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IN THE SUPREME COURT OF PENNSYLVANIA

43 EAP 2019

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

v.

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

REPLY BRIEF OF PLAINTIFFS/APPELLANTS

Appeal Pursuant to this Court's December 27, 2019 Order
Granting the Petition of the United States Court of Appeals
for the Sixth Circuit's for Certification of Questions of Law

Date: July 3, 2020

Peter Winebrake (80496)
R. Andrew Santillo (93041)
Mark J. Gottesfeld (307752)
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491

Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

A. Since the opening brief, another court has rejected Amazon's argument that Portal Act § 4's compensability limitations apply to state wage law 1

B. Amazon's factual assertions should be ignored 1

C. If considered, Amazon's factual assertions should be rejected..... 3

D. Amazon's argument that 34 Pa. Code § 231.1(b)'s "hours worked" definition does not apply to this overtime rights lawsuit contradicts Amazon's prior representations to the Kentucky District Court and the Sixth Circuit. 5

E. Amazon's argument that § 231.1(b)'s "hours worked" definition does not apply to this overtime rights lawsuit is substantively incorrect 6

F. Amazon's alternative argument that time associated with the security screenings falls outside of § 231.1(b)'s "hours worked" definition is incorrect 9

G. Amazon's "common usage" argument, if reached, should fail..... 11

H. The Court should reject Amazon's argument that the PMWA incorporates Portal Act § 4's compensability limitations. 13

1. The Commonwealth Court's *Stuber* opinion does not help Amazon..... 14

2. The similarities between § 231.1(b)'s "hours worked" definition and the FLSA's traditional "hours worked" definition bolsters Heimbach/Salasky's argument 17

3. Amazon's legislative/regulatory silence argument should fail 19

4. *Thomas v. Amazon* (N.D. Ohio) cuts against Amazon..... 19

I. The purported "*de minimis* doctrine" was not an established principle of wage law at the time of the PMWA's enactment. 20

J. Pennsylvania workers' wages are not "trifles." 23

K. Amazon's *amici* confirm the *de minimis* rule's unfairness 24

L. Conclusion. 25

TABLE OF AUTHORITIES

CASES: **Page**

Bostock v. Clayton County,
2020 U.S. LEXIS 3252 (June 15, 2020) 19

Bristol-Myers Co. v. Lit Brothers, Inc.,
6 A.2d 843 (Pa. 1939) 21, 23-24

Busk v. Integrity Staffing Solutions, Inc.,
905 F.3d 387 (6th Cir. 2018) 12, 17-18

Cerutti v. Frito Lay, Inc.,
777 F. Supp. 2d 920 (W.D. Pa. 2011) 15

Chevalier v. General Nutrition Centers, Inc.,
220 A.3d 1038 (Pa. 2019) 7

Dept. of Labor v. Whipple,
6 Pa. D. & C. 4th 418 (Pa. Com. Pl., Lycoming Cty. 1989) 15

Elderkin v. Gaster,
288 A.2d 771 (Pa. 1972) 20

Freidrich v. U.S. Computer Services, Inc.,
833 F. Supp. 470 (E.D. Pa. 1993) 15

Huse v. Merriam,
2 Me. 375 (1823) 22

Integrity Staffing Solutions, Inc. v. Busk,
574 U.S. 27 (2014) 17

Kennedy v. Gramling,
11 S.E. 1081 (S.C. 1890) 22

Landaas v. Canister Co.,
188 F.2d 768 (3d Cir. 1951) 21-23

LeClair v. Diakon Lutheran Social Ministries,
2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Pa. Com. Pl., Lehigh Cty. Jan. 14, 2013) 8

Lugo v. Farmer's Pride, Inc.,
967 A.2d 963 (Pa. Super. 2009) 8

Pennsylvania Department of Labor & Industry v. Stuber,
822 A.2d 870 (Pa. Cmwlth. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004) 14-15

Pennsylvania Federation of the Brotherhood of Maintenance of Way Employees v. National Railroad Passenger Corp.,
989 F.2d 112 (3d Cir. 1993) 8

Sloan v. Gulf Interstate Field Services, Inc.,
2016 U.S. Dist. LEXIS 29458 (W.D. Pa. March 8, 2016) 15

Thomas v. Amazon.com Services, Inc.,
2020 U.S. Dist. LEXIS 89882 (N.D. Ohio May 21, 2020) 19-20

Truman v. DeWolff, Bomberg & Associates, Inc.,
2009 U.S. Dist. LEXIS 57301 (W.D. Pa. July 7, 2009) 15

Woodard v. FedEx Freight East., Inc.,
250 F.R.D. 178 (M.D. Pa. 2008) 8

Vaccaro v. Amazon.com.DEDC, LLC,
No. 3:18-cv-11852, 2020 U.S. Dist. LEXIS 114526 (D.N.J. June 26, 2020) 1, 18

Vanstory-Frazier v. CHHS Hospital Co., LLC,
827 F. Supp. 2d 461 (E.D. Pa. 2011) 8

STATUTES/CODES/REGULATIONS:

29 U.S.C. §§ 201, *et seq.* 15

29 C.F.R. Parts 500-794 15

29 C.F.R. § 778.223 17

29 C.F.R. § 785.7 ..... 13, 17

29 C.F.R. § 785.15 13

43 P.S. § 333.101 *et seq.* .....

43 P.S. § 333.107 8

43 P.S. § 333.108 7

34 Pa. Code § 231.1(b)..... *passim*

34 Pa. Code § 231.43 7

O.R.C. § 4111.03 .....

Appellants Neal Heimbach and Karen Salasky offer the following in reply to Amazon's March 6, 2020 brief:

A. Since the opening brief, another court has rejected Amazon's argument that Portal Act § 4's compensability limitations apply to state wage law.

In their opening brief, Heimbach/Salasky cite decisions holding that Portal Act § 4's compensability limitations do not apply to the state wage statutes of Arizona, California, Nevada, Oregon, and Washington. *See* Opening Brief at 29-30. Now, New Jersey can be added to this list.

Specifically, in *Vaccaro v. Amazon.com.DEDC*, 2020 U.S. Dist. LEXIS 114526 (D.N.J. June 26, 2020), Amazon argued that its mandatory security screenings do not violate the New Jersey Wage and Hour Law ("NJWHL") because such law must be read in accordance with Portal Act § 4. *See id.* at *12-18. Chief District Judge Freda Wolfson rejected this argument because the NJWHL – like the PMWA here and like the Arizona and Nevada statutes at issue in *Busk* – contains no reference to Portal Act § 4 principles. *Id.*

B. Amazon's factual assertions should be ignored.

The Sixth Circuit certified two questions *of law* to this Court and cogently recited the "relevant facts" underlying the legal questions. *See* Appx. C at 2-3. The Sixth Circuit explicitly recognized that that the parties "disagree as to the amount of time this [security] screening took on average." *Id.* at 3.

Because this Rule 3341 proceeding strictly concerns questions of law, Heimbach/Salasky limited their statement of facts to: (i) a block quote of the Sixth Circuit's recitation of the "relevant facts," *see* Opening Br. at 6-7; (ii) an acknowledgement that "the parties presented the Kentucky District Court with competing evidence regarding the amount of uncompensated time based on Amazon's data," *id.* at 7 (citing reproduced record); and (iii) a summary of Plaintiff's expert analysis and Amazon's competing data analysis pertaining to the "amount of time" issue, *id.* at 7-8.

Amazon takes a different approach. It ignores the Sixth Circuit's factual recitation and replaces it with a one-sided account of the mandatory security screening process and the time associated with the screenings. *See* Amazon Br. at 3-7. Then, relying on its skewed record, Amazon trivializes this litigation as concerning the "brief time that some employees spend going through metal detectors on their way out the door," *id.* at 1, or as involving the "few seconds or minutes spent because of security screening while exiting the workplace," *id.* at 9.

Heimbach/Salasky will not sit idly by while Amazon unfairly distorts the factual record. *See* Section C *infra*. However, the factual disputes engendered by Amazon's brief are generally inconsequential. The Sixth Circuit already has summarized the facts for this Court and acknowledged that the parties "disagree as to the amount of time this [security] screening took on average." Appx. C at 3.

The Sixth Circuit's factual recitation should not be replaced with Amazon's skewed version of the factual record. The whole point of this proceeding is to argue and resolve issues of law; not to rummage through the Kentucky District Court's expansive factual record and cherry-pick evidentiary snippets. The parties' various factual disputes will be resolved later, after this Court clarifies the applicable Pennsylvania legal principles.

C. If considered, Amazon's factual assertions should be rejected.

Notwithstanding the above, Heimbach/Salasky feel obliged to inform the Court that Amazon's presentation of the record is one-sided and unreliable:

First, the security screening process was far more elaborate than Amazon suggests. In this regard, the Court is respectfully referred to Heimbach/Salasky's summary of the pertinent evidence in their summary judgment opposition brief. *See* R. 216a-220a.[1]

Second, regarding the amount of time Heimbach and Salasky spent going through the security screening process, Amazon *admits* that the process took *over 5 minutes* on 48% of Heimbach's workdays and on 19% of Salasky's workdays. *See* Amazon Br. at 6-7. Amazon asserts that, on some days, "at least one employee" who clocked-out "within one or two minutes" of Heimbach or Salasky would leave the building more quickly. *See id.* But this merely demonstrates that different

[1] The exhibits associated with this summary can be found at R.252a-R.472a.

employees got through security at different times depending on their specific security line. Moreover, with respect to Heimbach, this phenomenon only happened "[o]n almost half of the days" that his security screening time took over 5 minutes. *Id.* at 6. Thus, on the *other* half of the days, *every other worker* who clocked-out "within one or two minutes" of Heimbach also took over 5 minutes to get through security.

