Case No. 19-1348

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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

*Plaintiffs – Appellants*,

v.

NELNET DIVERSIFIED SOLUTIONS, LLC,

*Defendant – Appellee*.

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

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# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

Nelnet asks this Court to embrace a novel—indeed *radical*—conception of "work" in the modern, digital economy—one that stands at odds with the expressed intent of Congress, decades of settled precedent, and common sense.

Under Nelnet's proposed judicial interpretive update to the FLSA, "[a] modern worker has not truly reached the workspace until logging in to the computer and accessing job-relevant programs." Br. at 29–30. Therefore, according to Nelnet, loading computer software and preparing digital tools must be treated as the "modern equivalent of the historically noncompensable activities of ingress to the workstation and waiting in line to punch a time clock." Br. at 29.

Accepting this argument would violate fundamental notions of judicial power. This Court is bound to interpret statutes "in accord with the ordinary public meaning of [their] terms." *Bostock v. Clayton Cty., Georgia*,140 S. Ct. 1731, 1738 (2020). Judges may not "add to, remodel, update, or detract from old statutory terms" based on "extratextual sources" or their "own imaginations." *Id.* Doing so "would risk amending statutes outside the legislative process reserved for the people's representatives." *Id.*; *see* A. Scalia, A Matter of Interpretation 22 (1997).

The text of the FLSA and Portal Act soundly forecloses Nelnet's audacious claim. The Portal Act makes most travel time and waiting time

non-compensable *by its express terms*. 29 U.S.C. § 254(a). To state the obvious, no one—either in 1947 or now—would understand booting up a computer and loading software tools to be a type of "walking, riding, or traveling" contemplated by the statute. *See id.*

Even if the sort of judicial interpretive update sought by Nelnet were permissible, accepting Nelnet's proposed reinterpretation would make little sense. A computer is not a workplace. A *workplace* is a workplace. A computer, on the other hand, is a workplace *tool*. And the law treats the preparation of computer tools in the exact same manner as the preparation of other physical tools. Indeed, this Court has already said as much: "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." *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1281 (10th Cir. 2020) (quoting *Peterson v. Nelnet Diversified Sols., LLC*, 400 F. Supp. 3d 1122, 1135 (D. Colo. 2019)).

Even taking for granted that it is the job of Congress, not this Court, to provide the sort of legislative update Nelnet is asking for, it is hard to contemplate Congress ever taking such a step. Nelnet's proposed reinterpretation would upset decades of settled workplace custom, force potentially more than 100 million American workers to perform

considerable amounts of work for free, and transfer untold billions of dollars in hard-earned wages to employers. These considerations should weigh heavily against engaging in the sort of interpretive adventure proposed by Nelnet.

More remarkable still is the argument Nelnet *doesn't make*. Nowhere in its brief to this Court does Nelnet address the legal question actually presented in this case: whether the work performed by Call Center Representatives logging on to computers and loading software tools is an "integral and indispensable part of the[ir] principal activities" of servicing Nelnet's customers. *See Steiner v. Mitchell*, 350 U.S. 247, 252–53 (1956); *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 33 (2014); 29 U.S.C. § 254(a). The answer to this question is a clear—and, apparently, undisputed—"yes." The work of readying computers into an activated state and loading software platforms is both integral and indispensable to Call Center Representatives' broader customer service function. The Portal Act's exclusion for "activities which are preliminary to…[the employees'] principal activity or activities" therefore has no application in this case. 29 U.S.C. § 254(a).

Nelnet's willingness to go all in on its novel theory on the first question presented should inform this Court's consideration of the second. Given the strength with which traditional legal sources demonstrate that the time spent by Call Center Representatives logging

on to computers and loading software tools is compensable work time, the second question comes into sharper focus: what authority do courts have to disregard the plain text of the FLSA and Portal Act by invoking the judge-made de minimis rule? The answer is little to none.

Nelnet's submission only confirms that the de minimis doctrine provides no occasion to change the outcome dictated by the FLSA and Portal Act. As a threshold matter, Nelnet's allegations of waiver are misplaced. Appellants raise no new arguments on appeal. Instead, they present, as most appellate briefs do, expanded legal support for the same arguments made below. Here, the only relevant "argument" is the claim that the judge-made de minimis doctrine does not trump Appellants' statutory entitlement to compensation. Appellants' discussion regarding the de minimis doctrine's provenance, scope, and interaction with the FLSA is part and parcel of this same argument. The same is true with respect to Appellants' arguments regarding Nelnet's expert report. Just as they did below, Appellants accept that the report shows what it shows. But they also point out the undisputed gaps between what the *report shows* and what the *FLSA requires*. The summary judgment standard requires nothing less.

