 74-5, Page ID # 1990, lines 62:5-62:11.
[6] *See* Salasky Dep., RE 74-6, Page ID # 2004, lines 24:25-25:1.
[7] *See*, *e.g.*, Spencer Soper, *Inside Amazon's Warehouse*, Allentown Morning Call, Sept. 18, 2011, RE 74-8, Page ID # 2040.
[8] *See* Salasky Dep., RE 74-6, Page ID # 2003, lines 15:7-15:10.
[9] *Id.* at 16:6-16:7.
[10] *See* O'Hay Dep., RE 74-7, Page ID # 2021-2022, lines 60:6-60:21, 61:18-61:24; 95:20-95:23.
[11] *See* O'Hay Dep., RE 74-7, Page ID # 2022, lines 61:25-62:5; Page ID # 2029 at lines 127:20-127:24.
[12] *See id.* at Page ID # 2029, lines 128:20-128:25; Page ID # 2032, lines 137:15-138:3.
[13] *See* O'Hay Dep., RE 74-7, Page ID # 2031-2032, lines 136:24-138:3.

completing this process,[14] which was overseen by Amazon's Loss Prevention department.[15]

The screening area was equipped with metal detectors,[16] and Amazon issued "Security Screening Standards" that were followed by the Amazon guards.[17] These Standards ensured that the guards "engage[d] in a standardized primary and secondary screening process for individuals as they exit the [warehouse]."[18] The Standards are very detailed and confirm that "Amazon requires security screening of all persons and items . . . to deter and detect unauthorized removal of Amazon inventory and company property."[19]

All employees were subjected to "primary" screening procedures that required them to remove all metal items prior to approaching the screening area[20] and place the items in plastic trays.[21] This includes items such as "watches, keys,

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[14] *See* Am. Cpl., RE 1-4, Page ID # 61, at ¶ 25; Amazon Answer, RE 6, Page ID # 109, at ¶ 25; ISS Answer, RE 7, Page ID # 122, at ¶ 25.
[15] *See* O'Hay Dep., RE 74-7, Page ID # 2032, lines 138:5-138:11.
[16] *See* Sealed RE 76, Exhibit L (photographs of screening area); O'Hay Dep., RE 74-7, Page ID # 2033, lines 149:7-149:14.
[17] *See* Sealed RE 76, Exhibit M (Security Screening Standards).
[18] *Id.* at p. 1 (bates-numbered "AMAZ-HEIM_00000484).
[19] *Id.* at § 2.5 (bates-numbered "AMAZ-HEIM_00000484). In addition to the Security Screening Standards, Amazon has issued other companywide policy documents that detail the anti-theft screening process. These documents are collected at Sealed RE 76.
[20] *See* Sealed RE 76, Exhibit M at § 8.2 (bates-numbered "AMAZ-HEIM_00000486").
[21] *See id.* at §§ 8.3-8.5 (bates-numbered "AMAZ-HEIM_00000486"); see also Heimbach Dep., RE 74-5, Page ID # 1994, lines at 110:15-111:2

cell phones and coins,"[22] as well as "belts with metal buckles," "key rings," and "key chains."[23] All bags had to be inspected,[24] and certain items were "physically inspected for false bottoms or hidden compartments."[25] The Amazon guards were instructed to "visually examine" any items resembling Amazon property.[26] This visual examination could include "looking inside any unsealed opaque packages of a size capable [of] concealing items [such as] water bottles and other liquid containers."[27] The Amazon guards also performed "hands-on" searches of certain items.[28]

The metal detectors were sensitive and could be set-off by items such as work boots with metal eyelets or foil in cigarette packages.[29] Also, if employees "bunch up, it tends to set off the machines."[30] So the metal detector was going off "all the time."[31] Because only one employee can go through a metal detector at a time, delays associated with one employee slowed down the process for everyone

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[22] O'Hay Dep., RE 74-7, Page ID # 2036, lines 178:2-178:10,
[23] *Id.* at Page ID # 2036, lines 183:23-184:19.
[24] *See* ISS Answer, RE 74-4, Page ID # 1976-1977 at ¶ 22.
[25] Sealed RE 76, Exhibit M at § 8.7 (bates-numbered "AMAZ-HEIM_00000486").
[26] *See id.* at § 8.12 (bates-numbered "AMAZ-HEIM_00000486).
[27] *Id.* at § 8.13 (bates-numbered "AMAZ-HEIM_00000486).
[28] *See id.* at §§8.14-8.15 (bates-numbered "AMAZ-HEIM_00000486).
[29] *See* Heimbach Dep., RE 74-5, Page ID # 1994, lines 111:25-112:21; *id.*, Page ID # 1995, lines 149:12-149:24.
[30] O'Hay Dep., RE 74-7, Page ID # 2038, lines 185:6-185:8.
[31] Heimbach Dep., RE 74-5, Page ID # 1995, lines 149:6-149:11.

else in the line.[32]

Amazon erected "[p]hysical barriers . . . to assist in traffic control and to prevent by passing [sic] of the screening area."[33] The barriers were intended to prevent employees from "glomming up" and "keep them in a straight line."[34] Employees were instructed to avoid "tailgating."[35]

Sometimes, the anti-theft screening process ran smoothly, and employees proceeded through the metal detectors easily.[36] Other times, employees got stuck in line.[37] Ms. Salasky recalled: "it was hundreds of people at one time trying to get through only two or three gates, so it was humanly impossible without being rude to get through there as fast as you could."[38]

The delays got worse if the metal detector's alarm sounded and the employee was subjected to a "secondary screening."[39] This often happened to Mr.

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[32] *See* O'Hay Dep., RE 74-7, Page ID # 2034, lines 169:16-169:23.
[33] Sealed RE 76, Exhibit M at § 3.2 (bates-numbered "AMAZ-HEIM_00000487-488).
[34] *See* O'Hay Dep., RE 74-7, Page ID # 2034, lines 172:9-172:11.
[35] *See id.* at Page ID # 2037-2038, lines 184:23-185:8.
[36] *See* Heimbach Dep., RE 74-5, Page ID # 1997, lines 163:12-163:18.
[37] *See id.* at Page ID # 1997, lines 163:12-163:25; Page ID # 1998, lines 168:24-169:5.
[38] Salasky Dep., RE 74-6, Page ID # 2005, lines 52:21-52:24; *see also id.* at Page ID # 2006, lines 63:23-64:1 ("It was just so many people at one time and that is what determined how long you could get out without being rude to anyone or starting anything."); *id.* at Page ID # 2007, lines 66:6-66:22 (explaining that "you would have to wait in line to get through the metal detector" and estimating line to extend 20-25 feet).
[39] *See* O'Hay Dep., RE 74-7, Page ID # 2035, lines 174:12-175:8.

Heimbach because metal in his knee would set-off the metal detector.[40] These secondary screenings involved an "eight (8) point search pattern" and other strict protocols followed by the Amazon guards.[41] Employees subjected to secondary screenings were required to wait for others to complete the process.[42] "There could be five other people there that you had to wait [for] until they passed through."[43]

After getting through security, all employees were required to swipe-out at turnstiles located at the Facility's exit doors.[44] This enabled Amazon to "have an accurate record of who is, in fact, on premise[s] at all times."[45] Through discovery, Plaintiffs obtained this turnstile swipe data and compared it to the data showing when employees stopped getting paid.

