In the Supreme Court of Pennsylvania

No. 43 EAP 2019

NEAL HEIMBACH and KAREN SALASKY,
on behalf of themselves and all others similarly situated,
Plaintiffs/Appellants,
v.
AMAZON.COM, INC.; AMAZON.COM.DEDC, LLC,
and INTEGRITY STAFFING SOLUTIONS, INC.,
Defendants/Appellees.

On Certification of Questions of Law From the U.S. Court of Appeals, Sixth Circuit, No. 18-5942
Pursuant to the Order of December 27, 2019 at 124 EM 2019

BRIEF OF *AMICI CURIAE* PENNSYLVANIA AFL-CIO, SERVICE EMPLOYEES INTERNATIONAL UNION, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, COMMUNITY LEGAL SERVICES, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, WESTERN PENNSYLVANIA EMPLOYMENT LAWYERS ASSOCIATION, NELA-EASTERN PA, JUSTICE AT WORK, and TOWARDS JUSTICE

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I. INTERESTS OF *AMICI CURIAE*[1]

Amicus Curiae the Pennsylvania AFL-CIO is a federation of labor organizations operating throughout the Commonwealth of Pennsylvania, whose affiliated local unions, district councils, regional councils, central labor councils and area labor federations represent approximately 800,000 working men and women who reside in virtually every community in the Commonwealth and who, along with their families, comprise a very substantial portion of Pennsylvania residents. The Pennsylvania AFL-CIO is the central address and public policy voice of Unions in both the public and private sectors of our Commonwealth's economy. Among the goals and missions of the Pennsylvania AFL-CIO is the protection and assurance of adherence to the precepts of our Constitution and the proper application and administration of the laws of this Commonwealth including, but not limited to, the essential public policy embodied in the Pennsylvania Minimum Wage Act to protect working men and women from the disproportionate bargaining power potentially imposed by certain employers and from unreasonably low wages that would otherwise not be consistent with the value of the services they render in the private and public sectors of our economy.

Amicus Curiae the Service Employees International Union ("SEIU") is an

[1] Pursuant to Pa.R.A.P. 531(b)(2), *Amici* certify that no person or entity other than *Amici* or their respective counsel either (i) paid, in whole or in part, for the preparation of this brief or (ii) authored, in whole or in part, any aspect of this brief.

international labor union representing more than 2.2 million men and women in healthcare, property services, and public service employment in the United States, its Territories and Canada. SEIU advocates for workers on a diverse range of matters of concern in the workplace.

Amicus Curiae the United Food and Commercial Workers International Union ("UFCW") is a labor organization of 1.3 million members representing workers across the United States in industries including poultry, meat packing and other food processing, retail food and non-food retail, hospitals, nursing homes, other healthcare, and the chemical industry. UFCW represents workers and fights to broaden civil, labor, and human rights for all workers in the U.S.

Amicus Curiae Community Legal Services of Philadelphia ("CLS") is a non-profit legal services organization founded in 1966 that represents thousands of low-income Philadelphians every year in a variety of civil legal cases. CLS advocates for workplace rights of its mostly non-union clients on the federal, state, and local levels on matters including unemployment compensation, wage and hour rights, anti-discrimination, and other areas that impact poverty and economic inequality. We have litigated directly and participated as *amicus curiae* in Pennsylvania state courts on behalf of workers. We join this case because, through our representation of hundreds of individuals in wage cases over the last five decades, we see how shortchanging workers contributes to poverty and lack of economic mobility in

Pennsylvania.

Amicus Curiae the National Employment Law Project ("NELP") is a national non-profit legal organization with over 50 years of experience advocating for workers' rights to fair pay. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of statutory and regulatory labor standards, including baseline protections like pay for all hours worked. NELP has litigated and participated as *amicus curiae* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and state wage and hour laws. NELP also provides policy and legal assistance to worker centers, labor organizations and community-based organizations in Pennsylvania regarding wage and hour rights, and this collaboration informs its position in this case.

Amicus Curiae the National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country focused on empowering workers' rights plaintiffs' attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA members routinely litigate wage and hour cases in Pennsylvania, and have an interest in ensuring that the Pennsylvania Minimum Wage Act continues to protect Pennsylvania's low-wage workers, a population that is disproportionately vulnerable to wage theft and other illegal treatment in the

workplace.

Amicus Curiae the Western Pennsylvania Employment Lawyers Association ("WPELA") and NELA-Eastern PA ("NELA-EPa") are Pennsylvania-based affiliates of NELA. WPELA has approximately 49 members, and NELA-EPa has approximately 80 members, all of whom have certified that at least 51 percent of their employment law practice is devoted to advocating for employees in Pennsylvania. Many WPELA and NELA-EPa members regularly represent employees in actions under the Pennsylvania Minimum Wage Act. Therefore, their current and prospective clients have a great interest in the outcome of this matter.

