SUPREME COURT OF KENTUCKY
CASE NO. 2021-SC-0444-D

MARION HUGHES, ET AL.,

APPELLANTS

vs.

UPS SUPPLY CHAIN SOLUTIONS, INC., ET AL.

APPELLEES

BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, NATIONAL RETAIL FEDERATION and KENTUCKY RETAIL FEDERATION

On appeal from the Court of Appeals
Case No. 2019-CA-1457-MR

On appeal from the Jefferson Circuit Court
Case No. 07-CI-009996

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Certificate of Service

I certify that on June 7, 2022, ten copies of this Brief were served via FedEx Overnight Delivery on the Clerk of the Kentucky Supreme Court, 700 Capitol Ave., Room 209, Frankfort, KY 40601.One copy of this Brief was served via U.S. Mail on Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Mitch Perry, Jefferson Circuit Court, 700 W. Jefferson St., Louisville KY 40202; Andrew J. Horne, 700 N. Hurstbourne Pkwy., Suite 112, Louisville, KY 40222; Michael D. Grabhorn and Andrew M. Grabhorn, 2525 Nelson Miller Pkwy., Suite 107, Louisville, KY 40223; Kyle D. Johnson, 400 W. Market St., 32nd Floor, Louisville, KY, 40202; Joseph Palmore and Samuel Goldstein, 2100 L Street, NW, Washington, DC 20037

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PURPOSE OF THE BRIEF AND STATEMENT OF INTEREST

For the better part of fifty years, Kentucky's employers and employees have understood that time spent on pre- and post-shift activity like security screenings is not compensable "work" under KRS Chapter 337. That understanding is consistent with the federal Fair Labor Standards Act—the model for KRS Chapter 337. Appellants' argument threatens that shared understanding. And if adopted by this Court, it could impose unexpected, potentially crippling liability on Kentucky employers. The Court of Appeals rightly rejected Appellants' argument; this Court should do the same.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Kentucky Chamber of Commerce is the largest business organization in Kentucky, representing more than 13,000 companies, including many manufacturers, that share a strong interest in enhancing and protecting the state's economic future. The Chamber supports a prosperous business climate in the Commonwealth and works to advance Kentucky

through advocacy, information, program management and customer service to promote business retention and recruitment.

The National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of legal issues.

The Kentucky Retail Federation (KRF) is a business trade association formed to improve the retail business climate in Kentucky and represents over 6,000 members throughout the Commonwealth. Members are as diverse as the products they sell, from main street merchants to "big box" retailers. KRF takes an active role in the formulation of legislation in Kentucky that protects and promotes the free enterprise system and policies that encourage smart economic growth and fair business competition.

The foregoing *Amici* represent a wide cross-section of employers and have long promoted efforts to remove legal uncertainty under the FLSA so that their respective members can comply with the law and avoid costly litigation. As discussed below, the resolution of this case could impact the compensability of a broad range of pre- and post-shift screenings, conducted by employers to ensure the security of employers' property and the safety of employees and the public. Forcing employers to pay for this time could

discourage such screenings and increase the costs of Kentucky's goods and services, encouraging businesses to invest elsewhere. This Court should hold such security checks are not compensable.

ARGUMENT

I. Pre- and post-shift security checks are not compensable under KRS Chapter 337.

Two key points are undisputed. First, KRS Chapter 337 is Kentucky's analogue to the federal Fair Labor Standards Act ("FLSA"). *City of Louisville, Div. of Fire v. Fire Serv. Managers Ass'n ex rel. Kaelin*, 212 S.W.3d 89, 92 (Ky. 2006). Second, routine security screenings are *not* compensable under the FLSA, as amended by the Portal-to-Portal Act. *See Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 35 (2014).

The Portal-to-Portal Act clarifies that "activities which are preliminary to or postliminary to" an employee's "principal activity" are not compensable under the FLSA. 29 U.S.C. 254(a). Security screenings, the U.S. Supreme Court has explained, "are noncompensable postliminary activities." *Integrity Staffing*, 574 U.S. at 35.

Appellants believe that while Kentucky modeled KRS Chapter 337 after the FLSA, the Commonwealth did *not* incorporate the Portal-to-Portal Act. Appellants are mistaken.

Congress enacted the FLSA in 1938, establishing a minimum wage and overtime compensation for each hour worked beyond a 40-hour workweek for millions of workers in every conceivable industry. *Id.* at 31.

Initially, the U.S. Supreme Court interpreted "work" and "workweek" broadly. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In particular, the Court held—incorrectly—that "work" included any exertion "primarily for the benefit of the employer and his business" and *any* time an employee was required to be on the employer's premises. *Id.* Those decisions sparked a wave of litigation: more than 1,500 lawsuits, worth nearly $6 billion, in 1946 alone. *Integrity Staffing*, 574 U.S. at 31.

