No. 21-16522

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CARIENE CADENA and ANDREW GONZALES, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

CUSTOMER CONNEXX LLC; JANONE INC; and DOES 1 through 50, inclusive,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

Table of Contents - Continued

TABLE OF AUTHORITIES

Cases: **Page**

Cases - Continued:

Statutes:

Code of Federal Regulations:

Other Authorities:

Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the employees in this case arising under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.* For the reasons set forth below, the district court erred in concluding that time spent by call center agents booting up/logging into their computers, through which they make and receive phone calls, is not compensable.

STATEMENT OF INTEREST

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. 29 U.S.C. 204, 211(a), 216(c), 217. The FLSA generally requires employers to compensate employees for all "hours worked," defined to include all hours spent between an employee's first and last "principal activities" of the day. *See, e.g.*, *IBP, Inc. v. Alvarez,* 546 U.S. 21, 28 (2005). The Portal-to-Portal Act ("Portal Act") excludes from compensable time activities that are "preliminary to or postliminary to" an employee's principal activities. 29 U.S.C. 254(a). Activities that are integral and indispensable to a principal activity are, however, themselves compensable principal activities that define the limits of the workday. *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014). The Secretary has a compelling interest in defending the U.S. Department of Labor's ("the Department" or "DOL") interpretation of these "hours

worked" principles of the FLSA and ensuring that employees are properly compensated for all hours worked.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that the time spent by call center agents booting up/logging into their computers, through which they make and receive phone calls, is not compensable under the FLSA, as amended by the Portal Act.

STATUTORY AND REGULATORY PROVISIONS

All relevant statutory and regulatory authorities appear in Addendum A.

STATEMENT OF THE CASE

1. Customer Connexx LLC ("Connexx") operates a call center in Las Vegas that provides customer service and scheduling functions for an appliance recycling business. 7-ER-1686; 3-ER-418. Call center agents employed by Connexx conduct phone calls with customers through a phone program called "Five9," which is an application operated through the computer. 2-ER-54–55. The agents perform a series of steps to provide service to customers via Five9. These include awakening their computers or pressing the power button to turn the computer on, waiting for it to boot up, and logging into the computer by typing in a username and/or password, which automatically opens the computer desktop. 7-ER-1688; 3-ER-422; *see also* 3-ER-583. The desktop contains a link to the timekeeping system;

after the desktop opens, the agents click on the link to open the timekeeping system and then clock in. 7-ER-1688; 3-ER-422–23; *see also* 3-ER-583. Call center agents usually clock in and out using the timekeeping program accessed through their computers. 7-ER-1688; 3-ER-422. Because the agents perform the boot up/log in activities above before they clock into the timekeeping system, the time spent booting up/logging in is not included in the time for which they are paid. *Cadena v. Customer Connexx LLC*, Case No.: 2:18-cv-00233-APG-DJA, 2021 WL 3112446, at *5 (D. Nev. July 21, 2021). The activities that take place before clocking into the timekeeping program take between a few seconds and twenty minutes. *Id.* The time variations are due to many factors, such as whether the computer is already on, in sleep mode or turned off, and age of the computer. *Id.*[1] After clocking in, call center agents continue their work by logging into other computer programs needed to perform their work. *Id.* at *5 & n.5.

2. Plaintiffs filed suit against Connexx (and its parent company), alleging *inter alia* that defendants violated the overtime provisions of the FLSA by failing to compensate for the pre- and post-shift activities of booting up/logging into the

[1] Connexx employees can adjust their time to report off-the-clock work using "punch" forms. *Cadena*, 2021 WL 3112446, at *6. Irrespective of the specific factual circumstances that prompt employees to use punch forms, plaintiffs usually clock in using the computer timekeeping program, which they invariably do after booting up/logging into their computers. 7-ER-1688; 3-ER-422.

computer and logging off/booting down. Connexx eventually moved for summary judgment, arguing in relevant part that plaintiffs' pre- and post-shift activities are noncompensable preliminary or postliminary activities under the Portal Act because they are not integral and indispensable to plaintiffs' principal activities.