Amicus Curiae Justice at Work is a non-profit organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Justice at Work supports low-wage workers as they pursue economic and social justice through the provision of legal services, education, and advocacy. For almost 40 years, Justice at Work has provided direct legal assistance to thousands of workers in Pennsylvania and improved the living and working conditions of a much larger number through advocacy and impact litigation, including representation of groups of workers and class action litigation. Justice at Work therefore has a strong interest in protecting the rights of workers in Pennsylvania.

Amicus Curiae Towards Justice is ("TJ") is a non-profit law firm based in Denver, Colorado that seeks to advance economic justice through impact litigation,

strategic policy advocacy, and collaboration with workers, community groups, and governmental agencies. TJ represents and advocates for low wage and exploited workers nationwide. TJ engages in legislative and policy advocacy at the state level, including but not limited to ensuring that state laws provide worker protections above and beyond the minimums set by the FLSA.

II. ARGUMENT

A. Introduction

Plaintiffs Neil Heimbach, Karen Salasky, and the class of men and women who engage in the grueling work necessary to make sure that residents of Pennsylvania receive the Amazon purchases of their choosing with unprecedented speed, ask this Court to confirm its prior precedent and the holdings of numerous state and federal courts to find that the Pennsylvania Minimum Wage Act, 43 P.S. §§ 333.101 *et seq.* ("PMWA"), is more protective than the federal floor of worker protections set by the Fair Labor Standards Act of 1938 ("FLSA").

The undersigned *Amici* – national and local public interest organizations and labor organizations that do not merely support but actively engage in efforts to ensure the fair treatment of workers – march shoulder to shoulder with these Pennsylvania workers, and urge this Court to continue to honor the Pennsylvania General Assembly's clearly adopted public policy to protect employees in our Commonwealth from the "evils of unreasonable and unfair wages" that are "not fairly commensurate with the value of the services rendered," 43 P.S. § 333.101, and to hold that Pennsylvania law is more protective of the rights of this Commonwealth's workers than the FLSA as interpreted by the United States Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk,* 574 U.S. 27

(2014) ("*ISS*"). This Honorable Court should have little trouble in so determining, as such a decision is based upon the foundation of both law and sound public policy.

Adopted in 1938 under the leadership of then Secretary of Labor Frances Perkins and President Franklin D. Roosevelt, the FLSA was never intended to supplant or restrict any state's right to ensure better treatment of its workers than that set by the federal minimum. *See* 29 U.S.C. § 218(a) (savings clause). And, as this Court recently emphasized, when the Pennsylvania General Assembly adopted the PMWA in 1968, it did not "mince words in stating its purpose and fervently indicating its intent to use the Commonwealth's police power to increase employee wages." *Chevalier. Gen. Nutrition Ctrs., Inc.*, 220 A.3d 1038, 1055 (Pa. 2019).

Indeed, as numerous courts have held,[2] Pennsylvania has never adopted the federal Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq.* ("PPA"), which was passed by Congress with the express purpose of limiting compensation that would otherwise be owed to workers under the plain language of the FLSA prior to its amendment.[3] Nor has Pennsylvania incorporated the *de minimis* rule – another affirmative defense designed to keep money in the pocket of employers for work performed by its workforce if it is deemed "insubstantial" or "insignificant" (even if such "trifles" performed by individual workers collectively add up to millions of dollars in savings

[2] *See infra*, note 9.
[3] *See infra*, note 6.

for a company when aggregated). *See* 29 C.F.R. § 785.47; *see also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). The principles of the PPA and the *de minimis* rule plainly contradict the PMWA's goals of vigorously protecting the rights of workers who, due to a lack of economic bargaining power, count on state law to protect their basic wage and hour rights.

Importing the PPA and the *de minimis* rule into the PMWA would have an exceptionally negative impact on Pennsylvania's low-wage workers, who already face significant wage violations from employers seeking to race to the bottom by reducing labor costs in service of their bottom lines. It would condone denials of pay for pre- and post-shift activities that clearly constitute "work" under both a legal and common sense understanding of the word; and it would allow employers to shave minutes per day – *hundreds* of hours per year – from workers' earnings for services performed for the benefit of their employers. Such a result would have a tremendously detrimental impact on the lives of working people in this Commonwealth, including their ability to care for and raise their families and engage fully in our Commonwealth's economy.

Defendants Amazon.com, Inc., Amazon.com.DEDC, LLC, and one of its numerous third party staffing companies -- Integrity Staffing Solutions, Inc. (together "Amazon") ask this Court to ignore the traditional exercise of the states' police powers so that Amazon may rely solely on the federal floor of the FLSA when

calculating its labor costs and imposing its labor compensation practices. It should come as no surprise that Amazon would far prefer not to pay its warehouse workers an hourly wage for the time it requires them to spend on its premises waiting to undergo and undergoing mandatory security screening. Less money in workers' pockets means more profits and better bottom lines for executives and shareholders.