None of this should be very surprising when one considers that, at the end of some shifts, hundreds of workers were trying to get through security at the same time. As Salasky testified: "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." R.271a at Tr. 52:21-52:24; *see also* R.272a at Tr. 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.").

Finally, Amazon mischaracterizes the evidence concerning "express lanes." It asserts that "the record shows that Amazon created 'express lanes' so employees who choose not to bring personal items onto the warehouse floor may quickly exit unimpeded," Amazon Br. at 2, and that workers who use the "express lanes" can "walk straight out of the workplace," *id.* at 3. But Amazon cites zero record evidence for either of these propositions. *See id.* In fact, throughout its brief,

Amazon assiduously avoids ever citing to any actual record evidence that "express lanes" were particularly fast or efficient. That's because no such evidence exists. In fact, the opposite is true:

> **Q:** Was there ever a line at the express lane?
> **A:** Yeah, I've seen lines at the express lane, mm-hm. There's a lot of people in there.
> **Q:** Is that only when someone has set off the detector in the express lane?
> **A:** No, no, it's a – you know, its people leaving, its people leaving, you know. Your shift is leaving and if we had a busy night where they had 800, 900 people, you know, you could wait in line.

R.260a at Tr. 112:22-113:6 (Heimbach deposition).

In sum, while the certified questions of law can be answered based on the Sixth Circuit's recitation of "relevant facts," Heimbach/Salasky want to make sure the Court is aware that, at almost every turn, Amazon's "facts" are hotly disputed.

D. Amazon's argument that 34 Pa. Code § 231.1(b)'s "hours worked" definition does not apply to this overtime rights lawsuit contradicts Amazon's prior representations to the Kentucky District Court and the Sixth Circuit.

Amazon argues that § 231.1(b)'s "hours worked" definition does not cover overtime rights claims and, therefore, is irrelevant. *See* Amazon Br. at 26-29. (emphasis supplied). This argument flatly contradicts *Amazon's* persistent assertions throughout this litigation that the security screenings do not constitute "hours worked" under 34 Pa. Code § 231.1(b). Such argument was the centerpiece of Amazon's summary judgment brief, *see* R.91a-92a, R.105a-115a, and was reiterated in its reply brief, *see* R.483a-485a. Consistent with Amazon's argument,

the Kentucky District Court's summary judgment decision recognized the applicability of § 231.1(b)'s "hours worked" definition. *See* Appx. A at 4.

At the Sixth Circuit, Amazon continued to rely on § 231.1(b). In fact, it opposed certification of the question by filing a brief that: (i) quoted § 231.1(b)'s "hours worked" definition in its entirety, *see* Appx. E (attached) at 4-5; (ii) emphasized the district court's endorsement of § 231.1(b)'s "hours worked" definition, *see id*. at 5; and (iii) argued that "the undisputed summary judgment record in this case establishes that the post-shift security screening is not '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 workplace.' 34 Pa. Code § 231.1(b)," *id.* at 8; *see also id.* at 9 n.2 ("Because there is a regulatory definition of 'hours worked,' 34 Pa. Code § 231.1(b), the unsettled legal question here involves the interpretation of a regulation, not a statute.").

Based on Amazon's arguments, the Sixth Circuit used § 231.1(b)'s "hours worked" terminology in drafting the certified question Appx. C at 10; Appx. D. at 1. As such, it is puzzling and disturbing that Amazon now argues that § 231.1(b)'s "hours worked" definition is irrelevant.

E. Amazon's argument that § 231.1(b)'s "hours worked" definition does not apply to this overtime rights lawsuit is substantively incorrect.

Turning to the substance of Amazon's belated argument that § 231.1(b) is irrelevant, we examine the correctness of Amazon fundamental contention that the

"hours worked" term "appears in the statutory and regulatory previsions establishing an employer's *minimum wage* obligations," Amazon Br. at 26 (emphasis in original), making it improper to "pretend that the overtime provisions use a phrase they do not use," *id.* at 27.

This contention is simply wrong. In fact, the PMWA's *overtime* regulations also do use the "hours worked" terminology. Specifically, the PMWA regulations at 34 Pa. Code § 231.43 are dedicated to determining the "regular rate" for purposes of determining overtime pay. These overtime regulations employ the term "hours worked" at least seven separate times. *See* 34 Pa. Code § 231.43(1); *id.* at § 231.43(5); *id.* at § 231.43(5); *id.* at § 231.43(b); *id.* at § 231.43(c)(1); *id.* at § 231.43(d); *see also Chevalier v. General Nutrition Centers, Inc.*, 220 A.3d 1038, 1052, 1058 (Pa. 2019) (using "hours worked" term in discussing calculation of overtime pay).

Moreover, contrary to Amazon's argument, the PMWA's statutory text does not limit "hours worked" to the minimum wage. Specifically, PMWA § 8 requires that "[e]very employer. . . shall keep a true and accurate record of the *hours worked* by each employee and the wages paid to each, and shall furnish to the secretary or to his or her duly authorized representative, upon demand, a sworn statement of the same." 43 P.S. § 333.108 (emphasis supplied). In this context, it makes no sense to construe "hours worked" as not including overtime hours. The

Secretary is statutorily empowered to "examin[e] and inspec[t] any records of any such employer that in any way relate to wages, hours, or other conditions of employment of any such employees." *Id.* at § 333.107. But this expansive investigatory mandate would be undermined if the employer's obligation to keep records of all "hours worked" did not include overtime hours.

Amazon's argument also contradicts court opinions in which appellate courts addressing overtime rights claims have explicitly relied on § 231.1(b)'s "hours worked" definition. *See Pennsylvania Federation of the Brotherhood of Maintenance of Way Employees v. National Railroad Passenger Corp.*, 989 F.2d 112, 114 (3d Cir. 1993); *Lugo v. Farmer's Pride, Inc.*, 967 A.2d 963, 967 (Pa. Super. 2009). Similarly, trial court judges routinely employ the "hours worked" terminology in describing overtime hours under the PMWA. *See*, *e.g.*, *LeClair v. Diakon Lutheran Social Ministries*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 1 (Pa. Com. Pl., Lehigh Cty. Jan. 14, 2013) ("PMWA specifies that non-exempt employees are to receive overtime premium pay for all *hours worked* over 40 in a seven-day workweek") (emphasis supplied); *accord Vanstory-Frazier v. CHHS Hospital Co., LLC*, 827 F. Supp. 2d 461, 463 n. 2 (E.D. Pa. 2011); *Woodard v. FedEx Freight East., Inc.*, 250 F.R.D. 178, 190 (M.D. Pa. 2008);

Finally, it would be entirely unworkable if, as Amazon argues, time spent in activities during a non-overtime week were measured under § 231.1(b)'s "hours

worked" standard, while time spent in activities during an overtime week were measured under some other undefined standard. Amazon fails to explain why, in the absence of clear authority, this Court should require Pennsylvania employers and workers to calculate compensable work time under two separate standards.

In sum, the Court should reject Amazon's argument that § 231.1(b)'s "hours worked" definition does not apply to claims for unpaid overtime. In addition to contradicting Amazon's prior representations to the Kentucky District Court and the Sixth Circuit, *see* Section D *supra*, the argument is legally incorrect.

F. Amazon's alternative argument that time associated with the security screenings falls outside of § 231.1(b)'s "hours worked" definition is incorrect.

Amazon makes an alternative argument that, even if § 231.1(b) applies, the mandatory security screenings do not fall within the regulation's "hours worked" definition. *See* Amazon Br. at 29-33. Amazon claims this is so because § 231.1(b) defines "hours worked" to include time that is "required by the employer" and to exclude time that is "for the convenience of the employee." Amazon Br. at 25-26, 29-30 (quoting 34 Pa. Code § 231.1(b)).

Relying on its one-sided version of the "summary judgment record," Amazon concludes that time associated with the security screenings "was not required of [employees] and should not be counted as part of their workweek." *Id.* at 33. But the Sixth Circuit has already stated that the Breinigsville warehouse

workers "were *required* to undergo antitheft security screening." Appx. C at 2 (emphasis supplied). Moreover, the certified question characterizes the security screenings as "*mandatory*." *Id.* at 10; Appx. D at 1 (emphasis supplied). Amazon is not allowed to rewrite the Sixth Circuit's opinion and recharacterize the certified question based on its preferred interpretation of the "summary judgment record."

Moreover, since the beginning of this litigation, Amazon has admitted that it "*required*" the Breinigsville warehouse workers to participate in the security screenings. *See*, *e.g.*, R.55a at ¶¶ 23-25; R.66a-67a at ¶¶ 20-26. Even the Kentucky District Court, in granting Amazon's summary judgment motion, observed that "Amazon *required* employees working at the warehouse to go through an anti-theft screening process." Appx. A at 2 (emphasis supplied).