The unpaid time really adds up. Between September 5, 2010 (the beginning of the class period) and August 8, 2015, Plaintiffs and their coworkers incurred a

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[40] *See* Heimbach Dep., RE 74-5, Page ID # 1993, lines 106:1-107:5.
[41] *See* Sealed RE 76, Exhibit M at §§ 9.1-9.16 (bates-numbered "AMAZ-HEIM_00000487-488).
[42] *See* Heimbach Dep., RE 74-5, Page ID # 1993, lines 107:10-108:19; *id.* at Page ID # 1997, lines 164:21-165:19.
[43] *Id.* at Page ID # 1993, lines 107:15-107:16; *see also id.* at Page ID # 1997, lines 165:5-165:8.
[44] *See* O'Hay Dep., RE 74-7, Page ID # 2027-2028, lines 96:9-98:16; Heimbach Dep., RE 74-5, Page ID # 1997-1998, lines 165:25-166:5; Salasky Dep., RE 74-6, Page ID # 2012, lines 138:1-138:7.
[45] O'Hay Dep., RE 74-7, Page ID # 2028, lines 97:9-97:16.

total of 12,343,546 minutes (or 205,725 hours) of unpaid time,[46] and the average employee incurred 21 minutes of unpaid time per week.[47] Moreover, 7,601,161 of these minutes (or 126,686 of the hours) qualify for overtime pay because they arose in weeks in which the employee's paid hours already exceeded 40.[48] Thus, conservatively estimating that the warehouse employees had an average hourly pay rate of $11.00 during the covered time period, the total unpaid overtime wages approximate $2,090,319.00 (126,686 hours X $11.00 X 1.5).

Mr. Heimbach's unpaid time exceeds the average (probably due to an above-average number of secondary screenings). During 507 workdays ranging from August 21, 2011 until August 2, 2015, his unpaid time totals 4,065 minutes (or 67.75 hours), for an average of 8.02 minutes per day.[49] Also, Mr. Heimbach's unpaid time exceeded 10 minutes on 129 days and exceeded 15 minutes on 34 days.[50]

Meanwhile, Ms. Salasky's unpaid wages fall below the average. During 114 workdays ranging from November 14, 2010 until June 12, 2011, her unpaid time

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[46] *See* Revised Expert Report of Liesl M. Fox, Ph.D., RE 74-16, Page ID # 2095, 2098.
[47] *Id.* at Page ID # 2094, 2097.
[48] *See id.* at Page ID # 2095, 2098.
[49] *See* Santillo Dcl., PE 74-19, Page ID # 2148, ¶¶ 5-6.
[50] *See* Heimbach Payroll Data Spreadsheet, PE 74-19, Page ID # 2151-2162.

totals 568 minutes (or 9.46 hours), for an average of 4.38 minutes per day.[51] Also, Ms. Salasky's unpaid time exceeded 10 minutes on 7 days and exceeded 15 minutes on 2 days.[52]

B. Plaintiffs sue in Pennsylvania state court, get removed to federal court, get transferred to the Western District of Kentucky, lose, and appeal.

Plaintiffs started this action the Philadelphia Court of Common Pleas by filing a single-count complaint alleging unpaid wages under the PMWA. *See* Complaint, RE 1-1, Page ID # 36. Amazon removed the lawsuit to the Eastern District of Pennsylvania, asserting that the aggregate value exceeded $5 million and, as such, federal diversity jurisdiction was satisfied under the Class Action Fairness Act of 2005. *See* Notice of Removal, RE 1, Page ID # 4. Soon thereafter, the JPML transferred the action to the Western District of Kentucky.

Discovery ensued. Plaintiffs moved for class certification, *see* Motion for Class Certification, RE 56, Page ID # 1284-1627, and, the next day, Amazon moved for summary judgment, *see* Amazon S.J. Motion, RE 59, Page ID # 1689-1782. Amazon asked the Court to stay the class certification motion until after it

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[51] *See id.* at Page ID # 2148-2149, ¶¶7-8. There were 5 occasions in which Ms. Salasky's unpaid time exceeded 10 minutes. See id.

[52] *See* Salasky Payroll Data Spreadsheet, PE 74-19, Page ID # 2164-2166. This data seems consistent with Ms. Salasky's independent recollection that she was subjected to secondary screenings "approximately maybe five or ten times maybe, if that." Salasky Dep., RE 74-6, Page ID # 2011, lines 133:19-133:23.

resolved summary judgment. *See* Amazon Stay Motion, RE 63, Page ID # 1813-1823. The Court agreed, *see* Order, RE 71, Page ID # 1887-1889, and the summary judgment motion was fully briefed, *see* Plaintiffs S.J. Opposition, RE 1895-2211; Amazon S.J. Reply, RE 78, Page ID # 2267-2295.

Amazon's summary judgment motion sat undecided for 14 months. Then, on August 30, 2018, the district court issued a Memorandum and Order granting the motion, *see* Opinion, RE 86, Page ID # 2355-23636, and entering judgment in Amazon's favor, *see* Judgment, RE 87, Page ID # 2364. Plaintiffs appealed. *See* Notice of Appeal, RE 88, Page ID # 2365-2366.

C. The district court based its summary judgment decision on the district court's legal conclusion that the U.S. Supreme Court's *Integrity Staffing* decision controls the outcome of Plaintiffs' claim for unpaid wages under the Pennsylvania Minimum Wage Act.

In a recent Order addressing Plaintiffs' motion for certification of the question to the Pennsylvania Supreme Court, this Court characterized "the district court's grant of summary judgment" as being "based on its conclusion that the Supreme Court's decision in [*Integrity Staffing*] controls." *See* Doc. 20-1. This Court has similarly characterized other summary judgment opinions emerging from the MDL proceeding. *See Busk*, 905 F.3d at 395 ("The main question on appeal in this case is whether *Integrity Staffing* resolves similar claims brought under Nevada and Arizona law."); *Vance*, 852 F.3d at 606 ("At issue here is whether *Integrity Staffing* resolves a similar claim under [Kentucky law].").

Amazon primarily argued that time associated with mandatory security screenings did not constitute "work" because, among other reasons, such time did not entail "exertion" and was *de minimis*. *See* Amazon S.J. Brief, RE 59-1, Page ID # 1700-1717. The district court, however, did not address these arguments. *See* Opinion, RE 86, Page ID # 2360 n. 2. Instead, the district court granted summary judgment based on its view that the Portal-to-Portal Act limitations on compensability, as interpreted in *Integrity Staffing*, applied to and modified the PMWA's conception of "work." The district court reasoned:

> The Pennsylvania legislature need not have separately adopted the Portal-to-Portal Act in order for it to inform the Court's interpretation of the PMWA. The Pennsylvania legislature passed the PMWA in 1968, twenty-one years after Congress passed the Portal-to-Portal Act amending the FLSA. Thus, "[a]s long as [Pennsylvania] has had an FLSA analogue, there has been a federal Portal-to-Portal Act." If the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, "one may reasonably assume it would have done so affirmatively."
>
> Following from the above discussion, the Court concludes that it is proper to consider the Portal-to-Portal Act amendments, and the Supreme Court's interpretation thereof, in construing and applying the PMWA. The Supreme Court has held that post-shift security screenings are not compensable work under the FLSA as amended by the Portal-to-Portal Act. And the Court may rely on that law in order to interpret the PMWA here. The Court therefore finds that time spent undergoing or waiting to undergo security screenings is compensable under the PMWA. As a result, Plaintiffs no longer have a viable claim under Pennsylvania law, and the Court will grant the defendants' motion for summary judgment.

Page ID # 2359-2360 (internal citations and footnotes omitted).

V. SUMMARY OF THE ARGUMENT

Sometimes the PMWA is silent regarding an FLSA provision that is especially beneficial to employers. Faced with this circumstance, some employers will try to convince Pennsylvania judges to construe the PMWA's silence as an implicit adoption of the FLSA provision. These efforts generally fail. *See* pp. 22-26. And such failure is not surprising. The PMWA, after all, is interpreted expansively to the benefit of employees, *see* pp. 19-20 *infra*, and the state's Supreme Court has unanimously instructed that the PMWA should not be read *in pari materia* with the FLSA, *see id.* at pp. 20-21.

