STATE OF WISCONSIN
SUPREME COURT

NICOLE MCDANIEL, DAVID SMITH, AND MATTHEW DAVIS,

Plaintiffs-Appellants,

v.

Appeal No. 2022AP001759
Cir. Ct. No. 2020cv004571

WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

PETITION FOR REVIEW

Timothy W. Burns
State Bar No.: 1068086
BURNS BAIR LLP
10 East Doty Street, Suite 600
Madison, Wisconsin 53703
tburns@burnsbair.com

Christopher D. Stombaugh
State Bar No.: 1022065
DICELLO LEVITT LLP
Post Office Box 437
Platteville, Wisconsin 53818
Tel.: 440-953-8888
cstombaugh@dicellolevitt.com

Adam J. Levitt*
Daniel R. Schwartz*
DICELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel.: 312-214-7900
alevitt@dicellolevitt.com
dschwartz@dicellolevitt.com

Gary K. Burger*

BURGER LAW, LLC
500 North Broadway, Suite 1860
St. Louis, Missouri 63102
Tel.: 314-542-2222
gary@burgerlaw.com

Charles J. LaDuca*
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
Tel.: 202-789-3960
charles@cuneolaw.com

Michael J. Flannery*
CUNEO GILBERT & LADUCA, LLP
Two Cityplace Drive, Suite 200
St. Louis, Missouri 63141
Tel.: 314-226-1015
mflannery@cuneolaw.com

Counsel for Plaintiffs-Appellants McDaniel, Smith, and Davis, and the Class

* Admitted *Pro Hac Vice*

TABLE OF CONTENTS TO PETITION FOR REVIEW

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR REVIEW

Nicole McDaniel, David Smith, and Matthew Davis, Plaintiffs-Appellants, hereby petition the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10, Wis. Stat. § (Rule) 809.62, and Wis. Stat. § 809(1r)(d), to review the decision of the Court of Appeals, District II, in *McDaniel, et al. v. Wisconsin Dep't of Corrections*, Case No. 2022AP001759, filed on May 15, 2024.

ISSUES PRESENTED FOR REVIEW

1. Did the Wisconsin Court of Appeals err by applying an unprecedented and excessively demanding pleading standard when deciding a motion for class certification, effectively treating it as a motion for summary judgment?

Plaintiffs are a putative class of corrections officers seeking compensation for pre- and post-shift activities, such as passing through required security screenings prior to their shifts and donning and doffing equipment used during their shifts. Whether such pre- and post-shift work is compensable requires a factual inquiry into the nature of the work undertaken by corrections officers and into whether the pre- and post-shift activities are fundamentally integral to that work. If the pre-and post-shift activities are "integral" to the principal work that the corrections officers were hired to do, then the activities are compensable. The Circuit Court ruled that because approximately 99% of the corrections officers experience the same policy of non-compensation for the same required non-compensated activities, Plaintiffs had, "by a preponderance of the evidence," made a "factual showing" that the requirements for class certification had been met.

The Court of Appeals reversed the Circuit Court's ruling, stating that "the activities on which McDaniel bases her motion for class certification are non-compensable." The Court of Appeals based its ruling entirely on its finding that the security screenings that corrections officers are required to undergo prior to and after every work shift were "not integral and indispensable to [the corrections officers'] principal activities" (It ignored the other pre-shift and post-shift activities

described in the Complaint and motion for class certification, such as officer responsibilities to respond to threats even prior to passing through security, and their need to don and doff equipment). This factual *conclusion* was not only incorrect—many other courts have found that corrections officers' pre-shift activities, *including* security screenings, are compensable—but is an issue for trial, *not* class certification. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds* 568 U.S. 455, 459 (2013) (class certification "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."); *United Food & Com. Workers Union, Loc. 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 70 ("[s]imply put, the donning and doffing cases are fact dependent.")

2. Did the Wisconsin Court of Appeals err when it ruled, contrary to many state and federal courts around the country, that the corrections officers cannot be compensated for pre-shift and post-shift activities such as security screenings?

The Circuit Court ruled Plaintiffs had shown "by a preponderance of the evidence . . . that the requirements for certification are met," such that the evidence showed that "some combination of undergoing a security screening and being in the right place at the proper time are essential for corrections officers." By contrast, the Court of Appeals, without substantive discussion of the record, erroneously *concluded* that security screenings are not "integral and indispensable" to work done by the Wisconsin corrections officers. In addition to being a factual conclusion that should not have been drawn at the class certification stage, the

conclusion itself was incorrect and against the heavy weight of authority.

The record, in addition to basic logic, demonstrates that security screenings are vital to a corrections officer's job of maintaining a secure and safe environment and the other pre- and post-shift activities, such as donning required equipment, providing briefings to those relieving the officers, and otherwise remaining vigilant on arrival at the facility, are likewise vital to the work. Unsurprisingly, the Court of Appeals' conclusion is against the heavy weight of authority: federal and state courts across the United States—including multiple appellate courts—have explained that security screenings and correctional officers' other pre- and post-shift work are fundamentally integral to their jobs and are thus compensable.

STATEMENT OF CRITERIA FOR GRANTING REVIEW

The Court of Appeals' decision contravenes settled law, Wis. Stat. § 809.62(1r)(d), and raises, by its nature, legal issues "of the type that [are] likely to recur unless resolved by the supreme court." Wis. Stat. § 809(1r)(d). In short, the Court of Appeals misapprehends the factual inquiry appropriate in a class certification motion and, in so doing, risks widespread confusion on all future class action cases in Wisconsin. Simultaneously, the conclusion that the Court of Appeals (erroneously) drew regarding the nature of "work" will reverberate across all so-called donning and doffing cases in the State.

Plaintiffs and other class members are all corrections officers with strict eight-hour shifts who seek to be paid for pre- and post-shift activities. All Plaintiffs do the same or substantially similar work, and all Plaintiffs engage in the same or substantially the same pre- and post-shift activities.