Amazon also argues that workers who do not avail themselves of "express lanes" are somehow "convenienced" because they are allowed to bring "metallic" objects into the workplace. *See* Amazon Br. at 30-31.[2] But this argument ignores the fact that *all* workers – even the "non-convenienced" metal-free ones – must submit to a mandatory security screening. In other words, Amazon mandates a baseline requirement – going through some anti-theft security screening process – that applies to *everyone* regardless of their individual circumstances. *See* Opening

[2] In Heimbach's case, the purported "convenience" is derived from metal implants in his knee. *See* R.258a-259a at Tr. 105:23-106:4. This fact, standing alone, demonstrates the absurdity of Amazon's conception of "convenience."

Br. at 19-20 (defining "convenience" and discussing "convenience exception"). So, even if it were true that Amazon's "express lanes" hasten the screening procedure,[3] this would not alter the fundamentally mandatory character of the anti-theft security screenings. As the Sixth Circuit unambiguously states: "employees were *required* to undergo *antitheft* security screening." Appx. C at 3 (emphasis supplied).

G. Amazon's "common usage" argument, if reached, should fail.

If Amazon convinces the Court that the certified "hours worked" question should be answered without reference § 231.1(b)'s "hours worked" definition, we will find ourselves in a definitional vacuum that Amazon hopes to fill with a "common usage" analysis. *See* Amazon Br. at 12-14. And "common usage," according to Amazon, leads us to the 2020 on-line edition of the *Oxford English Dictionary*. *See id.* at 14.[4] Amazon recites this dictionary's definition of "work," placing special emphasis the notion that "work" entails "labour" or "toil." *Id*.

The gist of Amazon's "common usage" argument is that participation in mandatory security screenings is not "work" because "[o]ne does not labor or toil in leaving an Amazon fulfillment center, and hence waiting and screening time is

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[3] In fact, it is not true. *See* Section C *supra*.

[4] Amazon provides no explanation for why the wage rights of millions of Pennsylvania workers should be defined by the *Oxford English Dictionary* rather than some other source of "common usage." *See id.*

not 'work' as that term is commonly used." *Id.*

Heimbach/Salasky disagree with Amazon's ivory tower viewpoint that it is not "laborious" or "toilsome" to wait in a line and go through a mandatory anti-theft security screening after spending a shift picking inventory in an extremely hot warehouse.[5] And at least two courts side with Heimbach/Salasky. Specifically, in *Busk v. Integrity Staffing Solutions, Inc.*, 905 F.3d 387 (6th Cir. 2018), the Sixth Circuit rejected Amazon's argument that, under Nevada and Arizona wage law, "time spent waiting to undergo security screenings is not 'work' because it 'involves no exertion.'" *Id.* at 400-01. As the Circuit Court explained, "undergoing security screening clearly does involve exertion." *Id.* Likewise, in *Vaccaro*, *supra*, the District Court rejected Amazon's "exertion" argument under New Jersey wage law. *See* 2020 U.S. Dist. LEXIS 114526, at *11 n.1. The Court held that "the mandatory security screenings described in the [first amended complaint] clearly do involve physical exertion, *e.g.*, 'walking through a metal detector' and 'placing personal items on a conveyor belt.'" *Id.*

More fundamentally, Amazon's "labor or toil" definition of "work" cannot be reconciled with the PMWA's broad remedial purpose. *See* Opening Br. at 20-22 (discussing legislative purpose). Adopting Amazon's "labor or toil" definition

[5] Salasky recalls that the warehouse was so hot that "people were passing out on a daily basis." R.269a at Tr. 16:6-16:7; *see also* Spencer Soper, *Inside Amazon's Warehouse*, Allentown Morning Call, Sept. 18, 2011, reproduced at R.306a-316a.

would make the PMWA's definition of work far more *restrictive* than federal law, which defines work as requiring "no exertion at all," 29 C.F.R. § 785.7, and as including "waiting time":

> A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity.

Id. at § 785.15. Amazon offers no explanation for why this Court should conclude that the General Assembly or Secretary intended to define "work" in a manner that falls beneath the federal floor.

Finally, Amazon's "labor or toil" definition of work is unmanageable. Throughout the workday, all employees take brief moments to gather themselves, to reflect, to go to the restroom, or to telephone or email a spouse or a loved one or a friend. Moreover, many employees encounter periods of waiting throughout the workday. Yet, under Amazon's "labor or toil" definition, such brief breaks and waiting periods would not count as compensable work. In essence, the compensable work clock would constantly be turning-on and shutting-off throughout the workday.

H. The Court should reject Amazon's argument that the PMWA incorporates Portal Act § 4's compensability limitations.

Amazon argues that Portal Act § 4's compensability limitations should be grafted onto the PMWA. *See* Amazon Br. at 15-25. Heimbach/Salasky already

briefed this topic. *See* Opening Br. at 22-33. But there are a few additional points to be made in reply to Amazon's arguments:

1. The Commonwealth Court's *Stuber* opinion does not help Amazon.

Amazon's Portal Act § 4 argument relies on the Commonwealth Court's decision in *Pennsylvania Department of Labor & Industry v. Stuber*, 822 A.2d 870 (Pa. Cmwlth. 2003), *aff'd*, 859 A.2d 1253 (Pa. 2004). The *Stuber* Court set out to determine whether a worker was an "employee" or a non-employee "contractor" under the PMWA. *See id.* at 872. As the Court observed, both the PMWA and the FLSA were silent on this issue. *Id.* at 873. However, in FLSA cases, a common law test had emerged that involved weighing six "economic reality" factors. *Id.* at 874. This economic reality test was similar to the test applied under Pennsylvania's unemployment law. *Id.* at 874 n.5. So the Court applied the economic reality test to the PMWA claim. *Id.* at 873-74. Specifically, the Court held that "because the state and federal acts have identity of purpose, we hold that federal case law, and the 'economic reality' test employed by the federal courts, is the appropriate standard to use." *Stuber*, 822 A.2d at 873.

Stuber is a troubled opinion. Central to its holding is an observation that the PMWA "mirrors" the FLSA. *Stuber*, 822 A.2d at 873. This is incorrect. The PMWA does ***not*** "mirror" the FLSA, as exemplified by *Bayada*, *Chevalier*, and a host of other opinions recognizing substantive differences between the PMWA and

FLSA.[6] As the late Judge Gawthrop observed: "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." *Freidrich v. U.S. Computer Services, Inc.*, 833 F. Supp. 470, 476 (E.D. Pa. 1993).[7]

Next, the *Stuber* Court observed that (i) the PMWA and FLSA have "virtually identical" definitions of "employ," "employer," and "employee," 822 A.2d at 873; and (ii) that "it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it," *id.* Here again, Heimbach/Salasky disagree. While it may be true that the PMWA's and FLSA's definitions of "employ," "employer," and "employee" use "substantially parallel" language, it does not logically follow that that the two *statutes* are "substantially parallel." *Stuber* provides no authority for this sweeping assertion. *See id.*

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[6] *See*, *e.g.*, *Sloan v. Gulf Interstate Field Services, Inc.*, 2016 U.S. Dist. LEXIS 29458, *15 (W.D. Pa. March 8, 2016) (refusing to apply FLSA's "highly compensated" employee exemption to PMWA, which "does not even have such an exemption"); *Cerutti v. Frito Lay, Inc.*, 777 F. Supp. 2d 920, 925 n. 4 (W.D. Pa. 2011) (FLSA's "willfulness" requirement does not apply to employee's right to three-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) (FLSA's agricultural employee exemption does not apply to PMWA).

[7] Moreover, a review of the PMWA's and FLSA's respective statutory text will reveal many differences, *compare* 43 P.S. §§ 333.101, *et seq. with* 29 U.S.C. §§ 201, *et seq.*, and a review of the regulations will reveal even more, *compare* 29 C.F.R. Parts 500-794 *with* 34 Pa. Code Chapter 231.

Heimbach/Salasky respectfully ask this Court to consider correcting *Stuber's* erroneous and sweeping statements that the PMWA and FLSA "mirror" and "substantially parallel" each other. It is doubtful that these statements – which continue to be repeated by judges handling PMWA cases – would have been made if the Commonwealth Court was writing with the benefit of *Bayada* and *Chevalier*. Consistent with this Court's post-*Stuber* precedent, judges and litigants should be encouraged to analyze PMWA provisions on a provision-by-provision basis. While reference to FLSA principles may sometimes guide this analysis, there will be other occasions in which reliance on federal law is inconclusive or misplaced. *Stuber* distracts from such analysis.[8]

Moreover, even of this Court does not repudiate *Stuber*, the decision does not support Amazon's attempt to graft Portal Act § 4's compensability limitations onto the PMWA. It cannot be said that the PMWA and FLSA are "substantially parallel" with respect to the subject matter of this lawsuit. As already discussed, the PMWA contains no analog to the Portal Act, *see* Opening Br. at 24-26, and the PMWA regulations contain an "hours worked" regulation that makes no reference to Portal Act § 4 principles, *see* 34 Pa. Code § 231.1(b).

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[8] Careful analysis is especially important to Pennsylvania workers because, as noted in the Opening Brief, the current federal administration has been engaged in a campaign to significantly limit the scope and availability of FLSA protections. *See* Opening Br. at 10 n.2. The PMWA rights of Pennsylvania workers should not necessarily ebb and flow with the tide of national politics.

