Case No. 19-1348

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW PETERSON, ON BEHALF OF HIMSELF AND ALL SIMILARLY SITUATED PERSONS,

Plaintiffs – Appellants,

v.

NELNET DIVERSIFIED SOLUTIONS, LLC,

Defendant – Appellee.

On Appeal from the United States District Court
for the District of Colorado (Case No. 1:17-cv-01064)
The Honorable Nina Y. Wang

APPELLANTS' BRIEF (ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

The district court had federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this case arose under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. Aplt. App. Vol. 1 at 24.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court entered final judgment on September 3, 2019. Aplt. App. Vol. 2 at 521. Appellants filed a notice of appeal on September 16, 2019. *Id*. at 523. This appeal is from a final judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether time spent by call center employees booting up their computer workstations and loading software applications is compensable under the Fair Labor Standards Act.

2. Whether such time may be disregarded as de minimis.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the more than 80 years since Congress enacted the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. ("FLSA"), courts have frequently been called upon to determine whether time spent performing productive activities at the beginning or end of the workday is covered by the Act. This case presents that familiar dispute updated for the information age. The question presented is whether call center workers whose primary duty is interacting with customers must be paid for the time they spend—

a few minutes each and every shift—booting up their computers and loading the software tools they need to do their jobs. The answer is yes. These activities are work. And because this work is both integral and indispensable to the workers' broader role as customer service representatives, it is compensable under the FLSA.

The district court issued a split decision in this case. Looking at the text and structure of the FLSA, as amended by the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (codified at 29 U.S.C. §§ 251–262) ("Portal Act"), the district court agreed with Appellants that time spent booting up computers and loading software tools was covered by the FLSA and therefore compensable. Aplt. App. Vol. 2 at 503. These activities are "work" as the FLSA broadly defines it. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). The Portal Act excludes from the FLSA's coverage work that is "preliminary to [an employee's] principal activity or activities." 29 U.S.C. § 254(a). But an employee's "principal activity" "embraces all activities which are an 'integral and indispensable part of the principal activities.'" *Steiner v. Mitchell*, 350 U.S. 247, 252–53 (1956). And for the call center representatives in this case, booting up computers and loading software tools is integral and indispensable to their work. Their central role involves using their employer's computer systems and software tools to access the information they need to interact with customers. Without these tools, they could not do their jobs. And

"[c]ourt[s] have long held that pre-shift preparation of tools or equipment is considered integral and indispensable to the principal activities when the use of such tools in a readied or activated state is an integral part of the performance of the employee's principal activities." Aplt. App. Vol. 2 at 506. The district court's ruling also accords with the Department of Labor's longstanding and consistently held position that 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." Aplt. App. Vol. 1 at 186–87.

The district court went on to hold, however, that the time spent booting up computers and loading software tools could be disregarded under the so-called de minimis doctrine. Aplt. App. Vol. 2 at 512. On this count, the district court got it wrong. The de minimis doctrine is a judge-made rule that "has no obvious statutory derivation." *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 376 (4th Cir. 2011) (Wilkinson, J. concurring). Since the FLSA was enacted, neither the Supreme Court nor the Tenth Circuit have ever *held* that otherwise compensable time can be disregarded as de minimis. The Court should not start now. Because the doctrine cannot be squared with the text of the FLSA, it should be disregarded. At a minimum, it should be interpreted very narrowly.

Even assuming the doctrine's continued vitality, the district court misapplied it here. The doctrine holds that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." *See* 29 C.F.R. § 785.47. At the same time, the doctrine provides that "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time [the employee] is regularly required to spend on duties assigned to [the employee]." *Id.* In this case, the district court mistakenly applied the doctrine to work that is performed, like clockwork, *hundreds* of times every day, by *thousands* of employees, across a period of *years*. No permissible application of the doctrine permits such a wholesale disregard for the plain text of the FLSA.

The district court's judgment should be reversed, and judgment on liability should be entered in favor of Appellants.

STATEMENT OF THE CASE

I. FACTS.

A. Nelnet Employs Thousands of Call Center Representatives to Service Student Loan Borrowers.

Appellee Nelnet Diversified Solutions LLC ("Nelnet") is the largest student loan servicing company in the United States; it manages "more

than $455 billion in loans for more than 16 million borrowers." Aplt. App. Vol. 1 at 223.

To perform its loan servicing function, Nelnet maintains three call center facilities located in Aurora, Colorado, Lincoln, Nebraska, and Omaha, Nebraska. *Id.* at 220, 223.

This case concerns Nelnet's front-line call center employees. These employees use a computer, a headset, and a telephone to interact with borrowers—mostly student loan borrowers—through inbound and outbound calls and emails. *Id.* at 220–22, 224–26, 282.

These same employees are classified by Nelnet under three separate job titles—Flex Advisors, Collectors, and Advisors I. *Id.* at 75. For purposes of this dispute, however, the differences among these employees are immaterial. The district court and the parties below referred to these employees collectively as "Call Center Representatives" or "CCRs." Aplt. App. Vol. 2 at 491. This brief will do the same.

Nelnet's call centers operate on a vast scale. Between July 15, 2014 and April 25, 2018, Nelnet employed 3,499 Call Center Representatives. Aplt. App. Vol. 1 at 128.

Nelnet uniformly classified Call Center Representatives as overtime-eligible, hourly workers under the FLSA. Aplt. App. Vol. 2 at 306. They earned between $13.50 and $15 per hour. *Id.* Call Center

Representatives regularly worked more than 40 hours a week—even without accounting for the disputed time at issue in this case. *Id.* at 300.

B. Call Center Representatives Must Take a Number of Discrete Steps, Including Loading Nelnet's Specialized Software, Before They Can Clock In or Receive Customer Calls.

At the beginning of every shift, Call Center Representatives must take a number of discrete steps, including loading Nelnet's specialized software, before they can clock in or receive customer calls. Aplt. App. Vol. 1 at 144–45, 167.

After entering the call center floor, Call Center Representatives sit down at an open computer workstation. *Id.* at 157. If the computer is turned off, Call Center Representatives power up their workstation and wait for the operating system to load. *Id.* at 144, 234, 246, 256, 274; Aplt. App. Vol. 2 at 340. If the computer is already on, Call Center Representatives click the mouse or press any key to wake the computer. Aplt. App. Vol. 1 at 144, 157, 274. Next, Call Center Representatives "enter the keystrokes 'Ctrl, Alt & Delete.'" *Id.* This step allows Call Center Representatives to complete the authentication process. *Id.* at 144.

Call Center Representatives then "scan their security badge to initiate the authentication process" in Nelnet's computer system. *Id.* at 144, 157. Nelnet uses a computer program called Imprivata to manage

this process. *Id.* Once the scan is complete, the computer "automatically prompts the [Call Center Representatives] for their password." *Id.* at 144. Call Center Representatives then enter their password—a long string of random numbers printed on their badge—"to initiate authentication of the computer session." *Id.* at 144, 158.

After the authentication process is complete, the computer loads the local desktop. *Id.* at 144, 159. Once the local desktop is loaded, the computer then launches the Call Center Representatives' "Citrix desktop." *Id.* Citrix is a digital software platform that allows multiple users to remotely access and operate computer desktops running in a data center or a public or private cloud. *Id.* at 144.

In turn, once the Citrix desktop has finished loading and initiating a session, Nelnet's web-based portal opens. *Id.* at 144, 160. The portal's home page contains a link to Nelnet's timekeeping system. *Id.* at 144, 164. At this point, Call Center Representatives "are supposed to click on the timekeeping system to open it and then clock in." *Id.* at 144. Call Center Representatives do so about 81 percent of the time. Aplt. App. Vol. 2 at 297. The other 19 percent of the time, Call Center Representatives continue loading additional software tools before clocking in. *Id.*

There is no dispute that Call Center Representatives must perform each of the steps described above before clocking in. Aplt. App. Vol. 1 at 157. Nelnet's computer systems do not allow Call Center Representatives

to clock in without completing these required antecedent steps. *Id.* Nelnet does not pay Call Center Representatives for any time worked before clocking in. *Id.* at 166–68.

Moreover, Call Center Representatives must complete these and other concrete steps, including logging in to Nelnet's telephone software and separately logging in to one or more "additional web-based program[s]," before they can make or receive calls and interact with borrowers. *Id.* at 144–45, 165–66, 168, 171, 233, 237, 243.

Nelnet's policies dictate that Call Center Representatives "be seated at their desk and ready to begin work at the beginning of their scheduled shift." *Id.* at 229. Tardy employees face discipline. *Id.* And Nelnet measures tardiness "based on the time it takes for the [Call Center Representatives] to be in a *ready status for calls*, not based on the time they clocked in" or the time they began booting up computers or loading software. *Id.* (emphasis added).

C. The Work of Booting Up Computers and Loading Software Tools Is Tightly Integrated With and Essential to Call Center Representatives' Work Performing Customer Service.

Booting up computers and loading software tools is work that is integral and essential to Call Center Representatives' job performing customer service to Nelnet's borrowers.

In the course of their duties, Call Center Representatives "handle…inbound and outbound communications with [Nelnet's] borrowers." *Id.* at 220. Those communications are varied. Some involve "counsel[ling]" borrowers or simply answering "general inquiries" about an account's or a loan's status. *Id.* at 221, 224. Others involve issues relating to loan forbearance. *Id.* at 225. Others yet focus on "taking payments from…delinquent customers" and "resolv[ing] delinquent accounts." *Id.* at 221–22.

The parties' witnesses agreed that booting up computers and launching Nelnet's software tools was "work." Nelnet's corporate deponent, for example, testified that the phrase "starting work," as used in Nelnet's written policies, encompassed "sit[ting] down, log[ging] on, clock[ing] in, [and] do[ing] whatever else [Call Center Representatives] need to do to become ready and begin their shift." *Id.* at 230. Call Center Representatives likewise agreed that booting up their computers and launching Nelnet's software tools was part and parcel of their work. *Id.* at 254. They did not regard the work as mentally or physically arduous, but they consistently recognized it as work nonetheless. *Id.* at 235, 237, 239, 247, 254, 267; Aplt. App. Vol. 2 at 318.

Moreover, this work—booting up computers and loading the necessary software tools—encompasses essential steps for Call Center Representatives in the performance of their duties. Aplt. App. Vol. 1 at

35. As Nelnet conceded, Call Center Representatives "necessarily use computers to access electronically stored information, which requires [them] to log in to their computers and open job-relevant software." *Id.* at 207. "[T]he very data that allows the [Call Center Representatives] to service student loans, e.g., borrower information and payment history,…reside[s] within [Nelnet's] computer system." Aplt. App. Vol. 2 at 507. Call Center Representatives have no "access to such information outside the computer applications." *Id.*

For these reasons, Call Center Representatives cannot interact with borrowers without access to these tools. Aplt. App. Vol. 1 at 235. As one Call Center Representative testified, while certain software programs were "more important than other ones," "all programs were necessary" to be ready to serve Nelnet's customers. *Id.* at 239, 244. As another testified, time spent launching hardware and software tools was "obviously" related to servicing Nelnet's customers because Call Center Representatives "ha[d] to…have [their] computer and be logged in to take calls." *Id.* at 247. Another Call Center Representative explained that logging in to Nelnet's systems was both essential and beneficial to Nelnet because he "c[ould]n't perform the duties that they need[ed] [him] to perform in order to serve [Nelnet's] customers" without doing so. *Id.* at 276.

Nelnet's designated Rule 30(b)(6) corporate witness fully agreed with this assessment. He testified that Call Center Representatives must authenticate themselves through the Imprivata system before they are "allow[ed]…to open a computer." *Id.* at 157. Referring to the rest of the boot-up process, he agreed that Call Center Representatives "cannot make or receive calls without performing those preliminary steps." *Id.* at 168. In its response to Appellants' interrogatories, Nelnet described the software loaded by Call Center Representatives at the start of each shift as "critical to successfully complet[ing] duties and servic[ing] customers." *Id.* at 145.

D. Call Center Representatives Spend Minutes Each Shift Performing Work Before They Are Able To Clock In.

The process of booting up computers and loading critical software tools is not instantaneous—far from it. All Call Center Representatives spend several minutes each and every shift logging in to Nelnet's systems and loading Nelnet's software before they are able to clock in.

Nelnet retained an expert witness, Dr. G. Edward Anderson, to "generat[e] an estimate of the number of minutes associated with pre-Clock-In activities." Aplt. App. Vol. 2 at 286.

Using data generated over an 18-month sample period, Anderson analyzed the electronic time stamps created by the Imprivata system when Call Center Representatives swiped their badges immediately after

booting up their computers. *Id.* at 287, 294. He also analyzed the electronic time stamps created by the Citrix software when Call Center Representatives loaded the Citrix desktop. *Id.* Using these data points, Anderson created an estimate of the time spent by Call Center Representatives between the initiating of the Imprivata and Citrix software and the time they clocked in to Nelnet's timekeeping system. *Id.* at 289.

Anderson first calculated "the time between the Imprivata badge swipe and time stamp initiating the process of booting up each of the Opt-Ins' Citrix session and completion of the launch of the Citrix virtual desktop." *Id.* He concluded that the median length of this time was 1.02 minutes per shift in Nelnet's Aurora, Colorado location, .90 minutes per shift in the Lincoln, Nebraska location, and .50 minutes per shift in the Omaha, Nebraska location. *Id.* at 291.

Anderson then calculated "the time between completion of the launch of the Citrix virtual desktop station and completion of the Clock-In step." *Id.* at 289. He concluded that the median length of this time was 2.63 minutes per shift in Aurora, Colorado, 3.41 minutes per shift in Lincoln, Nebraska, and 2.01 minutes per shift in Omaha, Nebraska. *Id.* at 294.

Combining these two measurements—that is, accounting for the median times spent between swiping the Imprivata badge and clocking

in—and then averaging them out across all three locations results in a median time of 3.49 minutes per shift. *Id.* at 291, 294.

Anderson also calculated the *tenth percentile measure*—as opposed to the median measure—of the time between the launch of the Citrix software and clocking in. *Id.* at 291–92. This calculation estimated the length of time that was *shorter* than 90 percent of the total times measured in the sample. *Id.* He did so on the apparent assumption that longer boot-up times reflected a mix of compensable and non-compensable time. *Id.* at 292. He calculated the tenth percentile time between the launch of the Citrix virtual desktop and completion of the clock-in step as 1.25 minutes per shift in Aurora, 1.30 minutes per shift in Lincoln, and 1.10 minutes per shift in Omaha. *Id.*

For purposes of Appellants' *affirmative* motion for summary judgment, Appellants assumed that Anderson's calculations were accurate. Aplt. App. Vol. 1 at 112. Appellants made no such assumption in *opposing* Nelnet's summary judgment motion, however. Aplt. App. Vol. 2 at 380–400. And there are sound reasons to doubt the validity of the assumptions underlying Anderson's measurements. For one thing, the assumption that some—but not all—time spent loading the Citrix system is compensable is legally unsupported. As discussed below, *infra* at 25–26, the continuous workday rule prohibits employers from treating the workday like a piece of swiss cheese—treating some but not all activities

following the first principal activity as insufficiently important to be compensable.