The legal *question* to be answered regarding whether those pre- and post-shift activities are compensable is well-settled: if those pre- and post-shift activities are, by their nature, "integral" to Wisconsin Department of Corrections officers' shift work, then those activities are compensable. If the pre- and post-shift activities are not "integral," they are not compensable. *See Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 36 (2014).

In other words, the existence of a common *question* subject to common proof is not in dispute. What could, in theory, be disputed is the *answer* to that question: *i.e.*, whether discovery confirms that activities like vigilance upon arrival

at the facility, security screenings, and the donning of required equipment are "integral" to the core duties on shift. As the Wisconsin Supreme Court succinctly ruled, "[s]imply put, the donning and doffing cases are fact dependent." *United Food & Com. Workers Union, Loc. 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 70.

The Circuit Court accordingly certified the class. As the United States Supreme Court explained in *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, class certification "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." 568 U.S. 455, 459 (2013). In other words, "[w]hen, as here, the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—an alleged failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016) (internal citation omitted).

Nevertheless, the Court of Appeals *answered* the common questions. It ruled that the Plaintiffs' alleged pre- and post-shift activities were, by their nature, non-compensable because, in the Court of Appeals' view, those activities were not, by their nature, "integral" to the Plaintiffs' jobs as corrections officers. However, the determination of whether activities are integral (or not) required a probing factual analysis of the nature of the activities undertaken during a shift and the relationship between those shift activities and the pre- and post-shift activities. That probing inquiry is one the Circuit Court correctly refused to undertake prior

to summary judgment, but which the Court of Appeals improperly undertook in its review of the Circuit Court's class certification grant.

The Court of Appeals' conclusion was also wrong on the merits. Security screenings are clearly "integral" to corrections officers' work *securing* prisons, as are the *other* pre- and post-shift activities alleged at class certification, such as the vigilance upon arrival even prior to passing through security, the donning and doffing of essential equipment, and the creation of required post-shift briefings. As a result, most courts across the United States that have considered the same pre- and post-shift activities respecting corrections officers have determined that the activities are compensable (or, at least, have recognized that a trier of fact must make that ultimate determination).

In concluding otherwise, the Court of Appeals decision renders Wisconsin an outlier. If passing through security in order to vigilantly protect the integrity of a prison is not "integral" to a corrections officer's work, then it is difficult to imagine pre- and post-shift work in any context that could suffice under the Court of Appeals' standard. Such an extreme result is contrary to settled law, Wis. Stat. § 809.62(1r)(d).

I. INTRODUCTION

Plaintiffs Nicole McDaniel, David Smith, and Matthew Davis (collectively, "Plaintiffs") are corrections officers[1] seeking to certify a class for two claims: (1) violation of Wis Stat §§109.01-0303, which guarantees employees the right to be paid for compensable work; and (2) a declaratory judgment that adjudicates the class's right to be paid for all such future compensable work. All members of the class do the same or substantially the same work. The central issue in the case is clear: the corrections officers are paid as though they work strict eight-hour shifts, but they, in fact, engage in pre- and post-shift work that exceeds those eight hours and which, they contend, should be compensable.

Pre-shift work includes, among other things, remaining vigilant as soon as they enter the prison facility, passing through a substantial security screening, receiving a visual inspection from supervisors to ensure they are fit for duty and displaying required ID, gathering and doffing a host of tools relating to their work (including, e.g., handcuffs, keys, radios, pepper spray), proceeding through gates into the security envelope of the prison and then onward to their posts, and receiving a briefing from the corrections officers they relieve detailing responsibilities and updates regarding the shift. Post-shift duties include providing pass-down briefings to those relieving them of their guard duties, returning equipment, and exiting back through security.

[1] "Corrections officers" are sometimes colloquially referred to as "prison guards."

In Wisconsin, as in the rest of the United States, whether pre- and post-shift work is compensable requires an answer to the following fact-bound question: if the activity is a "duty that cannot be dispensed with, remitted, set aside, disregarded, or neglected," *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014), then it is sufficiently "integral" to the work as to require compensation and will trigger a "continuous workday," 29 C.F.R. § 790.6(a), making all subsequent activities compensable until the employee has performed the final "integral" task. If it is not "integral" and "indispensable," then the pre- and post-shift activities are not compensable.

The inquiry is a *factual* one: whether an activity is "integral" requires a detailed analysis of the nature of the work involved (even if the indispensable nature of security checks for prison guard work *should* be self-evident). As the Wisconsin Supreme Court recently explained while interpreting *Integrity Staffing*: "Simply put, the donning and doffing cases are fact dependent." *United Food & Com. Workers Union, Loc. 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 70.

But when must that factually-dependent analysis take place? The Circuit Court did not have a motion for summary judgment before it; it had a motion for class certification. When a court is determining whether a class may be certified, its role is *not* to decide, as a final matter, whether the certified class will ultimately be successful on the merits. Instead, it must rule whether there exist common *questions* that, if resolved in the class's favor, will merit class-wide relief.

Here, the existence of such common questions is not in reasonable dispute: if the class members are able to show, *as a factual matter*, that the pre- and post-shift activities are indispensable to their work as correctional officers, they should be entitled to relief. If they cannot show as much, they will not receive relief. The result will be the same *across the entire class*, a fact the Court of Appeals itself acknowledged in its across-the-board reversal.

Plaintiffs presented evidence, including testimony from the Wisconsin Department of Corrections' head of security, indicating that the pre-and post-shift activities—including responsibilities that exist from the moment Plaintiffs enter the facility and even prior to their passing through security—were "absolutely necessary" for the officers to do their jobs, triggering their continuous workday.