This Court should not accept Amazon's invitation. Rejection of the federal limitations imported into the FLSA is consistent with Pennsylvania's long tradition of protecting its workers through its own laws and recognition of federal worker protective legislation as a floor and not a federally supreme ceiling or uniformity mandate. The PMWA must be interpreted expansively, to the benefit of employees and the Pennsylvania economy. These independent statutory protections serve as a vital safeguard from changes in federal protections arising from the shifting objectives of different administrations less mindful of the rights of American workers than under Secretary Perkins.[4] It is neither in the interest of the Commonwealth nor in the interest of Pennsylvania employers and employees to be subject to such inconsistency and uncertainty. This Court should continue

[4] On February 26, 2020, eighteen states, including Pennsylvania, filed a lawsuit to challenge the recent U.S. Department of Labor ("DOL") regulation regarding the standard for joint employment as unlawful, asserting that the new regulation would "undermine critical workplace protections for the country's low- and middle-income workers, and lead to increased wage theft and other labor law violations." Complaint, *State of N.Y., et. al. v. Scalia*, No. 20-cv-01689 (S.D.N.Y. Feb. 26, 2020).

Pennsylvania's longstanding commitment to advancing the rights of Pennsylvania workers and decline to read the PPA and the *de minimis* rule into the PMWA.

B. The PMWA Does Not Incorporate the PPA and *De Minimis* Doctrine

Rejection of the FLSA's limitations on compensation through the PPA and *de minimis* rule is consistent with Pennsylvania's unmistakable intent to confer more generous protections to Pennsylvania workers.

1. The FLSA Does Not Limit the Protections That May Be Established by State Law

The plain language of the FLSA "evinces a clear intent to preserve rather than supplant state law." *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262 (3d Cir. 2012). It states:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage maximum work week lower than the maximum workweek under this chapter.

29 U.S.C. § 218(a). Federal courts have found that "the purpose behind the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990); *In re Cargill Meat Sols. Wage & Hour Litig.*, 632 F. Supp. 2d 368, 393 (M.D. Pa. 2008) (intent of savings clause "was to leave

undisturbed 'the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards.'") (quotation omitted); *see also* 29 C.F.R. § 541.4 ("The [FLSA] provides minimum standards that may be exceeded, but cannot be waived or reduced.").

The PMWA's declaration of policy provides clear intent to protect workers:

> In the absence of effective minimum fair wage rates for employe[e]s, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of the economy. The evils of unreasonable and unfair wages as they affect some employe[e]s employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employe[e]s employed therein and of the public interest of the community at large.

43 P.S. § 333.101; *see also Chevalier*, 220 A.3d at 1055. The same purpose was carried through when the PMWA was expanded in 1988 to protect "any individual employed by an employer," regardless of FLSA coverage. 43 P.S. § 333.103(h).

This Court has recognized that "[w]ith this strong public policy favoring employee protection as a backdrop," Pennsylvania courts have decisively interpreted the PMWA to establish "more beneficial wage and hour laws than those provided in the FLSA." *Chevalier,* 220 A.3d at 1055-56 (quoting *Bayada Nurses, Inc. v. Com., Dep't of Labor & Indus.*, 8 A.3d 866, 883 (2010) ("*Bayada*")). The PMWA's selective incorporation of certain FLSA provisions and/or regulations, while remaining wholly silent on or diverging from others, reflects a considered decision

to selectively authorize only some of the wage and hour provisions set out under federal law. *Id.* at 1058-59.

Though the federal *de minimis* doctrine[5] and the PPA[6] have existed since 1946 and 1947 respectively, at *no* time has either been incorporated into the PMWA, which was enacted in its current format in 1968 and amended in 1974, 1978, 1988, 1990, 1998, and 2006. Nor should it. Some states *have* expressly adopted the PPA, by including language that directly tracks the PPA[7] or by express reference to the PPA specifically.[8] The PMWA and its implementing regulations have never contained such language. *See* 43 P.S. §§ 333.101 *et seq.*; 34 Pa. Code §§ 231.1 *et seq.* Pennsylvania regulations instead established in 1979 – thirty-two years *after* the PPA – an independent definition of hours worked that mirrors how compensable

[5] The federal *de minimis* doctrine is a judicially created FLSA doctrine, *Anderson*, 328 U.S. at 692, subsequently codified as a federal regulation in 1961. *See* 29 C.F.R. § 785.47 ("insubstantial or insignificant periods of time beyond the scheduled working hours, *which cannot as a practical administrative matter be precisely recorded for payroll purposes*, may be disregarded"); *Anderson*, 328 U.S. at 690-91 (where "the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded.")

[6] Congress passed the PPA in 1947 to carve out from liability activities that the U.S. Supreme Court had found compensable pursuant to an expansive definition of hours worked under the FLSA. *Anderson*, 328 U.S. at 690-91. There is nothing in the legislative history of the PPA or related regulations to indicate that Congress sought to undermine the FLSA saving clause or otherwise interfere with the traditional power of a state to regulate more generously than the federal standards. *See*, *e.g.*, *Bonds*, LEXIS 10622, *9; *Cargill*, 632 F. Supp. 2d at 394; *Bayada*, 8 A.3d 883.

[7] *See, e.g.,* W. Va. Code § 21-5C-1(h).