Consistent with the above, three separate Pennsylvania courts have rejected employers' attempts to graft Portal Act § 4's compensability limits onto the PMWA. *See* pp. 36-42 *infra*. These three opinions have been authored by a federal judge in Scranton, a state trial judge in Washington County, and a unanimous panel of the Third Circuit. *See id.* Also, in two other cases, unanimous panels of the Superior Court and the Third Circuit have addressed PMWA compensability disputes without mentioning Portal Act principles (even though the facts fell squarely within the Portal Act's ambit). *See* pp. 42-43 *infra*.

The district court's summary judgment opinion is incorrect for several reasons discussed in this brief. But, most fundamentally, it cannot be squared with Pennsylvania decisional law. Here – as in *Busk* – reversal is warranted.

VI. ARGUMENT

In *Busk v. Integrity Staffing Solutions, Inc.*, 905 F.3d 387 (6th Cir. 2018), this Court followed a three-step approach in deciding whether the district court properly granted summary judgment against employees seeking overtime pay for time associated with workplace security screenings at Amazon warehouses in Nevada and Arizona. First, the Court reviewed the relevant statutory construction principles under Nevada and Arizona law. *See Busk*, 905 F.3d at 397-98. Second, the Court addressed whether time associated with the security screenings constituted "work" under Nevada and Arizona law. *See id.* at 398-402. Third, the Court addressed whether the Nevada and Arizona wage statutes "incorporate" the federal Portal-to-Portal Act's limitations on compensable time. *See id.* at 402-05.

Plaintiffs will follow *Busk's* three-step approach in this brief. *See* Subsections B-D *infra*. Before doing so, however, Plaintiffs will address a fundamental flaw in the district court's analysis. *See* Subsection A *infra*.

A. As in *Busk*, the district court improperly "conflated" work with compensability. This is a fundamental flaw in the district court's analysis.

In *Busk*, this Court explained that Portal Act § 4 does not narrow the definition of work. *See Busk*, 905 F.3d at 399-400. As stated:

> Defendants misread what the Portal-to-Portal Act accomplished. Defendants argue that it amended the Supreme Court's definition of 'work." . . . But that is not so.

Id. at 399; *see also id.* at 400 ("In short, the Portal-to-Portal Act excludes some 'work' from its bucket of what is compensable activity, but that does not mean it is not 'work."); *Vance*, 852 F.3d at 614 ("The Portal-to-Portal Act after all 'does not purport to change th[e] Court's earlier description of the terms "work" and "workweek."'" (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28, 126 S. Ct. 514, 520, 163 L. Ed. 2d 288, 297 (2005)); *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 803 (M.D. Tenn. 2008) ("enactment of [Portal Act] did not otherwise alter the Court's previous descriptions of the term 'work'").

Thus, it is entirely possible for a state wage statute to ***both*** mirror the FLSA's definition of "work" ***and*** nonetheless steer clear of Portal Act § 4. As *Busk* explained:

> But there is the error of the district court's analysis: it conflated two independent questions, which we have tried to separate: (1) whether time spent undergoing mandatory security screenings is work, and (2) whether such time is compensable.

Busk, 905 F.3d at 402.

The Nevada wage law in *Busk* demonstrates the above point. As the Court observed, the "Nevada law incorporates the federal definition of 'work,' and this broad definition encompasses the type of activity at issue in this case." *Busk*, 905 F.3d at 401. Notwithstanding, Portal Act § 4's limitations on compensability were inapplicable to Nevada law. *See id.* at 402-04.

In the opinion below, the district court's analysis violated the above

principles. The district court stated that the Portal Act "simply clarifies that some activities do not count as 'work.'" Opinion, RE 86, Page ID # 2359. Thus, "[t]he Pennsylvania legislature need not have separately adopted the Portal-to-Portal Act in order to inform the Court's interpretation of the PMWA." *Id.* This approach is mistaken. As in *Busk*, the district court improperly "conflated" work with compensability.

B. The PMWA is construed in favor of employees, is interpreted according to its plain language, and does not implicitly adopt FLSA principles in the event of statutory or regulatory silence.

In the two other Amazon security screening cases reviewed by this Court, the state statutes and regulations have not explicitly adopted Portal Act § 4's limitations on compensable time. So, in each case, a similar issue of statutory construction has emerged: To what extent should legislative or regulatory silence be interpreted as an implicit adoption of Portal Act compensability principles?

This Court has reached different outcomes in addressing the "silence" issue. In *Vance*, the Court made the following observation under Kentucky law: "Thus, 'absent a clear indication that the General Assembly considered the revision and deliberately rejected it,' . . . we cannot conclude that the lack of Portal-to-Portal Act language demonstrates legislative intent to exclude its compensation limits from Kentucky's wage and hour laws." *Vance*, 852 F.3d at 612-13 (internal citation omitted). Meanwhile, in *Busk*, the Court reached the opposite conclusion.

Regarding Nevada law, the Court observed: "Absent any affirmative indication that the Nevada legislature intended to adopt the Portal-to-Portal Act, there is no reason to assume that it did." *Busk*, 905 F.3d at 402. Regarding Arizona law, the Court observed: "In sum, there is nothing to suggest that the Arizona legislature intended to adopt the federal Portal-to-Portal Act into its Code. As with Nevada, we refuse to read-in such a significant statute by inference or implication." *Id.* at 405.

The district court followed the *Vance* approach: "If the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, 'one may reasonably assume it would have done so affirmatively.'" Opinion, RE 86, Page ID # 2360 (quoting *Vance*, 852 F.3d at 612). But there is a big analytical difference between *Vance* and the district court's opinion. In *Vance*, this Court's legal conclusion resulted from an extensive analysis of Kentucky statutory construction principles. *See Vance*, 852 F.3d at 610-13. The district court, meanwhile, undertook no meaningful analysis of Pennsylvania law. *See* Opinion, RE 86, Page ID # 2359-60.

As discussed below, Pennsylvania law does not support the district court's assumption that the PMWA's silence equates to an implicit adoption of the Portal Act's compensability limitations:

1. The PMWA is remedial legislation that generally is interpreted broadly in favor of employees.

The PMWA contains the following "Declaration of Policy":

> Employe[e]s are employed in some occupations in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employe[e]s employed in such occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and "freedom of contract" as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such occupations are often found to bear no relation to the fair value of the services rendered. In the absence of effective minimum fair wage rates for employe[e]s, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect some employe[e]s employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employe[e]s employed therein and of the public interest of the community at large.

43 P.S. § 333.101.

Some Pennsylvania judges have recognized that the above policy language supports interpreting the PMWA in an expansive manner that benefits Pennsylvania employees. *See*, *e.g.*, *Truman v. DeWolff, Bomberg & Associates, Inc.*, 2009 U.S. Dist. LEXIS 57301, *5 (W.D. Pa. July 7, 2009) ("Allowing employees who perform work outside of Pennsylvania to benefit from the PMWA is in accord with the PMWA's Declaration of Policy."); *Bayada Nurses, Inc. v. Pennsylvania Dept. of Labor & Industry*, 958 A.2d 1050, 1057 (Pa. Commw.

2008) (discussing 43 P.S. § 333.101 after observing that Pennsylvania "Supreme Court has long adhered to the principle of statutory construction that courts must consider the consequences of a particular interpretation and that legislative enactments are generally construed to effectuate their object and to promote justice"), *aff'd* 8 A.3d 866 (Pa. 2010); *Lugo v. Farmer's Pride, Inc.*, 967 A.2d 963, 9688 (Pa. Super. 2009) ("we find that the Legislature's declared policy underlying the PMWA also supports our finding that appellants may be entitled to compensation under the PMWA").