3. On July 21, 2021, the district court granted Connexx's motion, concluding that "the tasks for which the plaintiffs seek payment are noncompensable preliminary and postliminary activities." *Id.* at *8. The court noted that, under the Portal Act, an employer does not need to pay for time spent on activities which are preliminary to or postliminary to the principal activity or activities that an employee is employed to perform. *Id.* at *6 (citing 29 U.S.C. 254(a)). The court cited *Integrity Staffing* for the standard for determining when activities are preliminary or postliminary or instead are integral and indispensable. *Id.* at *7 (*Integrity Staffing*, 574 U.S. at 33, 36).

The court concluded that booting up/logging into and logging out/booting down are noncompensable principal activities because Connexx did not hire its customer service agents to turn computers on and off or clock in and out of a timekeeping system but hired them to "answer customer phone calls and perform scheduling tasks." *Id.* It further concluded that "turning on or otherwise engaging with a computer and loading a timekeeping program to clock in also are not integral and indispensable to the employees' duties[,]" commenting that Connexx

could "dispense with the electronic timekeeping method and the employees could still perform their work." *Id*. The court opined that "time spent engaging the computer in some fashion, loading the timekeeping program, and clocking in" are "the electronic equivalent of waiting in line to clock in or out of a physical time clock"—a noncompensable activity. *Id.*

The court also discussed plaintiffs' reliance on Department Fact Sheet #64 concerning call centers under the FLSA. The court opined that "[t]o the extent the fact sheet suggests that time spent starting a computer to clock in is compensable, that would appear to conflict with the DOL's own regulation that states that time spent checking in and out is not compensable." *Id.*

4. On August 2, 2021, plaintiffs moved for reconsideration. On September 14, 2021, the court denied the motion because it "rehashe[d] arguments already made and rejected."

SUMMARY OF THE ARGUMENT

The time spent by call center agents booting up/logging into their computers constitutes compensable time that begins the continuous workday because booting up/logging into computers is integral and indispensable to the call center agents' principal activities, which include providing customer service via phone calls conducted through the computer. The district court erred by overlooking important facts when analyzing whether booting up/logging into a computer is integral and

indispensable to the call center agents' principal work activities and therefore starts the continuous workday.[2] The district court further erred when it conflated booting up/logging into computers with clocking into the timekeeping system and then equated all of the pre-shift activity at issue with the normally noncompensable preliminary and postliminary activities of "checking in and out and waiting in line to do so."

ARGUMENT

I. PRINCIPAL ACTIVITIES INCLUDE ALL ACTIVITIES WHICH ARE "INTEGRAL AND INDISPENSABLE" TO PRINCIPAL ACTIVITIES

A. Background of the Portal-to-Portal Act

1. The FLSA was enacted in 1938 and generally requires employers to compensate employees for all "hours worked." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) (internal quotation marks omitted). In 1946, the Supreme Court held that "the statutory workweek" under the FLSA includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). As a result, the Court concluded that time spent engaging in

[2] The Secretary uses "booting up/logging into" throughout because either task would be encompassed in a call center agent's first principal activity that begins the continuous workday. Computers are sometimes already booted up when a call center agent arrives, *Cadena*, 2021 WL 3112446, at *5, in which case agents may "log into" computers without booting them up or restarting them.

"preliminary activities" after arriving at the workplace, including "putting on aprons and overalls, removing shirts, taping or greasing arms, [and] putting on finger cots," constitutes compensable work time. *Id.* at 692-93.

2. Congress viewed the Supreme Court's *Mt. Clemens* decision as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act the following year to address that "emergency." 29 U.S.C. 251(b); *see* Pub. L. No. 80-49, 61 Stat. 84 (May 14, 1947). Congress established that an employer would not be required to pay an employee for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or for "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a).

The Portal Act thus narrowly excludes certain activities from compensation under the FLSA, but *only* when such activities occur outside the workday, 29 U.S.C. 254(a), which is defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities," 29 C.F.R. 790.6(b). This governing principle, known as the "continuous workday"

rule, thus requires employers to compensate employees for *any* activities (except for bona fide meal breaks) that occur between the first and last principal activities of the workday. *Alvarez*, 546 U.S. at 28.