[8] *See, e.g.,* Mo. Rev. Stat. § 290.505(4).

work was defined under the FLSA *prior to* the introduction of the PPA. *See Anderson*, 328 U.S. at 690-91; *Bonds v. Gms Mine Repair & Maint.*, 2017 Pa. Dist. & Cnty. Dec. LEXIS 10622, *9 (Pa. Com. Pl., Washington Cty. Dec. 12, 2017); *Lugo v. Farmers Pride, Inc.*, 967 A.2d 963, 969 (2009).

2. The PMWA's Definition of Hours Worked Does Not Incorporate the PPA and *De Minimis* Limitations

The PMWA requires payment of the minimum wage for all hours worked. Pennsylvania regulations provide an explicit definition of "hours worked," which has been recognized as independent from the FLSA. *Lugo*, 967 A.2d at 969 ("[T]he term 'hours worked' has been defined as a term of art by the regulations supporting the PMWA."); 34 Pa. Code § 231.1(b). ("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 . . .; provided . . . that time spent on the premises of the employer for the convenience of the employee shall be excluded").

To the extent the Court considers the term "worked" to be undefined in the PMWA, proper application of the Pennsylvania Statutory Construction Act, 1 Pa. C.S.A. § 1921(c), demands the conclusion that the PMWA does not incorporate the PPA or *de minimis* doctrine. The interpretation of the agency enforcing the statute should be applied unless the agency's construction is clearly erroneous. *McWreath v. Dep't of Public Welfare,* 26 A. 3d 1251 (Pa. Commw. 2011); *see also* 1 Pa. C.S.A. § 1921(c)(8) (administrative interpretations of a statute considered to ascertain the

intention of the legislature). "A court may not substitute its discretion for that of the administrative agency acting within the boundaries of its powers, absent fraud, bad faith or abuse of power." *Bayada Nurses, Inc. v. Commw., Dep't of Labor & Indus*., 958 A.2d 1055 (Pa. Commw. 2008).

Moreover, the statutorily prescribed object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa. C.S. A. § 1921(a); *Irrera v. Southeastern Pa. Transp. Auth.*, 331 A. 2d 705 (Pa. Super. 1974). And, as detailed above, in enacting the PMWA, the General Assembly sought to exercise its police power for the protection of industry, employees and the public interest of the community at large. 43 P.S. § 333.101.

The PMWA definition manifestly includes Plaintiffs' time spent undergoing security screenings. Amazon requires employees to be on the premises or at the prescribed workplace to undergo screening, and the screenings are not mandated for the convenience of the employees. Indeed, Amazon uses security screenings to detect and deter theft and the screenings inconvenience employees, delaying their release from work and subjecting their property to scrutiny.

Further, in construing a statute, courts must favor public interest over private interest and consider consequences of a particular construction. *Borough of Beaver v. Liston*, 464 A. 2d 679 (Pa. Commw. 1983). Here, any statutory ambiguity must

be construed and resolved in favor of the public interest in fair, reasonable wages, rather than the employer's private interest in safeguarding its putative property.

3. Courts Have Recognized That the PMWA Establishes More Expansive Protections for Workers Than the FLSA

A decision rejecting Amazon's attempts to impose federal limitations on the PMWA's more beneficent definition of hours worked is also consistent with the robust case law interpreting the PMWA to provide workers with rights that go beyond the FLSA's "national floor."[9] It would directly follow this Court's well-reasoned opinions in *Chevalier* and *Bayada* regarding the independence of the PMWA, as well as the decisions from numerous Pennsylvania courts that speak directly on the irrelevance of the PPA and *de minimis* rule to PMWA claims. *Amici* urge this Court to follow prior decisional case law and preserve the rights of workers as intended by the PMWA.

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[9] *See, e.g.*, *Chevalier*, 220 A.3d at 1058-59 (declining to import the FLSA's Fluctuating Work Week method into the PMWA); *Bayada*, 8 A.3d at 883; *Ciarelli v. Sears, Roebuck & Co.*, 46 A.3d 643, 648 (Pa. 2012) (J. McCafferty dissenting) (the FLSA's PPA and *de minimis* restrictions on compensable work were not adopted by the General Assembly); *Smith v. Allegheny Tech., Inc*, 754 Fed. Appx. 136, 141 (2018) ("Pennsylvania has not enacted the [PPA], and Pennsylvania law requires compensation for a broader range of activities . . . than the FLSA . . . [n]either the principal activity not the integral or indispensable test applies" to PMWA claims); *Bonds*, LEXIS 10622, at *7-9 ("[a]lthough [*ISS*] significantly changed the scope of the federal law regarding compensation of pre- and post-shift work activities, the case ultimately has no impact on Plaintiff's [P]MWA claim. . . . Pennsylvania provides greater protection for employees than the federal law, and Pennsylvania has refused to adopt the FLSA."); *Cargill* 632 F. Supp. 2d at 392-94 (the PMWA "is more protective in individual employee rights" than the FLSA.).