Congress responded with the Portal-to-Portal Act in 1947. That Act is part of the conversation between Congress and the Court over the original meaning of the FLSA. Crucially, the Portal-to-Portal Act merely clarified the original meaning of the FLSA. It repudiates the U.S. Supreme Court's erroneous construction of the FLSA, and restates Congress's original intent.

Two features of Portal-to-Portal Act make that point clear. First, Congress declared in no uncertain terms that the Supreme Court had misconstrued the FLSA. *See* 29 U.S.C. § 251(a). According to Congress, the *Tennessee Coal* and *Anderson* decisions "disregard[ed] long-established customs, practices, and contracts," and "creat[ed] wholly unexpected liabilities, immense in amount and retroactive in operation." *Id.* Indeed, the federal courts of appeals immediately understood that the Portal-to-Portal

Act was meant to repudiate *Tennessee Coal* and *Anderson*. *See, e.g.*, *Newsom v. E.I. Dupont De Nemours & Co.*, 173 F.2d 856, 860 (6th Cir. 1949).

Second, Congress made the Portal-to-Portal Act retroactive. The Act "was passed in order to bar the innumerable claims that were being filed under the [FLSA] in order to take advantage of" the *Tennessee Coal* and *Anderson* decisions. *Newsom*, 173 F.2d at 860. The Act nullified any employer liability for such claims. 29 U.S.C. § 252(a). And the Act stripped state and federal courts alike of jurisdiction to entertain those claims "whether instituted prior to or on or after" the effective date of the Act. *Id.* § 252(d).

Through those two features of the Portal-to-Portal Act, Congress explained that it never intended for preliminary and postliminary activities to be compensable under the FLSA's conception of working time. Appellants described the Portal-to-Portal Act as an "exception" to the FLSA, but that is not accurate. Rather, as the Court of Appeals held, the Portal-to-Portal Act is a clear restatement of the original meaning of the FLSA. *See Hughes v. UPS Supply Chain Sols., Inc.*, No. 2019-CA-1457-MR, 2021 WL 3935355, at *6 (Ky. Ct. App. Sept. 3, 2021), *review granted* (Apr. 20, 2022). The Portal-to-Portal Act merely declares what the FLSA meant all along. The two are inseparable.

It is undisputed that in 1974, the General Assembly overhauled KRS Chapter 337 to adopt an analogue to the FLSA. The question is whose understanding did the General Assembly adopt? Was it the understanding of Congress when it enacted the FLSA—and that prevailed for 75 years

following the enactment of the Portal-to-Portal Act? Or was it instead the *mis*understanding of the US Supreme Court in the brief, three-year period between *Tennessee Coal* and *Anderson*—a misunderstanding that Congress quashed immediately? The question answers itself.

II. Appellants' expansive definition of compensable "work" will impose unexpected liability on employers for activities that are distinct from the employees' and employers' principal activity.

For nearly 50 years, employers and employees alike have expected that preliminary and postliminary activities like security screenings would not be considered compensable "work" under the KRS Chapter 337 (and for 75 years under the FLSA). The principle is straightforward: if an employer hires someone to make widgets, that person is employed to—and will be compensated for—making widgets, and *not* for passing through security checkpoints or crossing the lobby on the way to making those widgets. The Labor Cabinet shares that view. The Labor Cabinet issued regulations that incorporate Portal-to-Portal Act principles. *See* 803 Ky. Admin. Regs. 1:065. And the U.S. Sixth Circuit Court of Appeals confirmed those reasonable expectations, holding that KRS Chapter 337 "incorporates the Portal-to-Portal Act's compensation limits on preliminary and postliminary activities." *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 615 (6th Cir. 2017).

Appellants propose to expand the definition of compensable "work" and upset the settled expectations that have governed Kentucky workplaces for half a century. Doing so would unleash the wave of litigation that the Portal-to-Portal Act eliminated (indeed, that appears to be Appellants' goal).

Appellants' new rule would also create widespread uncertainty about the scope of employer liability.

A. Appellants' definition of compensable "work" is nearly impossible to apply to security screenings.

Appellants ask the Court to resurrect the *Tennessee Coal* and *Anderson* definitions of compensable "work": any exertion on the employer's premises, undertaken "primarily for the benefit of the employer and his business." *Anderson*, 328 U.S. at 690-91. But that test is hopelessly vague as applied to security screenings.

Employers across the Commonwealth use a wide range of security screening measures, and do so for a variety of reasons. Some only check bags an employee carries in and out of the workplace. Others check vehicles. Still others use wand swipes or metal detectors to secure their premises.

Employers also make a variety of choices about who to screen. Some employers screen every person entering or exiting the premises. Others screen only employees, or only employees working in particular areas or with particular job responsibilities.

These variations reflect the fact that employers use security screenings for a variety of reasons. Many employers set up security measures to prevent workplace and retail theft. Other employers check for weapons or illicit drugs in their efforts to maintain a safe work environment. An employer might screen employees as necessary condition for offering workplace perks, like on-

site childcare. And of course an employer might use security screenings for a combination of these and other reasons.