For another, Anderson's decision to use the median and tenth percentile measures rather than the *mean*—or average—amount of time, further underestimated the total amount of uncompensated time. The data confirms that boot-up times do not follow a normal distribution. While all computers take some time to load, some computers take significantly longer than others. Aplt. App. Vol. 1 at 256; Aplt. App. Vol. 2 at 340. The age of the computer, the number of Call Center Representatives working at any given time, and the number of programs that need to be launched can significantly slow the boot-up process. Aplt. App. Vol. 1 at 252; Aplt. App. Vol. 2 at 326. Call Center Representatives' experience bears out this point. On numerous occasions, computers would take five, 10, or 15 minutes or more to load. Aplt. App. Vol. 1 at 244, 252, 257–58, 270, 274, 278; Aplt. App. Vol. 2 at 315, 326–27, 338, 354. On rare occasions, the boot-up process would take 30 or even 45 minutes. Aplt. App. Vol. 2 at 327. Call Center Representatives described frequent problems booting up their computers. Aplt. App. Vol. 1 at 241, 243–44, 269; Aplt. App. Vol. 2 at 326. Citrix, for example, is a "temperamental program" that sometimes takes a long time to load or has to be closed and restarted multiple times. Aplt. App. Vol. 1 at 236, 269; Aplt. App. Vol. 2 at 315, 326, 340. The extended boot-up process

frequently left Call Center Representatives "frustrat[ed] [with] how long it would take." Aplt. App. Vol. 2 at 317.

When data is distributed in this manner—that is, with many data points bunched to the left but with a long tail to the right, known in statistics as a right-skewed or positively skewed frequency distribution—the *median* data point is materially lower than the *mean*.[1] The *tenth percentile* measurement is lower still. The mean, of course, most accurately captures the true *average* experience among employees. *Id.* at 293. And the average time spent working is the analytical touchstone for calculating unpaid overtime in FLSA cases. *See, e.g.*, *Monroe v. FTS USA, LLC*, 860 F.3d 389, 412 (6th Cir. 2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049 (2016).

Last, Anderson did not attempt to capture any time worked *before* swiping in to the Imprivata system. Aplt. App. Vol. 2 at 293. In other words, none of the time Call Center Representatives spent turning on or waking their computers was reflected in Anderson's analysis. *Id.* at 285–313. Turning on a computer added a minute or more to the boot-up process. Aplt. App. Vol. 1 at 234.

[1] For the statistically uninitiated, this short video does a good job explaining the relationship between a dataset's mode, median, and mean. *See* Elementary Business Statistics | Skewness and the Mean, Median, and Mode, https://www.youtube.com/watch?v=s6N_l3Bu-Mc.

Accounting for the deficiencies in Anderson's analysis would lead a reasonable fact finder to conclude that Call Center Representatives spent an average of four to six minutes of unpaid time each shift booting up their computers and launching software applications. Aplt. App. Vol. 1 at 234, 236, 241, 243–44, 252, 256–58, 269–70, 274, 278; Aplt. App. Vol. 2 at 285, 287, 289, 291–92, 294, 315, 317, 326–27, 338, 340, 354.

These disagreements, however, concern questions of degree, not kind. They should not obscure the principal, undisputed fact: that Call Center Representatives spent, on average, several minutes each and every shift performing uncompensated work before clocking in. Aplt. App. Vol. 1 at 167.

Based on his calculations, Anderson also attempted to calculate the wage loss for Appellants. He estimated that Appellants were entitled to $15,822 in unpaid compensation. Aplt. App. Vol. 2 at 299. This estimate was based solely on the time between completion of the launch of the Citrix virtual desktop and clocking in. *Id.* It did not factor in the time spent between turning on or waking the computer and launching the Citrix software. *Id.* Anderson's wage loss estimate, of course, was based on his use of the tenth percentile measurements—rather than the median or mean measurements—for this time. *Id.* Anderson's estimate also did not reflect the true scale of Nelnet's savings. It excluded time worked by Call Center Representatives who did not join this suit, time

worked that fell outside the statute of limitations, and so-called gap time: time worked that, when combined with the recorded time in the same workweek, did not exceed 40 hours. *Id.* at 306. Anderson's estimate did not include liquidated damages, interest, or other remedies available under the FLSA. *Id.* at 299.

E. Nelnet Never Considered Timekeeping Solutions That Would Have Captured Call Center Representatives' Initial Work Duties.

Nelnet's decisionmakers never considered the possibility of capturing the time Call Center Representatives spent logging in and loading software before these employees were able to clock in.

In deposition testimony, Nelnet's corporate designee testified that the company never considered linking either the Imprivata or Citrix systems with its timekeeping software to capture the time Call Center Representatives spent working before clocking in. Aplt. App. Vol. 1 at 174–76; Aplt. App. Vol. 2 at 431. The same witness testified that Nelnet never considered alternative timekeeping systems—such as installing a traditional timeclock or using an estimate—to capture the initial few minutes of Call Center Representatives' working time. Aplt. App. Vol. 1 at 181.

After discovery had closed, Nelnet filed a declaration from its IT Director, Greg Counts, that told a dramatically different story. Counts was not disclosed by Nelnet as a witness pursuant to Fed. R. Civ. P.

26(a)(1)(A) or in response to Appellants' discovery requests. Aplt. App. Vol. 1 at 141–42, 152. Unlike the head-in-the-sand testimony of Nelnet's designated corporate deponent, Counts testified in his declaration that Nelnet "had no technological means of pairing Imprivata, Citrix, or Timekeeping System timestamps to each other." *Id.* at 263. He further testified that linking these systems would require "custom, aftermarket software" that "Nelnet lacks both the resources and expertise to build." *Id.* He averred that manually comparing the relevant data points "would be enormously administratively burdensome to Nelnet." *Id.* at 265. Nelnet submitted a second declaration from a human resources employee that similarly testified that it would be "administratively burdensome—if not impossible—…to implement a change that uses Imprivata or Citrix timestamps in addition to Timekeeping System timestamps." Aplt. App. Vol. 2 at 333. Neither of these witnesses addressed the possibility of using a traditional time clock or simply estimating Call Center Representatives' boot-up time.

II. PROCEDURAL HISTORY.

Plaintiff Andrew Peterson filed an amended complaint claiming that he and other Call Center Representatives worked uncompensated time prior to clocking in to Nelnet's computerized timekeeping system. Aplt. App. Vol. 1 at 41, 47. The complaint stated a claim for unpaid overtime under the FLSA as well as claims for unpaid overtime and

failure to pay minimum wage under Colorado state law. *Id.* at 50–53. The parties consented to proceed before Magistrate Judge Nina Wang. *Id.* at 38.

The district court conditionally certified a collective action covering all Call Center Representatives who worked for Nelnet between July 15, 2014 and April 25, 2018. *Id.* at 85–88. Court-authorized notice of the lawsuit was sent to 3,498 people. *Id.* at 128. Ultimately, 340 additional plaintiffs joined this action by filing opt-in consent forms in the district court. *See generally* Dkt.[2]

The parties filed cross-motions for summary judgment addressing two questions: first, whether the time spent by Call Center Representatives booting up their workstations and loading software applications was covered by the FLSA and therefore compensable; and second, whether such time, even if deemed compensable under the Act, could nevertheless be disregarded under the so-called de minimis doctrine. Aplt. App. Vol. 1 at 106–27, 188–218.

The district court resolved the first question in Appellants' favor. Aplt. App. Vol. 2 at 503. Call Center Representatives' pre-shift activities, the court held, "are both necessary to the performance of the day's tasks and a material part of such performance." *Id.* These pre-shift activities,

[2] After the death of Plaintiff Peterson, his estate was substituted as the real party in interest. Appellants in this Court are Peterson's estate and the 340 additional opt-in plaintiffs.

the court recognized, are "integral and indispensable" to Call Center Representatives' principal duties: workers "would be unable to perform the labor for which they were hired if they did not complete the pre-shift activities to prepare the equipment their employer provides for them to use in performing their tasks." *Id.* at 504. The court observed that "the very data that allows [Call Center Representatives] to service student loans, e.g., borrower information and payment history," resides in Nelnet's computer systems. *Id.* at 507. Call Center Representatives do not "have access to such information outside the computer applications." *Id.*

The district court supported its conclusion with a long line of precedent holding that "pre-shift preparation of tools or equipment is considered integral and indispensable to the principal activities when the use of such tools in a readied or activated state is an integral part of the performance of the employee's principal activities." *Id.* at 506. The court rejected Nelnet's contrary argument that the pre-shift time at issue was "the digital equivalent of travel or of waiting in line to clock in." *Id.* at 502, 507. On the court's view, "[a]n employee is not employed to arrive at the office or pass through a security checkpoint, but she is employed to use certain tools in performance of her tasks, and pre-shift preparation of those tools is integral and indispensable to the performance of the principal labor for which the employee is employed." *Id.* at 508.

The district court went on to conclude, however, that Call Center Representatives' pre-shift time was covered by the de minimis doctrine. *Id.* at 512. The district court applied four factors, ostensibly articulated by the Ninth Circuit in *Lindow v. United States*, 738 F.2d 1057, 1062–64 (9th Cir. 1984). Aplt. App. Vol. 2 at 512. The court found that the first factor—the amount of time spent on a daily basis—favored Nelnet. The district court asserted that "courts usually permit a period of up to ten minutes to qualify as de minimis," and that "the time in this case clearly falls well below the ten-minute threshold." *Id.* The court concluded that the second factor—whether the work was performed on a regular basis—favored Appellants. *Id.* at 512–13. In this case, of course, "the pre-shift activities occurred every time a [Call Center Representative] logged onto a system before beginning work…." *Id.* at 513. The court found the third factor—whether the time at issue "cannot as a practical administrative matter be precisely recorded for payroll purposes"— "weigh[ed] heavily in favor of [Nelnet]." *Id.* at 513, 515. The court accepted the opinion of Nelnet's untimely and undisclosed witness that linking Nelnet's Imprivata and timekeeping systems would be unduly burdensome. *Id.* at 514. Moreover, the court concluded that "Plaintiff's argument that there are multiple methods Defendant[] could have used to accurately record this data…is unsupported by admissible evidence." *Id.* at 514–15. The court similarly held that the fourth factor—the aggregate size of the

claim—favored Nelnet. The amount in controversy, the court said, amounts to "cents, rather than dollars, per day." *Id.* at 518. The district court characterized the amount of time at issue as "brief" and the amount of wage loss as "trivial." *Id.*

In light of these holdings, the district court entered summary judgment in favor of Nelnet on Appellants' FLSA claims. *Id.* at 520. The court declined to exercise jurisdiction over the remaining state law claims. *Id.* at 519–20.

This appeal followed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT TIME SPENT BY CALL CENTER REPRESENTATIVES BOOTING UP COMPUTERS AND LOADING SOFTWARE TOOLS IS COMPENSABLE UNDER THE FLSA, BUT INCORRECTLY HELD THAT SUCH TIME MAY BE DISREGARDED AS DE MINIMIS.

The district court correctly held that the time Call Center Representatives spend booting up their computers and loading software is compensable under the FLSA and Portal Act. The district court erred, however, in concluding that this time could be disregarded as de minimis.

A. Standard of Review.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "On cross-motions for summary judgment, [this Court's] review of the summary judgment record is de novo and [it] must view the inferences to be drawn from affidavits, attached exhibits and depositions in the light most favorable to the party that did not prevail…." *Jacklovich v. Simmons*, 392 F.3d 420, 425 (10th Cir. 2004) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. The FLSA Broadly Requires Payment for Compensable Work.

(1) The FLSA is a remedial and humanitarian statute that must be construed broadly.

Congress enacted the FLSA in 1938 with the goal of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas–Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). Recognizing that broad coverage is essential to accomplish Congress' remedial goals, the Supreme Court has "consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction.'" *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 396 (1985) (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

The FLSA meets Congress' remedial objectives, in part, by requiring that "for a workweek longer than forty hours," an employee working "in excess of" forty hours be compensated for those excess hours

"at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). The FLSA defines "employ" as including "to suffer or permit to work." 29 U.S.C. § 203(g).

(2) The FLSA, as amended by the Portal-to-Portal Act, defines compensable work broadly.

The FLSA defines neither "work" nor "workweek." But the Supreme Court's "early cases defined those terms broadly." *IBP*, 546 U.S. at 25. "[R]elying on the remedial purposes of the statute and Webster's Dictionary," the Court "described 'work or employment' as 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *Id.* (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 n.11 (1944)). The Court later "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA." *Id.* (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)). The Court observed that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Id.* Two years later, the Court defined "the statutory workweek" to "includ[e] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–91 (1946)).

Through the Portal-to-Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84, Congress qualified the Supreme Court's interpretation of the FLSA. It excluded from the compensable workweek:

> (1) 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, and
>
> (2) 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).

Aside from these two specific modifications to the FLSA, The Portal Act did "not purport to change [the Supreme] Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.'" *IBP*, 546 U.S. at 28.

Similarly, the Portal Act's amendments had "no effect on the computation of hours that are worked '*within*' the workday." *Id.* (emphasis added). "[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [the Portal Act] have no application." *Id.* (quoting 29 C.F.R. § 790.6(a)).

Within the workday, the Supreme Court has adopted the "continuous workday rule," which defines "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Id.* (quoting 29 C.F.R. § 790.6(b)); *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1243 (10th Cir. 2016). Bona fide breaks exceeding 20 minutes—such as lunch breaks—are not compensable. *See Sec'y United States Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 429 (3d Cir. 2017) (citing 29 C.F.R. § 785.16). But "[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in industry.... They must be counted as hours worked." *Id.* (citing 29 C.F.R. § 785.16). This rule sensibly "safeguard[s] employees from having their wages withheld" when they "visit the bathroom, stretch their legs, get a cup of coffee, or simply clear their head after a difficult stretch of work." *Id.* In so doing, the rule "protects employee health and general well-being by not dissuading employees from taking such breaks when they are needed," and discourages unscrupulous employers from nickel-and-diming their employees through unduly granular and fractured conceptions of compensable work. *Id.*

The Supreme Court has, on four occasions, interpreted the concept of "principal activity or activities" as used in the Portal Act. In the first case, *Steiner*, 350 U.S. at 248, the Court considered whether time spent

by employees at a battery plant changing clothes and showering pre- and post-shift was a "principal activity." The Court concluded it was. *Id.* The Court held that "the term 'principal activity or activities' in Section 4 [of the Portal Act] embraces all activities which are an '*integral and indispensable part of the principal activities*.'" *Id.* at 252–53 (citations omitted) (emphasis added). In that case, the Court deemed the "donning and doffing of specialized protective gear" to be integral and indispensable to the workers' principal duty of manufacturing batteries. *IBP*, 546 U.S. at 28; *Steiner*, 350 U.S. at 256.