4. Many Other States Have Declined to Read the PPA and *De Minimis* Restrictions into State Law

Consistent with this Court's observation that "more generous protections provided by a state are not precluded" by the FLSA, *Bayada*, 8 A.3d at 883, numerous courts in other jurisdictions have refused to impose the PPA and *de minimis* limitations on state law.

Courts have held that *ISS* is not relevant to determinations of the compensability of time spent in security screening under applicable state laws. *Frlekin v. Apple Inc.*, No. S243805, 2020 WL 727813, at **6 n.4, 11 (Cal. Feb. 13, 2020) (*ISS* did not "guide [Supreme Court of California's] analysis" in finding security screen time compensable, for the PPA "'differs substantially from the state scheme" and "should be given no deference,'") (citation omitted); *Busk v. Integrity Staffing Sols.*, 905 F.3d 387, 397-405 (6th Cir. 2018), *cert. denied sub nom. Integrity Staffing Sols., Inc. v. Busk*, 140 S. Ct. 112 (2019) (time spent undergoing security screenings was compensable under Arizona and Nevada state laws because they did not affirmatively adopt the PPA, instead tracking the FLSA's more inclusive definition of work, and nothing in *ISS* changed this "longstanding definition").

Courts also have declined to read the PPA into state law in other contexts. *Anderson v. State, Dep't of Soc. & Health Servs.*, 63 P.3d 134, 136 (Wash. Ct. App. 2003) (declining to adopt PPA into Washington state law); *Stevens v. Brink's Home Sec., Inc.*, 169 P.3d 473, 476 (Wash. 2007) (drive time compensable under

Washington state law without reference to the PPA); *McMillan v. Massachusetts Soc. for Prevention of Cruelty To Animals*, 140 F.3d 288, 306 (1st Cir. 1998) (rejecting attempts to import the PPA's into claims under Massachusetts law) (citation omitted).

Numerous courts have also refused to adopt the federal *de minimis* doctrine into state wage laws, finding that it would harm workers and run contrary to state law and policy that seeks to protect and advance the rights of workers.[10]

This Court should take a similar approach in light of the PMWA's clear intent to protect workers and the absence of any evidence that the PMWA incorporates the PPA or *de minimis* rule's limits on compensation. The Court's decision in this respect would be fully supported by the savings clause of the FLSA, the legislative intent of the PMWA, and the rulings of similar courts.

[10] *See, e.g., Troester v. Starbucks Corp.*, 421 P.3d 1114, 1119 (Cal. 2018), *as modified on denial of reh'g* (Aug. 29, 2018) (Supreme Court of California would not "import any federal standard, which expressly eliminates substantial protections to employees, by implication."); *Strohl v. Brite Adventure Ctr., Inc.*, No. 08-CV-259 RML, 2010 WL 3236778, at *7 (E.D.N.Y. Aug. 13, 2010) ("the court is unaware of any *de minimis* exception under [New York] state law"); *Parow v. Howard*, No. 021403A, 2003 WL 23163114, at *3 (Mass. Super. Nov. 12, 2003) (finding "no support, factually or legally, for the Defendants' *de minimis* argument" as Massachusetts law "does not provide such a defense").

C. Imposing the PPA and *De Minimis* Doctrine Will Injure Workers and Is Inconsistent with the Public Policy Underlying the PMWA

In addition to the sound legal basis by which this Court should rule in favor of the workers in the instant matter, public policy rationales also counsel in favor of such a decision. Adoption of the PPA or *de minimis* doctrine would bear severely and impermissibly detrimental consequences on workers concentrated in industries that *already* experience rampant workplace violations. It is estimated that in a given workweek, in low-wage occupations in Pennsylvania, 397,673 workers experience a minimum wage violation, 326,647 workers experience an overtime violation, and 257,204 workers are not paid for off-the-clock work before and after their shifts.[11]

Low-wage workers across the country, and here in Pennsylvania, are beset by widespread wage theft – a practice by which employers take billions of dollars a year out of the pockets of their employees.[12] One common form of wage theft is a failure

[11] Stephen and Sandra Sheller Center for Social Justice, Temple University Beasley School of Law, Shortchanged: How Wage Theft Harms Pennsylvania's Workers and Economy, 16 (2015); *see also, e.g.,* Dep't of Labor, The Social And Economic Effects of Wage Violations (2014), https://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf [last visited March 5, 2020] (estimating millions of dollars in lost income in other states for wage theft).