B. The FLSA's Principal Activity/Integral and Indispensable Requirement

1. Because the Portal Act excludes from compensation only activities that occur before an employee's first principal activity and after the employee's last principal activity, the scope of that exclusion depends on the meaning of "principal activity." In 1947, shortly after the passage of the Portal Act, the Department issued an interpretive bulletin setting forth its views on the proper interpretation of that statute. U.S. Dep't of Labor, *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 12 Fed. Reg. 7655 (Nov. 18, 1947).[3] The regulations state that the "'principal' activities referred to in the statute are activities which the employee is 'employed to perform.'" 29 C.F.R. 790.8(a). An employee may "be engaged in several 'principal' activities during the workday," and "[t]he legislative history further indicates that Congress intended

[3] This interpretive bulletin, set forth at 29 C.F.R. Part 790, was ratified by Congress in 1949. *Steiner v. Mitchell*, 350 U.S. 247, 255 n.8 (1956). The contemporaneous and longstanding interpretations therein are entitled to deference because they reflect the considered views of the agency charged with enforcing the FLSA and the Portal Act, and they have been undisturbed by Congress in its numerous subsequent reexaminations of the FLSA. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

the words 'principal activities' to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed." *Id*. Thus, the regulations emphasize that the term "principal activities" is broad enough to embrace activities that "'are indispensable to the performance of productive work,'" *id.*, and "includes all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b).

The Department's regulations provide several examples. When an employee whose principal activities include operating a lathe has to oil, grease, or clean the machine at the beginning of the workday, such activities are integral and indispensable to the employee's principal activities. 29 C.F.R. 790.8(b)(1). Similarly, when a garment worker has to distribute clothing to work-benches and ready machines for operation, such activities are integral and indispensable to that employee's principal activities. 29 C.F.R. 790.8(b)(2). The regulations also explain that "checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." *Id.*; *see also* 29 C.F.R. 790.7(g).

2. The Supreme Court likewise has concluded that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956) (citation omitted); *see also Alvarez*, 546 U.S. at 37

("[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'"). Such an activity begins and ends the continuous workday, and marks the commencement and conclusion of compensable time. *Alvarez*, 546 U.S. at 37; 29 C.F.R. 790.6(b).

Based in part on the Department's regulations, the Supreme Court's decision in *Steiner* concluded that "activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." 350 U.S. at 255 n.9, 256. In *Steiner*, employees worked at a battery plant where the chemicals used gave off toxic fumes. *Id.* at 249-50. The employer and its workers' compensation insurance carrier required workers to change clothes and shower at the end of the shift "to make their plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation." *Id*. at 251. The Supreme Court stated that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id*. at 256. The Court therefore held that changing clothes and showering on the employer's premises was integral and indispensable to the employees' principal activities and thus the employees should be compensated for such time. *Id.* at 251, 253-56.

The same day it decided *Steiner*, the Court decided *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956), holding that the time employees at a slaughterhouse spent sharpening their knives was "an integral part of and indispensable to the various butchering activities for which they were principally employed." The Court cited testimony that "a dull knife would slow down production . . . , affect the appearance of the meat as well as the quality of the hides, cause waste and make for accidents." *Id*. at 262. Therefore, although the knife sharpening occurred "before or after the direct or productive labor for which the worker is primarily paid," *id*. at 260, the Court held that the time was compensable as integral and indispensable to the employees' principal activities.

3. In 2005, the Court reaffirmed this precedent in the context of donning and doffing protective and sanitary equipment in the meat and poultry processing industries. *Alvarez,* 546 U.S. 21. Although *Alvarez* concerned time that employees spent walking to the production area after donning equipment and the time they spent waiting to don and doff*, id.* at 24, the Court necessarily approved of the Ninth Circuit's conclusion that donning and doffing employer-required gear is integral and indispensable to the employees' principal work activities by concluding that any walking and waiting time that occurs after such donning and before such doffing is compensable, *id.* at 37, 39-40. *See Sandifer v. U.S. Steel*

Corp., 571 U.S. 220, 227 (2014) (explaining that in *Alvarez* "we applied *Steiner* to treat as compensable the donning and doffing of protective gear").