2. The similarities between § 231.1(b)'s "hours worked" definition and the FLSA's traditional "hours worked" definition bolsters Heimbach/Salasky's argument.

Amazon notes that § 231.1(b)'s definition of "hours worked" is similar to the definition of "hours worked" embodied in the FLSA regulations codified at 29 C.F..R. §§ 778.223 and 785.7. *See* Amazon Br. at 19-20. But this similarity *bolsters* Heimbach/Salasky's argument because the FLSA's traditional concept of work, when unencumbered by Portal Act § 4's compensability limitations, is extraordinarily broad and easily encompasses mandatory security screenings. Indeed, the U.S. Supreme Court's opinion in *Integrity Staffing Solutions, Inc. v. Busk*, 774 U.S. 27 (2014) – which held that Amazon's mandatory security screenings fell within Portal Act § 4's compensability limitations – was predicated on the recognition that the security screenings entail work.

Crucially, on remand from the Supreme Court, the Sixth Circuit made this exact point in explaining why Amazon's security screenings constitute work under Arizona and Nevada law. The Sixth Circuit explained:

> 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" 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.

Next, the Sixth Circuit addressed whether the legality of Amazon's security screenings could be saved by incorporating Portal Act § 4's compensability limitations into Nevada and Arizona state law. *See Busk*, 905 F.3d at 402-05. The Court held – as Heimbach/Salasky ask this Court to hold – that Portal Act § 4 principals did not apply because neither state's statutory text made any mention of such principles. Regarding Nevada law:

> 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.

Id. at 402. Regarding Arizona law:

> 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. And that is how Amazon's mandatory security screenings were found to violate Nevada and Arizona wage law.[9] The same should happen in Pennsylvania. *See generally* Opening Br. at 22-33.

[9] In *Vaccaro*, *supra*, Chief Judge Wolfson issued a similar holding under New Jersey law. *See* Section A *supra*.

3. Amazon's legislative/regulatory silence argument should fail.

Amazon concedes that neither the PMWA nor its regulations make any mention of Portal Act § 4 principles and asserts that such statutory/regulatory silence warrants the judicial imposition of Portal Act § 4 onto the PMWA. *See* Amazon Br. at 21-25. As just noted, this is precisely what the Sixth Circuit refused to do under Nevada and Arizona law, *see* Section H.2 *supra*, and what the *Vaccaro* Court refused to do under New Jersey law, *see* Section A *supra*. Moreover, Heimbach/Salasky have already explained why Pennsylvania law prohibits such judicial intrusiveness. *See* Opening Brief at 22-33.

As the U.S. Supreme Court recently instructed in its landmark *Bostock v. Clayton County* opinion: "But none of these contentions about what the employers think the law was meant to do, or should do, allow us to ignore the law as it is." 2020 U.S. LEXIS 3252, *31 (June 15, 2020).

4. *Thomas v. Amazon* (N.D. Ohio) cuts against Amazon.

Amazon cites *Thomas v. Amazon.com Services, Inc.*, 2020 U.S. Dist. LEXIS 89882 (N.D. Ohio May 21, 2020), wherein an Ohio District Court applied Portal Act § 4 principles to Ohio wage law and held that Amazon's mandatory security screenings were legal. *See* Amazon Br. at 24. Crucially, however, the *Thomas* Court based its holding on Ohio's express statutory mandate that the state's overtime law be read pursuant to "the manner and methods provided in" the FLSA.

See 2020 U.S. Dist. LEXIS 89882, at *14 (quoting O.R.C. § 4111.03)). Indeed, the *Thomas* Court distinguished Ohio's explicit statutory adoption of FLSA principles from Nevada's and Arizona's statutory silence in *Busk*. *See id.* at *15.

As *Thomas* and the Ohio wage statute demonstrate, state legislatures are well-able to incorporate Portal Act § 4 principles into state wage statutes. But Pennsylvania's General Assembly – like the legislatures in Nevada, Arizona, and New Jersey – has declined to follow this course.

I. The purported "*de minimis* doctrine" was not an established principle of wage law at the time of the PMWA's enactment.

Our law books are filled with "doctrines" and "maxims." But that does not mean every doctrine or maxim is applicable to every area of law. For example, no one would suggest that the "doctrine of merger," *see Elderkin v. Gaster*, 288 A.2d 771, 774 n. 11 (Pa. 1972), is relevant to a wage rights lawsuit.

The question in this case is not whether the purportedly "ancient" doctrine of *de minimis non curat lex* exists. Rather, the question is whether it can apply to the PMWA claims of workers who want to be paid for their labor.

In this regard, Amazon comes up short. It has scoured Pennsylvania decisional law and located a handful of opinions referencing what it calls a "*de minimis* principle." *See* Amazon Br. at 39-41. But these opinions address maters of insurance law, zoning law, property law, and estate law. *See id.* They have no relationship to employee wages or, for that matter, any aspect of employment law.

Amazon argues that the 1968 General Assembly and Department of Labor and Industry had no need to codify a *de minimis* rule when the PMWA was passed because it already was a well-established legal principle. *See* Amazon Br. at 41. But Amazon lays no foundation for its conclusion that, in 1968, a state legislator or Labor Secretary would have believed that an employer could refuse to pay a Pennsylvania worker for her work because the work time was *de minimis*. Amazon presents this Court's 1939 *Bristol-Myers* opinion as epitomizing the *de minimis* doctrine. *See id.* at 39-40. But this opinion concerned a false advertising claim under the state's Fair Trade Act. *See Bristol-Myers Co. v. Lit Brothers, Inc.*, 6 A.2d 843 (Pa. 1939). Why would anyone assume that the *de minimis* principles in a false advertising case override the PMWA requirement that workers be paid "for *all* hours worked"? 43 P.S. § 333.104(a) (emphasis supplied); 34 Pa. Code § 231.41 (emphasis supplied). The same question can be asked with respect to the insurance law, zoning law, property law, and estate law opinions cited by Amazon.

In fact, a well-informed 1968 state legislator or rule-maker would have reasonably believed that *de minimis* principles did *not* apply to wage claims. That's due to *Landaas v. Canister Co.*, 188 F.2d 768 (3d Cir. 1951), a unanimous 1951 opinion issued by the Philadelphia-based Third Circuit Court of Appeals and written by Judge Herbert Goodrich, who was one of the most prominent

Pennsylvania legal scholars of his time.[10] The *Landaas* Court refused to apply *de minimis* principles to a federal overtime claim:

> The employer makes another argument to the effect that the maxim "de minimus non curat lex" should be applied here. The basis for this argument is that many of the employees have small claims. They run from $ 21.67 to $ 256.88. But it will be noted that the period involved to acquire this much of a claim is three years. The amount accruing for each day is, therefore, very small. The employer gets encouragement from certain words about trivial delays in the portal-to-portal case discussions.
>
> We think there is nothing to this point. It has been said that the maxim de minimus does not apply to money demands. *Kennedy v. Gramling*, 1890, 33 S.C. 367, 11 S.E. 1081, 1088. In any event, the maxim is based on common sense and practicalities. The consideration of plaintiffs' claims does not take the court into the realm of the picayune or hypertechnical.

Id. at 771 (footnotes omitted). The *Landaas* Court made the above observations notwithstanding the U.S. Supreme Court's *Anderson* opinion. *See id.* at 771 n.5. Also, the Court generally expressed skepticism regarding the *de minimis* doctrine:

> A reading of excerpts from the cases there collected lends considerable support to the statement that, "The maxim is so vague in itself as to form a very uncertain ground of proceeding or judging . . . ." *Huse v. Merriam*, 1823, 2 Me. 375, 376.

Id. at 751 n. 6.

Thus, as reflected in *Landaas*, the *de minimis* doctrine was *not* an established principle of Pennsylvania wage law at the time of the PMWA's enactment. To the contrary, one the state's most distinguished legal scholars had

[10] Before taking the bench, Judge Goodrich served as the Dean of the University of Pennsylvania Law School. He co-authored of the seminal *Goodrich-Amram* treatise, which continues to be relied on by Pennsylvania practitioners.

refused to apply the doctrine to "very small" wage claims, had suggested that the doctrine "does not apply to money demands," and had criticized the doctrine as "'so vague in itself as to form a very uncertain ground of proceeding or judging." *Landaas*, 188 F.2d at 771. Under these circumstances, the failure of the General Assembly or the Secretary to include the purported doctrine in either the PMWA or the accompanying regulations is fatal to Amazon's argument.

J. Pennsylvania workers' wages are not "trifles."

Amazon cites this Court's 1939 *Bristol-Myers* opinion as embodying the "time-honored" *de minimis* doctrine. Writing in the false advertising context, the Court described the doctrine as follows:

> There is also a time-honored maxim of the law which applies to this case, to wit: "De minimis non curat lex." As BROOM says in his "Legal Maxims": "Courts of justice generally do not take ***trifling and immaterial matters*** into account." In "The Reward," 2 Dods. Adm. R. 269, 270, Sir W. SCOTT observed that "the court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim, de minimis non curat lex. Where there are ***irregularities of very slight consequence***, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a ***mere trifle***, which, if continued in practice, ***would weigh little or nothing on the public interest***, it might properly be overlooked."

Bristol-Myers, 6 A.2d at 848 (emphasis suppled).

Bristol-Myers' above language counsels against application of a *de minimis* doctrine to PMWA claims. Workers' wages are the *alpha* and *omega* of the PMWA. *See* Opening. Br. at 20-22 (discussing public policy underlying PMWA).