[12] Brady Meixell and Ross Eisenbrey, Economic Policy Institute, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year, Issue Brief #385 (2014), *available at* https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/; Temple, *supra* note 11, at 16 (estimating that low-wage workers in Pennsylvania lose a total of $19 million to $32 million in wages each week).

to pay employees for work performed "off-the-clock," outside standard shift times.[13] Advocates nationally and in Pennsylvania have deemed wage theft an "epidemic" and a "hidden crisis."[14]

Wage theft, including work off-the-clock, expands income inequality and hurts workers and their families.[15] Pennsylvania low-wage workers lose, on average, 15% of their earnings to wage theft, "which can force difficult decisions, such as whether to forgo purchasing food or face the consequences of unpaid bills for housing, utilities, and health care."[16] Failure to pay workers for work time that may be construed as small – "such as not paying for time spent preparing a work station at the start of a shift, or for cleaning up and closing up at the end of a shift" – can quickly add up to a *substantial* portion of the earnings brought home by low-wage individuals.[17] Notably, when declining to read the *de minimis* rule into California law, the California Supreme Court found that "a few extra minutes of work each day can add up" and, for the Starbucks workers involved, the amount at issue "is enough

[13]Annette Bernhardt et al., Broken Laws, Unprotected Workers, 22 (2009), *available at* https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf.
[14] Meixell *supra* note 12, at 2; Michelle Anderson, Wage Theft Could Cost $32 Million Weekly for Pennsylvania's Low-Wage Workers, Rewire News (May 3, 2016) *available at* https://rewire.news/article/2016/05/03/wage-theft-32-million-weekly-pennsylvania-low-wage-workers/.
[15] Bernhardt, *supra* note 13, at 9; Temple, *supra* note 11, at 16-17, Meixell *supra* note 12, at 2-3.
[16] Temple, *supra* note 11, at 2.
[17] Meixell *supra* note 12, at 1.

to pay a utility bill, buy a week of groceries, or cover a month of bus fares. *Troester*, 421 P.3d at 1125. What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages."[18] Wage theft also deprives local economies of money that would otherwise be spent by workers, denies the state valuable tax revenue, and penalizes law-abiding businesses that are at a competitive disadvantage to employers that break the law.

Adoption of the PPA and *de minimis* doctrine would condone and, indeed, enshrine the practice of employers' refusal to pay for otherwise compensable time and shift income away from workers. This shift "worsens income inequality, hurts workers and their families, and damages the sense of fairness and justice that a democracy needs to survive." *Meixell*, *supra* note 12. Limiting the PMWA's definition of compensable work would further stack the deck against working people, consolidate power in the hands of employers, and run counter to the explicit public policy set out by the PMWA.

[18] *Id.*; *see also* Temple, *supra* note 11, at 3, 17 (highlighting the stories of workers who, in the face of their nonpayment of their wages, had trouble paying for basic goods and were even forced to "choose between bread eggs, or milk" for their children).

1. Adoption of the PPA Would Allow Employers to Compel Uncompensated Work in a Wide Range of Already Low Paying Positions

Application of the PPA's limitations to the PMWA would have significant impact on low-wage workers who are regularly required to do pre- and post- shift work. As noted, off-the-clock violations are *already* pervasive, spanning key industries and perpetrated by employers large and small.[19]

Adoption of the PPA's standard would condone this practice of nonpayment for any pre- or post-shift activities that may be considered separate from and not integral or indispensable to an employer's principal activities. *ISS*, 574 U.S. at 36-37. This is true even when these activities are required by the employer and for the employer's benefit. *Id.* at 36. The kinds of off-the-clock work that could fit within the PPA's loophole but would otherwise be compensable under the PMWA are wide ranging.

For example, companies in the retail and warehousing industries have broadly adopted so-called "loss prevention" programs, including security screenings, to combat claims of inventory theft.[20] As discussed above, time spent undergoing these

[19] Bernhardt, *supra* note 13, at 9, 35-36.

[20] *See*, *e.g.*, Charles A. Sennewald and John H. Christman, Retail Crime, Security, and Loss Prevention: An Encyclopedic Reference, 302 (2008) (noting historic shift of asset security from apprehending employee thieves to "the concept of 'loss prevention'; *i.e.*, the protection efforts … directed toward shortage reduction"); 2019 National Retail Security Survey, National Retail Federation, 1 (2019), *available at*

screenings is work as defined under the PMWA. Were the PMWA not to be read independently from the PPA, however, the retail and warehousing employees who labor in grueling, dangerous conditions[21] for low and often stagnant wages[22] would acutely feel every dollar that is withheld in accordance with *ISS*. And, as an aside, employers engaging in such approaches apparently see no irony in refusing to compensate employees for the value of compulsory work time -- effectively wage

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https://cdn.nrf.com/sites/default/files/2019-06/NRSS%202019.pdf (estimating $50.6 billion in losses in 2018, with survey respondents widely reporting plans to increase loss prevention resources); 2018 National Retail Security Survey, National Retail Federation, 5 (2018), *available at* https://nrf.com/research/national-retail-security-survey-2018 (employee theft accounting for 33.2% of inventory shrinkage in 2018).