4. In 2014, the Supreme Court reaffirmed that it "has consistently interpreted the term 'principal activity or activities' to embrace all activities which are an integral and indispensable part of the principal activities." *Integrity Staffing*, 574 U.S. at 33 (internal quotation marks omitted). The Court examined whether warehouse workers were entitled to compensation for time that they spent waiting for and undergoing employer-required security screenings at the end of each workday. *Id*. at 29. The Court reasoned that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 33. It explained that the employer requiring the security screenings alone was insufficient to render such activity compensable and that the focus should not be on "whether an employer *required* a particular activity." *Id.* at 36 (emphasis in original). Instead, the Court emphasized that the "integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Id.* (emphasis in original) (citing with approval 29 C.F.R. 790.8(a) and (c)). The Court concluded that the security screenings were not an intrinsic element of the workers' principal activities of retrieving products from warehouse shelves and packaging them for

shipment and further stated that they could have been eliminated entirely without impairing the employees' ability to complete their work. *Id.* at 35. Accordingly, the security screenings were noncompensable postliminary activities because they were not integral or indispensable to the workers' principal activities. *Id.*

5. The compensability of call center employees' boot up/log in time has been specifically addressed by just one court of appeals, which held that the time was compensable. *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033 (10th Cir. 2021), *reh'g denied* (10th Cir. Dec. 9, 2021) (Addendum B). In *Peterson*, call center representatives alleged that Nelnet failed to pay them for time spent booting up their computers and launching software before clocking in. *Id.* at 1035. The Tenth Circuit affirmed the district court's holding that these pre-shift activities were compensable work because they were integral and indispensable to the representatives' principal activities of servicing student loans by communicating and interacting with borrowers via phone and email. *Id.* at 1041-42. Recognizing that the sole test governing compensability of this work is the integral and indispensable test as articulated in *Integrity Staffing* and *Alvarez*, the Tenth Circuit rejected Nelnet's position that booting up and launching software was not compensable because it required "little to no effort" and was therefore not "work."

Id. at 1038-39.[4] The Tenth Circuit agreed with the district court that "setting up the computer and loading the relevant programs to become call-ready is an integral and indispensable part of the principal activities for which [the representatives] are employed[,]" *id.* at 1039 (internal quotation marks omitted), and noted that this conclusion is consistent with Supreme Court and appellate case law assessing whether specific activities are integral and indispensable, *id.* at 1039-40 (citing cases).

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TIME SPENT BY CALL CENTER AGENTS BOOTING UP/LOGGING INTO COMPUTERS IS NOT "INTEGRAL AND INDISPENSABLE" TO THEIR PRINCIPAL ACTIVITIES

Booting up/logging into computers is integral and indispensable to call center agents' principal activities because it is an intrinsic element of agents' work and one with which they cannot dispense. The district court erred in two significant and reversible ways in concluding that the pre-shift tasks performed by Connexx's call center agents are noncompensable preliminary activities: (1) by overlooking key facts in analyzing whether booting up/logging into a computer is integral and

[4] In support of its argument that the pre-shift activities were not compensable because they were not "work," Nelnet relied on a line of earlier Tenth Circuit cases, *see, e.g.*, *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006), that the *Peterson* court declined to apply because "intervening Supreme Court cases—namely [*Integrity Staffing*] and *Alvarez*—treat the integral-and-indispensable inquiry as the sole test governing compensability." 15 F.4th at 1039.

indispensable to the call center agents' principal activities and therefore starts the continuous workday; and (2) by conflating booting up/logging into computers with clocking into the timekeeping system and then equating all of the pre-shift activity at issue with "checking in and out and waiting in line to do so."

A. The District Court Overlooked Key Facts

Overlooking key facts in its analysis critically impacted the district court's application of precedent and ultimate decision that time spent booting up/logging into computers is noncompensable. The court mostly accurately characterized *Integrity Staffing* and *Alvarez* but did not apply this precedent to the facts regarding how booting up/logging into a computer relates to agents' principal activities.[5] The court correctly noted that the integral and indispensable test is tied to the productive work that the employee is employed to perform and that the test does not turn on whether the employer requires or benefits from it. *Cadena*, 2021 WL 3112446, at *7 (citing *Integrity Staffing*, 574 U.S. at 36; *Alvarez*, 546 U.S. at 40-

[5] Facts material to the integral and indispensable analysis—including the manner in which the call center agents perform their work and the duties they perform throughout the day—do not appear to be in dispute. Whether an activity is integral and indispensable to an employee's principal activities is a question of law. *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) ("Whether an activity is excluded from hours worked under the FLSA, as amended by the Portal-to-Portal Act, is a mixed question of law and fact. The nature of the employees' duties is a question of fact, and the application of the FLSA to those duties is a question of law.").