Applying *Steiner* in a later case, the Court held that the time meatpacking employees spent sharpening their knives was an integral and indispensable part of their principal activities because dull knives would "slow down production" on the assembly line, "affect the appearance of the meat as well as the quality of the hides," "cause waste," and lead to "accidents." *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956).

The Court reached a similar conclusion in *IBP*. As in *Mitchell*, the Court in *IBP* concluded that "donning and doffing of unique protective gear" by slaughterhouse employees was a principal activity under the Portal Act. *IBP*, 546 U.S. at 32. Extending *Steiner* and *Mitchell*, the Court went on to conclude that time spent walking to the production area *after* donning protective gear was compensable. *Id.* at 32–33. Looking to the

text of the FLSA and Portal Act, together with the Department of Labor's ("DOL") implementing regulations, the Court held that "during a continuous workday, any walking time 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." *Id.* at 37.

In the fourth and most recent case, *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), the Court found that time spent by warehouse employees undergoing post-shift security screenings was postliminary and therefore not compensable. *Id.* at 29.

Integrity Staffing began by reaffirming that "the term 'principal activity or activities'…embrac[es] all activities which are an 'integral and indispensable part of the principal activities.'" *Id.* at 33 (citing *IBP*, 546 U.S. at 29–30 and *Steiner*, 350 U.S. at 252–53). Looking at the Court's own precedent, contemporaneous dictionary definitions, and DOL regulations, the Court defined "integral" as "[b]elonging to or making up an integral whole; constituent, component; spec[ifically] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage." *Id.* (citations omitted). The Court similarly defined "indispensable" as a function "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected." *Id.* (citations omitted).

Applying these standards, the Court held that time spent undergoing security screenings was not integral or indispensable to the workers' principal activities. *Id.* at 35. "[S]creenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment." *Id.* "And [the employer] could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id.* The Court went on to hold that an activity cannot be considered a principal activity solely because "an employer required a particular activity." *Id.* at 36. Such a rule would sweep too broadly, the Court observed, as many of the activities explicitly excluded by the Portal Act are required by employers. *Id.*

(3) The DOL has consistently held that time spent booting up computers and loading software applications in a call center environment is compensable.

Although the text of the FLSA and Portal Act, together with the Supreme Court's precedents, strongly suggest that call center employees must be compensated for time spent booting up computers and loading software applications, they do not address the question explicitly. But the DOL *has* addressed the question directly. And it has consistently held that such time is compensable.

In a 2008 interpretive rule that remains in effect to this day, the DOL addressed "the application of the FLSA to employees working in call

centers." Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet #64: Call Centers under the Fair Labor Standards Act (FLSA), (July 2008), available at https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs64.pdf and Aplt. App. Vol. 1 at 186–87. After reviewing the governing legal standards under the FLSA and Portal Act, the DOL guidance held that 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." *Id.*

(4) The de minimis doctrine is a judge-made rule of questionable origins that must be applied narrowly.

The so-called de minimis rule is something of a doctrinal ghost. Unlike the FLSA and Portal Act's rules for defining and delimiting compensable work, the de minimis doctrine "has no obvious statutory derivation." *Perez*, 650 F.3d at 376 (4th Cir. 2011) (Wilkinson, J. concurring). In the more than 80 years since the FLSA was enacted,

neither the Supreme Court nor the Tenth Circuit have ever *held* that otherwise compensable time should be disregarded as de minimis.[3]

The doctrine traces its roots to dicta in the Supreme Court's opinion in *Mount Clemens*, 328 U.S. at 692. There, the Court said that "[w]e do not, of course, preclude the application of a de minimis rule where the minimum walking time is such as to be negligible." *Id.* "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." *Id.* "Split-second absurdities," the Court suggested, "are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." *Id.*

Following the Court's dicta in *Mount Clemens*, the DOL in 1955 issued an interpretive rule codifying the de minimis doctrine. *See* 29 C.F.R. § 785.47. It provides that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be

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[3] As discussed below, this Court has, on one occasion, in an unpublished summary opinion containing a single paragraph of analysis, affirmed, in part, a district court's holding that some compensable time was de minimis. *See Bustillos v. Bd. of Cty. Comm'rs of Hidalgo Cty.*, No. CV 13-0971 JB/GBW, 2015 WL 7873813 (D.N.M. Oct. 20, 2015) (unpublished), *aff'd in relevant part, rev'd in part sub nom. Jimenez v. Bd. of Cty. Comm'rs of Hidalgo Cty.*, 697 F. App'x 597 (10th Cir. 2017) (unpublished). Even the truncated analysis in *Bustillos*, however, does not support the application of the de minimis doctrine in this case.

disregarded." *Id.* At the same time, the rule provides that "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time [the employee] is regularly required to spend on duties assigned to [the employee]." *Id.*; *Castaneda*, 819 F.3d at 1243.

Building on the DOL's guidance, the Ninth Circuit articulated three factors for courts to weigh in the de minimis analysis: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow*, 738 F.2d at 1063.

This Court has adhered to both the DOL's de minimis interpretive regulation and the *Lindow* factors—albeit only in cases *rejecting* the application of the de minimis doctrine. *See, e.g.*, *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1284 (10th Cir. 2020); *Castaneda*, 819 F.3d at 1243.

Since *Mount Clemens* was decided in 1946, the Supreme Court has only once revisited the de minimis doctrine. As in *Mount Clemens*, it did so in dicta. This time, however, the Court cast substantial doubt on the doctrine's existence. In *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014), the Court interpreted the phrase "changing clothes" as used in 29 U.S.C. § 203(o), a provision of the FLSA allowing time spent changing clothes to be deemed non-compensable if excluded "by the express terms of…a bona

fide collective-bargaining agreement." *Sandifer*, 571 U.S. at 226. In the Court's brief discussion of the de minimis doctrine, the Court noted that the de minimis rule apparently derives from the common law "doctrine *de minimis non curat lex* (the law does not take account of trifles)." *Id.* at 221. But, the Court observed, the "doctrine does not fit comfortably within the statute at issue here, which…is *all about* trifles—the relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs." *Id.* at 234.

Following the Supreme Court's disapproval of the doctrine in *Sandifer*, "[t]here are [now] conflicting views in the courts concerning the application of the common law doctrine of de minim[i]s" to the FLSA. *See, e.g.*, *Castaneda v. JBS USA, LLC*, No. 08-CV-01833-RPM, 2014 WL 1796707 (D. Colo. May 6, 2014) (unpublished); *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 851 (7th Cir. 2014) (Wood, J., dissenting); *Harvey v. AB Electrolux*, 9 F. Supp. 3d 950, 962 (N.D. Iowa 2014).

The employer—not the employees—bears the burden to show that the de minimis doctrine applies. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011).

C. The District Court Correctly Held That the Time Spent by Call Center Representatives Booting Up Computers and Launching Software Applications Is Compensable Under the FLSA.

The district correctly held that time spent by Call Center Representatives booting up their computers and launching software applications is compensable. These activities comfortably fall within the definition of work articulated by the Supreme Court. These same activities are "principal activities" within the meaning of the Portal Act because they are both integral and indispensable to Call Center Representatives' work servicing Nelnet's customers.

(1) Booting up computers and launching software is "work" within the meaning of the FLSA.

Booting up computers and launching software is "work" within the meaning of the FLSA. These activities involve both "physical exertion"—for example, typing on a keyboard—and "mental exertion"—for example, recalling and inputting keystrokes and passwords. Aplt. App. Vol. 1 at 230, 235, 237, 239, 247, 254, 267; Aplt. App. Vol. 2 at 318; *IBP*, 546 U.S. at 25 (citing *Tennessee Coal*, 321 U.S. at 598 n.11). And in any event, "'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA." *Id.* (citing *Armour*, 323 U.S. at 133).

Moreover, these activities are "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *Id.* (quoting *Tennessee Coal*, 321 U.S. at 598

n.11). Call Center Representatives cannot interact with borrowers or get paid without completing these steps. Aplt. App. Vol. 1 at 157, 166–68. And booting up computers and launching software solely "benefit[s]" Nelnet. *Id.* at 235, 239, 244, 247, 276. These steps exist solely to allow Call Center Representatives to ready the tools and information they need to do their jobs. *Id.* at 144–45, 165–66, 168, 171, 233, 237, 243. They involve no personal benefit to the employees whatsoever.

(2) Booting up computers and launching software is work that is integral and indispensable to Call Center Representatives' principal activities.

Booting up computers and launching software is not just work. These activities are, as the district court correctly found, "principal activities" and therefore compensable under the Portal Act. 29 U.S.C. § 254(a).

Under the text of the Portal Act as interpreted by *Steiner*, *Mitchell*, *IBP*, and *Integrity Staffing*, starting computers and loading software applications are "activities which are an 'integral and indispensable part of the principal activities'" of call center employees. *Integrity Staffing*, 574 U.S. at 33 (citing *IBP*, 546 U.S. at 29–30 and *Steiner*, 350 U.S. at 252–53).

Start with "integral." Call Center Representatives' first tasks "[b]elong[] to or mak[e] up an integral whole" and are "spec[ifically] necessary to the completeness or integrity of the whole" job. *Id.*

Computers and software are literally the tools of the trade for Call Center Representatives. All day long (or more accurately, all shift long), Call Center Representatives use these tools to interact with borrowers. The computer itself, the programs that allow the computer to work, and the information that is structured and housed within Nelnet's computer systems are the essential *stuff* of Nelnet's business in the loan servicing industry. These tools are integral to Call Center Representatives "handl[ing]…inbound and outbound communications with [Nelnet's] borrowers." Aplt. App. Vol. 1 at 220. They play a central role in "counsel[ing]" borrowers and answering "general inquiries" about an account's or a loan's status. *Id.* at 221, 224. They are vital tools in "taking payments from…delinquent customers" and "resolv[ing] delinquent accounts." *Id.* at 221–22. *See Jackson v. ThinkDirect Mktg. Grp., Inc.*, No. 1:16-cv-03749, 2019 WL 8277236, at *4 (N.D. Ga. Dec. 9, 2019) (unpublished) ("[L]ogging into the [computer] system forms an intrinsic element of completing a [sales associate]'s work."); *Gaffers v. Kelly Servs., Inc.*, No. 16-cv-10128, Dkt. 64, 66 at 17 (E.D. Mich. June 2, 2016) (unpublished) (same).

The work of preparing these tools is also "indispensable." *Integrity Staffing*, 574 U.S. at 33. Call Center Representatives' work booting up computers and logging in to Nelnet's software applications "cannot be dispensed with, remitted, set aside, disregarded, or neglected." *Id.*

(citations omitted). Nelnet *conceded* that Call Center Representatives "necessarily use computers to access electronically stored information, which requires [them] to log in to their computers and open job-relevant software." Aplt. App. Vol. 1 at 207. Indeed, "[t]he very data that allows the [Call Center Representatives] to service student loans, e.g., borrower information and payment history,…reside[s] within [Nelnet's] computer system." Aplt. App. Vol. 2 at 507. Call Center Representatives have no "access to such information outside the computer applications." Aplt. App. Vol. 1 at 157; Aplt. App. Vol. 2 at 507. The work of booting up computers and launching key software is so indispensable, in fact, that Call Center Representatives cannot interact with borrowers without access to these tools. Aplt. App. Vol. 1 at 168, 235, 239, 244, 247, 276. Nelnet's own description captures it best: software loaded by Call Center Representatives at the start of each shift is "critical to successfully complet[ing] duties and servic[ing] customers." *Id.* at 145.

The conclusion that booting up computers and launching programs is integral and indispensable to Call Center Representatives' job is only reinforced by the specific holdings in *Steiner*, *Mitchell*, *IBP*, and *Integrity Staffing*. Like changing into specialized clothes designed for use at a battery plant, *Steiner*, 350 U.S. at 256, sharpening knives for use in meatpacking, *Mitchell*, 350 U.S. at 262, and donning unique protective gear in a slaughterhouse, *IBP*, 546 U.S. at 32, the activities at issue in

this case are both closely related to (that is, integral) and vitally important to (that is, indispensable) Call Center Representatives' overall duties servicing borrowers. "The requirement of logging into and out of electronics systems needed to process calls is at least [as] integral to the work of answering phone calls…as the donning and doffing protective gear required for work around hazardous chemicals or sharpening knives preparatory to work in a slaughterhouse…." *Gaffers*, No. 16-cv-10128, Dkt. 64, 66 at 17–18.

Steiner, *Mitchell*, *IBP*, and *Integrity Staffing* also reinforce the crucial point that an employee need not prove that Activity A is *impossible* without Activity B. After all, the workers in *Steiner*, *Mitchell*, and *IBP* could have, at least theoretically, made batteries, cut meat, and killed livestock without any protective garments or while using dull knives. But these employees' beginning-of-shift activities qualified as integral and indispensable because without them, "production" would "slow down," the "appearance" and "quality" of the product would suffer, and "accidents" would be more likely to occur. *Mitchell*, 350 U.S. at 262. "[I]ndispensability does not depend upon whether the [employees] could perform some aspect of their jobs in the absence of the activity; the question is whether the employer 'could have eliminated the [activity] altogether *without impairing* the employees' ability to complete their work.'" *Aguilar*, 948 F.3d at 1279 (quoting *Integrity Staffing*, 574 U.S. at

35) (emphasis added). Call Center Representatives' beginning-of-shift activities clear that hurdle by a mile. Doing the job without their computers and software would not simply impair the work—making it more challenging, more slow, and more error prone. It would make the job impossible.

Integrity Staffing, which held in favor of the employer, also fully supports Call Center Representatives' position. The security screenings at issue in *Integrity Staffing* "were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment." *Integrity Staffing*, 574 U.S. at 35. In that case, the employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id.* The exact opposite is true here. Eliminating computers and software from Call Center Representatives' work would idle the employees entirely.