2. The PMWA is interpreted based on its plain meaning and not *in pari materia* with the FLSA.

The Pennsylvania Supreme Court's opinion in *Bayada Nurses, Inc. v. Pennsylvania Dept. of Labor & Industry*, 8 A.3d 866 (Pa. 2010), stands out as the seminal Pennsylvania decision addressing the interplay between the PMWA and the FLSA. *Bayada* concerned the legal implications of language differences in the FLSA's and PMWA's "domestic service" regulations. In particular, both statutes exempted "domestic service" employees from minimum wage and overtime pay mandates. *See* 29 U.S.C. § 213(a)(15); 43 P.S. § 333.105(a)(2). The FLSA regulations defined "domestic service employment" as "'services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.'" *Bayada*, 8 A.3d at 878 (quoting former 29 C.F.R. § 552.3). This FLSA regulation had been interpreted as

including – and thereby exempting from the minimum wage and overtime mandates – domestic workers paid by third-party agencies. *See Bayada*, 8 A.2d at 878 (citing former 29 C.F.R. § 552.109(a)); *accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007). Meanwhile, the PMWA regulations defined "domestic services" as "'work in or about a private dwelling for an employer in his capacity as a householder . . . .'" *Id.* at 881 (quoting 34 Pa. Code 231.1).

Bayada, as a third-party agency, wanted the PMWA to be interpreted like the FLSA. So it argued that "because the FLSA and the [PMWA] parallel one another, the federal and state laws should be read *in pari materia*," especially since the language in both statues was "nearly identical" and "focus[ed] on the kind of work to be performed." *Bayada*, 8 A.2d at 878.

The Supreme Court rejected Bayada's argument. After explaining that the PMWA and its regulations must be interpreted based on their plain language, *see id.* at 880-81, the Court observed:

> [T]he FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees; and it is not mandated that state regulation be read identically to, or *in pari materia* with, the federal regulatory scheme.

Id. at 883.

3. Pennsylvania cases interpreting the PMWA contradict the district court's assumption that the PMWA's silence regarding the Portal Act's compensability principles equates to an adoption of such principles.

Pennsylvania judges generally refuse to assume that the PMWA's statutory or regulatory silence reflects an adoption of FLSA principles. These cases, which are described below, contradict the district court's conclusion that "[i]f the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, 'one may reasonably assume it would have done so affirmatively.'" Opinion, RE 86, Page ID # 2360 (quoting *Vance*, 852 F.3d at 612). As demonstrated below, while such a conclusion holds up in Kentucky – but not Nevada or Arizona – it would fail in Pennsylvania:

a. The "fluctuating workweek" cases.

In recent years, several Pennsylvania courts have considered whether the PMWA allows employers to pay overtime to salaried employees based on the "fluctuating workweek" (a.k.a. "half-time") method utilized under the FLSA. This method is well-established based on a 1942 Supreme Court decision and a 1968 Department of Labor regulation. *See* 29 C.F.R. § 778.114; *see generally Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 647-49 (6th Cir. 1986).

Neither the PMWA nor its regulations specifically mention the fluctuating workweek method. So Pennsylvania employers – applying logic similar to the

district court below – have sought to interpret this legislative and regulatory silence as justifying an assumption that the method applies to PMWA claims.

Pennsylvania courts have generally rejected such logic. For example, in *Chevalier v. General Nutrition Centers, Inc.*, 177 A.3d 280 (Pa. Super. 2017), the Pennsylvania Superior Court reasoned that the PMWA's lack of a statutory or regulatory provision mirroring the FLSA's fluctuating workweek regulation demonstrated a conscious decision to reject the fluctuating workweek method. *See id.* at 302.[53] The Eastern and Western Districts of Pennsylvania agree: "'[H]ad the Pennsylvania regulatory body wished to authorize one-half time payment under Section 231.43(d), it certainly knew how to do so.'" *Verderame v. RadioShack Corp.*, 31 F. Supp. 3d 702, 707 (E.D. Pa. 2014) (quoting *Foster v. Kraft Foods Global, Inc.*, 285 F.R.D. 343, 345 (W.D. Pa. 2012)); *accord Freidrich v. U.S. Computer Services, Inc.*, 833 F. Supp. 470, 475-76 (E.D. Pa. 1993) (refusing to recognize fluctuating workweek method and observing: "While it might be convenient for defendant and other multi-state employers if federal law and Pennsylvania law were identical on the issue of overtime compensation, the fact is that they are not.").

b. The "8/80" cases.

In another line of cases, Pennsylvania employers sought to incorporate the

[53] *Chevalier* currently is on appeal to the Pennsylvania Supreme Court.

FLSA's "8/80" rule into the PMWA. The FLSA's 8/80 rule is codified at 29 U.S.C. § 207(j) and allows hospitals and certain other health care employers to avoid paying overtime based on a 40-hour workweek by, instead, paying overtime when employees work over 80 hours in a 14-day period or over 8 hours in a day. *See* 29 U.S.C. § 207(j). This provision was added to the FLSA in 1966. *See* P.L. 89-601 at § 403 (located at 80 Stat. 842).

In three separate cases, Pennsylvania courts have refused to assume that the PMWA's legislative and regulatory silence indicated an adoption of the 8/80 rule. The following passage is typical of the courts' reasoning:

> This Court may not speculate as to the intent of the General Assembly where the words and phrases of the statute are clear. . . . The [P]MWA does not make reference to an 8/80 Period. This Court cannot incorporate the language of Section 7(j) here. . . . The logic of the exclusion in the federal statute may seem fitting and yet this court cannot substitute its own interpretation with that of the Pennsylvania Legislature and a Statute which presents no ambiguity.

Turner v. Mercy Health System, 2010 Phila. Ct. Com. Pl. LEXIS 146, *8 (Pa. Com. Pl., Philadelphia Cty. March 10, 2010); *accord Bordel v. Geisinger Medical Center*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 37, *1-11 (Pa. Com. Pl., Northumberland Cty. May 6, 2013); *LeClair v. Diakon Lutheran Social Ministries*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1, *6-10 (Pa. Com. Pl., Lehigh Cty. Jan. 14, 2013).[54]

[54] As *LeClair* notes, the Pennsylvania legislature subsequently amended the

c. Other examples.

Pennsylvania courts' refusal to assume that the PMWA's silence equates to adoption of FLSA principles is demonstrated in other contexts. For example, the FLSA explicitly provides that only the Secretary of Labor can seek injunctive relief under the statute, *see* 29 U.S.C. § 211(a), and this prevents employees from suing for injunctive relief, *see Balgowan v. State of New Jersey*, 115 F.3d 214, 218 (3d Cir. 1997). The PMWA, meanwhile, is silent on this issue. *See* 43 P.S. §§ 333.101, *et seq.* However, in *Reed v. Friendly's Ice Cream, LLC*, 2016 U.S. Dist. LEXIS 62197 (M.D. Pa. May 11, 2016), the district court refused to read the PMWA's silence as adopting the FLSA rule: "In light of the [PMWA]'s silence as to equitable and injunctive relief . . . the court is in no position to declare that private actions for equitable or injunctive relief under the [P]MWA . . . are prohibited." *Id.* at *16.