41).[6] However, instead of substantively analyzing how booting up/logging into a computer is tied to answering phone calls and performing scheduling tasks—the productive work the call center agents are employed to perform—the court focused its integral and indispensable analysis solely and cursorily on whether "engaging with a computer and loading a timekeeping program to clock in" were integral and indispensable to the employees' duties, concluded that they were not, and noted that employees could perform their work without using the electronic timekeeper. *Id.* [7]

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[6] The district court cited *Alvarez* to support the proposition that "the test" also does not turn on "whether the activity is *necessary* for the employee to perform his or her principal activity." *Cadena*, 2021 WL 3112446, at *7 (emphasis added). However, this is misleading, as it suggests that an activity being necessary is not relevant. *Alvarez* stated that the fact that an activity is "necessary" does not automatically mean it is integral and indispensable. 546 U.S. at 40-41. But neither *Alvarez* nor *Integrity Staffing* said that whether an activity is "necessary" is irrelevant to the analysis. Indeed, "necessary" is a general enough term that it potentially means both (1) the employer requires the activity, which *Integrity Staffing* made clear is not determinative, and (2) the activity is an intrinsic element of the principal activity and one with which the employee cannot dispense if the employee is to perform the principal activities, which are determinative.

[7] The court first concluded that booting up and clocking into a timekeeping system were not principal activities because Connexx did not hire agents to turn computers on or clock into a timekeeping system. *Cadena*, 2021 WL 3112446, at *7. Connexx certainly did not hire agents for these purposes, but that is not the end of the analysis. *Integrity Staffing* and *Alvarez* require analyzing whether the activity is integral and indispensable even if the activity is not itself what the employer hired the employee to do. *See Peterson*, 15 F.4th at 1038 ("as should be obvious," employees are not employed to boot up and launch software, but the issue is whether employees' pre-shift activities are integral and indispensable to their principal activities and therefore are included within them).

In so doing, the court ignored relevant facts. Although the district court accepted that call center agents "answer customer phone calls and perform scheduling tasks" as part of their principal activities, *id.*, it crucially did not properly consider facts presented in plaintiffs' opposition to Connexx's motion for summary judgment that indicated that agents are incapable of performing those duties "without having an operational computer, loaded with the phone program, scripts, customer information, and email and tracking programs." 3-ER-436; 4-ER-595 (Q: Do call center agents need a computer to do their job? . . . A: Yes, they do. Q: Do call center agents need a phone to do their job? . . . A: They're using a headset. They don't have a telephone. The phone is through the computer.); 4-ER-597 (Q: Do you believe it's important to make sure that those – that the computer is operational? A: Yes, they would have to be operational.).

The court inexplicably continued to overlook these critical facts after plaintiffs filed their motion for reconsideration, which provided additional clarifying facts. 2-ER-37–56. Specifically, additional testimony from the Connexx Call Center Director's depositions confirmed that: (1) "Five9" is the telephone system agents use; (2) the Five9 telephone system is a computer application; (3) the telephone system interfaces with the computer as a "soft phone"; (4) a call center agent cannot be logged into the telephone system without being logged into

an operational computer; and (5) scripts used for phone calls are accessed through the phone system on the computer. 2-ER-41; 2-ER-54–55 (Q: Have you always used Five9 as the telephone system? A: Yes. Q: Does the Five9 telephone system interface with the computers in any way? A: Yes. . . . Q: And why does it do that? . . . A: That's our soft phone. So that's what the agents utilize to receive the caller onto their workstation. So they use their hard drive to receive that caller through the soft phone on the computer.); 2-ER-49 (Q: . . . Can an agent be logged in to Five9 without the computer being operational? A: No.); 2-ER-50 (A: My agents take the call from the utility customer and places the order for the recycling center to pick it up. Q: Okay. Is there a specific script for each of the utility programs? A: Yes. Q: How do call center agents access those scripts? A: It populates on the Five9 [phone] system.).