Looking at Tenth Circuit and out-of-circuit precedent lends further support to Call Center Representatives' position. The district court summarized it best: "Court[s] have long held that pre-shift preparation of tools or equipment is considered integral and indispensable to the principal activities when the use of such tools in a readied or activated state is an integral part of the performance of the employee's principal activities." Aplt. App. Vol. 2 at 506. Under this line of authority, preparing and transporting tools to the worksite is considered an integral

and indispensable activity. *See Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1350 (10th Cir. 1986); *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir. 1958). So is cleaning protective equipment for knife-wielders in a meat processing plant, *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994), gathering and distributing tools and materials to employee workstations, *Kellar*, 664 F.3d at 174, collecting and loading the parts needed to perform electrical work, *Brantley v. Ferrell Elec., Inc.*, 112 F.Supp.3d 1348, 1371 (S.D. Ga. 2015), loading and unloading tools required to do landscaping work, *Alvarado v. Skelton*, No. 3:16-3030, 2017 WL 2880396, at *5 (M.D. Tenn. July 6, 2017) (unpublished), setting up an MRI machine in preparation for a patient, *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 717–18 (2d Cir. 2001), loading a truck with tools to drive to the worksite, *Gaytan v. G&G Landscaping Constr., Inc.*, 145 F. Supp. 3d 320, 325 (D.N.J. 2015), driving specialized equipment from the employer's office to the worksite, *Burton v. Hillsborough Cty., Fla.*, 181 F. App'x 829, 838 (11th Cir. 2006) (unpublished), checking out specialized tools to use on the job, *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App'x 448, 454 (5th Cir. 2009) (unpublished), grooming, feeding, and training police dogs, *Reich v. New York City Transit Auth.*, 45 F.3d 646, 652 (2d Cir. 1995), and—most directly relevant here—logging on to a computer and loading software tools. *Jackson*, 2019 WL 8277236, at *4; *Gaffers*,

No. 16-cv-10128, Dkt. 64, 66 at 17–18. These authorities all reinforce the conclusion that loading software tools is integral and indispensable to providing customer service at Nelnet.

The district court's holding also aligns with the DOL's position. In a call center environment, 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." Wage & Hour Div., U.S. Dep't of Labor, Fact Sheet #64. Aplt. App. Vol. 1 at 186–87. The DOL has considerable expertise in the labor market and in administering the FLSA. *See G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205, 210 (10th Cir. 2015) (unpublished). In this case, the DOL's consistently held position is persuasive and should be followed. *Renewable Fuels Ass'n v. United States Envtl. Prot. Agency*, 948 F.3d 1206, 1244 (10th Cir. 2020) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Jackson*, 2019 WL 8277236, at *4. Of course, even if this Court affords no deference to the DOL's opinion, traditional tools of statutory interpretation lead to the exact same result.

In the face of these compelling authorities, Nelnet stakes its position on a strained analogy: that "[i]n the modern marketplace, logging in to a computer" and loading essential software tools is "the

digital equivalent of travel or of waiting in line to clock in." Aplt. App. Vol. 2 at 411.

Nelnet's analogy suffers from several flaws. The first is that the Portal Act explicitly excludes preliminary travel and waiting time from the FLSA's coverage. 29 U.S.C. § 254(a). The statute does not, however, permit analogies to these activities or contain any catch-all "or similar activities" language.

Moreover, the analogy is a bad one. Loading and preparing the tools of work is nothing like driving to work or entering the workplace. Call Center Representatives travel to work and enter Nelnet's premises, too—no analogy necessary—and they are not seeking compensation for that time. As the cases discussed above suggest, booting up computers and loading software tools is the "digital equivalent" to preparing and loading *physical tools*. A printing press operator must load the press with ink and arrange the typeface before he prints. This time is compensable. A carpenter must arrange her tools and materials before the measuring and cutting begins. This time is compensable. A store's shipping agent must retrieve the goods from the shelves before packaging them up and putting them in the mail. This time is compensable. The same holds true with respect to the gathering and preparation of digital tools.

Nelnet's analogy is also too broad and too categorical. On the breadth: Nelnet's argument is not limited to any particular length of time

spent loading software. Indeed, the record in this case suggests that Call Center Representatives must load several additional software tools *after* the employees are able to clock in but *before* they can make or receive calls. Aplt. App. Vol. 1 at 144–45, 165–66, 168, 171, 233, 237, 243. Accepting Nelnet's analogy would necessarily mean that 20, 40, or even 60 minutes of time or more spent loading layers of complex software and downloading voluminous data would be deemed entirely non-compensable.

Finally, Nelnet's analogy is too categorical. In analyzing what counts as integral and indispensable, context matters. It is "difficult to fix a definite standard for determining what activities of an employee, performed before and after his hours of work, are an integral part of and indispensable to his principal activities. Each case must be decided upon its particular facts." *Baker v. Barnard Const. Co., Inc.*, 146 F.3d 1214, 1218–19 (10th Cir. 1998) (citation omitted). This Court, by way of illustration, recently held that security screenings for prison employees are integral and indispensable to their work and therefore compensable. *Aguilar*, 948 F.3d at 1279–80. This Court distinguished *Integrity Staffing*, 574 U.S. at 35, which held that security screenings were *not* integral or indispensable for warehouse employees. Appellants do not suggest that *all* work involving a computer is a principal activity for *all* employees. (In this context, it is: using computers and software goes to

the heart of Call Center Representatives' work.) But Nelnet's opposing proposition is equally wrong. The FLSA and Portal Act do not categorically exclude time spent using computers as the modern-day equivalent to driving to work.

For these reasons, the district court correctly concluded that the time spent by Call Center Representatives booting up their computers and loading software applications is compensable.

D. The District Court Erred When It Concluded That Time Spent by Call Center Representatives Booting Up Computers and Launching Software Applications Is De Minimis.

The district court erred in finding the time spent booting up computers and loading software applications de minimis. The de minimis doctrine has no grounding in the text of the FLSA and, like other similar judge-made rules, should be jettisoned entirely or at least interpreted very narrowly.

Assuming the doctrine applies, the district court erred in finding the time de minimis on this record. Call Center Representatives spend several minutes each and every shift working unpaid time. They work in a controlled, centralized environment where Nelnet could easily capture the unpaid time using software, a traditional time clock, or simply an estimate. The district court's distortion and misapplication of the relevant factors effectively sanctioned the precise result the law forbids:

employers "may not arbitrarily fail to count as hours worked any part, *however small*, of the employee's fixed or *regular working time*…." 29 C.F.R. § 785.47 (emphasis added); *Castaneda*, 819 F.3d at 1243. Assuming the de minimis doctrine lives, this Court should hold that it is inapplicable in this case.

(1) The de minimis doctrine contravenes the plain text of the FLSA and should be repudiated; at a minimum, such a judge-made gloss on the text of the Act should be construed very narrowly.

The de minimis doctrine "has no viable place in the interpretation of the FLSA" and should be discarded. S*ee Brennan v. Sugar Cane Growers Coop. of Florida*, 486 F.2d 1006, 1013 (5th Cir. 1973). At a minimum, as a judge-made exception to a federal statute passed by Congress and signed by the President, it must be interpreted narrowly and applied sparingly.

"[T]he judicial function does not allow [courts] to disregard that which Congress has plainly and constitutionally decreed and to formulate exceptions which [they] think, for practical reasons, Congress might have made had it thought more about the problem." *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 514, (1945). "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *United States v. Rutherford*, 442 U.S. 544, 559 (1979).

These principles apply in full force here. The de minimis doctrine "has no obvious statutory derivation." *Perez*, 650 F.3d at 376 (Wilkinson, J. concurring). And as the Supreme Court suggested in *Sandifer*, the "doctrine does not fit comfortably within the statute at issue here, which…is *all about* trifles—the relatively insignificant periods of time in which employees" perform a wide range of beginning-of-shift activities. *Sandifer*, 571 U.S. at 234. The Court's dicta in *Sandifer* vindicates the principle that "[j]udge-made law may [not] be fashioned" when "Congress has provided so much federal law that its detail or comprehensiveness would be undermined by common law supplements." *Matter of Oswego Barge Corp.*, 664 F.2d 327, 339 n.15 (2d Cir. 1981) (citing *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960)).

Jettisoning the de minimis doctrine would also align with broader jurisprudential trends. Fifty years ago, judge-made exceptions to federal statutes were a common feature across the legal landscape. Today, such exceptions are strongly disfavored. Examples of this trend abound. The Supreme Court once blessed various "prudential"—i.e., judge-made—limits on federal jurisdiction. Current law recognizes that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging," *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citations and internal quotations omitted), and a court "cannot limit a cause of action that

Congress has created merely because 'prudence' dictates." *Id.* at 128. Similarly, in a prior "era[,] [the Supreme] Court routinely implied causes of action." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020). Today, causes of action must flow from indicia of congressional intent. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855–56 (2017).

Principles of stare decisis pose no barrier to jettisoning the de minimis doctrine. The Supreme Court has only addressed the doctrine in dicta, and the Supreme Court's dicta is not binding on this Court. *See Central Va. Community Coll. v. Katz*, 546 U.S. 356, 363 (2006). Although Supreme Court dicta is entitled to considerable weight, "to the extent that Supreme Court cases contain conflicting dicta, a later dictum super[s]edes an earlier one…." *Bembenek v. Donohoo*, 355 F. Supp. 2d 942, 950 (E.D. Wis. 2005) (citing *United States v. Yuginovich*, 256 U.S. 450, 463 (1921)). In this case, the later dictum is the Court's statement in *Sandifer* casting doubt on the vitality of the de minimis doctrine. *Sandifer*, 571 U.S. at 234. Prior published opinions of this Court have similarly considered—and rejected—the application of the de minimis doctrine. *E.g.*, *Aguilar*, 948 F.3d at 1286; *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998); *Metzler v. IBP, Inc.*, 127 F.3d 959, 965 (10th Cir. 1997); *Reich*, 38 F.3d at 1126. These cases, which rejected the *application* of the de minimis doctrine, do not bind this Court with

respect to the *existence* of the doctrine. *See United States v. Turner*, 602 F.3d 778, 785–86 (6th Cir. 2010) (explaining that statements which are "not necessary to the outcome" are not binding on later panels).

To the extent this Court retains the de minimis doctrine, it should be interpreted very narrowly. "[J]udge-made doctrine[s]" apply "only in narrowly limited 'special circumstances.'" *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973). In a patent law analog, to cite one example among many, the "de minimis exception" to infringement is "very narrowly" construed. *See Embrex, Inc. v. Service Engineering Corp.*, 216 F.3d 1343, 1349 (Fed. Cir. 2000). These narrow construction principles ensure that courts do not "intrude upon powers vested in the legislative or executive branches." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 90 (1947).

(2) Even assuming the de minimis doctrine applies, the district court misapplied three of the four *Lindow* factors.

Even assuming the de minimis doctrine applies generally, the district court misapplied the doctrine to the facts presented here.

(a) The amount of time spent on a daily basis favors Appellants.

The district court made several legal and factual errors in evaluating the amount of time at issue.

The district court first erred when it stated that "courts usually permit a period of up to ten minutes to qualify as de minimis." Aplt. App.

Vol. 2 at 512. This misstates the law. "There is no precise amount of time that may be denied compensation as de minimis." *Aguilar*, 948 F.3d at 1286 (citing *Reich*, 144 F.3d at 1333). This Court has observed that "as little as ten minutes of working time *goes beyond* the level of de minimis." *Id.* (emphasis added). In other words, ten minutes represents a point *beyond the outer limit* of what the de minimis doctrine will allow, assuming all of the relevant factors favor the employer—not, as the district court suggested, an amount that "courts usually permit" "to qualify as de minimis." Aplt. App. Vol. 2 at 512.

The district court's second error is closely related: it treated "the amount of time spent on a daily basis" as the first of four independent factors under the *Lindow* analysis. *Id.* But *Lindow* embraces only three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the [employees] performed the work on a regular basis." *Aguilar*, 948 F.3d at 1284 (citing *Castaneda*, 819 F.3d at 1243). The amount of time spent on a daily basis is already accounted for in evaluating "the size of the claim in the aggregate." *Id.* Thus, the district court effectively—and impermissibly—double counted one factor in favor of Nelnet.

Third, the district court made impermissible inferences in favor of Nelnet when it found that Call Center Representatives only worked "between one and two minutes of uncompensated work" each shift. Aplt.

App. Vol. 2 at 518. This estimate was based on a number of faulty assumptions in the analysis of Nelnet's expert, including his use of the median and tenth percentile rather than the average working time. *See supra* at 13–15. Without these unfounded assumptions, a reasonable fact finder could have concluded that Call Center Representatives spent four to six minutes of time each shift booting up their computers and launching software applications. *Id.* Even using the expert's own estimation of median time yielded a measurement of 3.5 minutes per shift. *Id.* And the burden on employees in showing the extent of unpaid time is not onerous: they must "show the amount and extent of th[eir] work as a matter of just and reasonable inference." *Tyson Foods*, 136 S. Ct. at 1048.

(b) The time at issue can, as a practical administrative matter, be precisely recorded for payroll purposes.

The district court erred again when it found that the time at issue cannot, as a practical administrative matter, be precisely recorded for payroll purposes. Aplt. App. Vol. 2 at 513.

Call Center Representatives work in a centralized, controlled environment. In that environment, Nelnet has several obvious solutions at its disposal to track the uncompensated time.

First, Nelnet could do so using computer software. The district court was wrong to accept the testimony of Nelnet's undisclosed witness

that such an arrangement would be impossible. Aplt. App. Vol. 1 at 263. A court ruling on summary judgment "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1175 (10th Cir. 2001). Evidence that a jury is required to believe must be "uncontradicted and unimpeached...[and] come[] from disinterested witnesses." *Id.* The testimony of Nelnet's undisclosed witness was not disinterested and a jury was certainly not "required to believe" it. The testimony was also contradicted by corporate deposition testimony where the witness testified that Nelnet had never even considered such a course. Aplt. App. Vol. 1 at 174–76; Aplt. App. Vol. 2 at 431.

Second, Nelnet could track the time using a time clock. Time clocks have been the industrial standard for nearly 100 years. When presented with this possibility, Nelnet's corporate witness could not muster any objections. Aplt. App. Vol. 1 at 181. There is no reason Nelnet should be excused from using this widely accepted and available technology. *See Aguilar*, 948 F.3d at 1285.

Last, Nelnet could simply do an estimate of the boot-up time. As this Court held in *Aguilar*, there is no administrative barrier to paying employees where "it is possible to estimate the average time the [employees] devote to [the relevant activity]." *Id.* Estimates are common in the industrial workplace and permitted under the FLSA. *See, e.g.*,

Tyson Foods, 136 S. Ct. at 1048. Many employers who run call centers have adopted formulas or estimates to compensate employees for boot-up time. *E.g.*, *Burch v. Qwest Comm'ns Intern., Inc.*, No. 06-3523, Dkt. 507 at 6 (D. Minn.) (unpublished) (agreeing to pay five minutes of time per shift for "computer and application log on."). This Court said it best in *Aguilar*: "[B]ecause [the employer] already records the majority of the time at issue and could reasonably estimate the time that it does not record, this factor weighs in the [employees'] favor." 948 F.3d at 1285.