Here are some more examples for the Court's consideration: *Sloan v. Gulf Interstate Field Services, Inc.*, 2016 U.S. Dist. LEXIS 29458, *15 (W.D. Pa. March 8, 2016) (refusing to assume that FLSA's "highly compensated" employee exemption applies to PMWA, which "does not even have such an exemption");

PMWA to add a PMWA analogue to the 8/80 rule. *See LeClair*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1, at *8. This is precisely what is *supposed* to happen under our federalist system. State legislatures – not judges – decide the extent to which state statutes should mirror federal law.

Cerutti v. Frito Lay, Inc., 777 F. Supp. 2d 920, 925 n. 4 (W.D. Pa. 2011) (refusing to assume that FLSA's "willfulness" requirement applies to employee's right to 3-year limitations period under PMWA); *Truman v. DeWolff, Bomberg & Associates, Inc.*, 2009 U.S. Dist. LEXIS 57301, *5 (W.D. Pa. July 7, 2009) (PMWA provides overtime rights to Pennsylvania employees stationed outside of United States, even though FLSA exempts such employees); *Dept. of Labor v. Whipple*, 6 Pa. D. & C. 4th 418, 418-22 (Pa. Com. Pl., Lycoming Cty. 1989) (refusing to assume FLSA's agricultural employee exemption applies to PMWA).

In sum, the Pennsylvania Supreme Court would likely reject the district court's conclusion that "[i]f the Pennsylvania legislature had intended to expose employers to liability foreclosed by the Portal-to-Portal Act, 'one may reasonably assume it would have done so affirmatively.'" Opinion, RE 86, Page ID # 2360.

C. Time associated with Amazon's mandatory security screenings is "work" under the PMWA.

Having reviewed Pennsylvania's statutory construction principles, we turn to the question of "work." *See Busk*, 905 F.3d at 398-99 ("the first step for this Court in determining whether time spent undergoing mandatory security screenings is compensable is to determine whether such time constitutes 'work' under Nevada and Arizona state law").

The "work" question is answered by *Busk*. There, this Court explained that, as a general matter, time associated with Amazon's mandatory security screenings

constitutes "work" under the FLSA:

> Putting aside the Portal-to-Portal Act for a moment, time spent waiting in line and then undergoing mandatory security screenings clearly seems to fit the federal definition of "work." The screenings surely are "required by the employer," and Plaintiffs have alleged that the screenings are "solely for the benefit of the employers and their customers."

Busk, 905 F.3d at 399. Thus, it logically followed that the time associated with the mandatory security screenings constituted "work" under Nevada law because "Nevada law incorporates the federal definition of 'work,' and this broad definition encompasses the type of activity at issue in this case." *Id.* at 401. Likewise, because Arizona's conception of "work" was at least as broad as the FSLA's, "time spent undergoing mandatory security screenings is 'work' under federal law, and, thus, under Arizona law." *Id.* at 402.

Here, *Busk's* logic resolves the "work" question in Plaintiffs' favor. As the district court correctly observed, the definitions of "work" under the PMWA and FLSA are "nearly identical." Opinion, PE 86, Page ID # 23585; *compare* 34 Pa. Code. § 231.1(b) (work "includes time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place") *with Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 690-91, 66 S. Ct. 2d 1187, 1194, 90 L. Ed. 1515, 1525 (1946) (work includes "all time during which an employee is necessarily required to be on the on the employer's premises, on duty or at a prescribed workplace"). Amazon agrees. *See*

Moving Brief, RE 59, Page ID # 1703 ("Pennsylvania defines 'work' in line with the FLSA"); Reply Brief, RE 78, Page ID # 2278 ("There simply is no difference between the PMWA's and the FLSA's definitions of both 'work' . . . and 'hours worked.'"). Thus, as in *Busk*, since the mandatory security screenings constitute "work" under the FLSA, they also constitute work under the PMWA.

Moreover, an independent review of Pennsylvania law confirms that Plaintiffs' activities associated with the mandatory security screening constitute work under the PMWA. The PMWA broadly defines "hours worked" to "include[]time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place." 34 Pa. Code. § 231.1(b). Thus, in *Lugo v. Farmer's Pride, Inc.*, 967 A.2d 963 (Pa. Super. 2009), the Pennsylvania Superior Court held that poultry plant employees seeking compensation under the PMWA for time associated with the donning, doffing, and sanitation of protective gear adequately pled work by merely alleging that the plant "required [the employees] to be on its premises and on duty during the donning, doffing, and sanitizing of the protective gear." *Id.* at 968. If such basic allegations were "proven true, then clearly the PMWA would consider the time spent donning, doffing, and sanitizing the protective gear as part of the 'hours worked' and for which appellants would be owed wages under the PMWA." *Id.*; *see also Pennsylvania Federation of the Brotherhood of Maintenance of Way*

Employees v. National Railroad Passenger Corp., 989 F.2d 112, 115 (3d Cir 1993) (PMWA's "work" determination depends on whether employee is "'required by the employer to be on the premises of the employer, to be on duty, or to be at the prescribed work place'").

Here, Amazon cannot satisfy its heavy burden of proving "that there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), with respect to the "work" issue. In fact, the opposite is true. It is undisputed that Amazon "required" Plaintiffs to be both on its "premises" and "at the prescribed work place" during the screenings. *See* pp. 5-9 *supra*. This fact, standing alone, establishes "work" under the PMWA. *See Lugo*, 967 A.2d at 968. Alternatively, a jury can reasonably find that Amazon "required" Plaintiffs to be "on duty" during the screenings, *see* pp. 5-9 *supra; see also Smith v. Allegheny Technologies, Inc.*, 2018 U.S. App. LEXIS 34700, *10 (3d Cir. Dec. 10, 2018) (defining "duty" in PMWA to include riding a van for purposes of crossing a picket line).

1. Amazon's "exertion" argument, if considered on appeal, should be rejected.

Amazon's summary judgment brief argued that Plaintiff did not engage in "work" under the PMWA because the mandatory security screenings did not entail "exertion." *See* Amazon S.J. Brief, RE 59-1, Page ID # 1700-1703. The district court found it "unnecessary" to address this argument. *See* Opinion, RE 86, Page ID # 2360 n. 2. If Amazon pursues this argument on appeal, Plaintiffs will respond

to Amazon's specific arguments in the reply brief. In the meantime, Plaintiffs submit that the "exertion" argument lacks merit for the following reasons:

First, in *Busk*, this Court deemed Amazon's "exertion" argument as "highly dubious for a number of reasons, not the least of which is that undergoing security screening clearly does involve exertion." *Busk*, 905 F.3d at 400-01. The same can be said here. As discussed at pages 5-9 *supra*, Amazon's mandatory security screenings entail an onerous, unpleasant, and intrusive process. And Plaintiffs were *required* to *actively* participate in such process. Surely, a jury could reasonably find that the screenings entailed "exertion."

Second, Amazon's "exertion" argument largely depends on value judgments over what types of activities are worthy of the "exertion" label. For example, I'm working pretty darn hard on this legal brief right now. But I'm also sitting at a desk in a relatively pleasant office with a cup of coffee by my side and music playing in the background. Most of my blue collar clients probably would not consider any of this to be particularly "exertive." For example, I doubt Mr. Heimbach considers my brief-writing to be more "exertive" than his daily 8-minute (on average) slog through Amazon's mandatory security screening process after a full day of manual labor in a very hot warehouse. At bottom, Amazon cannot explain how judges are supposed to separate "exertive" from "non-exertive" activities in a principled manner.

Third, as explained in *Busk*, Amazon's "exertion" argument is contradicted by the Supreme Court's "work" jurisprudence. *See Busk*, 905 F.3d at 401; *accord Hill v. United States*, 751 F.2d 810, 812-13 (6th Cir. 1984). Meanwhile, in the Third Circuit – where this case hopefully will be tried someday – Amazon's "exertion" argument has been obliterated. *See DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) ("*Armour [v. Wantock*, 323 U.S. 126 (1944)] demonstrates that exertion is not in fact, required for activity to constitute 'work.'").