Defendant—incredibly, and contradicting its own employee—disagrees. The ultimate resolution of the fact-bound issue of whether pre- and post-shift activities are, indeed, indispensable to correctional officers' work must be adjudicated by the trier of fact, most likely at trial.

What the Court of Appeals did, instead, was erroneously take upon itself, at the class certification stage, the responsibility for making the ultimate determination on the disputed factual issue. Citing out-of-state precedent and without substantial discussion, the Court of Appeals declined to discuss several of the pre-and post-shift activities in which the guards engaged and ruled that, as a matter of fact and law, the correctional officers' security checks were fundamentally unrelated to their principal job guarding and securing the prisons.

While the Court of Appeals' conclusion regarding the non-shift activities was clearly erroneous—it ignored a host of pre- and post-shift activities, and security screenings are self-evidently integral to corrections officers' work—the fact-finding should never have occurred.

As the United States Supreme Court has explained, class certification "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen,* 568 U.S. at 459 (emphasis in original). The Court of Appeals ignored this admonition and *answered* the reasonably disputed factual question in Defendant's favor.

But by resolving a reasonably disputed factual issue at class certification and by ignoring that there exist common questions, the resolution of which would allow for common class-wide relief, the Court of Appeals raised the standard for class certification in Wisconsin above any other jurisdiction in the United States.

Compounding the problem, the ultimate conclusion the Court of Appeals reached was wrong and against the weight of authority. Security checks and other pre- and post-shift activities are clearly integral to corrections officers' work protecting prisons. Indeed, most courts across the United States considering whether corrections officers may be compensated for the pre- and post-shift work activities described in the Complaint have concluded and confirmed that activities such as security screenings are vital to the corrections officers' work keeping prisons *secure*. These decisions are important not only with respect to corrections officers' work but for *any* work for which pre- and post-shift activity may be

demanded. If pre-shift security screenings are fundamentally non-compensable in Wisconsin for corrections officers, then it is hard to imagine much (if any) pre- and post-shift work in Wisconsin that would be compensable in any context.

In short, the Court of Appeals' decision will reverberate across Wisconsin's legal landscape in at least two ways. First, the decision stands for the incorrect proposition that a court should make ultimate factual conclusions at class certification rather than limit itself to determining whether there exist *questions* common to the class. Second, the decision represents a fundamental misinterpretation of the law regarding so-called "donning and doffing" cases and would make it difficult for *any* such cases to exist in Wisconsin—detrimentally affecting large swaths of Wisconsin's labor force, including the thousands of corrections officers whose ability to recover wages owed to them hinges on certification of the prospective Class.

II. STATEMENT OF FACTS AND THE CASE

A. Plaintiffs file their class complaint, and the Circuit Court certifies the class.

Plaintiffs are Wisconsin Department of Corrections ("WDC") officers seeking compensation for time spent working before and after their official shifts.

The Circuit Court summarized the relevant facts—none of which are in dispute here—as follows:[2]

> Despite the fact that shifts are hard and fast 8 hours and WDC employees are only paid for those 8 hours, some workers spend

[2] "S-App. at ___" refers to the Plaintiffs-Appellants' Appendix before this Court.

around 3 minutes a day doing pre- and post-shift activities, while others can spend up to 30 minutes a day. . . It is alleged that "99%" or "the vast majority" of class members engage in these pre- and post-shift activities. McDaniel has presented testimony that confirms that it is state policy that WDC employees are not compensated for pre- and post-shift activities. The pre-shift activities include:

- Correctional Officers must pass bags containing their belongings through x-ray machines which scan for possible contraband that may not be brought into prisons for security reasons.

- When Correctional Officers report for duty, their supervisors check them off on a daily duty roster and tell them their post assignments if they do not already know those.

- Supervisors visually inspect Correctional Officers to ensure that they are fit for duty, not under the influence of intoxicants, in uniform, and displaying their ID cards.

- Correctional Officers then proceed through gates, sometimes called "sally ports," into the security envelope at the prisons.

- Correctional Officers obtain equipment, such as handcuffs, keys, radios, and OC pepper spray, essential to perform their principal duty to protect prison personnel and visitors, maintain security, guard and escort prisoners, respond to emergencies, communicate with prison personnel, and otherwise function as Correctional Officers.

Post-shift activities include:

- Correctional officers may not leave their assigned posts until relieved by the Correctional Officers scheduled to work the next shift.

- Correctional Officers provide pass-down briefings to those individuals.

- Correctional Officers then walk to exit the security envelop through the gates or sally ports that were used to enter it. At

> that point, the Correctional Officers generally return the keys and other equipment that had been issued to them and pick up their personal belongings. Correctional Officers are responsible for that equipment until it has been returned and may be disciplined if they fail to protect it.
>
> WDC employees are *required* to complete all pre-shift activities prior to starting their shift but are only compensated for the 8-hour shift. Similarly, employees are not compensated for post-shift times. WDC employees are also expected to be ready to respond to emergencies at any point in their shifts, as well as during these pre- and post-shift activities. Essentially, WDC employees have at least some degree of responsibility from the moment they enter a facility.[3]

Plaintiffs filed their Complaint on August 3, 2020, and, following two amendments, moved for class certification on July 30, 2021. The Circuit Court granted their class certification motion on September 29, 2022.

Recognizing that a "class certification motion is not a 'dress rehearsal' for the merits of the case,"[4] the Circuit Court ruled that "[w]hat matters is that the plaintiff, by a preponderance of the evidence, shows that the requirements for certification are met."[5] The Circuit Court reasoned that "[i]t is at least plausible that some combination of undergoing a security screening and being in the right place at the proper time are essential for corrections officers." *Id*. It also noted that Plaintiffs supported their argument that "employees can indeed be compensated for all time which they are on duty and on the premises" (*i.e.*, even before technically passing through security, corrections officers begin their workday

[3] S-App. at 000013-14 (Cir. Ct. Class Certification Decision).