The district court's error on this element was two-fold. First, the district court took a trees-for-the-forest approach, focusing heavily on the difficulties it perceived in tracking the time using software. Aplt. App. Vol. 2 at 514. But the court's discussion ignored the other commonsense, simple approaches Nelnet could have adopted to track time. Aplt. App. Vol. 1 at 181.

Second, the district court took an unduly restrictive view of the law, essentially treating any administrative burden as sufficient to justify application of the de minimis doctrine. Aplt. App. Vol. 2 at 514. An employer must prove that the time at issue "cannot…be precisely recorded." 29 C.F.R. § 785.47. *Any time* a court finds that an employer is out of compliance with the FLSA, some administrative inconvenience will inevitably follow. But courts in similar circumstances have held that where, as here, the employees work in a centralized, controlled

environment and the employer already has a strong sense of how much unpaid time is owed, the administrative burden is not nearly high enough to justify disregarding the time as de minimis. *See Aguilar*, 948 F.3d at 1285; *Kellar*, 664 F.3d at 176–77 (holding that because employees performed the same activities each day, "it would have been possible to compute how much time" employees spent on them); *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1059 (9th Cir. 2010) (reasoning that even though "it may be difficult to determine the actual time" at issue, "it may be possible to reasonably determine or estimate the average time"); *Kosakow*, 274 F.3d at 719 (regular time spent each morning "would not be difficult to calculate"). Cases that hold this factor satisfied typically involve work that occurs outside the worksite or work that varies dramatically based on the individual circumstances of each employee. *E.g.*, *Singh v. City of New York*, 524 F.3d 361, 371 (2d Cir. 2008). Here, accounting for the unpaid time was not only possible but simple. The district court erred in treating it otherwise.

(c) The aggregate size of the claim favors Appellants.

The aggregate size of the claim also favors Appellants.

In analyzing this factor, courts look to both "the aggregate claim for each individual" employee, *Aguilar*, 948 F.3d at 1285, as well as the "aggregate based on the total number of workers." *Reich*, 144 F.3d at

1334. The touchstone of the analysis, however, remains the "the amount of daily time spent on the additional work." *Aguilar*, 948 F.3d at 1284 (citing *Reich*, 144 F.3d at 1333).

Either way the Court looks at it, the aggregate size of the claim is significant. A single Call Center Representative who earns $13.50 an hour and works five shifts in a week loses significant earnings. Assuming five minutes of uncompensated time per day would result in a weekly overtime loss of $8.44. Three minutes of uncompensated time per day would result in a weekly loss of $5.07. Two minutes of uncompensated time per day would result in a weekly loss of $3.38. This Court, only four months ago, suggested that as little as "$1 per week for 50 weeks would not be [a] de minimis claim." *Aguilar*, 948 F.3d at 1286 (citing *Lindow*, 738 F.2d at 1063); 29 C.F.R. § 785.47. These amounts are significant to low wage workers. A recent report by the JPMorgan Chase Institute found that two-thirds of Americans have less than six weeks of take-home pay in savings. *See* Diana Farrell, *Weathering Volatility 2.0* (Oct. 2019), available at https://bit.ly/3eS0LpJ. Low wage workers, like Call Center Representatives, rely on their earnings for food, medicine, housing, and other essential items. The district court was wrong to treat the wage loss here as "trivial." Aplt. App. Vol. 2 at 518.

Analyzing the "aggregate based on the total number of workers" only makes things worse for Nelnet. *Reich*, 144 F.3d at 1334. Nelnet is

the largest student loan servicing company in the United States. Aplt. App. Vol. 1 at 223. Nelnet's call centers operate on a massive, industrial scale. *Id.* at 128. Between July 15, 2014 and April 25, 2018, Nelnet employed 3,499 Call Center Representatives. *Id.* And, of course, that time only covers the period within the statute of limitations in this case. A reasonable fact finder could conclude that Nelnet has employed thousands more Call Center Representatives. *Id.* A few dollars per employee per week quickly aggregates into a kingly sum. *Aguilar*, 948 F.3d at 1284; *Reich*, 144 F.3d at 1333. The total aggregate amount of unpaid time in this case is substantial.

(d) The regularity of the additional work favors Appellants.

The district court correctly found that the regularity of the work time spent booting up computers and launching software applications favors Appellants. This point cannot be overstated. Call Center Representatives' obligation to boot up computers and launch software applications extends to each and every shift—day after day, week after week, year after year. Aplt. App. Vol. 1 at 144–45, 167. It would not be possible for this factor to weigh more heavily in favor of the employees. *Aguilar*, 948 F.3d at 1284; *Reich*, 144 F.3d at 1334.

(3) Even assuming the district court correctly evaluated each *Lindow* factor, the court erred in striking the balance in favor of Nelnet.

The district court's error on the de minimis analysis was not limited to its examination of each individual factor. The court's more significant error was improperly balancing those factors in a way that led to a result totally at odds with the de minimis rule itself.

Under the DOL regulations, which this Court has repeatedly cited with approval, "[a]n employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time [the employee] is regularly required to spend on duties assigned to [the employee]." 29 C.F.R. § 785.47; *Castaneda*, 819 F.3d at 1243; *Aguilar*, 948 F.3d at 1284; *Metzler*, 127 F.3d at 964.

The balance struck by the district court cannot be squared with this requirement. Rather than employing the *Lindow* factors to illuminate the governing test, the district court used them to subvert it. Call Center Representatives' working time was not "small." But even if it was, the time was part of their "regular working time." The regulation suggests that in such a circumstance, neither courts nor employers may "arbitrarily fail to count" it, regardless of the inconvenience to an employer in doing so. *Jimenez*, 697 F. App'x at 599; *Castaneda*, 819 F.3d at 1243; *Aguilar*, 948 F.3d at 1284; *Metzler*, 127 F.3d at 964. This

formulation aligns with a "sometimes-forgotten guide": "common sense." *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc). A reasonable observer might regard an unpredictable twice-a-year late-night call from a supervisor or a rare interrupted lunch break as too trifling to matter. But the same reasonable observer would likely look at Nelnet's years-long, mass-scale, systemic refusal to pay for time worked as a form of industrial wage theft.

The district court erred in holding otherwise.

CONCLUSION

The district court's judgment should be reversed. This case should be remanded with instructions to grant Appellants' motion for summary judgment.

Dated: June 11, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument in this case. This case presents important issues regarding the proper interpretation of federal law and the existence and scope of the de minimis doctrine. Oral argument will give this Court a valuable opportunity to ask questions about the record and clarify the parties' arguments.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because the brief contains 12,903 words, as determined by the word-count function of Microsoft Word for Office 365, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

Dated: June 11, 2020

s/Adam W. Hansen
Adam W. Hansen

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Norton AntiVirus, and according to the program is free of viruses.

Dated: June 11, 2020

s/Adam W. Hansen
Adam W. Hansen

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01064-NYW

ANDREW PETERSON,
on behalf of himself and all similarly situated persons,

Plaintiff,

v.

NELNET DIVERSIFIED SOLUTIONS, LLC,

Defendant.

AMENDED MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This civil action comes before the court on Plaintiff Andrew Peterson's ("Plaintiff" or "Mr. Peterson") and Defendant Nelnet Diversified Solutions, LLC's ("Defendant" or "Nelnet") cross-motions for summary judgment ("Plaintiff's MSJ" and "Defendant's MSJ", respectively) [#158; #168] as well as Nelnet's Motion to Decertify FLSA Collective Action ("the Decertification Motion") [#171, filed May 15, 2019]. The undersigned fully presides over this case pursuant to 28 U.S.C. § 636(c), the consent of the Parties [#11], and the Order of Reference dated June 26, 2017 [#12]. For the reasons stated in this Memorandum Opinion and Order, Defendant's Motion for Summary Judgment is **GRANTED**, Plaintiff's Motion for Summary Judgment is **DENIED**, and Defendant's Decertification Motion is **DENIED AS MOOT**. Because there are no federal claims remaining, the court declines to exercise supplemental jurisdiction and **DISMISSES without prejudice** Plaintiff's remaining state law claim.[1]

[1] The language regarding remand to state court was inadvertently included in the court's original Memorandum Opinion and Order. Having not been filed originally in state court, there is no

BACKGROUND

Plaintiff Andrew Peterson ("Plaintiff" or "Mr. Peterson") initiated this action on April 28, 2017, by filing a Complaint asserting a collective action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), for unpaid overtime wages "on behalf of himself and all current and former Account Managers and Call Center Representatives."[2] [#1]. Mr. Peterson worked for Defendant Nelnet, which is in the business of servicing loans, at its Aurora, Colorado location from approximately September 2011 to September 2014. [*Id.* at ¶¶ 10, 11]. Mr. Peterson alleged that Nelnet violated the FLSA by failing to pay him and other call center representatives premium overtime compensation for hours worked in excess of forty hours in a workweek. [*Id.* at ¶ 2]. In support of his claim, Mr. Peterson averred that Nelnet failed to accurately track or record the actual hours worked by CCRs as follows: "(i) [by] failing to provide [call center representatives] with a way to accurately record the hours they actually worked; (ii) permitting [call center representatives] to work before and after they 'clock in' to Nelnet's timekeeping system; and (iii) allowing work during uncompensated lunch breaks." [*Id.* at ¶ 6]. In his original Complaint, Mr. Peterson asserted claims for: (1) violation of the FLSA on behalf of himself and the collective; (2) violation of Colorado Minimum Wage Order on behalf of himself and a Rule 23 class of individuals ("Second Cause of Action"); and (3) violation of the Colorado Wage Act on behalf of himself and a Rule 23 class of individuals ("Third Cause of Action"). [#1]. Defendant subsequently filed a Motion to Dismiss, [#19], which was mooted

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basis for remand of this action to state court pursuant to 28 U.S.C. § 1446 *et seq. See Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 617 (4th Cir. 2001) ("Obviously, as Norwest recognizes, if the case was not removed, it cannot be remanded." (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988))).

[2] When referring to "Plaintiff" the court intends to refer both to Mr. Andrew Peterson and the collective joined in this litigation. The court will use "Mr. Peterson" when referring to Mr. Peterson's individual state law claim and the arguments made in support of that claim.

when Plaintiff filed his Amended Complaint as a matter of right. [#29; #30]. The Amended Complaint included the same three claims with additional factual detail. [#29]. Defendant filed an Answer to the Amended Complaint on October 5, 2017. [#37].

On January 31, 2018, Plaintiff filed a Motion for Court Authorized Notice Pursuant to 29 U.S.C. § 216(b) of the FLSA ("Motion for Conditional Certification"). [#50]. On April 25, 2018, the court granted the Motion for Conditional Certification in part, allowing a collective to go forward as to Advisors, Collectors, and Flex Advisors for pre-shift uncompensated log-in time (collectively, "CCRs"). [#79]. Shortly thereafter, the parties stipulated to the following definition of the conditionally certified collective:

> Current and former Flex Advisors, Collectors, or Advisor Is who worked at Nelnet Diversified Solutions, LLC's Aurora, Colorado; Lincoln, Nebraska; and Omaha, Nebraska Customer Interaction Center locations at any time from July 15, 2014 to April 25, 2018 and who worked off-the-clock without compensation at the beginning of their shifts prior to clocking into the timekeeping system. Individuals who worked as Collectors in Direct Account Placement or "DAP" are not included in this collective definition.

[#82].

On June 29, 2018, the notice administrator mailed the FLSA collection action notice to the putative collective members who worked at the relevant locations in Aurora, Lincoln, and Omaha. [#92]. Ultimately, 359 individuals opted into the FLSA collective, a few of whom have since been dismissed from the collective for unrelated reasons, primarily failure to participate in discovery. [#99; #100; #101; #102; #105; #108 at 11 n.3].

On November 16, 2018, the Parties submitted a Joint Status Report, in which Plaintiff indicated "[t]he Plaintiff is no longer pursuing any Rule 23 class action claims." [#117 at 1]. Plaintiff further indicated "[i]f the case reaches a trial, such trial would therefore be narrowed to the compensability of activities that plaintiff alleges he was required to perform to become call-

ready before clocking in pre-shift and related potential damages issues." [*Id.* at 2]. The Parties then indicated that they believed trial could be completed in five days. [*Id.*]. Based on this Status Report, the court dismissed the Second and Third Causes of Action from the Amended Complaint and ordered the Parties to file a Supplemental Scheduling Order. [#119]. Following a Motion to Reconsider based on an ambiguity as to whether the Aurora-based FLSA collective members were still asserting their Colorado state law claims individually if not as a class, the court affirmed its prior order and denied further relief, finding that the relevant claims remaining were the conditional class's FLSA claims and Mr. Peterson's individual state law claims. [#128; #153]. Shortly thereafter, the Parties filed the instant cross-motions for summary judgment and Defendant filed the Decertification Motion. After an extension of time harmonized the briefing schedule on the pending motions, briefing closed on June 21, 2019, and the matters are now ripe for decision.

LEGAL STANDARD

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)). Nevertheless, the content of the evidence presented at summary judgment must be admissible to be considered. *See* Fed. R. Civ. P. 56(c)(4); *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 485 (10th Cir. 1995).

Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Service*, 812 F.2d 621, 623 (10th Cir. 1987). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat. Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 289 (1968)).

ANALYSIS

The court begins by considering the cross-motions for summary judgment. The court begins with the undisputed material facts and then examines whether the time at issue qualifies as compensable time. Finding the time compensable, the court then proceeds to consider whether the time is *de minimis* and concludes that the time at issue is so brief and recording it poses such an administrative challenge that the time is *de minimis* as a matter of law. Accordingly, the court concludes that summary judgment should enter for Defendant Nelnet.

UNDISPUTED MATERIAL FACTS

The following undisputed material facts are drawn from the Parties' cross-motions for summary judgment.[3]

1. Defendant Nelnet Diversified Solutions LLC is in the business of servicing student loans. [#168-1 at 5, 39:16–20].
2. To this end, Nelnet maintains several "customer interaction centers" in Aurora, Colorado; Lincoln, Nebraska, and Omaha, Nebraska. [*Id.* at 41:17–22].
3. At these centers, Nelnet employees service student loans and interact with debtors over the phone and through email. [*Id.* at 2, 9:4–15]. This case is concerned with those employees who were worked as Flex Advisors, Collectors, or Advisors I from July 15, 2014 to April 25, 2018 ("the CCRs" or "the employees").
4. CCRs are paid once they clock into the timekeeping system at their individual workstations.[4] [#168-8 at 2, 12:12–24]. Before a CCR may clock in to the system, he or she must first perform several steps.
5. First, the CCR selects a workstation and moves the mouse or presses a key to wake the computer up from standby mode. [#168-11 at 3].