Yet, under Amazon's own authority, the *de minimis* doctrine depends on unpaid wages being characterized as "trifling and immaterial matters," as "irregularities of very slight consequence," as a "mere trifle," and as a matter that "would weigh little or nothing on the public interest." *Bristol-Myers*, 6 A.2d at 848. In Pennsylvania, unpaid wages are no such thing. While the *de minimis* doctrine may be justified in other contexts, it is fundamentally at odds with the notions of workplace justice and fairness that underlie the PMWA. *See* Opening Br. at 20-22.

K. Amazon's *amici* confirm the *de minimis* rule's unfairness.

Amici curiae National Retail Federation and Pennsylvania Retailers Association (collectively "NRF/PRA") submit a brief that provides examples how employers use the federal *de minimis* rule to deny compensation for a host of workplace activities. According to *amici*'s review of "[t]he body of federal caselaw," employers have avoided paying: (i) service technicians for work associated with their computers, *see* NRF/PRA Br. at 13; (ii) technicians for time spent inspecting work vehicles, *id.;* (iii) a restaurant worker for time spent "straightening chairs and picking up trash," *id.* at 14; (iv) manufacturing workers for time spent putting on protective gear, *id.*; (v) corrections officers for time spent "transporting canine unit dogs," *id.*; (vi) fire alarm inspectors for time spent transporting "inspection documents," *id.*; (vii) dog handlers for "significant" duties such as cleaning-up dog "vomit[]," *id.* at 14-15; (viii) police officers for time spent

cleaning and feeding police dogs, *id.* at 15; and (ix) police officers for time spent cleaning radios and oiling handcuffs, *id.*

None of these outcomes can be squared with the PMWA's legislative purpose. *See* Opening Br. at 20-22. On behalf of Pennsylvania's hard-working technicians, restaurant workers, manufacturing workers, corrections officers, fire alarm inspectors, dog handlers, and police officers, Heimbach/Salasky ask this Court to hold that the *de minimis* doctrine has no place under the PMWA.

L. Conclusion.

Based on the above, as well as the arguments in the opening brief, Heimbach/Salasky respectfully ask this Court to answer the first certified question in the affirmative and the second certified question in the negative.

Date: July 3, 2020

Respectfully submitted,

Peter Winebrake (80496)
R. Andrew Santillo (93041)
Mark J. Gottesfeld (307752)
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: July 3, 2020

Peter Winebrake
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491

WORD COUNT CERTIFICATION

In accordance with Pennsylvania Rule of Appellate Procedure 2135(a)(1), I certify that the attached brief contains 6,168 words as calculated by the word-count feature of Microsoft Word.

Date: July 3, 2020

Peter Winebrake
Winebrake & Santillo, LLC
715 Twining Road, Suite 211
Dresher, PA 19025
(215) 884-2491

Appendix E

No. 18-5942

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

IN RE: AMAZON.COM, INC., FULFILLMENT CENTER FAIR LABOR STANDARDS ACT (FLSA) AND WAGE AND HOUR LITIGATION.

NEAL HEIMBACH; KAREN SALASKY,

Plaintiffs-Appellants,

v.

AMAZON.COM, INC.; AMAZON.COM.DEDC, LLC; INTEGRITY STAFFING SOLUTIONS, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky
Nos. 3:14-cv-00204, 3:14-md-02504, The Honorable David J. Hale

APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION FOR CERTIFICATION

Jay Inman
LITTLER MENDELSON P.C.
333 West Vine Street, Suite 1720
Lexington, Kentucky 40507
T. 859.317.7973

Counsel for Integrity Staffing Solutions, Inc.

Richard G. Rosenblatt
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, New Jersey 08540
T. 609.919.6600

David B. Salmons
Michael E. Kenneally
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T. 202.739.3000

Counsel for Amazon.com, Inc. and Amazon.com.DEDC, LLC

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

In accordance with Sixth Circuit Rule 26.1, Amazon.com, Inc. and Amazon.com.DEDC, LLC make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   - Amazon.com.DEDC, LLC is a wholly owned subsidiary of Amazon.com Services, Inc.
   - Amazon.com Services, Inc. is a wholly owned subsidiary of parent company Amazon.com, Inc.
   - Amazon.com, Inc. has no parent company, and no other publicly held company owns 10% or more of Amazon.com, Inc.'s stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   None.

Dated: November 9, 2018

s/ Richard G. Rosenblatt
Richard G. Rosenblatt

Counsel for Amazon.com, Inc. and Amazon.com.DEDC, LLC

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST (cont'd)

In accordance with Sixth Circuit Rule 26.1, Integrity Staffing Solutions, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   - Integrity Staffing Solutions, Inc., is a non-governmental corporate party. It has no parent corporation and no publicly held corporation owns more than 10% of its stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   None.

Dated: November 9, 2018

s/ Jay Inman
Jay Inman

Counsel for Integrity Staffing Solutions, Inc.

TABLE OF CONTENTS

Page

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 6

I. Courts Are Not Divided Over The Question Plaintiffs Propose To Certify. 6

II. Certification Would Be Unwarranted Even If Plaintiffs' Cited State Trial Court Decision Created A Conflict. 9

III. Plaintiffs' Arguments In The District Court Contradict Their Current Assertions About This Case's Broader Public Importance. 13

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946).....5, 7, 10, 11

Bayada Nurses, Inc. v. Dep't of Labor & Indus.,
958 A.2d 1050 (Pa. Commw. Ct. 2008).....11

Bonds v. GMS Mine Repair & Maint., Inc.,
No. 2015-6310, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com. Pls. Dec. 12, 2017).....*passim*

Busk v. Integrity Staffing Sols., Inc.,
905 F.3d 387 (6th Cir. 2018).....4, 10

Chevalier v. Gen. Nutrition Ctrs., Inc.,
177 A.3d 280 (Pa. Super. Ct. 2017).....11

Ciarelli v. Sears, Roebuck & Co.,
46 A.3d 643 (Pa. 2012).....7

Commonwealth v. Phinn,
761 A.2d 176 (Pa. Super. Ct. 2000).....9

Espinoza v. Atlas R.R. Constr., LLC,
657 F. App'x 101 (3d Cir. 2016).....5, 6, 8, 10

Frlekin v. Apple, Inc.,
870 F.3d 867 (9th Cir. 2017).....12, 13

Integrity Staffing Sols., Inc. v. Busk,
135 S. Ct. 513 (2014).....3, 5, 8

State Auto Prop. & Cas. Ins. Co. v. Hargis,
785 F.3d 189 (6th Cir. 2015).....2, 6, 11

Sunbeam Corp. v. Civil Serv. Emps. Coop. Ass'n,
187 F.2d 768 (3d Cir. 1951).....10

TABLE OF AUTHORITIES (cont'd)

Page(s)

Transamerica Ins. Co. v. Duro Bag Mfg. Co.,
50 F.3d 370 (6th Cir. 1995) 6, 10

Vance v. Amazon.com, Inc.,
852 F.3d 601 (6th Cir. 2017) 4, 10

STATUTES

43 P.S. § 333.104 4

29 U.S.C. § 201 *et seq.* (Fair Labor Standards Act of 1938).....3

RULES & REGULATIONS

34 PA. CODE § 231.1 .....5, 7, 8, 9

CAL. CODE REGS. tit. 8, § 11070 12

PA. R.A.P. 3341.....6, 9

INTRODUCTION

Plaintiffs-Appellants Neal Heimbach and Karen Salasky ask this Court to certify the following question to the Pennsylvania Supreme Court:

> Whether time associated with workplace security screenings conducted at the end of a warehouse employee's shift can be compensable under the Pennsylvania Minimum Wage Act ("PMWA"), 43 P.S. §§ 333.10, *et seq.*, even though, in *Integrity Staffing Solutions, Inc. v. Busk*, ___ U.S. ___, 135 S. Ct. 513, 190 L. Ed. 2d 41 (2014), the United States Supreme Court deemed such time non-compensable "postliminary" activities under the federal Portal-to-Portal Act, 29 U.S.C. §§ 251, *et seq.*

Pls.' Mot. 1-2, 14. That question does not warrant certification, for several reasons.

First, contrary to Plaintiffs' suggestion, there is no conflict between courts on the question Plaintiffs propose to certify. No court, other than the court below, has had occasion to examine whether employers are obligated under the PMWA to compensate employees for time spent during post-shift security screenings. The lone supposedly conflicting case that Plaintiffs identify, the unpublished state trial court decision in *Bonds v. GMS Mine Repair & Maintenance, Inc.*, No. 2015-6310, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622 (Pa. Com. Pls. Dec. 12, 2017) (Pls.' App'x D), addressed time spent by coal mine workers in "pre- and post-shift safety meetings." Pls.' App'x D 3. While that decision did make a few more general pronouncements about the relationship between the PMWA and the federal Fair Labor Standards Act,

those pronouncements do not resolve the legal issues in this factually very different case, and are unconvincing in any event.