Considering these facts, booting up/logging into computers, which takes place prior to clocking into the computerized timekeeping system, is integral and indispensable to call center agents' principal activities because it is an intrinsic element of the agents' work duties and one with which they cannot dispense with if they are to perform their principal activities. *See Integrity Staffing*, 574 U.S. at 33, 35. Booting up/logging in is "integral" because it is precisely through the computer, and only the computer, that call center agents are able to service customers via "phone." It is also through use of the computer that call center

agents access scripts to speak to customers and schedule appliance pick-ups with them. *See, e.g.*, 8-ER-1754–55 (describing "primary job was to sit at the computer and take inbound calls" from customers who wanted to recycle and replace their refrigerators "and so we would set that appointment up for them"). Likewise, the pre-shift activity of booting up/logging in is indispensable in that it cannot be dispensed with without critically impairing call center agents' ability to perform their jobs. Were booting up/logging into computers eliminated, call center agents would not be able to service customers via phone because they accept phone calls through a computer, not through physical telephones.

The close connection between computers and the call center agents' work is therefore undeniable, and call center agents make consistent and continual use of the computer and applications accessed through the computer to perform their work. *See* 29 C.F.R. 790.8(c) ("Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance."); *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1281-83 (10th Cir. 2020) (checking keys and equipment in and out was integral and indispensable to detention officers' work because of "close connection" between keys and equipment and work of guarding prisoners, including maintaining custody and discipline of inmates).

Additionally, booting up/logging into the computer to become call-ready (and use the phone through the computer) is akin to pre-shift preparation of tools or equipment that is considered integral and indispensable to the principal activities when the use of such tools or equipment in their readied state is an integral and indispensable part of the performance of the employee's principal activities. *See Peterson,* 15 F.4th at 1039-41, 1049 (call center representatives are preparing tools that are necessary and intrinsic to their principal activities when booting up their computers and launching software and therefore such pre-shift tasks are compensable); 29 C.F.R. 790.8(b)(1) (to operate a lathe, an employee oiling, greasing or cleaning his machine, or installing a new cutting tool at the beginning of his workday, is performing activities that are an integral part of the principal activity); *see also, e.g.*, *King Packing*, 350 U.S. at 261–63 (sharpening knives was integral and indispensable to working in meatpacking plant); *Steiner*, 350 U.S. at 248–51, 256 (pre-shift changing into and post-shift changing out of work clothing and showering was integral and indispensable to battery plant work); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 718 (2d Cir. 2001) (setting up and testing X-ray machine was integral and indispensable because preparatory work needed to conclude before patients arrived); *Wilson v. Peckham, Inc.*, No. 1:20-CV-565, 2021 WL 3168616, at *5 (W.D. Mich. July 26, 2021) (analogizing call center agents' booting up and logging into computer network as "akin to

preparing a tool that the employee must use throughout the workday, like sharpening a knife[,]" and therefore such activities are integral and indispensable). Accordingly, booting up/logging into their computers is integral and indispensable to the call center agents' principal activities, thus marking the commencement of their compensable work hours. *See Alvarez*, 546 U.S. at 37; 29 C.F.R. 790.6(b).

B. The District Court Conflated Booting Up/Logging In with Clocking into the Timekeeping System and then Equated All of that Pre-Shift Activity to Waiting in Line to Clock In

1. The court also erred in repeatedly conflating booting up/logging into computers with clocking into the timekeeping system. For example, the district court framed the issue as only "whether time spent engaging the computer in some fashion, loading the timekeeping program, and clocking in are compensable tasks" and concluded: "Starting and turning off computers and clocking in and out of a timekeeping system . . . . are not integral and indispensable to the employees' duties as call center customer service agents. . . . [Connexx] could dispense with the electronic timekeeping method and employees could still perform their work." *Cadena*, 2021 WL 3112446, at *7. But booting up/logging into a computer and clocking into a timekeeping program accessible through the computer are distinct pre-shift activities that relate to agents' principal activities differently. Indeed, call center agents may not need to be clocked into the timekeeping program to load the phone program through which they perform their job duties, but they necessarily

must boot up/log into the computer to load and use the Five9 phone program. *See, e.g.*, 2-ER-49; 8-ER-1901–02. By conflating booting up/logging into the computer with clocking into the timekeeping program, the district court primarily (and improperly) focused on whether clocking into the timekeeping program is integral and indispensable to call center agents' principal activities.

Instead, the proper inquiry should only have been whether booting up/logging into computers is integral and indispensable to call center agents' principal activities. Because it is, booting up/logging into their computers is the activity that marks the beginning of the their compensable work hours, thereby starting the continuous workday as described above. *See Alvarez*, 546 U.S. at 37. That Connexx chooses to have call center agents clock into the timekeeping system through the computer *after* they perform an activity that is integral and indispensable to their principal activities does not render time spent booting up/logging into computers or any activity that follows it noncompensable.