[3] The Parties agree as to all the relevant material facts, but occasionally disagree with another party's precise framing of a material fact or present a putative material fact which is actually an inference or conclusion drawn from other material facts without direct evidentiary support. The Parties also proffer many material facts which the court does not find relevant to its disposition of the matter. The court accepts and recounts below only the relevant material facts, disregarding another party's objection as to the correct interpretation of that fact and disregarding those alleged facts which are not relevant or directly supported by evidence. For ease of reference, the court will cite to the relevant underlying exhibit initially, but future reference to this section will cite to these facts in the following format: "Material Fact ¶ 1."

[4] Nelnet has used several different timekeeping systems in the relevant timeframe but because the exact system is not relevant, the court does not distinguish between these systems.

6. The CCR then inserts an "Imprivata" security badge and enters his or her credentials (username, password). [*Id.*].
7. The computer automatically launches Citrix, which loads the CCR's personal desktop, and Nelnet's Intranet which contains a link to the timekeeping system. [*Id.*].
8. Once the Intranet has loaded, an employee has access to the timekeeping system and may, and nearly always does, clock into the system and begin receiving payment. [*Id.*; #168-5 at 2–3, 7:4–10:24]. The time from the Imprivata badge swipe to the Citrix session initiating is referred to as the "Boot-Up Time" and the time from Citrix initiating to the timeclock check in is referred to as the "Citrix-Active Time" and collectively, "pre-shift activities."
9. Completing these pre-shift activities is necessary to conduct the CCRs' principal job duties. [*Id.*; #159-1 at 39, 17:8–13].
10. The median Boot-Up Time is 0.5 minutes in Omaha, 0.9 minutes in Lincoln, and 1.02 minutes in Aurora. [#168-16 at 17].
11. The median 10th percentile Citrix-Active Time—which the parties accept as the relevant measure—is 1.1 minutes at Omaha, 1.3 minutes in Lincoln, and 1.25 minutes in Aurora. [*Id.*].
12. Nelnet policy provided that CCRs were to be "call ready" within six minutes of their scheduled shift, and, by custom, permitted CCRs to clock in five minutes prior to the start of a shift. [#168-31 at 2; #168-32 at 1].
13. Nelnet policy is that an employee should clock in at this point before launching any further programs. [*Id.* at 12–13, 161:9–162:8].

14. To become call ready after booting up the computer and launching Citrix and the Intranet, a CCR must launch several additional programs. [*Id.* at 162:9–23].
15. Nelnet permits its employees to use their computers for personal tasks and the timekeeping system design permits the employee to clearly delineate when the work begins and ends. [#168-23 at ¶ 13].
16. CCRs are also permitted to do personal tasks when waiting for the pre-shift activities to complete which are basic, rote activities that do not require much if any thought or effort. [#168-18 at 2–3, 57:7–18, 138:3–140:2].
17. Nelnet does not, and has never, used the timestamps associated with logging into Citrix or insertion of the Imprivata Badge for timekeeping purposes. [168-9 at ¶ 10].[5]
18. It would be technically challenging to link the Imprivata or Citrix timestamps to the timekeeping system typically used for compensation. [#168-23 at ¶¶ 10–15; #168-9 at ¶¶ 11–16].

[5] Plaintiff challenges Material Facts ¶¶ 17–19 on the basis that "Defendant admitted to never consulting Citrix, Imprivata, or anyone internally about linking its records with Plaintiffs' time stamps and therefore any claim that such a practice is impossible or impracticable is baseless." [#174 at 6]. Citing the deposition of Jason Latimer, Plaintiff notes that he stated that "to [his] knowledge" Nelnet never examined the feasibility of linking Imprivata or Citrix to the timekeeping system. [#174-2 at 4–5, 6–7]. This statement is insufficient to rebut the uncontroverted testimony of Wendi Beck, Managing Director of Benefits, Compensation, and Payroll for Nelnet, who definitively states that linkage would be "not possible" given the design of the systems at issue [#168-23 at ¶¶ 10–16] and Greg Counts, IT Director for Nelnet, who similarly states that Nelnet has "no technological means" to link the systems at issue and that Nelnet would "most likely" have to build specialized software to accomplish such a task. [#168-9 at ¶¶ 10–16]. To be a "genuine" factual dispute, there must be more than a mere scintilla of evidence and the dispute must be more than "merely colorable." *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993). Plaintiff's reliance on Mr. Latimer's lack of knowledge whether such linkage was considered does not create a genuine material dispute that linking the two systems at issue would be possible as Plaintiff offers no evidence such as an expert opinion or admission that the linkage is possible but Nelnet merely failed to ask.

19. Linking the CCR's compensation to the Imprivata Badge insertion or Citrix login would most likely require custom-made software which Nelnet neither possesses nor knows how to create. [#168-23 at ¶ 12; #168-9 at ¶ 12].

ANALYSIS

I. Are the Pre-Shift Activities Covered by the FLSA

The Parties refer to the two categories of pre-shift time, the Boot-Up Time (defined as the time between the employee's badge swipe and the time stamp initiating the process of booting up each Citrix sessions) and the Citrix-Active Time (defined as the time between completing the launch of the Citrix virtual desktop application and completion of clocking in), as distinct. *E.g.*, [#158 at 13–14; #168 at 24]. As discussed more fully below, the court's analysis renders any distinction between the two categories immaterial, and so the court simply refers to these two categories as the "pre-shift activities."

A. Legal Standard—Compensable Time

The FLSA does not provide a definition of work, and United States Supreme Court has long-described "work or employment" under the FLSA as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S.680, 691-92 (1946). A year after *Anderson* and in response to concerns over overbreadth, Congress passed the Portal to Portal Act of 1947, codified at 29 U.S.C. §§ 251–262, amending certain provisions of the FLSA to specifically preclude coverage for activities that are considered "preliminary or postliminary" to the principal activity of work. *IBP*, 546 U.S. at 25. The "principal activities" are those activities for which an employee is employed. *Integrity Staffing Sols., Inc. v. Busk*, 135 S. Ct. 513. 518

(2014) (quoting 29 U.S.C. § 254(a)(1)). Under the "continuous-workday rule," all activity from the first principal activity is ordinarily compensable until the last principal activity. *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1243 (10th Cir. 2016).

Relevant here, § 254(a)(2) provides that "no employer shall be subject to any liability" for "activities which are preliminary to or postliminary to said principal activity or activities" which occur before or subsequent to "principal activities or activitie s" in the workday. This distinction is not always easily made. The Supreme Court has recognized that some activities which are temporally preliminary to the principal gainful activity the employee is employed to perform are compensable as those same principal activities when such preliminary activities are "an integral and indispensable part of the principal activities for which workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). The word "integral" has been interpreted to mean "a duty that cannot be dispensed with, remitted, set aside, disregarded, or neglected." *Integrity Staffing*, 135 S. Ct. at 517. On the other hand, under this integral and indispensable standard, activities which are necessary to perform one's work but not substantively connected to the actual performance of such work are not considered compensable. For instance, walking to a workstation or waiting to don protective gear may be a necessary precondition to performing one's duties but it is nonetheless not compensable because it is unrelated to the performance of those duties. § 254(a)(1) (excepting "riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform"); *IBP*, 546 U.S. at 42. Similarly, although not required to perform an employee's principal activities, an employer may require certain tasks of employees without rendering time spent performing such tasks compensable, such as mandatory security screenings. *Integrity Staffing*, 135 S. Ct. at 518. Likewise, passing through a security checkpoint for a nuclear plant is

essential to the security of such a sensitive facility, but it is unrelated to the performance of the plant workers' duties. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593–94 (2d Cir. 2007).

But when a preliminary task is integral and indispensable to the performance of the employee's principal activities, that preliminary task is compensable. *Steiner*, 350 U.S. at 256. For example, some chemical plants work with hazardous chemicals on a regular basis such that extensive protective gear and regular bathing is required to maintain a healthy and safe working environment. *Id.* at 249. The act of donning the protective gear and bathing to remove harmful chemical particulate matter is considered integral and indispensable because it is inextricably interrelated to the performance of an employee's work in such environment. *Id.* at 256. Similarly, time spent sharpening knives for work at a slaughterhouse is considered integral and indispensable because "razor sharp" knives are required to safely and effectively produce clean and aesthetically pleasing cuts of meat. *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956). In sum, "an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—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." *Integrity Staffing*, 135 S.Ct. at 519.

B. Application

Nelnet argues that the pre-shift activities at issue are not compensable because they are not principal activities but rather preliminary activities which are neither integral or indispensable to work. [#168 at 18-22; #174 at 6-13]. Relying on *Reich v. IBP, Inc.*, 38 F.3d 1123, 1124 (10th Cir. 1994) and *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006), Nelnet also argues that the pre-shift activities cannot be integral to Plaintiffs' principal activities, because the pre-shift activities are not demanding and permit a CCR to engage in

personal discussions and diversions during the process. [#168 at 19; Material Fact ¶ 16]. Nelnet also contends that computers are not integral and indispensable but instead merely enhance the performance capacity of the CCRs. [#168 at 20 ("That Opt-Ins can complete their work assisting borrowers more efficiently using electronic records (rather than voluminous paper files) is insufficient to render logging in to computers and loading job-relevant programs "integral and indispensable.")].

Plaintiff argues that the pre-shift activity time is compensable because the work performed during that time is the first "principal activity," relying on Department of Labor Fact Sheet #64. [#179 at 4-6]. Plaintiff further contends that even if the logging in process is not considered a "principal activity," it is still compensable because the pre-shift activities are integral and indispensable, as a CCR cannot use the Citrix system until it has been successfully initiated, and the Citrix system is required by Nelnet in order for the CCRs to make and receive calls for loan servicing. [#158 at 15; 179 at 6–7].

1. Are Pre-Shift Activities "Principal Work" or "Preliminary Work"?

Fact Sheet #64. Plaintiff contends that the Department of Labor's Wage and Hour Division's Fact Sheet #64 ("Fact Sheet"), attached to Plaintiff's Motion for Summary Judgment as Exhibit E. [#159-1 at 88], establishes that the pre-shift activities are "principal work," and is entitled to significant deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). [#158 at 10, #174 at 5-6]. The Fact Sheet is specific to call center workers and states that "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." [#159-1 at 90]. Defendant counters that the Fact Sheet merits no deference, much less *Skidmore* deference. [#180 at 5–7].

Under *Skidmore*, the deference due to an administrative agency interpretation of the law depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006); *Flores-Molina v. Sessions*, 850 F.3d 1150, 1158 (10th Cir. 2017) (same). Here, by its own terms, the Fact Sheet #64 only "provides general information and is not to be considered in the same light as official statements of position contained in the regulations." [#159-1 at 90]. In addition, in concluding that "starting the computer to download work instructions, computer applications, and work-related emails," the Department of Labor did not engage in substantive analysis nor cite to statutory reference or case law interpretation. [*Id.*]. *Cf. Salazar v. Butterball, LLC*, No. 08-CV-02071-MSK-CBS, 2010 WL 965353, at *5 (D. Colo. Mar. 15, 2010), *aff'd*, 644 F.3d 1130 (10th Cir. 2011) (observing that DOL "Opinion Letters and the like are entitled to respect or deference to the extent that they have the 'power to persuade', which is based on the thoroughness of the evaluation, the validity of the reasoning, the opinion's consistency with earlier and later pronouncements, and any other factors which a court finds relevant" and finding that the DOL's 1997 and 2001 opinion letters regarding donning and doffing were entitled to some deference after finding the agency's position and reasoning persuasive). Plaintiff cites no authority, and this court could not independently find any, that accords Fact Sheet #64 any deference, and the court notes that the Fact Sheet was last revised in July 2008 [#1591 at 89], prior to further refinement of the applicable law by the Supreme Court and Tenth Circuit. Accordingly, this court affords limited deference to Fact Sheet #64, and notes that it does not displace or supersede the court's own interpretation and judgment with respect to whether pre-

shift activities here are "principal work" or otherwise compensable. *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1085 (D. Colo. 2016).

***Bustillos*.** For its part, Nelnet argues that this court should simply follow *Bustillos v. Bd. of Cty. Commissioners of Hidalgo Cty.*, No. CV 13-0971 JB/GBW, 2015 WL 7873813 (D.N.M. Oct. 20, 2015), *aff'd in relevant part, rev'd in part sub nom. Jimenez v. Bd. of Cty. Commissioners of Hidalgo Cty.*, 697 F. App'x 597 (10th Cir. 2017) and find that, as a matter of law, the preshift activities are not principal work, and constitute noncompensable tasks. *Bustillos* involved a 911 call center operator who had to perform several preliminary tasks before beginning work, including logging into her computer. 2015 WL 7873813 at *17. There, the district court found that "[d]onning a headset, logging into the computer, and cleaning her workstation are merely preliminary or postliminary to the productive work that the employee is employed to perform. These activities do not constitute the actual work of consequence performed for an employer, and are more like the ingress and egress process." *Id.* (quotations and citations omitted). On appeal, the Tenth Circuit affirmed in an unpublished opinion "for substantially the reasons advanced by the district court for each of its rulings." *Jimenez*, 697 F. App'x at 598. In a footnote without any analysis, the Tenth Circuit distinguished, without discussion, the pre-shift briefing from "other preliminary, non-compensable tasks such as putting on her headset and logging into her computer." *Id.*at 599 n.2.

The court respectfully declines to find *Bustillos* controlling in this instance simply because the activities at issue are similar and further declines to suggest that logging into a computer system should be treated in all cases as "the digital equivalent of travel or of waiting in line to clock in." [#168 at 18]. The controlling authority makes clear that courts must determine on a case-by-case basis whether an employee's activities are compensable under the FLSA. *See*

Smith v. Aztec Well Servicing Co., 462 F.3d 1274, 1285 (10th Cir. 2006) (citations omitted); 29 C.F.R. § 785.6.

Bustillos relied on *Integrity Staffing*, but this court finds the ingress/egress argument unavailing because the screening at issue in *Integrity Staffing* was wholly unrelated to the performance of the employees' tasks—the employees had completed their tasks and were screened as they left the warehouse. 574 U.S. at 515. By contrast, setting up one's computer to take calls at a call center is intertwined with the substance performance of the day's tasks. A different situation might arise if employees were not paid for postliminary tasks such as shutting down one's workstation and logging out, but here the pre-shift activities are both necessary to the performance of the day's tasks and a material part of such performance.