In sum, Amazon's "exertion" argument – even if considered on appeal – should be rejected.

2. Amazon's "*de minimis*" argument, if considered on appeal, should be rejected.

Amazon's summary judgment brief also argued that time associated with the mandatory security screenings was *de minimis* and, therefore, not compensable work. *See* Amazon S.J. Brief, RE 59-1, Page ID # 1715-1717. The district court found it "unnecessary" to address this argument. *See* Opinion, RE 86, Page ID # 2360 n. 2. If Amazon pursues this argument on appeal, Plaintiffs will respond to Amazon's specific arguments in the reply brief. In the meantime, Plaintiffs submit that the "*de minimis*" argument lacks merit for the following reasons:

First, it seems unfair and inappropriate for Amazon to assert a *de minimis* defense after removing a lawsuit from state to federal court by alleging, pursuant to

the Class Action Fairness Act, that the lawsuit potentially is worth over $5 million. *See* Notice of Removal, RE 1, Page ID # 4.

Second, while the *de minimis* rule appears in the FLSA's interpretive regulations, see 29 C.F.R. § 785.47, neither the PMWA nor its regulations make any mention of the rule. *See generally* 43 P.S. §§ 333.101, *et seq.*; 34 Pa. Code §§ 231.1, *et seq.* So, based on the interpretive principles described at pages 22-26 *supra*, the rule should not be grafted into Pennsylvania law.

Third, the *de minimis* defense is inapplicable in class action lawsuits in which the unpaid time is significant in the aggregate, *see*, *e.g.*, *DeAsencio*, 500 F.3d at 374; *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998). Here, the class members were not paid for 12,343,546 minutes (or 205,725 hours) of time, *see* pp. 9-10 *supra*, and Mr. Heimbach and Ms. Salasky were not paid for 4,065 minutes (or 67.75 hours) and 568 minutes (or 9.46 hours) minutes respectively, *see* pp. 9-10 *supra*.

Fourth, the *de minimis* defense is inapplicable where the uncompensated time recurs on a regular basis. *See DeAsencio*, 500 F.3d at 374; *Monfort*, 144 F.3d at 1334.

Fifth, as explained by the Third Circuit, Amazon's *de minimis* defense

> applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part,

> however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

Id. (quoting 29 C.F.R. § 785.47).

Here, Amazon cannot prove "that there is no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), with respect to the above requirements because a jury can reasonably finid that: **(1)** the security screenings did not cover "uncertain and indefinite periods of time" because they occurred every single workday pursuant to standardized procedures, *see* pp. 5-9 *supra*; **(2)** the security screenings did not last only "a few seconds or minutes duration" because, as reflected by data, the screenings resulted in *average daily* unpaid time of 8.02 minutes for Mr. Heimbach (who also had over 10 minutes of unpaid time on 134 occasions and over 15 minutes of unpaid time on 34 occasions), *average daily* unpaid time of 4.38 minutes for Ms. Salasky (who also had over 10 minutes of unpaid time on 7 occasions and over 15 minutes of unpaid time on 2 occasions), and *average weekly* unpaid wages 21 minutes for the class members, *see* pp. 9-11 *supra*; and **(3)** Amazon cannot demonstrate that its failure to capture the unpaid time is "due to considerations justified by industrial realities" rather than its own unwillingness to fix the situation by, for example, moving the time clocks to the other side of the security line, using the turnstile punch time to determine the end of the paid workday, or altering the payroll system to automatically award

employees extra time each day to account for the security screening process, *see* *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 869 (W.D. Wis. 2007).

In sum, Amazon's *de minimis* argument – even if considered on appeal – should be rejected.

D. The Portal Act's compensability limitations, as described in *Integrity Staffing*, do not apply to the PMWA.

Having determined that time associated with the mandatory security screenings is "work" under the PMWA, the "next question" *Busk*, 905 F.3d at 402, is whether the Portal Act's limitations on compensability, as applied in *Integrity Staffing*, impact Plaintiffs' PMWA claim.

1. Portal Act § 4's compensability limitations.

Plaintiffs' argument requires an understanding of both Portal Act § 4 and the 1949 amendment to Portal Act § 4. Those provisions are recounted below:

a. The 1947 Portal Act.

In 1947, Congress passed the Portal Act, which dealt with several different topics. *See generally* 61 Stat. 84 (May 14, 1947). We are focused on § 4 of the Portal Act, which provided in relevant part:

> (a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act –
>
> (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,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.
>
> (b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either–
>
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Id.

b. The 1949 Amendment.

In 1949, Congress passed Public Law 393. *See* 63 Stat. 910 (Oct. 26, 1949).

Section 3(o) of Public Law 393 provided the following:

> In determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

Id. at 911. This provision currently is codified at 29 U.S.C. § 203(o).

Public Law 393's § 3(o) amended and modified Portal Act § 4. This is made

clear in § 16(b) of Public Law 393, which reads: "*Except as provided in Section 3(o)* . . . , no amendment made by this Act shall be construed as amending, modifying, or repealing any provision of the Portal-to-Portal Act of 1947." *Id.* at 920 (emphasis supplied); *see also Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956) (stating, immediately after discussing the Portal Act: "In 1949, Section 3(o) was added to the Act."); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 958 (11th Cir. 2007) (Section 3(o) enacted to "strengthen the employer-protective Portal-to-Portal Act by closing a 'loophole' therein").

2. Three Pennsylvania courts have held that Portal Act § 4's compensability limitations are inapplicable to PMWA claims.

As detailed below, three separate courts have held that Portal Act § 4's compensability limitations do not apply to PMWA claims. These important court decisions are discussed in chronological order below:

a. *In re Cargill Meat Solutions Wage and Hour Litig.*, 632 F. Supp. 2d 368 (M.D. Pa. 2008).

In *Cargill*, employees in a Pennsylvania beef plant brought claims under, *inter alia*, the FLSA and PMWA, alleging that Cargill failed to compensate them "for time spent donning, doffing, waiting for, gathering, maintaining, and sanitizing work-related clothing, gear, and equipment and for time spent traveling between the changing area and the production line before and after shifts and during break times." *Cargill*, 632 F. Supp. 2d at 371. Since the plant was

unionized, the employees were covered by a collective bargaining agreement. *See id.* at 373.

The district court initially focused on the employees' FLSA claim. *See id.* at 376-92. All agreed that, absent the collective bargaining agreement, the pre-shift activities at issue were compensable under Portal Act § 4. *See id.* at 377-78. However, according to Cargill, such activities were non-compensable under the Section 3(o) amendment to Portal Act § 4 because the activities (i) constituted "time spent in changing clothes or washing" and (ii) had been treated as non-compensable "by custom or practice under a bona fide collective-bargaining agreement." *See id.* at 378. The district court rejected this argument, *see id.* at 378-88, as well as some others relating to the FLSA claim, *see id.* at 388-92.