Second, Plaintiffs' lone, unreported state court decision would not justify certification even if it did present a true conflict. The decision is not precedential—in Pennsylvania courts or elsewhere—and so does not present a reasonable ground for Pennsylvania Supreme Court review. The premise of Plaintiffs' motion is that this Court should exercise its power to certify simply because Pennsylvania's appellate courts have never addressed the question. But federal courts should not and "generally 'will not trouble [their] sister state courts every time an arguably unsettled question of state law comes across [their] desks.'" *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015) (citation omitted). As explained below and as the parties' merits briefs will show conclusively, this Court can and should affirm the decision below by applying "well-established principles," *id.* (citation omitted), and certification would only delay disposition of this case and waste judicial resources.

Indeed, this case is especially unsuitable for certification because—contrary to Plaintiffs' insinuations—the summary judgment record conclusively establishes that employees passed quickly through the security apparatus on their way out of the building, which is why Defendants raised an alternative *de minimis* argument for rejecting Plaintiffs' claims. Even if the proposed question were resolved against

Defendants, a court would still have to address this alternative argument, as well as Defendants' separate alternative argument that the lead named plaintiff is judicially estopped from pursuing these claims.

Third, certification is also inappropriate because there is no reason to believe the Pennsylvania-law question presented by this case will have significant public importance beyond the parties here. Although Plaintiffs now insist that it is impossible to overstate "[t]he importance of this appeal," Pls.' Mot. 13, they admitted in the district court that "almost no Pennsylvania employers" other than Defendants require post-shift security screenings. Pls.' Opp. To Summ. J., RE 199 (3:14-md-02504-DJH), Page ID # 3670.

For these reasons and others, Plaintiffs' motion should be denied.

BACKGROUND

This case is the latest appeal out of multidistrict litigation in the Western District of Kentucky over Amazon warehouses' post-shift, antitheft screenings for employees who bring metal objects into the workplace. One of those cases began as a case under the federal Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, and ultimately reached the Supreme Court of the United States. In *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 518 (2014), the Court unanimously

rejected those federal claims, holding that end-of-day antitheft screening is not compensable work under the FLSA.

After the Supreme Court's holding, several plaintiffs have continued to pursue parallel claims under various state analogues of the FLSA. Two such cases have already been decided by this Court. In *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 611 (6th Cir. 2017), a unanimous panel concluded that Kentucky's definition of compensable work tracked the federal definition. In *Busk v. Integrity Staffing Solutions, Inc.*, 905 F.3d 387, 391, 405 (6th Cir. 2018), a divided panel reached the opposite conclusion about Nevada and Arizona law.

This case arises under Pennsylvania law. The Pennsylvania Minimum Wage Act ("PMWA") obligates employers to pay their employees "for all hours worked." 43 P.S. § 333.104(a). Although the PMWA does not define "hours worked," the term is defined in a regulation issued by the Pennsylvania Bureau of Labor Law Compliance:

> *Hours worked*—The term 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, time spent in traveling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work; provided, however, that time allowed for meals shall be excluded unless the employee is required or permitted to work during that time, and provided further, that time spent on the premises of the employer for the convenience of the employee shall be excluded.

34 PA. CODE § 231.1(b).

Accepting an argument advanced by Plaintiffs, the district court concluded that, in relevant part, this definition of "hours worked" was very similar to a definition first articulated by the U.S. Supreme Court. *See* D. Ct. Op., RE 86 (3:14-cv-00204-DJH), Page ID # 2358 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946)); *cf.* Pls.' Opp. To Summ. J., RE 199, Page ID # 3656 ("[T]he PMWA's definition of 'Hours worked' tracks the definition of work recited by the Supreme Court in the seminal 1946 decision *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946)" (parallel citations omitted)).

The district court then invoked Third Circuit case law recognizing that "[w]hen the PMWA 'substantially parallels' the FLSA, Pennsylvania and federal courts have used FLSA law for interpretative guidance because the statutes have similar purposes"—at least "where the state and federal provisions are similar to each other or where there is a need to fill in a gap missing in the state law." *Espinoza v. Atlas R.R. Constr., LLC*, 657 F. App'x 101, 105 (3d Cir. 2016) (quoted at D. Ct. Op., RE 86, Page ID # 2357). Because of the parallels and this interpretative principle, the district court concluded that Pennsylvania law would follow the Supreme Court's decision in *Busk* and not classify post-shift security screenings and compensable work. D. Ct. Op., RE 86, Page ID # 2360. Having ruled for Defendants on

that ground, the court found it "unnecessary to address Defendants' additional arguments." *Id.* n.2.

ARGUMENT

The question Plaintiffs propose to certify does not meet the standards of the Pennsylvania Supreme Court or of this Court. Under Pennsylvania's Rules of Appellate Procedure, certification is inappropriate unless "there are special and important reasons therefor." PA. R.A.P. 3341(c). Under this Court's precedent, certification is inappropriate where there is "a reasonably clear and principled course of action" for resolving the issues in the appeal. *State Auto Prop.*, 785 F.3d at 194; *see also Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). Because certification is inappropriate under both standards, Plaintiffs' motion should be denied.

I. Courts Are Not Divided Over The Question Plaintiffs Propose To Certify.

The centerpiece of Plaintiffs' motion is a Pennsylvania county trial court's decision in *Bonds* (Pls.' App'x D), which Plaintiffs advance in an effort to show that "[t]he question of law is one with respect to which there are conflicting decisions in other courts." PA. R.A.P. 3341(c)(2). Plaintiffs' argument misfires because "[t]he question of law" they want certified *was not decided in the Bonds case*.

Plaintiffs ask this Court to certify a question tethered to the factual circumstances of this case: "time associated with workplace security screenings conducted at the end of a warehouse employee's shift." Pls.' Mot. 1. But that scenario was not addressed in *Bonds*, a case about "pre- and post-shift safety meetings" for coal mine workers. Pls.' App'x D 3.[1]

The factual differences are quite important in determining the correct application of Pennsylvania's definition of "hours worked." Even if time spent in mandatory safety meetings is "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), that in no way establishes that time employees spend exiting their workplace so qualifies—particularly when the employer does not require them to spend any particular amount of time in the exiting process and even provides "express lanes" for individuals who choose not to carry metal objects. Time spent in the employee's exiting process is attributable "to the fortuitous circumstance of his position in line," and so would not qualify as an "hour worked" even under the federal definition that Plaintiffs themselves favor. *Anderson*, 328

[1] Nor was that scenario addressed in the dissenting opinion that Plaintiffs invoke. *See* Pls.' Mot. 8, 13 (discussing *Ciarelli v. Sears, Roebuck & Co.*, 46 A.3d 643, 648 (Pa. 2012) (McCafferty, J., dissenting from dismissal of appeal as being improvidently granted)). Apart from being a *dissent* from a *nonprecedential* decision *refusing* to resolve a novel PMWA question and authored by a justice *no longer on the Pennsylvania Supreme Court*, *Ciarelli* addressed travel time and is thus irrelevant to the question Plaintiffs propose to certify.

U.S. at 690. Thus, regardless of whether Pennsylvania law incorporates aspects of the federal Portal-to-Portal Act or the Supreme Court's *Busk* decision, the undisputed summary judgment record in this case establishes that the post-shift security screening is not "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).

To be sure, the district court did state, in a footnote, that it found the *Bonds* decision "unpersuasive." D. Ct. Op., RE 86, Page ID # 2360, n.3. But that conclusion was well warranted in light of the Pennsylvania trial court's refusal even to consider whether FLSA case law had any effect on how best to understand the state's regulatory definition of hours worked. The *Bonds* court advanced a non sequitur: because "Pennsylvania has not fully adopted the provisions of the FLSA" and because the PMWA and FLSA were not "interchangeable," federal case law "has no impact." Pls.' App'x D 3-4. The *Bonds* court did not mention, let alone address, the Third Circuit's recognition that "Pennsylvania and federal courts have used FLSA law for interpretative guidance . . . where the state and federal provisions are similar to each other or where there is a need to fill in a gap missing in the state law." *Espinoza*, 657 F. App'x at 105. And its discussion of the few cases it did choose to address was cursory. The district court was right to find the decision unpersuasive.

But the mere fact that the district court spotted certain flaws in the *Bond* court's analysis does not create a conflict with *Bonds* on the distinct factual questions presented in this case. Aside from the district court below, no court—at least to Defendants' knowledge—has ever addressed the proper application of the PMWA and related regulations within the post-shift security screening context. Plaintiffs motion should be denied for that reason alone.[2]

II. Certification Would Be Unwarranted Even If Plaintiffs' Cited State Trial Court Decision Created A Conflict.

Another problem for Plaintiffs is that a single unpublished state trial court decision is a paltry basis for certification. Pennsylvania's certification rules were not written to cover such a minor level of case-law conflict. Under Pennsylvania law, trial court decisions are not precedential, even when published. *See, e.g.*, *Commonwealth v. Phinn*, 761 A.2d 176, 179 (Pa. Super. Ct. 2000). And the Third Circuit has held that since "a single Common Pleas decision can be disregarded by another Common Pleas court of the Commonwealth," it is not binding on the federal courts

[2] Plaintiffs contend that certification is warranted regardless of conflict because the case purportedly involves the "an unsettled issue of the . . . construction[] or application of a statute of this Commonwealth." Pls.' Mot. 12 (quoting PA. R.A.P. 3341(c)(3)). Plaintiffs are mistaken. Because there is a regulatory definition of "hours worked," 34 Pa. Code § 231.1(b), the unsettled legal question here involves the interpretation of a regulation, not a statute. And as discussed in Section II below, certification would be unwarranted under this Court's standards because it is perfectly able to construe the regulation at issue, even if the Pennsylvania Supreme Court would entertain the possibility of taking the question.

nor entitled to much weight in a federal court's *Erie* guess. *See, e.g.*, *Sunbeam Corp. v. Civil Serv. Emps. Coop. Ass'n*, 187 F.2d 768, 772 (3d Cir. 1951). If the mere existence of a conflicting unpublished state trial court decision were enough to warrant certification, it is hard to imagine any issue not already resolved by the state supreme court that would not be eligible.