The *Bustillos* court then went on to analogize to *Aztec Well* and out-of-circuit donning and doffing cases to emphasize that "pre- and post-shift activities that can be accomplished with minimal effort and time are non-compensable." 2015 WL 7873813 at *18. But this court concludes that this case is more like *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1350 (10th Cir. 1986) (transporting tools to worksite considered integral and indispensable),and *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir. 1958) (transporting equipment to and from well sites was compensable) because the pre-shift tasks refer to the substantive tools of performance, not secondary gear like safety goggles or hardhats. *Compare Mitchell*, 262 F.2d at 555 ('But employees who transport equipment without which well servicing could not be done, are performing an activity which is so closely related to the work which they and the other employees perform, that it must be considered an integral and indispensable part of their principal activities."), *with Aztec Well*, 462 F.3d at 1289 ("Nor is there any evidence that Aztec regularly required the plaintiffs to pick up or drop off essential

equipment or paperwork while traveling, which could also constitute a "principal activity" within the meaning of the Portal–to–Portal Act. . . . Requiring employees to show up at their work stations with such standard equipment as a hard hat, safety glasses, earplugs, and safety shoes is no different from having a baseball player show up in uniform, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature." (citations and quotations omitted, formatting altered)).

The court finds the *Aztec Well* court's discussion of § 790.7(d) to be illuminating on this point. § 790.7(d) provides that while commuting and travel time is not normally compensable, when "walking, riding, or traveling is not segregable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) . . . it does not constitute travel 'to and from the actual place of performance' of the principal activities he is employed to perform [as exempted under the Portal Act, 29 U.S.C. § 254(a)(1)]." § 790.7(d). While the *Aztec Well* court found that showing up with basic safety gear was "not segregable from the simultaneous performance of [the employees'] assigned work," the court finds that the pre-shift activities in this case are distinguishable and so neither *Aztec Well* nor *Bustillos* are availing. A logger who neglects to carry "a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area" simply cannot perform his tasks under any circumstances. *Id.* A logger is expected to show up to the work site with a hard hat, but the employer provides the chainsaw which the employee must prepare to perform the work expected of him. Similarly, the CCRs would be unable to perform the labor for which they were hired if they did not complete the pre-shift activities to prepare the equipment their employer provides for them to use in performing their tasks. In short, the court finds that *Aztec Well* and § 790.7(d) support the court's finding that the pre-shift activities are integral to the

principal activities, and respectfully disagrees with the *Bustillo* court's determination to the contrary to the extent that court's analysis is in tension with the court's analysis here.

The Pre-Shift Activities are Not, by their Nature, Principal Activities. There is no dispute that "the principal activity of work" of the CCRs is the servicing of loans. Material Fact ¶ 1. The CCRs service student loans and interact with debtors over the phone and through email. *Id.* at ¶ 3. And aside from the language from Fact Sheet #64 characterizing "starting the computer to download work instructions, computer applications, and work-related emails," as "principal work," there is no real dispute that the CCRs are not hired to log into a computer system. *See Integrity Staffing*, 135 S.Ct. at 518 (observing that "principal activity of work" are those activities for which an employee is employed). Therefore, this court concludes that the pre-shift activities do not constitute the employees' "principal work."

This conclusion, however, does not resolve whether the time associated with the pre-shift activities are compensable. This court finds that the appropriate approach is to consider, based on the circumstances presented here, whether Plaintiffs' pre-shift activities are compensable under *Steiner*. 350 U.S. at 256. Indeed, to hold otherwise might suggest that login activities, regardless of the principal work at issue, were categorically compensable or noncompensable. The case law interpreting the FLSA does not suggest to this court that painting with such a broad brush is appropriate, *compare Steiner*, 350 U.S. at 256 (holding that clothes-changing and showering were an integral and indispensable part of the principal activity of manufacturing automotive-type wet batteries) *with Gorman*, 488 F.3d at 594 (holding that donning a helmet, safety glasses, and steel-toed boots, though indispensable, were not integral to working at a nuclear power plant). Accordingly, the court now turns to whether the pre-shift activities are

compensable as preliminary work that is integral and indispensable to the principal activities of the employees under the FLSA.

2. Are the Pre-Shift Activities Integral and Indispensable?

Time and complexity. First, this court finds that Nelnet's arguments that the pre-shift activities are not compensable because they take a short period of time to complete and that CCRs can perform other tasks during the same time are more appropriately considered within the inquiry of whether the *de minimis* exception applies. The length of time and the complexity of the task alone are not necessarily material to the analysis of such activities are "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Integrity Staffing*, 135 S.Ct. at 519. *Cf. Reich*, 38 F.3d at 1126 n.1 ("It could also be said that the time spent putting on and taking off these items is de minimis as a matter of law, although it is more properly considered not work at all. Requiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature.").

Integral and Indispensable Preparatory Work. Court have long held that pre-shift preparation of tools or equipment is considered integral and indispensable to the principal activities when the use of such tools in a readied or activated state is an integral part of the performance of the employee's principal activities. *See, e.g.*, *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App'x 448, 454 (5th Cir. 2009) (checking out specialized tools is compensable). Thus, sharpening knives for work in a slaughterhouse qualifies because the employees regularly use the knives in performing their duties. *King Packing*, 350 U.S. at 263. And setting up and testing an MRI machine qualifies as well because the machine must be

in its ready-to-use state for patients coming in at the start of the day. *See Kosakow v. New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 717–18 (2d Cir. 2001). So too is loading a truck with tools to drive to a worksite, *Gaytan v. G&G Landscaping Constr., Inc.*, 145 F. Supp. 3d 320, 325 (D.N.J. 2015), and grooming, feeding, and training police dogs for canine officers whose job depends on an efficient canine partner, *Reich v. New York City Transit Auth.*, 45 F.3d 646, 652 (2d Cir. 1995); *Andrews v. DuBois*, 888 F. Supp. 213, 216 (D. Mass. 1995).

Here, the court finds 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 workmen are employed" under *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956), and therefore does not fall within the Portal Act's exemption. There appears no dispute between the Parties that "Opt-Ins necessarily use computers to access electronically stored information, which requires Opt-Ins to log in to their computers and open job-relevant software." [#168 at 20; Material Fact ¶ 9]. Indeed, the very data that allows the CCRs to service student loans, e.g., borrower information and payment history, appears to reside within the computer system; there is no evidence before this court that Plaintiffs have access to such information outside the computer applications. Nelnet recognizes that "many modern hourly workers use computers to access electronically stored information to perform their work" [#168 at 20] and in this case, part of the expected principal activity of CCRs is to interact with borrowers through email. [Material Fact ¶ 3].

Ingress Process. Nelnet argues that the pre-shift activities are the equivalents of historically non-compensable ingress to the workstation and waiting in line to clock in. The court respectfully disagrees. Nelnet analogizes extensively to the ingress process which is specifically classified as non-compensable preliminary time under the Portal Act, 29 U.S.C.A.

§ 254(a)(1). *See, e.g.*, [168 at 13 (referring to it as "digital ingress or wait time")]. But this analogy fails because, specific statutory exemption for travel time aside, the ingress process is not a part of the performance of the day's labor, it is rather simply a necessary precondition like the antecedent commute from the worker's home to the place of employment. Here, the pre-shift activities are not only necessary, but the CCR makes regular use of the prepared electronic tools in performing their substantive tasks. Therefore, the necessary preliminary work is intertwined with the substantive performance of the principal tasks which renders such preliminary work integral and indispensable. An employee is not employed to arrive at the office or pass through a security checkpoint, but she is employed to use certain tools in performance of her tasks, and pre-shift preparation of those tools is integral and indispensable to the performance of the principal labor for which the employee is employed.

Indeed, although the parties separate the day between the pre-shift activities and the remainder of the day, the court finds that there is no basis to distinguish the Boot-Up Time and the Citrix-Active Time from subsequent time where the CCR is required to launch several additional programs to become call-ready but has clocked in and begun receiving compensation. [Material Fact ¶ 14]. Nelnet specifically argues that these acts are not distinct. [#168 at 12 n.5 ("[N]either the time spent logging-in to the computer nor loading job-related programs is compensable.")]. But under the "continuous-workday rule," once the employee's work day starts with the first principal activity, all activity is ordinarily compensable until the work day ends, *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1243 (10th Cir. 2016). The entire time the CCR spends from first inserting the Imprivata badge to becoming call ready—"the call-ready process"—is more sensibly viewed as one continuous process required to prepare CCRs to perform the principal activity for which they were hired, i.e., servicing student loans by

interacting with borrowers via email or telephone. This is work that is done for the benefit of the employer and is intertwined with the substantive performance of the day's labor where the CCR regularly makes use of the materials and programs prepared in this process to do assigned work. *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1350 (10th Cir. 1986) (transporting tools to worksite considered integral and indispensable), *overruled on other grounds, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *D A & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir. 1958) (transporting equipment to and from well sites was compensable under the Portal Act because "transport[ing] equipment without which well servicing could not be done, [is] an activity which is so closely related to the work which they and the other employees perform, that it must be considered an integral and indispensable part of their principal activities").

Donning and doffing cases help illustrate the distinction between necessary work and necessary work intertwined with the substantive performance of the employee's tasks. When the gear required of an employee is both required and must be donned and doffed at the employer's facility, that time is compensable. When the gear is not required or may be donned and doffed at home, then that time is not compensable. Donning and doffing a police uniform is not integral because one can do that at home, *Bamonte v. City of Mesa*, 598 F.3d 1217, 1227 (9th Cir. 2010) ("[T]he relevant inquiry is not whether the uniform itself or the safety gear itself is indispensable to the job—they most certainly are—but rather, the relevant inquiry is whether the nature of the work requires the donning and doffing process to be done on the employer's premises." (citing

lower court opinion, quotations omitted)).[6] But cleanroom workers who were required to don and doff at the facility were exempted from the Portal Act because that act was considered integral and indispensable, *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004), and as already mentioned, the same applies to slaughterhouse workers wearing special gear, *IBP*, 546 U.S. at 32, and battery plant workers handling hazardous chemicals, *Steiner*, 350 U.S. at 27. And just as two employees can make small talk while putting on chainmail gloves, the CCRs here can talk while booting up their computers without changing the nature of the activity.

Wait Time. Nelnet's analogy to wait time is more compelling but ultimately unpersuasive. Generally, an employee waiting to begin a principal activity is engaged in preliminary, non-compensable time. 29 C.F.R. § 790.7(g) ("Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so . . . ."); *see also, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005) (waiting to begin the process of donning protective gear is "two steps removed from the productive activity" and not compensable); *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 226 (5th Cir. 2017) (holding that time spend waiting for company bus and driving to worksite were not compensable). Here, the pre-shift activities are only one step removed from the principal activity and, again, necessarily intertwined with the performance of such tasks. That the pre-shift activities involve periods of waiting alternating with rote input no more precludes a

[6] The Tenth Circuit has addressed donning and doffing protective gear in a slightly different manner. Instead of considering the relation between the protective gear and the work performed, the Tenth Circuit has focused on the definition of "changing clothes" which is exempted from the definition of "hours worked" under 29 U.S.C. § 203(*o*). *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1136 (10th Cir. 2011). The *Butterball* court did not address the integral and indispensable question. *Id.* at 1138 n.4.

finding of indispensability than waiting at a stop light would in *Crenshaw* or *Mitchell*. And the availability of personal entertainment during this process no more precludes such finding than the *Crenshaw* or *Mitchell* plaintiffs listening to the radio or talking with one another would.

The court finds that Defendant's other authority is also distinguishable. For example, Nelnet cites to *Butler v. DirectSAT USA, LLC*, 55 F. Supp. 3d 793 (D. Md. 2014) and *Kuebel v. Black & Decker (U.S.) Inc.*, No. 08-CV-6020, 2009 WL 1401694 (W.D.N.Y. May 18, 2009), to argue that logging into a computer and receiving work instructions was not compensable. [#168 at 17]. But the email correspondence and computer use in those cases is distinguishable because it only involved receiving instructions and directions—in neither case did the employees then make consistent use of the computer systems in performance of their tasks as, respectively, cable-company technicians and retail specialists. *Butler*, 55 F. Supp. 3d at 797; *Kuebel*¸ 2009 WL 1401694, at *2. The computer use in this case is consistent and integral the performance of the CCR's duties, not merely an unrelated precondition such as receiving directions to the next job site. Having found that the pre-shift activities are integral and indispensable nature to the CCRs' principal tasks, this court now turns to whether they are nevertheless noncompensable because they are *de minimis*.

II. Are the Pre-Shift Activities Nevertheless Noncompensable as *De Minimis*?

Nelnet argues that the pre-shift activity time in this case, which in the usual course takes no more than two and a half minutes on the high end, constitutes *de minimis* activity and is therefore not compensable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). [#168 at 23]. Plaintiff counters that this time occurred reliably with every shift, and even if the amount is small, the claim in the aggregate is not. [#174 at 15]. The court finds this time is *de minimis*.

The Tenth Circuit, adopting the test applied in the Ninth Circuit formulated in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), applies a multi-factor balancing test to determine whether the time at issue is "insubstantial or insignificant . . . [and] which cannot as a practical administrative matter be precisely recorded for payroll purposes." 29 C.F.R. § 785.47. First, the amount of time spent on a daily basis must be sufficiently brief to qualify as *de minimis*—courts usually permit a period of up to ten minutes to qualify as *de minimis*, although the application of the exception depends on satisfaction of the other factors in the test. *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333 (10th Cir. 1998). Second, the court considers the practical administrative difficulty of recording the time. *Id.* at 1334. Third, the size of the claim in the aggregate. *Id.* Fourth and finally, whether the claimants performed the work on a regular basis. *Id.* No single factor is determinative in this holistic analysis. *Id.* at 1333 (stating that the court must "evaluate" these "factors"); *Garcia v. Tyson Foods, Inc.*, 766 F. Supp. 2d 1167, 1179 n.8 (D. Kan. 2011). Because the time in this case clearly falls well below the ten-minute threshold, the court proceeds directly to the other factors.

Regularity and Ascertainability. The court finds that the time in case regularly occurring, readily ascertainable, and therefore is not "uncertain and indefinite." The parties do

not dispute that the pre-shift activities occurred every time a CCR logged onto a system before beginning work, nor do the parties dispute that the pre-shift activities have a definite start with waking up the computer and inserting the Imprivata badge. Nelnet disputes the ease with which it could use such information for timesheet purposes, but that is not the court's concern for this factor. For the *de minimis* analysis, the court is concerned with whether the occurrence and length of the unpaid time is certain and definite, and in this case it is. "An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." *Jimenez v. Bd. of Cty. Commissioners of Hidalgo Cty.*, 697 F. App'x 597, 599 (10th Cir. 2017) (quoting 29 C.F.R. § 785.47). The time is regularly occurring and may be readily ascertained and this factor weighs in favor of Plaintiff. The court now turns to Nelnet's argument that it is practically burdensome for such time to be reliable recorded given the use of the timekeeping system which cannot receive input from the insertion of the badge. [#168 at 25–26].