This brings us to the portion of *Cargill* that is relevant to the instant appeal. Cargill argued that the employee's PMWA claim was preempted by the FLSA to the extent the PMWA conflicted with Portal Act § 4, as amended by Section 3(o). *See id.* at 392-94. The district court rejected this argument. *See id.* First, the court explained that the FLSA contemplates that state wage laws can offer employees wage rights that rise above the "floor" established by the FLSA. *See id.* at 393. Next, focusing on the interplay between the Portal Act and Pennsylvania law, the court observed: "The series of incidents which led to the Portal-to-Portal Act was litigation under the FLSA not state law legislation." *Id.* at 394. Finally, and most

importantly, the court explained that the Portal Act, as amended by Section 3(o), had no application to the PMWA claim:

> Neither the PMWA nor the PWPCL contain a counterpart to § 203(o) or other similar provisions. . . . A more beneficent definition of hours worked embodied in the Pennsylvania statutes does not circumvent or nullify the purpose of § 203(o). *Chavez*, 2005 U.S. Dist. LEXIS 29714 at *120. The provisions of the Portal Act and §203(o) "indicate Congress's intent to better define the liability of employers under the FLSA. They do not, however, supplant the traditional power of the state to more generously regulate wage and hours via there [sic] own state regulations." *Id.*
>
> Pennsylvania has not adopted a similar exception to § 203, and, as a result Pennsylvania law protects employees by not permitting unions and employers to negotiate away payment for donning and doffing of clothes as Congress has under the FLSA. As noted above, Cargill argues that it cannot comply with both the FLSA and Pennsylvania law regarding this matter. However, Cargill, in Pennsylvania, could comply with both laws by following the Pennsylvania law, which is more protective of individual employee rights, by paying its employees for donning and doffing of gear. Based on the entire scheme of the FLSA to protect workers and create minimum standards over which a state may more generously regulate, a successful § 203(o) defense would not preempt Plaintiffs' PMWA and PWPCL claims.

Id.

b. *Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com. Pl., Washington Cty. Dec. 12, 2017).

Bonds started out as a hybrid class/collective action in federal district court. *See Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2014 U.S. Dist. LEXIS 89181 (W.D. Pa. July 1, 2014). The plaintiffs were coal miners who sought to be paid under the FLSA and PMWA for various pre-shift activities such as attending

mandatory safety meetings. *See id.* at *15. After discovery, the employer moved for summary judgment, and the district court set out to determine "whether the time that the underground mine workers spend attending pre-shift meetings is compensable under the FLSA, as amended by the Portal-to-Portal Act of 1947." *Id.* at *21. In answering this question, the district court undertook an extensive analysis of the FLSA, the Portal-to-Portal Act, and the U.S. Supreme Court decisions applying the Portal-to-Portal Act. *See id.* at *21-35. The district court then granted summary judgment against the miners, reasoning that the pre-shift safety meetings were not compensable under the Portal-to-Portal Act. *See id.* at *35-40.

Next, the district court turned to the miners' PMWA claim. *See Bonds*, 2014 U.S. Dist. LEXIS 89181, at *40-41. The district court observed that "'the Pennsylvania General Assembly has not in any way adopted the federal Portal-to-Portal Act.'" *Id.* at *40 (quoting *Ciarelli v. Sears, Roebuck & Co.*, 46 A.3d 643, 648 (Pa. 2012) (McCafferty, J. dissenting from dismissal of appeal as being improvidently granted)). The district court then reasoned that, because the Portal Act's applicability to the miners' PMWA claim was a "novel issue of state[] law," it would refrain from exercising supplemental jurisdiction over the PMWA claim. *See id.* at *40-41.

In the wake of the district court's ruling, the miners pursued their PMWA

claim in the Pennsylvania Court of Common Pleas. *See Bonds v. GMS Mine Repair & Maintenance, Inc.*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com. Pl., Washington Cty. Dec. 12, 2017). Once again, the employer moved for summary judgment, arguing that the PMWA – like the Portal Act – rendered the miners' pre-shift activities non-compensable. *See id.* at *6-11.

The Common Pleas Court rejected the employer's argument. *See Bonds*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622, at *6-11. After explaining that the PMWA often provides Pennsylvania employees with greater protections than the FLSA, *see id.* at *9-10, the Court explained that the Portal Act and *Integrity Staffing* were irrelevant to the miners' claim:

> Although the *Integrity Staffing* case significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, the case ultimately has no impact on Plaintiff's [P]MWA claim. As previously stated, the law in Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA. The standard set forth in *Integrity Staffing* is inapplicable to plaintiffs' state law claims, therefore Defendant's Motion for Summary Judgment is DENIED.

Id. at *11.

c. *Smith v. Allegheny Technologies, Inc.*, __ Fed. Appx. __, 2018 U.S. App. LEXIS 34700 (3d Cir. Dec. 10, 2018).

Most recently, the Third Circuit issued a non-precedential opinion in *Smith*. The opinion is notable for two reasons. First, it refuses to follow another non-precedential opinion, entitled *Espinoza v. Atlas Railroad Construction, LLC*, 657

Fed. Appx. 101 (3d Cir. 2016), and states that *Espinoza* "has no persuasive authority under the rules of our Court." *Smith*, 2018 U.S. Dist. LEXIS 34700, at 9. This is notable because, in the opinion below, the district court cited to *Espinoza*, *see* Opinion, RE 86, Page ID # 2358-2859.

More importantly, *Smith* held that Portal Act § 4's limitations on compensability do not apply to PMWA claims. In *Smith*, temporary employees were hired to work in a steel plant while the unionized permanent employees were on strike. *See Smith*, 2018 U.S. Dist. LEXIS 34700, at *1-3. This required the temporary employees to ride in company-supplied vans across union picket lines at the beginning of each workday. *See id.* The temporary employees eventually filed suit, seeking unpaid wages under the FLSA and the PMWA for time spent riding in the vans. *See id.* The district court dismissed both claims. *See id.*

On appeal, the Third Circuit affirmed the dismissal of the FLSA claim. *See Smith*, 2018 U.S. Dist. LEXIS 34700, at *3-8. The Court explained that the employees' travel claims were non-compensable under Portal Act § 4 and *Integrity Staffing*. *See id.*

Crucially, however, the Third Circuit vacated the district court's dismissal of the PMWA claim. *See Smith*, 2018 U.S. Dist. LEXIS 34700, at *8-9. The Court explained that the district court's Portal Act/*Integrity Staffing* analysis was irrelevant to the PMWA claims:

> The District Court concluded that Smith and Harris' claim under the PMWA failed for "the same reasons that the Court concluded that [they] cannot establish that commuting across the picket line in Strom's vans was either a principal activity or integral and indispensable to a principal activity of their employment." J.A. at 26. ***But Pennsylvania has not enacted the Portal-to-Portal Act, and Pennsylvania law requires compensation for a broader range of activities, including travel time, than the FLSA.*** *See De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 307 (3d Cir. 2003), *as amended* (Nov. 14, 2003); *In re Cargill Meat Sols. Wage & Hour Litig.*, 632 F. Supp. 2d 368, 394, 397-98 (M.D. Pa. 2008). ***Neither the principal activity nor the integral or indispensable test applies here.***

Id. at *8-9 (emphasis supplied).

3. In other cases, Pennsylvania courts address PMWA compensability issues without regard to Portal Act § 4 even though the underlying work activities fall within the Portal Act's subject matter.

Cargill, Bonds, and *Smith* are Plaintiffs' favorite cases because the judges therein specifically hold that the Portal Act's compensability limitations do not apply to PMWA claims. However, Plaintiffs also alert the Court to two additional previously referenced opinions: (i) the Pennsylvania Superior Court's *Lugo* opinion, *see* pp. 28-29 *supra*, and (ii) the Third Circuit's *Pennsylvania Federation* opinion, *see* pp. 28-29 *supra*. Both of these opinions addressed compensability under the PMWA. The *Lugo* employees sought pay for time spent donning, doffing, and cleaning protective gear at the beginning of the workday. *See Lugo*, 967 A.2d at 995-96. Meanwhile, the *Pennsylvania Federation* employees sought pay for time spent traveling in company-owned vehicles between camp cars (where

the employees slept) and the job site at the end of the workday. *See Pennsylvania Federation*, 989 F.2d at 114.