[4] S-App. at 000016.

[5] S-App. at 000020.

because they have responsibilities such as the need for vigilance on the premises of a prison).[6]

Of course, ample record evidence supported the Circuit Court's conclusion, including sworn testimony by Brian Foster, the WDC's Security Chief, that all pre- and post-shift activities required of officers are "absolutely necessary" for the officers to do their jobs,[7]. Officers must also remain "vigilan[t]" on-premises, even outside of the time of their specific shift and/or prior to passing through security.[8]

Having determined that Plaintiffs had supported the "argument that WDC employees can be compensated for the activities detailed in the complaint,"[9] the Circuit Court likewise ruled that Plaintiffs presented a methodology that could be used to calculate damages across the entire class,[10] the class was manageable,[11] and

[6] S-App. at 000022.

[7] S-App. at 000039 (Foster Dep. 126:16-17 ("is it fair to say from a security point of view that you don't require any activities of officers before or after the shift that isn't absolutely necessary." A. Correct Q. So then is it fair that the pre and post shift activity that we have listed are the activities that are necessary for them to take their post? A. Yes.")); *see also* S-App. at 000045 (Beier Dep. 51:23-52:3 (admitting that the "keys, radio and security screenings and OC spray" are needed for corrections officers "to perform their duties.")).

[8] S-App. at 000040 (Foster Dep. 133:9-17 (Q. "[G]uarding and supervising or being vigilant, isn't that the same guard attitude or officer attitude that you have to have as soon as you walk in the door?" A. "I think the vigilance—we've gone over this I think several times. The vigilance is certainly necessary." Q. "All the time for when you go through the door?" A. "Yes.")).

[9] S-App. at 000020.

[10] S-App. at 000020-23.

[11] S-App. at 000023-25.

Plaintiffs showed the proposed class meets the statutory requirement of predominance.[12]

The Circuit Court accordingly certified the following class:

> All current and former non-exempt, hourly paid [DOC] employees who worked as security personnel in a correctional institution (including but not limited to Correctional officers and Correctional Sergeants) in the State of Wisconsin at any time during the period starting two years before the action commenced through the date of judgment ("the Class Period").

The WDC appealed.

B. The Court of Appeals reverses the Circuit Court.

On May 15, 2024, the Court of Appeals reversed the Circuit Court on a single issue: it ruled there exists no "compensable injury. . . at issue" because "the law is clear that the activities on which McDaniel bases her motion for class certification are not compensable."[13] The Court of Appeals determined—apparently as part of its factual analysis of the record—that the pre- and post-shift activities are non-compensable.

Compounding its error, the Court of Appeals concentrated on the pre-shift security screenings. It did not, for example, discuss the record evidence regarding the time to don and doff required equipment, the need for visual inspection by supervisors, the required pass-down briefings before and after shift, or the need

[12] S-App. at 000025-27.

[13] S-App. at 000009 (*McDaniel, et al. v. Wisconsin Dep't of Corrections*, 2020CV4571 (May 15, 2024) (*per curiam*) (GUNDRUM, P.J., GROGAN, LAZAR, JJ.) at ¶¶ 15—16) (referred to as "COA Decision" below).

for officers to remain "vigilant" as soon as they enter the prison facility, *i.e.*, even before passing through security. It cited four cases to support its conclusion that the security screenings were *necessarily* non-compensable: *Integrity Staffing Solutions*, 574 U.S. at 33, a United States Supreme Court case in which *warehouse workers* were not compensated for a *post-shift* security screening, and three cases from the Court of Federal Claims—all penned by the same judge—where certain prison employees were not compensated for time spent passing through a security screening.

The Court of Appeals did not cite, discuss, or otherwise refer to decisions from the many other courts across the United States (state and federal, including but not limited to the Court of Federal Claims) that have found the unique circumstances of prisons made security screenings (and other alleged activities) an integral part of prison employees' work. These *un*cited cases include, e.g., *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1278 (10th Cir. 2020) ("MTC conducts the security screening to prevent weapons and other contraband from entering the prison. And keeping weapons and other contraband out of prison is necessarily tied to the officers' work of providing prison security and searching for contraband. Indeed, the security screening and the officers' work share the same purpose.")

The primary driver of the Court of Appeals' decision was its misinterpretation of *Integrity Staffing*, a case about *post*-shift screening of workers in an Amazon warehouse, and the case in which the Supreme Court explained that pre-and post-shift work is compensable if that pre- and post-shift

work is "integral and indispensable to the principal activities that an employee is employed to perform." 574 U.S. at 33.

III. ARGUMENT

The Court of Appeals' application of *Integrity Staffing* was erroneous in at least two significant ways.

First, in applying *Integrity Staffing* in the manner it did, the Court of Appeals necessarily resolved a contested question of fact—something it may not do on a motion for class certification.

Second, the Court of Appeals' ultimate resolution of that factual question ignored the record before it and directly contravened the weight of legal authority across the United States on this issue. Many courts have considered whether corrections officers' pre- and post-shift activities like security screenings are compensable, and the vast majority have said that they are (or, at the very least, that the answer is up to an ultimate trier of fact).

A. The Court of Appeals erroneously resolved a disputed factual issue.

It is axiomatic that, at class certification, a court is tasked with determining whether there exists a common *question* applicable to the entire class, not the ultimate answer to that common question. *See* Wis. Stat. § 803.08 (2)(c). Disputed factual questions, such as an alleged "failure of proof as to an element of the plaintiffs' cause of action," should not be ultimately resolved at the class certification stage. *Amgen*, 568 U.S. at 470.

Instead, class certification "requires a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id*. at 459. In other words, "[w]hen, as here, the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity. . . courts should engage that question as a matter of summary judgment, not class certification." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 457 (2016) (internal citation omitted).