[21] *See*, *e.g.*, Emily Guendelsberger, I Worked at an Amazon Fulfilment Center; They Treat Workers Like Robots, Time (July 18, 2019), *available at* https://time.com/5629233/amazon-warehouse-employee-treatment-robots/; Stephanie Richards, *Screening for Integrity: What's Missing from Integrity Staffing Solutions, Inc. v. Busk*, 31 ABA J. Lab. & Emp. L. 553, 553 (2016) (describing how, to prevent employee theft at an Amazon warehouse staffed by Integrity Staffing Solutions in Lehigh Valley, Pennsylvania, Amazon insisted on keeping the doors shut despite temperatures inside regularly exceeding 110 degrees); Will Evans, Behind the Smiles: Amazon's internal injury records expose the true toll of its relentless drive for speed (Nov. 25, 2019), The Center for Investigative Reporting, *available at* https://www.revealnews.org/article/behind-the-smiles/ ("rate of serious injuries for [surveyed Amazon] facilities was more than double the national average for the warehousing industry").

[22] *See*, *e.g.*, Unfulfillment Centres: What Amazon does to wages, Economist (Jan. 20, 2018), *available at* https://www.economist.com/united-states/2018/01/20/what-amazon-does-to-wages (describing "flat or falling industry wage" in warehouses in the "cities and towns where Amazon opens distribution centres" and Amazon workers earning "about 10% less than similar workers employed elsewhere.").

theft -- in their pursuit of protecting themselves from broad, predominantly unsubstantiated, claims of inventory theft.

Further, while time spent donning and doffing work-related equipment and clothing generally is deemed a compensable principal activity (or integral and indispensable to one), *see*, *e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005), the PPA provides that time spent changing clothes may be excluded from compensation by a collective bargaining agreement's ("CBA") express terms, custom, or practice. The PMWA, however, requires compensation for all hours worked regardless of any CBA. *Cargill*, 632 F. Supp. 2d at 368. A decision reading the PPA into state law would be inconsistent with the policy underlying the PMWA, which acknowledges that low-wage workers do not enjoy "a level of equality in bargaining with their employers . . . [such that] 'freedom of contract' as applied to their relations with their employers is illusory." 43 P.S. § 333.101.

There are a litany of additional work activities that might be required by and performed for the benefit of the employer but that would fall within the PPA's exclusion from compensation. The respondent-plaintiffs in *ISS* recounted possible outcomes from such a standard:

> A warehouse worker could be required to mow the lawn or wash the boss's car. A receptionist could be directed to come in early to make coffee or tend to the office plants. . . . if an employee at a meat packing plant spent 38 hours a week cleaning and packaging carcasses, and only 2 hours a week butchering the animals, the employer would not have to

> pay the employee for time spent sharpening the knives needed for the butchering . . . .'"

Brief for Respondents at 40-41, *ISS*, 2014 WL 3866627 (U.S.) (citation omitted).

These examples also highlight the potential for abuse that stems from adoption of the PPA. Application of this standard requires nuanced determinations of the principal activities of employment and what is integral and indispensable to those activities. It can be difficult for courts to make this assessment, as they are often asked to rule without the benefit of a full factual record. *See, e.g.*, *ISS*, 574 U.S. 27 (decided on a motion to dismiss); *Smith*, 754 F. App'x. at 136 (same). This fuzzy standard can encourage employers to evade paying employees for any work that could arguably be disassociated from the principal activities.[23] And even when the required tasks are legitimately removed from an employee's principal activity, the PPA creates no incentive for employers to be efficient with their employee's time.[24] Employers could use a single metal detector to screen their entire workforce without monetary consequence, allowing employers to reap this benefit while placing unnecessary, uncompensated demands on their workforce. Comparatively, were the Court to require compensation for all activities that fall under the PMWA's

[23] *See* Richards, *supra* note 22 at 565-66.
[24] *Id.*

independent definition[25] of hours worked, workers throughout Pennsylvania would benefit from a clearer, more inclusive standard and one that is less subject to abuse.

Finally, importation of the PPA would not only harm workers with respect to pre- and post-shift activities required by their employers; it could effectively impose large swaths of shifting and untested federal law on workers in Pennsylvania. Section 10 of the PPA excuses an employer's violation of the FLSA if the employer can show that the DOL issued a regulation, order, ruling, or other written interpretation that condoned the employer's actions. 29 U.S.C. § 259. Even if the ruling on which the employer relied is rescinded by the DOL or overturned by the courts, it can avoid liability as long as its actions were allowed when taken.[26]

2. The Federal *De Minimis* Defense Does Not Align with the Spirit of Pennsylvania Law

The *de minimis* doctrine is likewise incongruous with the spirit of the PMWA and would harm Pennsylvania's low-wage workers. While the *de minimis* doctrine emerged out of "practical administrative" concerns around timekeeping, 29 C.F.R. § 785.47, "in light of the realities of the industrial world" as well as concerns that employers would bear the burden of paying for "split-second absurdities," *Anderson*,

[25] *Lugo*, 967 A.2d at 969; 34 Pa. Code § 231.1.

[26] *See, e.g.*, 85 Fed. Red. 2,820, 2,825 (emphasizing that employers "may safely rely" on DOL interpretations "unless and until any such interpretation 'is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.'") (quoting 29 U.S.C. § 259).

328 U.S. at 692, adoption of the *de minimis* rule here would shift onto Pennsylvania's low-wage workers the burden of forgoing pay for periods of compensable time that are purportedly difficult to record.