In other words, *Lugo* and *Pennsylvania Federation* involved precisely the type of "preliminary" and "postliminary" activities litigated under Portal Act § 4.[55] Notwithstanding, in addressing compensability, neither court makes any mention of the Portal Act. This further demonstrates the Portal Act's irrelevance to PMWA claims.

4. The district court erred in applying Portal Act § 4's compensability limitation, as described in *Integrity Staffing*, to Plaintiffs' PMWA claim.

The district court erred by concluding that Portal Act § 4/*Integrity Staffing* controlled the outcome of Plaintiff's PMWA claim. As detailed at pages 19-26 *supra*, Pennsylvania courts interpret the PMWA to extend beyond the reaches of the FLSA and generally refuse to graft FLSA provisions onto the PMWA based on the PMWA's statutory or regulatory silence. Yet, the district court – relying on *Vance* –assumed that the silence of Pennsylvania lawmakers and regulators equated to an adoption of the Portal Act. *See* p. 18 *supra*. This assumption was incorrect, because the Kentucky principles underlying *Vance* do not reflect Pennsylvania's PMWA jurisprudence. *See* pp. 19-26 *supra*. Had the district court

[55] Indeed, in the federal counterpart to *Lugo*, the Portal Act is central to the federal district court's analysis. *See Lugo v. Farmer's Pride, Inc.*, 802 F. Supp. 2d 598 (E.D. Pa. 2011).

been more mindful of Pennsylvania jurisprudence, it would have made the opposite finding, as this Court did under Nevada and Arizona law in *Busk*. *See* pp. 17-18 *supra*.

Moreover, the district court's analysis clashes with the holdings in *Cargill, Bonds*, and *Smith*, all of which explicitly reject employers' arguments that the Portal Act – and, by extension, *Integrity Staffing* – apply to PMWA claims. *See* pp. 36-42 *supra*. Moreover, the district court's holding conflicts with the outcomes of *Lugo* and *Pennsylvania Federation*, neither of which mention Portal Act principles in addressing PMWA claims that clearly fall within the Portal Act's scope under the FLSA, *see* pp. 42-43 *supra*.

In sum, the district court has gone far out on a limb. With very little analysis and contrary to the holdings of three separate Pennsylvania courts, it grafted Portal Act § 4 onto the PMWA. It is doubtful that the Pennsylvania Supreme Court would endorse such judicial activism.

VII. CONCLUSION

Based on the above arguments, Plaintiffs respectfully request that this Court either (i) grant Plaintiffs' pending motion to certify the question or (ii) reverse the district court's summary judgment decision.

Date: April 3, 2019

Respectfully submitted,

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ADDENDUM

DESIGANTION OF RELEVANT DISTRICT COURT DOCUMENTS

(6 Cir. R. 28(b)(1)(A)(i))

Record Entry Number	Description of Entry	Page ID# Range
COMPLAINT		
1-1	Plaintiff's Original Complaint	36-49
1-4	Plaintiffs' First Amended Complaint	57-67
OTHER PLEADINGS OR MOTIONS RELEVANT TO THE ARGUMENTS ON APPEAL		
1	Notice of Removal	1-34
6	Answer and Defenses of Defendants Amazon, Inc., Amazon.com.DEDC, LLC, and Amazon.com DEDC, Inc. to Plaintiffs' First Amended Complaint (Exhibit B to Plaintiffs' MSJ)	105-117
7	Defendant Integrity Staffing Solutions, Inc.'s Answer and Affirmative and Other Defenses to the Amended Complaint (Exhibit C to Plaintiffs' MSJ)	118-130
56	Plaintiffs' Motion for Class Certification	1284-1627
59	Defendants AmaZon.com, Inc., Amazon.com.DEDC, LLC's Motion for Summary Judgment	1689-1718
63	Amazon's Motion to Stay the Class Certification Motion	1813-1823
71	Order dated April 22, 2016 granting Amazon's Motion to Stay the Class Certification Motion	1887-1889
74	Plaintiffs' Opposition to Defendants' Summary Judgment Motion	1895-2211

78	Amazon's Reply in Support of Summary Judgment	2267-2295
80	Plaintiffs' Supplemental Authority in Further Support of their Opposition to Summary Judgment	2296-2309
82	Plaintiffs' Supplemental Authority Informing the Court of Proposed Pennsylvania Senate Bill 587	2314-22319
84	Plaintiffs' Supplemental Authority in Further Support of their Opposition to Summary Judgment	2324-2336
THE JUDGMENT FROM WHICH THE APPEAL IS TAKEN		
87	Judgment dated August 30, 2018 entered in favor of Defendants Amazon.com, Inc., Amazon.com.DEDC, LLC, and Integrity Staffing Solutions, Inc. with respect to all claims asserted in this matter by Plaintiffs Neal Heimbach and Karen Salasky.	2364
RELEVANT MEMORANDUM OPINIONS		
86	Memorandum Opinion and Order dated August 30, 2018 Granting Defendants' Motion for Summary Judgment	2355-2363
THE NOTICE OF APPEAL		
88	Notice of Appeal dated September 6, 2018 from the Judgment and the Memorandum Opinion and Order entered on August 30, 2018.	2365-2366
OTHER PARTS OF THE RECORD		
74-5	Deposition of Neal Heimbach (Exhibit D to Plaintiffs' Motion for Summary Judgment ("Plaintiffs' MSJ")	1986-1999

74-6	Deposition of Karen Salasky (Exhibit E to Plaintiffs' MSJ)	2000-2012
74-7	Deposition of Amy O'Hay (Exhibit F to Plaintiffs' MSJ)	2013-2038
74-8	Newspaper Article from the Allentown Morning Call – *Inside Amazon's Warehouse* (Exhibit G to Plaintiffs' MSJ)	2039-2050
76 (Filed Under Seal)	Rounding and Grace Period Policy (Exhibit J to Plaintiffs' MSJ)	N/A
76 (Filed Under Seal)	Attendance Policy (Exhibit K to Plaintiffs' MSJ)	N/A
76 (Filed Under Seal)	Photographs of Screening Area (Exhibit L to Plaintiffs' MSJ)	N/A
76 (Filed Under Seal)	Security Screening Standards (Exhibit M to Plaintiffs' MSJ)	N/A
76 (Filed Under Seal)	Collection of Policy Documents (Exhibit N to Plaintiffs' MSJ)	N/A
74-16	Revised Expert Report of Liesl M. Fox, Ph.D. Regarding Time Worked Off-the-Clock (Exhibit O to Plaintiffs' MSJ)	2092-2107
74-19	Declaration of R. Andrew Santillo and accompanying tables (Exhibit R to Plaintiffs' MSJ)	2146-2166

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 6 Cir. R. 26.1, Plaintiffs/Appellants Neil Heimbach and Karen Salasky submit the following statement of their corporate interests and affiliates for the use of the judges of this Court:

1. Plaintiffs/Appellants are not subsidiaries or affiliates of a publicly owned corporation.
2. Plaintiffs/Appellants are unaware of any publicly owned corporation, not a party to the appeal, that has a financial interests in the outcome.

Dated: April 3, 2019

/s/ Peter Winebrake
Peter Winebrake
Counsel for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, Counsel of Record hereby certifies that the foregoing brief is proportionately spaced, has a typeface of 14 points and contains 10,614, including footnotes as counted by the Microsoft Word processing program used to generate Appellant's Brief.

Dated: April 3, 2019

/s/ Peter Winebrake
Peter Winebrake
Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, Counsel of Record hereby certifies that he electronically filed the foregoing documents with the Clerk of the Court for the United State Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on April 3, 2019.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 3, 2019

/s/ Peter Winebrake
Peter Winebrake
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