Under *Integrity Staffing*, whether pre- and post-shift activities are compensable turns on whether those activities are "integral and indispensable" to the work for which the employee was hired. 574 U.S. at 33. Further, when an employee first engages in that integral and indispensable work, the employee's "continuous workday" is triggered, meaning that subsequent activities—even if those activities would not individually be considered "integral"—are likewise compensable. 29 C.F.R. § 790.6(a); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

Here, it is undisputed that the putative class members (all corrections officers) engage in the same shift work and are, in turn, required to engage in the same pre- and post-shift work. The essential common question applicable to the *entire* class is accordingly straightforward: is the officers' pre-and post-shift work sufficiently "integral and indispensable" to the shift work to be compensable under *Integrity Staffing*?

The answer is fundamentally fact-bound. As the Wisconsin Supreme Court has explained, *Integrity Staffing* stands for the proposition that "whether an

activity is integral and indispensable to an employee's principal activities is answered by reference to the nature of the employees' job duties. Simply put, the donning and doffing cases are fact dependent." *Hormel Foods Corp.*, 2016 WI 13, ¶ 71.

Unsurprisingly then, most courts to consider the pre- and post-shift activities of corrections officers have recognized that "[w]hether such pre- and post-shift activities are *in fact* integral and indispensable to Plaintiffs' principal activities as correctional officers, such that they are compensable under the FSLA, is a matter for discovery." *Alvarez v. United States*, No. 20-1533C, 2021 WL 6163405, at *7 (Fed. Cl. Dec. 30, 2021); *see also*, *Astor v. United States*, 79 Fed. Cl. 303, 312 (2007) (The "employee's primary duty characterization remains a case-by-case determination."); *Hodge v. N. Carolina Dep't of Pub. Safety*, No. 5:19-CV-478-D, 2024 WL 499523, at *5 (E.D.N.C. Feb. 8, 2024) ("whether plaintiffs are engaged in a principal activity as soon as they enter a prison facility is a 'fact-intensive' inquiry"); *Adegbite v. United States*, 156 Fed. Cl. 495, 507 (2021) ("If discovery shows that Plaintiffs could perform their principal duties effectively without the security screenings, the Government may well prevail on summary judgment or at trial on that basis. But it cannot prevail now."); 29 C.F.R. § 790.7(h) (2020) (providing that the circumstances may determine if a preliminary or postliminary activity is compensable).

In their class certification motion, Plaintiffs presented numerous facts indicating their pre- and post-shift work is "integral and indispensable" to the

prison guards' shift work, including a sworn admission by WDC Security Chief Brian Foster that all pre- and post-shift activities required of officers are "absolutely necessary" for the officers to do their jobs.[14] Mr. Foster's testimony even showed that Plaintiffs' indispensable activities begin *prior* to passing through security, triggering their continuous workday since the officers must remain "vigilan[t]" on-premises and prepared to respond to any emergencies upon arrival at the facility.[15] Indeed, courts have recognized this need to remain "vigilant" supports a finding that pre-shift activity for prison guards is compensable. *See*, *e.g.*, *Adegbite* 156 Fed. Cl. at 508; *Hodge*, 2024 WL 499523, at *5 (certifying class and ruling that "whether plaintiffs are engaged in a principal activity as soon as they enter a prison facility" and thus begin their continuous workday "is a fact intensive inquiry").

Despite the host of pre- and post-shift activities uncovered in discovery that Plaintiffs described as otherwise integral and indispensable to the guards' work—including: (1) the need for vigilance upon arrival; (2) security checks; (3) daily roster reports; (4) inspection by supervisors; (5) procession through sally ports; (6) the donning of equipment including handcuffs, keys, radios, and pepper spray; (7) provision post-shift of pass-down briefings; (8) post-shift walk-out through the

[14] S-App. at 000039 (Foster Dep. 126:16-17); *see also* S-App. at 000045 (Beier Dep. 51:23-52:3).

[15] S-App. at 000040 (Foster Dep. 133:9-17).

facility; and (9) return of equipment to the facility before departure[16]—the Court of Appeals ruled (without substantive analysis) that *none* of the pre- and post-shift work was compensable.[17] To get there, the Court of Appeals had to (1) ignore the existence of any "integral" activity that could trigger the continuous workday (including those, like the vigilance requirement, that precede a security screening) and (2) resolve as a matter of fact that security screenings (and all other activities) are *not* integral to the officers' work.

In other words, the Court of Appeals simultaneously ignored the record before it and reached a *factual* conclusion that "the activities on which McDaniel bases her motion for class certification are not compensable" because they are akin to "the mechanical steps of entering and exiting the workplace."[18]

In addition to being totally unsupported in the record, the Court of Appeals clearly erred when it engaged in roving class certification fact-finding. *See*, *e.g.*, *Hodge* 2024 WL 499523, at *5 (certifying class of corrections officers claiming that workday begins as soon as they enter a prison facility, and ruling that while defendant "challenges how the continuous workday doctrine applies to plaintiffs. .

[16] S-App. at 000033-38, 41 (Foster Dep. 41, 43-45, 51-53, 55, 58, 74-75, 77, 166); S-App. at 000043—46 (Beier Dep. 34, 42-43, 52, 55-57); S-App. at 000048—52 (McDaniel Dep. 31-35); S-App. at 000054—55, 61-63 (Davis Dep. 20-21, 66, 94, 101); S-App. at 000064—69 (Redgranite Correctional Institution Post Orders); S-App. at 000069—80 (Stanley Correctional Institution Post Orders).

[17] S-App. at 000008-9 (COA Decision at ¶ 16).

[18] S-App. at 000009 (COA Decision at ¶ 16).