2. The court's erroneous conflation of booting up/logging in and clocking into the timekeeping program set the stage for the court to erroneously conclude that all of the pre-shift activity at issue is equivalent to clocking in and waiting in line to clock in, which are ordinarily noncompensable preliminary activities. Courts analyzing similar facts involving call center agents have concluded that time spent booting up/logging into computers is not equivalent to clocking in, but

instead is integral and indispensable to the agents' principal activities. *Peterson*, 15 F.4th at 1041 ("[T]urning on a computer, entering passwords, and launching software is not analogous to waiting in line to punch a clock, particularly when—very much unlike a time clock—the computer itself is an integral tool for the work the individual is employed to perform."); *Wilson*, 2021 WL 3168616, at *5 (computers are different from traditional time clocks because the computers are necessary for call center agents to perform their work and "the bootup and login process is not something that [the employer] can eliminate without impairing its agents' ability to answer customer calls"); *see also Jackson v. ThinkDirect Mktg. Grp., Inc.*, Case No. 1:16-cv-03749, 2019 WL 8277236, at *4 (N.D. Ga. Dec. 9, 2019) (rejecting defendant's argument that home-based call sales associates logging into defendant's system was like commuting to work; this activity instead formed an intrinsic element of the work they were employed to perform).

In rejecting the argument that the boot up/log in process for call center agents is equivalent to waiting in line to clock in, the court in *Wilson* observed that "a traditional check in process occurs somewhere other than the place where the employee actually performs her work." 2021 WL 3168616, at *5. The court reasoned:

> If one purpose of the [Portal Act] was to *exclude* time spent *walking* from building entrances and time clocks to the employee's workspace as compensable time, then it makes sense to exclude other activities occurring *before* that walk time, including time waiting to enter the

> building or to check in at another location. But here, [the call center] agents had already arrived at their workspaces when they started their computers. Thus, time spent at their workspaces looks different from time waiting at another location. In other words, . . . the bootup and login time looks different from the "ingress and egress" process.

Id. (emphasis in original). Here, the pre-shift activity of booting up/logging in is intertwined with the performance of the tasks the call center agents are employed to perform, as in *Peterson*, and Connexx's call center agents are already at their workspaces from the moment they attempt to turn on a computer, rendering this time different from the "ingress and egress" process.

3. In concluding that the pre-shift activities at issue are the electronic equivalent of checking in and out and waiting in line to do so, the court relied on a Department regulation and two cases—*Cadena*, 2021 WL 3112446, at *7 (citing 29 C.F.R. 790.7(g), *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046 (9th Cir. 2010), and *Jimenez v. Bd. of Cnty. Comm'rs of Hidalgo Cnty.*, No. 15-2213, 697 F. App'x 597 (10th Cir. 2017))—none of which support the court's conclusion. Section 790.7(g) states that activities such as checking in and out and waiting in line to do so would be considered preliminary or postliminary activities when performed both outside the workday and under conditions normally present. Here, however, clocking into the timekeeping program is *not* performed outside of the workday, because the call center agents clock in *after* they boot up/log into their computers. And, as

discussed above, booting up/logging into computers is integral and indispensable to the work the agents are employed to perform. Booting up/logging into the computer thus starts the call center agents' continuous workday, and everything that follows is compensable until the end of the last principal activity (except bona fide meal breaks). *See Alvarez*, 546 U.S. at 37 ("[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity'" and "during a continuous workday, [any otherwise noncompensable activity] that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [the Portal Act], and as a result is covered by the FLSA."). Nothing in the regulation at section 790.7(g) states that clocking in that occurs after the first principal activity of the day renders the first principal activity of booting up/logging in or the subsequent clocking in noncompensable; such conclusions would be contrary to Supreme Court precedent.[8]

[8] The district court appeared to view the Department's Fact Sheet #64, which concerns call centers, as conflicting with this regulation. *Cadena*, 2021 WL 3112446, at *7. The fact sheet states, in relevant part: "An example of the first principal activity of the day for agents/specialists/representatives working in call centers includes starting the computer to download work instructions, computer applications, and work-related emails." 3-ER-458. Premised on the false equivalence the court made between "engaging the computer in some fashion, loading the timekeeping program, and clocking in" and "waiting in line to clock in or out of a physical time clock," the court stated: "To the extent the fact sheet suggests that time spent starting a computer to clock in is compensable, that would appear to conflict with the DOL's own regulation that states that time spent