On the merits, Nelnet's defense of the de minimis doctrine's application fares no better. Nelnet asks this Court to sanction precisely what the doctrine forbids: "arbitrarily fail[ing] to count as hours worked

any part, however small, of [an] employee's fixed or regular working time." 29 C.F.R. § 785.47. Nelnet offers no cogent explanation for why it supposedly faces insurmountable practical hurdles to tracking boot-up time, and no response to this Court's observation that "because employees performed the same activities every day" it "would have been possible to compute how much time" employees spent performing them. *Aguilar*, 948 F.3d at 1285 (quoting *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176–77 (7th Cir. 2011)). With respect to "the aggregate amount of compensable time," the second de minimis factor, Nelnet provides little beyond its unadorned disagreement with this Court's assessment in *Aguilar* that as little as $1 in lost wages each week is a sufficiently substantial sum to preclude the application of the doctrine. And, of course, as Nelnet concedes, the regularity with which Call Center Representatives perform the work at issue—every single day on every shift—decisively cuts against applying the de minimis rule.

This case, at bottom, pits a straightforward application of federal law, on the one hand, against an unsupported reinterpretation of that law and a plea to subordinate a congressionally enacted statute to an inapplicable judge-made rule, on the other. The correct choice is clear.

The district court's judgment should be reversed, and the case remanded with instructions to enter summary judgment on liability in favor of Appellants.

## 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.

The district correctly held that time spent by Call Center Representatives booting up computers and loading software tools is compensable under the FLSA.

#### A. Time Spent Booting Up Computers and Loading Software Tools Is Work Covered by the FLSA.

Nelnet first contends that time spent booting up computers and loading software tools is not "work" within the meaning of the FLSA. This argument is both factually and legally misplaced.

On the facts, Nelnet's arguments are premised on characterizations of the record that are not supported by the evidence.

Nelnet repeatedly characterizes the boot-up process as "activating a computer to access electronic timekeeping software." Br. at 20. But Call Center Representatives' beginning-of-shift work encompasses much more than this. Call Center Representatives must activate and open three separate software platforms before they are able to clock in using a fourth program. Aplt. App. Vol. 1 at 144, 157, 274. These platforms do not exist simply to launch a timekeeping application. On the contrary, Nelnet's programs, like Imprivata and Citrix, are crucial to accessing

information necessary to interact with borrowers. Aplt. App. Vol. 1 at 35, 157, 235 276.

Nelnet also claims that it "permitted Plaintiffs to use their work computers for personal tasks" and that Call Center Representatives "were likewise allowed to engage in personal business while completing the pre-shift steps." Br. at 9. This assertion is more false than true. Nelnet prohibits Call Center Representatives from using their computers for personal purposes except during "break and lunch times." Aplt. App. Vol. 2 at 332–33, 404. Nelnet prohibits any use—at any time—of social media, computer games, or digital music or video streaming. *Id.* at 404. Nelnet similarly prohibits the use of cell phones anywhere on the call center floor. *Id.* at 402. While at their workstations, Call Center Representatives must keep their cell phones on silent and stored inside their desks. *Id.* A violation of these policies can lead to discipline and termination. *Id.* at 403–04.

Nor does the record support Nelnet's claim that Call Center Representatives were doing anything other than working during the boot-up process. One Call Center Representative testified, for example, that he "would set up [his] desk" and "read[]…job aids" while he was loading Nelnet's software tools. *Id.* at 235. Another testified that she would "read up on" Nelnet's various loan programs. *Id.* at 274. Other Call Center Representatives gave similar accounts. *Id.* at 235, 237, 239, 247,

254, 267; Aplt. App. Vol. 2 at 318. Call Center Representatives were not allowed to leave their workstations unattended during the boot-up process. Aplt. App. Vol. 1 at 235, 274. To be sure, Call Center Representatives would, on occasion, talk to their co-workers during the boot-up process. But these interactions were typically limited to "[j]ust 'good morning' or 'hello, how you doing?'" *Id.* at 274. Even these sorts of minimal interactions were rare, however. *Id.* at 237. For the most part, Call Center Representatives remained "focus[ed] on…signing in." *Id.*

Nelnet's claim that booting up computers and loading software applications "required little to no effort or thought from Plaintiffs," Br. at 9, similarly misses the mark. These steps required both mental and physical exertion. Aplt. App. Vol. 1 at 235, 237, 239, 247, 254, 267; Aplt. App. Vol. 2 at 318. Nor could Call Center Representatives just sit back and let the computers do the work. Call Center Representatives described the boot-up process as riddled with problems and often requiring multiple reboots. Aplt. App. Vol. 1 at 236, 241, 243–44, 269; Aplt. App. Vol. 2 at 315, 326, 340. Attention to the process at hand was critical. Aplt. App. Vol. 1 at 236, 241, 243–44, 269; Aplt. App. Vol. 2 at 315, 326, 340.