.its arguments fail to defeat commonality" because that argument, centered on a dispute regarding what is "integral" work at the institution, "concerns the merits of plaintiffs' case, not commonality under Rule 23."); *Amgen*, 568 U.S. at 466 ("the probable outcome on the merits is not properly part of the certification decision"); *Stehberger v. Gannett Publ'g Servs., LLC*, 2023 WI App 16, ¶ 13 ("a class certification motion is not a 'license to engage in free-ranging merits inquiries'. . .") (*quoting Amgen*, 568 U.S. at 466).

In short, the Court of Appeals committed reversible error when it fundamentally misunderstood the court's task at class certification. Rather than consider whether "*questions* common to the class predominate," *Amgen*, 568 U.S. at 459, it improperly "engage[d] in free-ranging merits inquiries at the certification stage," *id.* at 466.

B. The Court of Appeals' conclusion contravenes the weight of authority across the United States regarding correction officers' work.

The conclusion the Court of Appeals drew from its inappropriate and incomplete fact-finding—that security checks in prisons are, by their very nature, non-compensable—is also "contrary to settled law," Wis. Stat. § 809.62(1r)(d). As discussed above, Plaintiffs elicited substantial record evidence, including sworn testimony from the Security Chief of the WDC, supporting their argument that the pre- and post-shift activities are "absolutely necessary." Logic also dictates that security screenings—which exist to keep a prison secure and free of contraband—

are integral to a corrections officer's job to keep a prison secure and free of contraband.

Courts across the United States have considered this very question, and the vast majority have explained that the unique environment of a prison makes the security checks and other non-shift activities that Plaintiffs describe (such as donning and doffing required equipment) "indispensable" and, therefore, compensable. *See*, *e.g.*, *Aguilar*, 948 F.3d at 1279 ("Because the time the officers devote to undergoing the security screening is integral and indispensable to their principal activities, that activity begins their workday."); *Hodge*, 2024 WL 499523, at *5 (certifying a class of correctional officers arguing that security screenings are "integral" to corrections officers' work); *Roberts v. State*, 250 Ariz. 590, 598 (Ct. App. 2021), *vacated on other grounds*, 253 Ariz. 259 (2022) ("The security screening process is integral and indispensable to the Officers' principal, compensable activities of maintaining safe and secure prisons; therefore, the screenings constitute the start of the Officers' workday."); *Alexander v. United States*, 156 Fed. Cl. 512, 523 (2021) ("[t]he principal duties of prison guards at a penal institution are directed exactly towards maintaining safety and security of the facility, staff, and inmates in the [corrections institution], without which all parts of the [corrections institution] could not function."); *Alvarez*, 2021 WL 6163405, at *4 (the same); *Baytos v. United States*, No. 21-1085 C, 2022 WL 598742, at *7 (Fed. Cl. Feb. 28, 2022) (without security screenings corrections officers "plausibly could not perform the job they were hired to do."). *Cf.*

Echeverria v. State of Nevada, 2022 WL 1652450, at *13 (D. Nev. May 23, 2022) (on motion for summary judgment finding that time spent by corrections officer collecting gear is compensable); *Hootselle v. Missouri Dep't of Corr.*, 624 S.W.3d 123, 141 (Mo. 2021) ("the undisputed material facts demonstrate [corrections officers'] time spent picking up and returning equipment used in supervising, guarding, escorting, and disciplining offenders on shift is a principal activity.").

The Court of Appeals cited *none* of this law and engaged in no substantive analysis. Instead, it cited four cases in support of the proposition that none of the pre-and post-shift activities described are compensable. None of those cases, however, leads to the conclusion that a court may dismiss, despite factual evidence to the contrary, the notion that security screenings (not to mention other non-shift activities) are "integral and indispensable" to prison guards' work.

First, the Court of Appeals cited *Integrity Staffing* for the proposition that security screenings are, *by their nature*, not "integral and indispensable" to any principal activity. But that is not what *Integrity Staffing* holds. There, the Supreme Court considered *post-shift* security screenings of Amazon warehouse workers—*i.e.*, screenings to make sure workers were not stealing merchandise. As the Tenth Circuit explained when it ruled that correctional officers' tasks, including but not limited to security screenings, must be compensated:

> But as the officers point out, [*Integrity Staffing*] did not hold that a security screening can never be compensable. Instead, the Court explained that whether an activity is compensable depends on "the productive work that the employee is employed to perform." *Id.* at 36, 135 S.Ct. 513. And that "productive work" marks the critical

> distinction between [*Integrity Staffing*] and this case. *Id*. There, the theft-prevention, postshift security screening was not "tied to" the work of retrieving items from warehouse shelves. *Id*. Indeed, there was no connection at all between the work and the screening.
>
> We cannot say the same here. MTC conducts the security screening to prevent weapons and other contraband from entering the prison. And keeping weapons and other contraband out of the prison is necessarily "tied to" the officers' work of providing prison security and searching for contraband. *Id*. Indeed, the security screening and the officers' work share the same purpose.

Aguilar, 948 F.3d at 1277–78.[19]

In other words, *"Integrity Staffing* once again clarified that whether an activity is integral and indispensable to an employee's principal activities is answered by reference to the nature of the employee's job duties," *Hormel Foods Corp*., 2016 WI 13, ¶ 70, and this "fact dependent" inquiry logically makes corrections officers' pre-shift security screenings compensable, since it would be impossible to imagine work as a corrections officer without them, *id*.

Having erred by apparently concluding that *Integrity Staffing* stands for the proposition that security screenings are fundamentally non-compensable, the Court of Appeals compounded that error by justifying that conclusion with citation (but no discussion) of three cases out of the Court of Federal Claims, ***all authored***

[19] *See also*, *e.g*., *Roberts*, 250 Ariz. at 598–99 ("[T]hat [Integrity Staffing] involved security screenings is not dispositive. The appropriate analysis focuses on the work the employee is hired to perform, which in [Integrity Staffing] was primarily retrieving retail products and packaging them for shipment. . . Applying the same analysis, we must consider the Officers' principal activities. . . the pre-shift security screenings here are inherently related to the Officers' work of providing a secure prison and preventing the introduction of contraband.")

by the same judge: *Medrano v. United States*, 159 Fed. Cl. 537, 545 (2022) (SCHWARTZ, J.); *Alkire v. United States*, 158 Fed. Cl. 380, 391 (2022) (SCHWARTZ, J.), and *Aitken v. United States*, 162 Fed. Cl. 356, 365 (2022) (SCHWARTZ, J.).