The district court's reliance on *Rutti* is also misplaced. *Rutti* concerned technicians who installed and repaired vehicle recovery systems. 596 F.3d at 1049. Rutti had to travel to job sites in a company-owned vehicle, and he alleged that morning time spent receiving assignments, mapping routes to assignments, and prioritizing jobs was compensable. *Id.* Part of this time was spent logging into a hand-held computer device that informed him of his jobs for the day. *Id.* The Ninth Circuit held that most of Rutti's morning activities were related to his commute, were not integral to his principal activities, and therefore were not compensable. *Id.* at 1057-58. The Ninth Circuit did not address whether logging into the hand-held device to receive information about jobs was akin to waiting in line to clock in or out. *Rutti* is inapposite to this case because booting up/logging into computers is not related to call center agents' commute but is intricately intertwined with the productive work they are employed to perform.

Likewise, *Jimenez* does not support the district court's conclusion. *Jimenez* concerned a 911 dispatcher whose employer required that she report to work five minutes before her shift for briefing by the outgoing dispatcher. 697 F. App'x at

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checking in and out is not compensable." *Cadena*, 2021 WL 3112446, at *7. Since the two are not equivalent, as discussed, there is no merit to the notion that the fact sheet and regulation may be in conflict. The court is also mistaken for the fundamental reason that the fact sheet in no way suggests that clocking in is compensable. Indeed, the fact sheet contains no reference whatsoever to clocking in or to timekeeping systems generally.

598. The dispatcher claimed that she should be compensated for this and other pre-shift activities such as putting on her headset, logging into her computer, and cleaning her workstation, which she testified took altogether between five and ten minutes. *Id.* at 599 & n.2; *Bustillos v. Bd. of Cty. Comm'rs of Hidalgo Cty.*, No. CV 13-0971 JB/GBW, 2015 WL 7873813, at *17 (D.N.M. Oct. 20, 2015) (describing the dispatcher's pre-shift activities), *aff'd in part, rev'd in part sub nom. Jimenez*, 697 F. App'x 597 (10th Cir. 2017). The focus of the Tenth Circuit's short decision was on the pre-shift briefings. The court reversed the district court on this issue, holding that the information contained in pre-shift briefings was integral and indispensable to the principal activity for which the dispatcher was hired, and therefore that time was compensable. 697 F. App'x at 598-99. The court remanded because there was sufficient evidence for a factfinder to determine the amount of pre-shift time for which the dispatcher must be compensated. *Id.* at 599 & n.2. In noting this evidence, the Tenth Circuit made a conclusory statement in passing in a footnote, without any analysis, that the pre-shift time for the briefings included "other preliminary, non-compensable tasks such as putting on her headset and logging into her computer." *Id.* at 599 n.2. The Tenth Circuit did not specifically discuss the dispatcher's duties or whether putting on a headset or logging into a computer were integral and indispensable to the dispatcher's principal activities. Nor did it discuss the order in which the dispatcher performed

the pre-shift activities. The basis for the Tenth Circuit's conclusory comment in the footnote is thus unclear.[9] Nothing in *Jimenez* supports the conclusion that the pre-shift activity at issue here is the equivalent of waiting in line to clock in or out of a physical time clock.

[9] The district court, for its part, provided two reasons for concluding that the pre-shift donning of the headset, logging into the computer, and cleaning the workstation were noncompensable: (1) these activities were "like the ingress and egress process"; and (2) even though the dispatcher could not perform her job without her headset and logging into the computer to receive 911 calls, these activities could be done with minimal effort and concentration and therefore were not "work." *Bustillos*, 2015 WL 7873813, at *17-18. The Tenth Circuit did not discuss these aspects of the district court's decision.

CONCLUSION

For the foregoing reasons, this Court should remand the district court's decision. Booting up/logging in is integral and indispensable to call center agents' principal activities. In concluding otherwise, the district court erroneously overlooked key facts, and then erroneously conflated booting up/logging in with clocking into the timekeeping system and equated all the pre-shift activity with checking in and waiting to do so.

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2021, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that service will be accomplished on counsel of record in this case by the appellate CM/ECF system.

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