Last, Nelnet strongly implies that it affords Call Center Representatives a generous chunk of paid time at the start of each shift to conduct personal business, but this is not true either. Nelnet says that it "required Plaintiffs to be call-ready within six minutes of the start of

their scheduled shift, but allowed Plaintiffs to clock in five minutes before the shift, giving them 11 minutes of paid time to become 'call ready' for their shift." Br. at 10. Two other pieces of information are critical to putting this assertion in context. First, of course, Call Center Representatives were not paid for time spent booting up their computers and loading the software applications necessary to launch the timekeeping software. Aplt. App. Vol. 1 at 157. In other words, regardless of whether Call Center Representatives showed up for their shifts a few minutes early or late, they were required to complete the same initial steps without compensation. *Id.* Second—and Nelnet omits this fact entirely—Call Center Representatives were required to start taking calls as soon they had completed loading the software necessary to do so. *Id.* at 170. So if, for example, an employee began the boot-up process at 8:55 a.m. and completed it at 9 a.m., Nelnet required him to begin interacting with customers at 9 a.m. *Id.* Failure to do so would lead to negative consequences. *Id.*

Ultimately, though, these factual skirmishes do not affect the outcome. Under any plausible reading of the record, booting up computers and loading software applications was work as the FLSA broadly defines it. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

"Work," as the term is used in the FLSA, means any activity, whether it involves mental or physical exertion or not, that is "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)). For the reasons stated in Appellants' principal brief, Call Center Representatives' beginning-of-shift duties easily satisfy this definition.

Nelnet relies on *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) and *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) to argue that the time spent here booting up computers and loading software tools was not work, but neither case supports Nelnet's claim. First, these decisions stand in considerable tension with *IBP*, 546 U.S. at 28, and its broad conception of compensable work. *See Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1246 (D. Kan. 2007). This Court must be cautious not to confuse *simple, boring, or routine work* with activities that are *not work at all*. Many modern-day office jobs involve "routine mental…work." *See* 29 C.F.R. § 541.301(b); Office Space (Judgmental Films 1999). But the Supreme Court has made clear that no amount of mental or physical exertion is required to fall within the FLSA's broad definition of work. *IBP*, 546 U.S. at 28 (quoting *Tennessee Coal*, 321 U.S. at 598 n.11).

But even taken on their own terms, neither *Smith* nor *Reich* applies here. As *Smith* and *Reich* explained, only where an "activity takes all of a few seconds and requires little or no concentration," can such an

activity "properly considered not work at all." *Smith*, 462 F.3d at 1289 (citing *Reich*, 38 F.3d at 1126 n.1). Even activities that require only a "modicum of concentration" must be considered work. *Reich*, 38 F.3d at 1226. Here, of course, the activities in question take many multiples of "a few seconds" and require concentration and attention. Aplt. App. Vol. 1 at 236, 241, 243–44, 269; Aplt. App. Vol. 2 at 315, 326, 340.

*Smith* and *Reich* also excluded activities from the definition of "work" that are directly related to ordinary dressing: these activities, like "a baseball player show[ing] up in uniform, or a judge with a robe," are completed by essentially every employee, typically at home, and were not contemplated by Congress when it enacted the FLSA. *Smith*, 462 F.3d at 1289; *Reich*, 38 F.3d at 1125–26 n.1. But whatever exclusion exists for putting on ordinary clothes, it does not apply to "pre[ ]shift preparation of tools or equipment" "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." *Aguilar*, 948 F.3d at 1281 (quoting *Peterson*, 400 F. Supp. 3d at 1135). As explained in Appellants' principal brief, when the preparation of such tools must immediately precede the use of such tools in the workplace, the preparation of the tools is both "work" under the FLSA and excluded from the terms of the Portal Act. Appellants' Br. at 39–41. Call Center Representatives were not dressing themselves when

they engaged in the boot-up process. They were preparing workplace tools in a manner necessary to perform their other principal work.

Nelnet's claim that multitasking during the boot-up process removed such time from the definition of work, Br. at 27, is similarly meritless. Aside from this point's lack of support in the record, Nelnet's argument is legally wrong as well. Multitasking is common in the workplace—take, for example, a worker assembling a car while asking his line-mate about his weekend. Quite sensibly, such time is fully compensable. So long as the time at issue is "predominantly for the benefit of the employer," it is compensable work. *See Lamon v. City of Shawnee*, 972 F.2d 1145, 1157–58 (10th Cir. 1992). There is no question that this was the case here. The occasional "hello" to a co-worker during the boot-up process in no way altered the principal and overwhelming benefit to Nelnet in booting up its computers and loading its preferred and required software tools.