But as this Court has often explained, the Court sees no need to certify when, "[a]lthough [the state] has not addressed the exact question at issue, it does have well-established principles to govern" the matter at hand. *Transamerica*, 50 F.3d at 372. Here, the question is a relatively straightforward question of how to apply Pennsylvania's express definition of "hours worked" in light of the well-settled principle that "Pennsylvania and federal courts have used FLSA law for interpretative guidance . . . where the state and federal provisions are similar to each other or where there is a need to fill in a gap missing in the state law." *Espinoza*, 657 F. App'x at 105. That is an interpretative task to which this Court is perfectly well suited, particularly in light of its recent experience addressing other appeals from this MDL. *See Vance*, 852 F.3d 601; *Busk*, 905 F.3d 387.

In addition, and as the district court noted, Plaintiffs' concessions and arguments below endorsed the view that the U.S. Supreme Court's decision in *Anderson* provided the appropriate lens for reading Pennsylvania's regulation. They argued that "the PMWA's definition of 'Hours worked' tracks the definition of work recited

by the Supreme Court in the seminal 1946 [*Anderson*] decision." Pls.' Opp. To Summ. J., RE 199, Page ID # 3656. Then Plaintiffs devoted almost the entirety of their opposition brief to analyzing *Anderson* and related federal-law decisions. *Id.* at 3656-82. There is no need to certify to a state court a question over how to interpret a federal Supreme Court decision, nor would it be appropriate to allow Plaintiffs to advance an argument on appeal that is at odds with their arguments in the district court. Either way, the case does not present an issue over which "to trouble [a] sister state court[.]" *State Auto Prop.*, 785 F.3d at 194.

The circumstances here are very different than those that led to the Pennsylvania Supreme Court's review in the two cases Plaintiffs identify. *See* Pls.' Mot. 5-7. In each of those cases, the decisions issued by the intermediate Pennsylvania appellate courts were deeply fractured. *See Chevalier v. Gen. Nutrition Ctrs., Inc.*, 177 A.3d 280 (Pa. Super. Ct. 2017) (affirming, reversing, and vacating trial court decision in various parts, with two of three judges filing separate concurring-in-part-and-dissenting-in-part opinions); *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 958 A.2d 1050 (Pa. Commw. Ct. 2008) (en banc court splitting 4-3 on the question presented). The fact that the Pennsylvania Supreme Court has twice granted review in PMWA cases over the past decade, in the face of such deep division among its appellate judges, is no reason to assume that it would grant review of the much more straightforward question here.

Nor are Plaintiffs supported by the Ninth Circuit's decision to certify a post-shift security screening question to the California Supreme Court in *Frlekin v. Apple, Inc.*, 870 F.3d 867 (9th Cir. 2017). *See* Pls.' Mot. 14 n.7. The differences between this case and that case actually reinforce the inappropriateness of certification here. According to the Ninth Circuit, the text of California's regulatory definition of "hours worked"—which differs materially from the definition in this case[3]—appeared to support the plaintiffs, but California Supreme Court and intermediate appellate court precedent, on the other hand, seemed to support the defendant. *See Frlekin*, 870 F.3d at 871. After extensively analyzing this conflict, including in light of Ninth Circuit precedent on the relevant provision in California law—and noting that *ten* previous cases had raised the same California law issue in connection with employment security checks—the Court concluded that it lacked sufficient guidance and that the question was important enough to warrant state supreme court guidance. *Id.* at 873-74. Plaintiffs have not identified any remotely comparable difficulties in resolving the question in this case.

This case also differs from *Frelkin* in another important way. Plaintiffs cannot truthfully say, as the Ninth Circuit in *Frlekin* did, that "the outcome of this case

[3] Specifically, the California regulatory definition focuses on the whether the time was "time during which an employee is subject to the control of an employer." *Frlekin*, 870 F.3d at 871 (quoting CAL. CODE REGS. tit. 8, § 11070(2)(G)). Pennsylvania's regulatory definition, in contrast, does not turn on the concept of control.

depends on the answer" to the question proposed for certification. *Id.* at 874. Separate from the proposed question, Defendants have raised several additional grounds for rejecting Plaintiffs' claims—including that the lead named plaintiff was barred by judicial estoppel from pursuing these claims based on his conduct in a prior bankruptcy proceeding, and that the time spent by the employees here was so short as to qualify as *de minimis* as a matter of law. *See* D. Ct. Op., RE 86, Page ID # 2360, n.2. Although the district court found it unnecessary to reach those questions in light of its decision, *id.*, a court would need to address them even if the Pennsylvania Supreme Court were to resolve Plaintiffs' proposed question in Plaintiffs' favor. Because of these additional case-specific issues, which Plaintiffs do not even suggest are deserving of certification, this case (unlike *Frlekin*) is not "a suitable vehicle for the [Pennsylvania] Supreme Court to address the question" Plaintiffs propose. *Frlekin*, 870 F.3d at 874.

III. Plaintiffs' Arguments In The District Court Contradict Their Current Assertions About This Case's Broader Public Importance.

Plaintiffs' motion ends by insisting that "[t]he importance of this appeal cannot be understated." Pls.' Mot. 13. While the broader public importance of a legal question may sometimes justify certification—at least absent countervailing reasons—Plaintiffs' insistence on the importance of this lawsuit rings hollow.

Unlike the *Frlekin* case, there is no evidence that the security-screening issue has ever arisen before under Pennsylvania law. On the contrary, Plaintiffs made a

point in the district court of emphasizing the novelty of the factual scenario in this case. According to Plaintiffs, "almost no Pennsylvania employers . . . require their employers to go through an airport-style, anti-theft screening process at the end of every shift." Pls.' Opp. To Summ. J., RE 199, Page ID # 3670-71. Plaintiffs' counsel even stressed his extensive experience as someone "who has handled hundreds of wage and hour lawsuits and interviewed thousands of Pennsylvania workers from all walks of life": "even though my firm has represented many warehouse and retail workers over the years, this case represents the first time we have ever encountered clients who were subject to anti-theft screenings." *Id.*

Despite their contradictory assertions below, Plaintiffs offer zero support for their newfound conviction in the widespread significance of the proposed question. Because there is no reason to certify a question that is uncertain, if not unlikely, to arise again in the future, Plaintiffs' motion should be denied for this reason too.

CONCLUSION

For all these reasons, Plaintiffs' motion for certification should be denied.

Dated: November 9, 2018

Respectfully submitted,

s/ Jay Inman
Jay Inman
LITTLER MENDELSON P.C.
333 West Vine Street, Suite 1720
Lexington, Kentucky 40507
T. 859.317.7973

Counsel for Integrity Staffing Solutions, Inc.

s/ Richard G. Rosenblatt
Richard G. Rosenblatt
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, New Jersey 08540
T. 609.919.6600

David B. Salmons
Michael E. Kenneally
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004
T. 202.739.3000

Counsel for Amazon.com, Inc. and Amazon.com.DEDC, LLC

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43 EAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

In Re: Amazon.Com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation	:	43 EAP 2019

Neal Heimbach; Karen Salasky, Appellants
v.
Amazon.Com, Inc.; Amazon.Com.DEDC, LLC;
Integrity Staffing Solutions, Inc., Appellees

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Address:	1111 Pennsylvania Avenue, N.W. Washington, DC 20004
Phone:	202-739-3000
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

Served:	David B. Salmons
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1111 Pennsylvania Avenue, N.W. Washington, DC 20004
Phone:	202-739-3000
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

Served:	Jay Andrew Inman
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	333 W. Vine Street Suite 1720 Lexington, KY 40507
Phone:	859-317-7973
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Jay Andrew Inman
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	333 W. Vine Street Suite 1720 Lexington, KY 40507
Phone:	859-317-7973
Representing:	Appellee Integrity Staffing Solutions, Inc.