But these three cases were poorly reasoned, are more limited in scope than the Court of Appeals' decision, and are against the heavy weight of authority even within the Court of Federal Claims itself.

Poor reasoning. First, *Medrano*, *Alkire*, and *Aitken* all stand for the same clearly incorrect proposition that security screenings for prison employees are unnecessary for corrections officers' jobs. Judge Schwartz explains his logic with the following metaphor, a substantially similar version of which he repeats in each case:

> Suppose two prison employees came to work at the same duty post on the same day, neither one carrying contraband. Even if one was screened and the other was not, nothing in the Amended Complaint suggests they could not perform their own duties equally well. Or suppose two hypothetical prisons, one of which screened all its employees and one of which did not. The safety and effectiveness of the employees inside the prison would depend on whether they introduced contraband, not on whether they were screened. Precisely the same was true in *Integrity Staffing*: Assuming warehouse employees refrained from stealing, whether they were screened or not at the end of their shifts makes no difference in whether they could do their jobs. The only inference is that like in *Integrity Staffing*, the prisons could have eliminated the screenings altogether without impairing the employees' ability to complete their work.

Medrano, 159 Fed. Cl. at 546 (citing 574 U.S. at 35).

Judge Schwartz's reasoning is deeply flawed. For example, Judge Schwartz imagines two prison employees—one screened for contraband, the other not—and

concludes that nothing suggests each could not do their duties "equally well." But that conclusion flies in the face of common sense: if a corrections officer is not assured that every other corrections officer is screened for, e.g., weapons, their energies would necessarily be focused not only on observing inmates but also on keeping an eye on the non-screened employee.

The prison would be less safe, and taking away the screening would have a natural consequence of impairing the corrections officers' ability to do their work. For that reason, *in this case*, the WDC's Chief of Security was forced to admit in a sworn deposition that the pre- and post-shift activities required of officers, including security screenings, are "absolutely necessary" for the officers to do their jobs.[20]

Indeed, the Wisconsin Supreme Court has explained that pre- and post-shift duties are compensable if those duties are "tied directly to the work the employees were hired to perform," *Hormel Foods Corp.*, 2016 WI 13, ¶ 62, ***even if it were theoretically possible to do the employees' tasks without them***, a standard easily met by Plaintiffs here. In *Hormel*, this court considered the donning and doffing of required clothes in a Hormel Foods canning plant. Hormel had to guarantee food safety, both for consumer health and due to federal standards. Importantly, federal standards did *not* require that any particular kind

[20] S-App. at 000039 (Foster Dep. 126:16-17); *see also* S-App. at 000045 (Beier Dep. 51:23-52:3).

of gear be worn, only that the employees wash their hands and wear clean garments.

To maintain safety standards, Hormel required all employees to don and doff clothing and protective gear provided by Hormel, including gear like helmets to protect the workers themselves, and gear such as sanitized plastic material to protect the food from contamination. The Hormel Plaintiffs themselves admitted that it was hypothetically possible for the Hormel employees "to do their jobs in street clothes." *Id*.

Despite that admission, however, this Court recognized that the plaintiffs must be paid for the time donning and doffing their gear. The reason was simple: "Putting on and taking off the required clothing and equipment at the beginning and end of the day is tied directly to the work the employees were hired to perform—food production—and cannot be eliminated altogether without degrading the sanitation of the food or the safety of the employees." *Hormel Foods Corp*., 2016 WI 13, ¶ 62.

Just as the Hormel factory workers' donning and doffing of gear was "tied directly to the work the employees were hired to perform," *id*., so too is the corrections officers' passing through security and donning and doffing of equipment in the Wisconsin correctional institutions inextricably "tied directly to the work the employees were hired to perform," and could not be "eliminated altogether without degrading the. . . safety of the employees." *Id*.

More limited. Second, the Judge Schwartz cases do not even go as far as the Court of Appeals does here. While Judge Schwartz's reasoning with respect to security screenings was flawed, he did recognize that *other* pre- and post-shift activities may indeed be compensable. In *Aitken*, Judge Schwartz refused at summary judgment to dismiss the corrections officers' claim that donning a utility belt is sufficiently integral to their work to warrant compensation. Instead, he ruled that the integral nature of the required equipment was a question of fact for trial. *See Aitken*, 162 Fed. Cl. at 368. The Court of Appeals simply ignored the corrections officers' pre- and post-shift activities other than security screenings.

Against the weight of authority. Many U.S. courts have specifically considered whether corrections officers' security screenings and other pre- and post-shift activities described by Plaintiffs are compensable, and the vast majority have concluded that they are,[21] ***even in Judge Schwartz's Court of Federal Claims***. *See Alvarez*, 2021 WL 6163405 at *7 (recognizing security screenings can be "integral to Plaintiffs' primary duty [as prison guards]") (DAVIS, J.); *Adair v. United States*, No. 20-1148C, 2021 WL 6163407 (Fed. Cl. Dec. 30, 2021) (the same, and recognizing that conclusive determination of integral nature of pre-shift activities will be made following discovery) (DAVIS, J.); *Alexander,* 156 Fed. Cl. at

[21] These include cases from at least the following courts (in addition to the Court of Federal Claims cases described *infra*): the Tenth Circuit (*Aguilar,* 948 F.3d at 1279); the Arizona Court of Appeals (*Roberts*, 250 Ariz. at 598); the Eastern District of North Carolina (*Hodge*, 2024 WL 499523, at *5); the District of Nevada (*Echeverria*, 2022 WL 1652450, at *13 (on motion for summary judgment finding that time spent by corrections officer collecting gear is compensable)), and the Missouri Supreme Court (*Hootselle*, 624 S.W.3d at 141).