Appellants propose that any activity taken "primarily for the employer's benefit" is compensable work, but offer no guidance on how to apply that standard. Is a drug-free or violence-free workplace primarily for the employer's benefit, or the employee's? Prevention of employee theft "benefits" a wide range of groups. Employee theft appropriates funds that could otherwise be spent on lower prices or higher wages, so prevention of such theft actually "benefits" employers, employees, consumers, and the community more broadly. Who "primarily benefits" from an employer's anti-theft measures? Some employers are tenants of a building that itself imposes security screenings—airports and office buildings are two obvious examples. Do the landlord-imposed security measures "primarily benefit" the employer, the employee, the landlord, or someone else? Appellants offer no principled guidance to navigate any of these questions.

B. Appellants' definition of compensable "work" would dramatically expand employer liability for other preliminary and postliminary activity.

It would be difficult enough to apply Appellants' proposed rule to security screenings, but Appellants' argument does not stop there. Under their rule, compensable "work" could include the walk from the employer's front door to the employee's workspace. *See Anderson*, 328 U.S. at 689-90. It could include time spent "opening windows" if the employee claims that opening a window is part of "prepar[ing] for the start of productive work." *Id.*

at 693. Even the walk from the parking lot to the front door might constitute "work."[1]

C. Appellants' rule would create uncertainty, invite litigation, and increase pressure to settle.

Each element of uncertainty is an invitation to litigation. After all, that is exactly what happened after the US Supreme Court adopted that (erroneous) definition of compensable "work" in *Anderson*. *See Integrity Staffing*, 574 U.S. at 31. And it is precisely such litigation that the Portal-to-Portal Act was designed to eliminate.

With increased litigation comes increased pressure to settle. KRS Chapter 337 gives plaintiff's counsel at least three significant leverage points for even meritless cases. First, Chapter 337 authorizes double damages and attorney fees for violations of the chapter. KRS 337.385(1). Second, plaintiffs may bring class actions for Chapter 337 claims. *McCann v. Sullivan Univ. Sys., Inc.*, 528 S.W.3d 331, 336 (Ky. 2017). Third, under Chapter 337 an employer's innocent intentions are not a defense to liability: if an employer believes in good faith that it has complied with Chapter 337, then the court merely "may" decline to award double damages. KRS 337.385(2).

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[1] This would create the curious situation where an employer with on-site parking might have to pay for more of the workday than an employer who does not maintain a parking lot. An employee who drives to work and walks in from the parking lot might be entitled to more pay than the employee who takes a bus and is dropped off at the front door.

If the Court ratifies Appellants' proposed new rule, it would increase pressure on employers to settle large Chapter 337 class actions to avoid incurring expensive and time-consuming discovery obligations, followed by the risk of massive, double-damages liability. The fifteen-year history of this case is just one example of the dangers of expanding Chapter 337 liability.

III. If the Court adopts Appellants' definition of compensable "work," employers could lose a valuable tool to combat employee theft.

Appellants' arguments would dramatically expand employer liability and litigation risk. But the problems do not end there.

Employee theft is a serious concern for employers, including many of amici's members. Some estimates have found that employers lose five percent of revenue from theft, fraud, and other losses. *See* ASS'N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE, 2022 GLOBAL FRAUD STUDY 4 (2022), https://tinyurl.com/2p9dd22s (last visited June 6, 2022). Common methods of theft include removing employer merchandise and other company property from the workplace. PHILIP P. PURPURA, SECURITY LOSS & PREVENTION 168-169 (Mary Jane Peluso et al. eds., 6th ed. 2013).

The retail industry faces particular problems with employee theft. According to the most recent National Retail Security Survey, the average employer must combat dozens (and in some cases, hundreds) of employee thefts each year, representing billions of dollars in losses to employers in the aggregate. NATIONAL RETAIL FEDERATION, 2021 RETAIL SECURITY SURVEY 6

(2021), https://tinyurl.com/bdehz5m7 (last visited June 6, 2022). Unsurprisingly, the staggering costs of employee theft are incorporated into retailers' prices and passed on to consumers.

If the Court decides to rewrite Chapter 337 and require employers to compensate employees for security screenings, many employers will face a difficult choice. Employers could continue to use security screenings and incur additional labor costs for those screenings. Or employers could forgo screenings altogether, or modify them in ways that would be less effective but without adding compensable time to the workday. While the second option would not increase labor costs, it will likely increase losses due to employee theft and decrease the safety of the workplace. But no matter which choice an employer makes, Kentucky's consumers will likely absorb the costs.

Fortunately, the Court can easily avoid all of these problems by simply applying Chapter 337 the way the General Assembly intended: as Kentucky's analogue to the FLSA, where preliminary and postliminary activities like security screenings are not compensable "work."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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