Indeed, in situations where employees engage in work that would be considered *de minimis*, it is the *employer* who requires or permits the off-the-clock work and wholly fails to record that time worked. Forcing employees to bear the burden of the employer's failure to record time is wholly inconsistent with the protections that Pennsylvania law extends its workers. *See*, *e.g.*, 43 P.S. § 333.108 (imposing a duty to "keep a true and accurate record of the hours worked by each employe[e] and the wages paid to each").

Further, the *de minimis* defense runs counter to the aforementioned policies aimed at protecting Pennsylvania workers, as it would allow employers to avoid paying for certain work activities merely by construing them as separate from the rest of the day's work. Nearly *any* work activity – viewed in a narrow lens – could be construed as *de minimis*. But it is the sum total of these activities that amounts to a full day's work for which Pennsylvania law demands compensation. Adoption of the *de minimis* defense risks incentivizing employers to deny compensation for any separately construed work activities, particularly those occurring at the beginning or end of a workday.

This doctrine would only worsen the situation for Pennsylvania's low-wage workers; when a worker earns only minimum wage, an employer's refusal to pay for even just a few minutes per day can make the difference in the ability of that worker and their family to pay for rent, food, or utilities. *See, e.g., Troester*, 421 P.3d at 1125. The *de minimis* doctrine fails to advance Pennsylvania's public policy in favor of protecting workers' rights. And, we are compelled to note that the *de minimis* doctrine is put forth as a "one-way street" solely to the detriment of the worker and to the benefit of the employer. If, as urged, it is truly *de minimis*, the rule should be to pay the worker this otherwise immaterial sum as opposed to compelling services without compensation.

D. Maintaining the PMWA's Independence from Federal Law Is Vital to Pennsylvania Workers and Employers

Finally, maintaining the PMWA's independence from the FLSA is vital, as federal protections are subject to change based on the objectives of different federal administrations. An agency's interpretations undergo substantive changes with the advent of each successor administration, as the leadership of executive agencies is responsible for carrying out the sitting President's policy agenda. A ruling that the PPA should be read into state law would effectively impose large swaths of shifting, untested, and even presently unknown federal law on workers in Pennsylvania.

Drastic reversals of DOL regulations over the last decade demonstrate the uncertainty and disruption that would stem from requiring Pennsylvania's reliance

on federal law. For example, in the first week of January 2018, the DOL revived 17 opinion letters to employers issued during the final days of President Bush's second term that had been previously withdrawn when President Obama took office. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letters, FLSA2018-1 – FLSA2018-17 (Jan. 5, 2018). The revived opinion letters allow employers to evade paying overtime and complying with other FLSA provisions.

In June 2017, the DOL announced the withdrawal of two Obama-era interpretations on joint employment and independent contractors that had been favorable to workers. *See* U.S. Dep't of Labor, Wage & Hour Div., News Release No. 17-0807-NAT (June 7, 2017); U.S. Dep't of Labor, Wage & Hour Div., AI No. 2015-01 (independent contractor classification); U.S. Dep't of Labor, Wage & Hour. Div., AI No. 2016-01 (joint employer standard). *See also* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA2019-6; 84 Fed. Reg. 14,043 (Apr. 9, 2019) (opinion letter regarding "gig economy" workers' classification); 85 Fed. Reg. 2820 (Jan. 16, 2020) (final joint employer rule). The current DOL's rule on joint employment is now under challenge by eighteen states, including Pennsylvania. *See* Complaint, *State of N.Y., et. al. v. Scalia*, No. 20-cv-01689 (S.D.N.Y. Feb. 26, 2020).

As another example, in November 2019, the DOL issued a notice of proposed rulemaking that would give employers more unilaterally imposed power in calculating overtime pay for employees with fluctuating workweeks, allowing

employers to include bonus and premium payments from non-relevant work periods when calculating overtime pay. *See* 84 Fed. Reg. 59590 (proposed Nov. 5, 2019) (to be codified at 29 C.F.R. § 778). The proposed rule explicitly reverses the 2011 final rule, which determined such payments "incompatible with the fluctuating workweek method of computing overtime.'" *Id.* at 59,592.

The outcome of the 2020 election could significantly change the reach of the FLSA. If a new President is inaugurated in January 2021, a freeze on regulations not yet in effect will be likely be issued, and certain guidance documents withdrawn or reinstated. Imposing the shifting sands of the FLSA and its regulatory framework on the PMWA would subject Pennsylvania's employers and employees to the pendulum swing of differing presidential administrations, promoting chaos and inconsistencies for Pennsylvania employers and employees. This Court should ensure predictability within Pennsylvania by honoring the legislative intent of the PMWA to provide firm and concrete protections to the workers who live within the Commonwealth.

III. CONCLUSION

Amici respectfully request that the Court find in favor of Appellants on both certified questions.

Dated: March 6, 2020

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For Justice at Work

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.

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WORD COUNT CERTIFICATION

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(3), I certify that the attached brief contains 6,997 words as calculated by the word-count feature of Microsoft Word.

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