512 (HORN, J.) (recognizing fact-specific nature of inquiry and determining that "passing through various security steps at the [correctional institution] could be central to plaintiffs' assigned duties, as well as after they have passed through security, as plaintiffs, for example, are expected to perform required activities as prison guards, by responding to security incidents as they arise and watching for contraband."); *Baytos*, 2022 WL 598742, at *7 (without security screenings corrections officers "plausibly could not perform the job they were hired to do.") (MEYERS, J.), and *Adegbite*, 156 Fed. Cl. at 507 (MEYERS, J.) ("it is unclear how that Court concluded that Plaintiff could still perform his job effectively if the pre-shift screenings were eliminated").

Indeed, before this case, *no corrections officer case* that reached the class certification stage was dismissed because the pre- and post-shift activities, like those Plaintiffs allege, are non-compensable. Two have been certified in the last three years. *Hodge*, 2024 WL 499523 at *11, and *Hootselle*, 624 S.W.3d at 141.

In short, the Court of Appeals built its radical, first-of-its-kind decision on a fragile edifice: a misinterpretation of *Integrity Staffing*, followed by an oblique citation without discussion to three cases written by an outlier jurist, at least three of whose own colleagues on the Court of Federal Claims have reached the opposite result (across at least five different cases). It did all of this while simply ignoring and declining to discuss many of the pre- and post-shift activities inherent in corrections officers' work, such as the time-consuming acts of putting on required equipment and providing briefings to other officers. It also ignored Plaintiffs'

factually-supported allegation that from the moment Plaintiffs enter the prison, they are required to be vigilant and to respond to any incidents triggering their workday even before passing through security.

The Court of Appeals' decision is important not only with respect to cases involving corrections officers but with respect to donning and doffing cases writ large. If corrections officers' security screenings are not "integral" to the corrections officers' core work of securing a prison, then it is difficult to imagine what "donning and doffing" cases *would* survive.

Certainly, the Court of Appeals' decision is directly at odds with this Court's instruction in *Hormel* that it is not enough that it may be hypothetically possible to do a job without the pre-shift activity. Instead, *Hormel* instructs, what matters is whether the required pre-shift activity is so intrinsically tied to the core job as to likely "degrade" the core job without it. *Hormel*, 2016 WI 13, ¶ 62. A corrections officer's job of keeping the prison safe and secure unquestionably would be degraded if corrections officers weren't subjected to security screenings, activities that all agree exist to keep the prison safe and secure.

IV. CONCLUSION AND REQUEST FOR RELIEF

In sum, the Court of Appeals committed reversible error warranting Supreme Court review by (1) resolving a contested factual issue at the class certification stage; and (2) by, in drawing that factual conclusion, creating such a

legally unsupportable standard for so-called "donning and doffing" cases as to render those cases virtually impossible to bring in the State of Wisconsin.

Plaintiffs-Appellants accordingly respectfully request that this Court grant this Petition and REVERSE the Court of Appeals, conclude that Plaintiffs' claims are viable on a classwide basis, and REMAND the case for continued proceedings in the Circuit Court.

Dated: June 14, 2024

Electronically signed by:

/s/ Timothy W. Burns
Timothy W. Burns
State Bar No.: 1068086
BURNS BAIR LLP
10 East Doty Street, Suite 600
Madison, Wisconsin 53703
tburns@burnsbair.com

Christopher D. Stombaugh
State Bar No.: 1022065
DICELLO LEVITT LLP
Post Office Box 437
Platteville, Wisconsin 53818
Tel.: 440-953-8888
cstombaugh@dicellolevitt.com

Adam J. Levitt*
Daniel R. Schwartz*
DICELLO LEVITT LLP
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Tel.: 312-214-7900
alevitt@dicellolevitt.com
dschwartz@dicellolevitt.com

Gary K. Burger*
BURGER LAW, LLC
500 North Broadway, Suite 1860
St. Louis, Missouri 63102

Tel.: 314-542-2222
gary@burgerlaw.com

Charles J. LaDuca*
CUNEO GILBERT & LADUCA, LLP
4725 Wisconsin Avenue NW, Suite 200
Washington, DC 20016
Tel.: 202-789-3960
charles@cuneolaw.com

Michael J. Flannery*
CUNEO GILBERT & LADUCA, LLP
Two Cityplace Drive, Suite 200
St. Louis, Missouri 63141
Tel.: 314-226-1015
mflannery@cuneolaw.com

Counsel for Plaintiffs-Appellants McDaniel, Smith, and Davis, and the Class

* Admitted *Pro Hac Vice*

CERTIFICATION BY ATTORNEY

I hereby certify that this Petition for Review conforms with the rules contained in Wis. Stat. § 809.62(4) and Wis. Stat. §§ 809.19(8)(b), (bm), and (bg) for a petition for review. The length of this brief is 7929 words in a proportional serif font.

I further certify that filed with this brief is an appendix that complies with § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court and administrative agencies; (4) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (5) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I certify that if this appeal is taken from a circuit court order, the appendix contains that order.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Date: June 14, 2024 Electronically signed by:

/s/ Timothy W. Burns
Timothy W. Burns

E-FILING CERTIFICATE

I hereby certify that: I have submitted an electronic copy of this petition for review and appendix, which comply with the requirements of the Rule Governing Electronic Filing in the Supreme Court, Wis. Stat. § 809.801. I further certify that a copy of this certificate has been served with this petition for review and appendix and served on all parties by electronic filing.

Date: June 14, 2024 Electronically signed by:

/s/ Timothy W. Burns
Timothy W. Burns