Administrative Burden. The operative question is whether the time at issue in this case "cannot as a practical administrative matter be precisely recorded for payroll purposes." § 785.47. Nelnet relies on *Corbin v. Time Warner Ent.-Advance/Newhouse P'ship*, 821 F.3d 1069, 1082 (9th Cir. 2016), which the court finds instructive. [#168 at 26]. In *Corbin*, the Defendant's timekeeping system rounded an employee's reported time to the nearest quarter-hour and Plaintiff alleged this deprived him of one (1) minute of compensable time over several years of employment. *Id.* at 1073. Applying the same test applicable in the Tenth Circuit, the Ninth Circuit found that the administrative burdens of capturing this additional time were outweighed by the practical administrative burden. *Id.* at 1081–82.

> First, the practical administrative burden on [Defendant] to cross-reference every employee's log-in/out patterns is quite high. To do so, [Defendant] would have to double-check four time stamps (clocking in/out for work; clocking in/out for lunch) for each employee on each day on the off-chance that an employee accidentally loaded an auxiliary program . . . before loading [the relevant timekeeping software]. Indeed, Corbin's argument that [Defendant] should have done such an analysis would require [Defendant] to undermine its policy prohibiting off-the-clock work by proactively searching out and compensating violations. Moreover, Corbin's contention that the de minimis doctrine does not apply because [Defendant] could ascertain the exact log-in/out times by scouring its computer records is baseless; the de minimis doctrine is designed to allow employers to forego just such an arduous task.

Id.[7]

In this case, Nelnet argues that it faces a similar burden and states that it "would be administratively infeasible for Nelnet to incorporate the Timestamps for timekeeping and payroll purposes, whether using the Timestamps alone or in conjunction with the existing Timekeeping System and payroll system." [#168 at 26]. Indeed, to get the undisputed times at issue in this case, Nelnet's expert had to do precisely the same laborious cross-checking task the Ninth Circuit rejected in *Corbin*. [*Id.*]. The fundamental problem is that the evidence before the court, even taken in the light most favorable to Plaintiff, is insufficient to permit a factfinder to conclude that the Imprivata badge swipe may be linked to the timekeeping system and can, as a practical administrative matter, be precisely recorded for payroll purposes without either procuring a custom-ordered software to link the two or undergoing the laborious cross-checking at issue in *Corbin*. [*Id.* at 11, 26]; Material Facts ¶¶ 17–19.

Plaintiff's argument that there are multiple methods Defendants could have used to accurately record this data, including adding timeclocks at the desks to replace the current system, designing new software, or cross-referencing the data, is unsupported by admissible

[7] The court notes that the *Corbin* court is assuming that time spent booting up Plaintiff's computer and loading work programs before clocking into the timekeeping is compensable.

evidence. [#174 at 18]. Plaintiff does not present any admissible evidence that would permit a factfinder to concluded that these alternatives are not burdensome, nor does Plaintiff rebut Nelnet's proffered material facts with admissible evidence establishing the implausibility of such alternatives. Thus, the court finds this prong weighs heavily in favor of Defendant. Defendant is not obliged to use any specific timekeeping system, and Plaintiff fails to set forth admissible evidence that his proposed solutions, e.g., requiring Nelnet to entirely change the timekeeping system to a punch-clock, to undergo laborious manual cross-checking, or to design a new type of software to link the two unrelated systems, would not be burdensome. *Aguilar v. Mgmt. & Training Corp.*, No. CV 16-00050 WJ/GJF, 2017 WL 4804361, at *18 (D.N.M. Oct. 24, 2017) (finding this factor favored defendant when the time was not able to be reliably recorded unless defendant posted personnel at every location where the uncompensated time occurred); *see also Hubbs v. Big Lots Stores, Inc.*, No. LA-CV-1501601-JAK-ASX, 2018 WL 5264143, at *4 (C.D. Cal. July 11, 2018) ("Courts have also held that employers are not required to reconfigure administrative systems to capture small amounts of compensable time."); *Haight v. The Wackenhut Corp.*, 692 F. Supp. 2d 339, 345 (S.D.N.Y. 2010) ("The Court concludes that the time spent donning/doffing generic protective gear is *de minimis*. The Court finds [seven] minutes to be an insignificant amount of time such that the practical administrative difficulty of recording the additional time would outweigh the size of the claim in the aggregate."); *Alvarado v. Costco Wholesale Corp.*, No. C 06-04015 JSW, 2008 WL 2477393, at *4 (N.D. Cal. June 18, 2008) (finding that repositioning the time clock was burdensome and thus this factor weighed in favor of employer).

The Aggregate Size of the Claim. Under the multi-factor test in *Reich*, the court may look to either the total value of the claim, the total number of workers, or the value of the claim

per individual worker. 144 F.3d at 1334. The court finds that under any measure this factor weighs in favor of Nelnet.

The court begins by disregarding the non-joined putative members of the collective. Plaintiff argues in part that the size of the claim is large because there are approximately 3,150 additional employees who did not join this collective. [#174 at 19]. But the test refers to the size of the *claim* and the work performed by the *claimants*. *Reich*, 144 F.3d at 1334; *Lindow*, 738 F.2d at 1063 ("Moreover, courts in other contexts have applied the de minimis rule in relation to *the total sum or claim involved in the litigation*." (emphasis added)). The court therefore disregards non-joined members of the collective as irrelevant to this issue. For those Plaintiffs currently joined in this litigation, lost wages for both the Boot-Up and Citrix-Active Time totals approximately $30,000. [#168 at 28; #174 at 19].

Although the courts within the Tenth Circuit have not expressly held, the application of this doctrine in the Ninth Circuit—which applies the same test—considers the average claim per employee, aggregating a day's *de minimis* activities. There's no doubt that nearly 30,000 man-hours of work in *Hubbs* was significant in absolute terms, but it averaged out to only "an average gap time that is less than three minutes per shift." *Hubbs*, 2018 WL 5264143, at *9; *see also Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1319 (N.D. Ala. 2008) ("Regardless of the number of employees for whom Plaintiff seeks back wages, or the length of time for which such pay is sought, the proper focus is on the aggregate amount of uncompensated time for each employee per day, not the total number of employees over any length of time. . . . This court's decision is consistent with [*Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998)]."). *But see Lindow*, 738 F.3d at 1063 ("We would promote capricious and unfair results, for example, by

compensating one worker $50 for one week's work while denying the same relief to another worker who has earned $1 a week for 50 weeks.").

By contrast, other courts have emphasized the need to look at the entire amount at issue in the litigation. *See Rutti v. Lojack Corp.*, 596 F.3d 1046, 1057 (9th Cir. 2010) ("[C]ourts apply 'the de minimis rule in relation to the total sum or claim involved in the litigation.'" (quoting *Lindow*, 738 F.2d at 1063)); *Reich*, 144 F.3d at 1334. Under any view, the court disregards the claims of those not joined. *Perez v. Wells Fargo & Co.*, No. C 14-0989 PJH, 2015 WL 1887354, at *7 (N.D. Cal. Apr. 24, 2015) ("*Lindow* does not hold that the court should consider the aggregate size of the entire [collective's] claim in the absence of other, relevant, factual allegations." (quotation marks omitted)).

In absolute terms, the Parties agree that the lost wages total approximately $30,000, well below what other courts have found to be *de minimis* amounts. *Aguilar*, 2017 WL 4804361, at *18 (finding this factor favored defendant when the claim was worth an indeterminate amount less than $355,478.00). Plaintiff claims that this court should include various measures of enhanced damages in this calculation, bringing the figure nearer to $60,000. [#174 at 19]. Notably, this section of the Response is devoid of any authority, and the court sees no basis to aggregate an uncertain, unawarded measures of damages. The *de minimis* test is concerned with the balance between the burden in remedying the situation in relation to the amount of lost wages, statutory damages are not relevant to this analysis. As it stands, the court finds that in absolute terms the aggregate amount of the claim strongly supports a *de minimis* finding.

When considered on a per-capita basis, Plaintiff fares no better. There are 336 opt-in plaintiffs and plus the one named Plaintiff leaves the court with 337 total plaintiffs. For $30,000 of damages, that comes out to $84 per plaintiff over the collective period, from July 15, 2014 to

April 25, 2018, based on regular periods of between one and two minutes of uncompensated work. The court does not have sufficient information before it to determine precisely the average lost wages per work day as undoubtedly not every plaintiff worked full time during the entirety of the collective period, but there is no evidence in the record to suggest that the figure amounts to more than cents, rather than dollars, per day. *Singh v. City of New York*, 524 F.3d 361, 371 (2d Cir. 2008) ("[W]e conclude that any additional commuting time in this case is de minimis as a matter of law . . . . [T]he plaintiffs' depositions show that the aggregate claims are quite small, generally amounting to only a few minutes on occasional days."); *Haight*, 692 F.Supp.2d at 345. Unlike *Singh*, the time here occurred on a regular basis, but also unlike *Singh*, often did not even amount to one minute. The court concludes that this factor strongly weighs in favor of Defendant given the trivial total sum and the brief daily time at issue. *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 520 (E.D. Tex. 2005) (finding a time of ten to fifteen minutes per day to be *de minimis*).

After weighing the relevant factors, this court concludes that the Boot-Up Time and the Citrix-Active Time, collectively "pre-shift activities," constitute *de minimis* time and are therefore not compensable. The court reaches this conclusion, *inter alia*, due to the unrebutted evidence that adjusting to account for this time would require a substantively different timekeeping system, representing a serious administrative burden on the Defendant. Plaintiff has simply failed to adduce sufficient evidence to persuade the court, or even create a genuine issue of material fact, that Defendant was seriously and systematically undercompensating its employees. Even with hundreds of Opt-Ins, the amount allegedly underpaid over the course of the collective action period is at best $30,000 and likely less. Given the serious administrative burden and the "few seconds or minutes of work beyond the scheduled working hours" at issue,

the court concludes that this time is *de minimis*. Accordingly, summary judgment shall enter in favor of Defendant.

III. The Court Declines to Exercise Supplemental Jurisdiction.

Defendant briefly states that this court should decline to exercise supplemental jurisdiction over the sole remaining state law claim in this case asserted by Mr. Peterson in his individual capacity. [#168 at 30]. Mr. Peterson opposes this request. [#174 at 20].

A court may dismiss a case when, as here, the court dismisses all claims over which it had original jurisdiction. 28 U.S.C. § 1367(c)(3). In determining whether to exercise supplemental jurisdiction over state law claims, a court enjoys substantial discretion to balance the exercise of jurisdiction with the needs of the case and judicial economy. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172–74 (1997). The Supreme Court and Tenth Circuit have both held that "If federal claims are dismissed before trial, leaving only issues of state law, 'the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.'" *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 549 (10th Cir. 1997) (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988)). While not an ironclad rule inflexibly applied, the Tenth Circuit has stated that courts "usually should" decline to exercise jurisdiction in such circumstances. *Koch v. City of Del City*, 660 F.3d 1228, 1248 (10th Cir. 2011).

The sole remaining claim in this case is Mr. Peterson's individual state law claim under the Colorado Wage Claim Act. [#29 at ¶¶ 67–77]. In considering the exercise of jurisdiction, the court considers the parties' interests in the efficient resolution of the matter in the forum with which they are familiar and before a judicial officer familiar with the case, with the principles of federalism and comity inherent in committing issues of state law to state courts. *Cohill*, 484 U.S.

at 350. Consistent with the principle that "[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary," the court declines to exercise jurisdiction. *Thatcher Enterprises v. Cache Cty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990); *Knight v. Century Park Assocs., LLC*, No. 14-CV-1584-WJM-NYW, 2015 WL 4575085, at *4 (D. Colo. July 30, 2015) (declining supplemental jurisdiction after dismissal of federal claims); *Sauer v. McGraw-Hill Companies, Inc.*, No. 99 N 1898, 2001 WL 1250099, at *18 (D. Colo. June 12, 2001) (declining to exercise supplemental jurisdiction over Plaintiff's Colorado Wage Claim Act claims following resolution of the federal claims).

CONCLUSION

For the forgoing reasons, **IT IS ORDERED** that:

(1) Plaintiff Andrew Peterson's Motion for Summary Judgment [#158] is **DENIED**;

(2) Defendant Nelnet's Motion for Summary Judgment [#168] is **GRANTED;**

(3) Defendant Nelnet's Decertification Motion [#171] is **DENIED AS MOOT**;

(4) The court **DECLINES** to exercise supplemental jurisdiction under § 1367(c)(3);

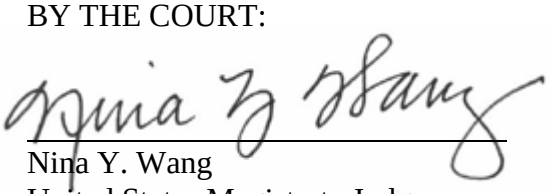
(5) Plaintiff's state law claim is **DISMISSED WITHOUT PREJUDICE;**

(6) The Clerk of the Court is directed to **ENTER JUDGMENT** in favor of Defendant Nelnet Diversified Solutions, LLC; and

(7) Defendant, as the prevailing party, shall be awarded its costs pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure and D.C.COLO.LCivR 54.1.

DATED: September 3, 2019

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01064-NYW

ANDREW PETERSON,
on behalf of himself and all similarly situated persons,

Plaintiff,

v.

NELNET DIVERSIFIED SOLUTIONS, LLC,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Amended Memorandum Opinion and Order [#189] of Magistrate Judge Nina Y. Wang, granting Defendant Nelnet Diversified Solutions, LLC's Motion for Summary Judgment [#168] and denying Plaintiff Andrew Peterson's Motion for Summary Judgment [#158], entered on September 3, 2019 it is

ORDERED that summary judgment is hereby entered in favor of Defendant Nelnet Diversified Solutions, LLC and against Plaintiff Andrew Peterson and Plaintiff Andrew Peterson's federal claims are DISMISSED with prejudice;

ORDERED that the court declines to exercise supplemental jurisdiction over Plaintiff Andrew Peterson's remaining state law claim and said claim is DISMISSED without prejudice; and

It is FURTHER ORDERED that Plaintiff Andrew Peterson recovers nothing, the action is

terminated, and Defendant Nelnet Diversified Solutions, LLC is **AWARDED** its costs, to be taxed by the Clerk of the Court pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 3rd day of September, 2019.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ B. Wilkins

B. Wilkins
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of June, 2020, I caused the foregoing brief to be filed electronically with the Court, where it is available for viewing and downloading from the Court's ECF system, and that such electronic filing automatically generates a notice of electronic filing constituting service. I certify that all parties required to be served have been served.

s/Adam W. Hansen
Adam W. Hansen