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Martha Jane Keon
Service Method:	eService
Email:	mkeon@littler.com
Service Date:	7/3/2020
Address:	Three Parkway 1601 Cherry Street, Suite 1400 Philadelphia, PA 19102-1321
Phone:	267--40-2-3050
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Martha Jane Keon
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	Littler Mendelson PC 1601 Cherry St Ste 1400 Philadelphia, PA 191021313
Phone:	267-402-3050
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Martha Jane Keon
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	Littler Mendelson PC 1601 Cherry St Ste 1400 Philadelphia, PA 191021313
Phone:	267-402-3050
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Michael E. Kenneally
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1111 Pennsylvania Avenue, N.W. Washington, DC 200042541
Phone:	--
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

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Served:	Michael E. Kenneally
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1111 Pennsylvania Avenue, N.W. Washington, DC 200042541
Phone:	--
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

Served:	Richard G. Rosenblatt
Service Method:	eService
Email:	richard.rosenblatt@morganlewis.com
Service Date:	7/3/2020
Address:	12 Walkaway Lane Cherry Hill, NJ 08003
Phone:	609-.91-9.6609
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

Served:	Richard G. Rosenblatt
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	502 Carnegie Ctr Princeton, NJ 085406289
Phone:	609-919-6600
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

Served:	Richard G. Rosenblatt
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	502 Carnegie Ctr Princeton, NJ 085406289
Phone:	609-919-6600
Representing:	Appellee Amazon.Com, Inc. Appellee Amazon.Com.DEDC, LLC

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PROOF OF SERVICE

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Served:	Sarah Bryan Fask
Service Method:	eService
Email:	sbryan@littler.com
Service Date:	7/3/2020
Address:	1600 Cherry Street, Suite 1400 Philadelphia, PA 19102
Phone:	267--40-2-3070
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Sarah Bryan Fask
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	Littler Mendelson Pc 1601 Cherry St Ste 1400 Philadelphia, PA 191021313
Phone:	267-402-3070
Representing:	Appellee Integrity Staffing Solutions, Inc.

Served:	Sarah Bryan Fask
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	Littler Mendelson Pc 1601 Cherry St Ste 1400 Philadelphia, PA 191021313
Phone:	267-402-3070
Representing:	Appellee Integrity Staffing Solutions, Inc.

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Courtesy Copy

Served:	Camille Rodriguez	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	1818 Market Street, Suite 3600 Philadelphia, PA 19103	
Phone:	215-875-4635	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	Camille Rodriguez	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	1818 Market Street, Suite 3600 Philadelphia, PA 19103	
Phone:	215-875-4635	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
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Service Date:	7/3/2020	
Address:	90 Broad Street, Suite 1100 New York, NY 10004	
Phone:	212-285-3025	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	Catherine Ruckelshaus	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	90 Broad Street, Suite 1100 New York, NY 10004	
Phone:	212-285-3025	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
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	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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Served:	Irwin William Aronson	
Service Method:	eService	
Email:	iaronson@wwdlaw.com	
Service Date:	7/3/2020	
Address:	Suite 601 212 Locust Street Harrisburg, PA 17101	
Phone:	717-221-1000	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	Irwin William Aronson	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Willig Williams & Davidson 212 Locust St Ste 301 Harrisburg, PA 171011510	
Phone:	717-221-1000	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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Served:	Irwin William Aronson
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	Willig Williams & Davidson 212 Locust St Ste 301 Harrisburg, PA 171011510
Phone:	717-221-1000
Representing:	Appellant Amicus Curiae Community Legal Services Appellant Amicus Curiae Justice At Work Appellant Amicus Curiae National Employment Law Project Appellant Amicus Curiae National Employment Lawyers Association Appellant Amicus Curiae NELA-Eastern PA Appellant Amicus Curiae Pennsylvania AFL-CIO Appellant Amicus Curiae Service Employees International Union Appellant Amicus Curiae Towards Justice Appellant Amicus Curiae United Food and Commercial Workers International Union Appellant Amicus Curiae Western Pennsylvania Employment Lawyers Association

Served:	John Bartley Delone
Service Method:	eService
Email:	jdelone@attorneygeneral.gov
Service Date:	7/3/2020
Address:	Office of Attorney General, Appellate Section 15th Floor, Strawberry Square Harrisburg, PA 17120
Phone:	717--78-3-3226
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

Served:	John Bartley Delone
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1600 Arch Street, Suite 300 Philadelphia, PA 19103
Phone:	215-560-2704
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA

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Served:	John Bartley Delone
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1600 Arch Street, Suite 300 Philadelphia, PA 19103
Phone:	215-560-2704
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

Served:	Karin D. Vogel
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	501 West Broadway, 19th Floor San Diego, CA 921013598
Phone:	--
Representing:	Appellee Amicus Curiae National Retail Federation and Pennsylvania Retailers Association

Served:	Karin D. Vogel
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	501 West Broadway, 19th Floor San Diego, CA 921013598
Phone:	--
Representing:	Appellee Amicus Curiae National Retail Federation and Pennsylvania Retailers Association

Served:	Krysten Leigh Connon
Service Method:	eService
Email:	kconnon@bm.net
Service Date:	7/3/2020
Address:	1324 Locust Street Apartment 614 Philadelphia, PA 19107
Phone:	201-486-5417
Representing:	Appellant Amicus Curiae Community Legal Services Appellant Amicus Curiae Justice At Work Appellant Amicus Curiae National Employment Law Project Appellant Amicus Curiae National Employment Lawyers Association Appellant Amicus Curiae NELA-Eastern PA Appellant Amicus Curiae Pennsylvania AFL-CIO Appellant Amicus Curiae Service Employees International Union Appellant Amicus Curiae Towards Justice Appellant Amicus Curiae United Food and Commercial Workers International Union Appellant Amicus Curiae Western Pennsylvania Employment Lawyers Association

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Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger Montague	
	1818 Market St Ste 3600	
	Philadelphia, PA 19103	
Phone:	201-486-5417	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger Montague	
	1818 Market St Ste 3600	
	Philadelphia, PA 19103	
Phone:	201-486-5417	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	90 Broad Street, Suite 1100 New York, NY 10004	
Phone:	212-285-3025	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	M. Patricia Smith	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	90 Broad Street, Suite 1100 New York, NY 10004	
Phone:	212-285-3025	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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Served:	Michaela L. Walin	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger Montague Pc 1818 Market Street, Suite 3600 Philadelphia, PA 19103	
Phone:	215-875-3053	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	Michaela L. Walin	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger Montague Pc 1818 Market Street, Suite 3600 Philadelphia, PA 19103	
Phone:	215-875-3053	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

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PROOF OF SERVICE

(Continued)

Served:	Nancy Anne Walker
Service Method:	eService
Email:	nwalker@attorneygeneral.gov
Service Date:	7/3/2020
Address:	1600 Arch Street, Suite 300 Philadelphia, PA 19103
Phone:	215-560-2704
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

Served:	Nancy Anne Walker
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1600 Arch St Ste 300 Philadelphia, PA 19103
Phone:	215-560-2704
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

Served:	Nancy Anne Walker
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	1600 Arch St Ste 300 Philadelphia, PA 19103
Phone:	215-560-2704
Representing:	Appellant Amicus Curiae Josh Shapiro, Attorney General of the Commonwealth of Pennsylvania

Served:	Pennsylvania Retailers Association
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	501 West Broadway, 19th Floor San Diego, CA 92101
Representing:	Appellee Amicus Curiae Pennsylvania Retailers Association

Served:	Samantha D. Hardy
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	501 West Broadway, 19th Floor San Diego, CA 921013598
Phone:	619-338-6500
Representing:	Appellee Amicus Curiae National Retail Federation and Pennsylvania Retailers Association

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Samantha D. Hardy
Service Method:	First Class Mail
Service Date:	7/3/2020
Address:	501 West Broadway, 19th Floor San Diego, CA 921013598
Phone:	619-338-6500
Representing:	Appellee Amicus Curiae National Retail Federation and Pennsylvania Retailers Association

Served:	Sarah Rebecca Schalman-Bergen
Service Method:	eService
Email:	sschalman-bergen@bm.net
Service Date:	7/3/2020
Address:	Berger & Montague, P.C. 1622 Locust Street Philadelphia, PA 19103
Phone:	215--87-5-3053
Representing:	Appellant Amicus Curiae Community Legal Services Appellant Amicus Curiae Justice At Work Appellant Amicus Curiae National Employment Law Project Appellant Amicus Curiae National Employment Lawyers Association Appellant Amicus Curiae NELA-Eastern PA Appellant Amicus Curiae Pennsylvania AFL-CIO Appellant Amicus Curiae Service Employees International Union Appellant Amicus Curiae Towards Justice Appellant Amicus Curiae United Food and Commercial Workers International Union Appellant Amicus Curiae Western Pennsylvania Employment Lawyers Association

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served:	Sarah Rebecca Schalman-Bergen	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger & Montague Pc	
	1818 Market Street, Suite 3600	
	Philadelphia, PA 19103	
Phone:	215-875-3053	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

Served:	Sarah Rebecca Schalman-Bergen	
Service Method:	First Class Mail	
Service Date:	7/3/2020	
Address:	Berger & Montague Pc	
	1818 Market Street, Suite 3600	
	Philadelphia, PA 19103	
Phone:	215-875-3053	
Representing:	Appellant Amicus Curiae	Community Legal Services
	Appellant Amicus Curiae	Justice At Work
	Appellant Amicus Curiae	National Employment Law Project
	Appellant Amicus Curiae	National Employment Lawyers Association
	Appellant Amicus Curiae	NELA-Eastern PA
	Appellant Amicus Curiae	Pennsylvania AFL-CIO
	Appellant Amicus Curiae	Service Employees International Union
	Appellant Amicus Curiae	Towards Justice
	Appellant Amicus Curiae	United Food and Commercial Workers International Union
	Appellant Amicus Curiae	Western Pennsylvania Employment Lawyers Association

IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Peter David Winebrake

(Signature of Person Serving)

Person Serving:	Winebrake, Peter David
Attorney Registration No:	080496
Law Firm:	Winebrake & Santillo, LLC
Address:	715 Twining Road Suite 211 Dresher, PA 19025
Representing:	Appellant Heimbach, Neal Appellant Salasky, Karen