Booting up computers and loading software tools are unquestionably activities "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP*, 546 U.S. at 28 (quoting *Tennessee Coal*, 321 U.S. at 598 n.11). They are therefore work covered by the FLSA.

### B. Time Spent Booting Up Computers and Loading Software Tools Is a Principal Activity Within the Meaning of the Portal Act.

Time spent booting up computers and loading software applications is also a "principal activity" within the meaning of the Portal Act because these duties are "integral and indispensable" to Call Center Representatives' duties servicing Nelnet's customers. *Steiner*, 350 U.S. at 252–53; *Integrity Staffing*, 574 U.S. at 33; 29 U.S.C. § 254(a).

Nelnet's only discussion of this issue, *see* Br. at 23–25, involves its claim that "the pre-shift steps at issue do not constitute Plaintiffs' principal activities" because "Plaintiffs were employed to service student loans and to assist borrowers by phone…." *Id.* at 23. But this discussion misses the point entirely. No one disputes that servicing customers was *one* principal activity performed by Call Center Representatives. But Nelnet's suggestion that identifying one principal activity necessarily excludes all others is mistaken. It was not enough to point out, for example, that the workers' main job duty was making batteries in *Steiner*, 350 U.S. at 256, meatpacking in *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956), or slaughtering animals in *IBP*, 546 U.S. at 32. Rather, the dispositive question in those cases was whether the *beginning-of-shift activities at issue* (changing clothes, sharpening knives, and donning protective gear) were *also principal activities* based on the settled understanding 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 [other] principal activities*.'" *Steiner*, 350 U.S. at 252–53 (citations omitted).

Properly framed, then, the question before this Court is whether time spent booting up computers and loading software applications is also a "principal activity" within the meaning of the Portal Act because these duties are "integral and indispensable" to Call Center Representatives' duties servicing Nelnet's customers. *Steiner*, 350 U.S. at 252–53; *Integrity Staffing*, 574 U.S. at 33; 29 U.S.C. § 254(a).

Remarkably, nowhere in its submission to this Court does Nelnet even attempt to answer this question. That omission speaks volumes. Nelnet refuses to mount an argument on this point because no plausible argument in its favor exists. Under settled law, 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. Both the computer, the software, and the data housed within Nelnet's computer systems are "spec[ifically] necessary to the completeness or integrity of the whole" job. *Id.* And as all parties agree, this work is essential: Call Center Representatives cannot perform their servicing duties without them. Aplt. App. Vol. 1 at 157, 207; Aplt. App. Vol. 2 at 507. *See generally* Appellants' Br. at 35–44.

### C. This Court May Not Disregard the Language of the FLSA and Portal Act and Analogize Boot-Up Time to Walking or Travel Time.

Unable and unwilling to defend its business practices under current law, Nelnet asks this Court to treat time booting up computers and loading software tools as analogues to non-compensable travel and walking time. There is no principled basis to do so.

Under Nelnet's proposed judicial interpretive update to the FLSA, "[a] modern worker has not truly reached the workspace until logging in to the computer and accessing job-relevant programs." Br. at 29–30. Therefore, according to Nelnet, loading computer software and preparing digital tools must be treated as the "modern equivalent of the historically noncompensable activities of ingress to the workstation and waiting in line to punch a time clock." Br. at 29. This argument is truly a "a first-of-its-kind theory." Br. at 19–20.

This Court's job is to interpret the law as written, not craft creative analogies to other, inapplicable provisions. Accepting Nelnet's argument would violate fundamental notions of judicial power. This Court is bound to interpret statutes "in accord with the ordinary public meaning of [their] terms." *Bostock*, 140 S. Ct. at 1738. Judges may not "add to, remodel, update, or detract from old statutory terms" based on "extratextual sources" or their "own imaginations." *Id.* Doing so "would risk amending statutes outside the legislative process reserved for the

people's representatives." *Id.*; *see* A. Scalia, A Matter of Interpretation 22 (1997).

The text of the FLSA and Portal Act soundly forecloses Nelnet's argument. The Portal Act makes most travel time and waiting time non-compensable *by its express terms*. 29 U.S.C. § 254(a). A desire to eliminate compensation for waiting time was the principal motivating force behind Congress' decision to enact the Portal Act. *Alvarez*, 546 U.S. at 40. To state the obvious, no one—either in 1947 or now—would understand booting up a computer and loading software tools to be a type of "walking, riding, or traveling" contemplated by the statute. *See id.*

Even if the sort of judicial interpretive update sought by Nelnet were permissible, accepting Nelnet's proposed reinterpretation would make little sense. "Analogies have their limits, and this one is flawed." *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 7 (1st Cir. 2014). A computer is not a workplace. A *workplace* is a workplace. A computer, on the other hand, is a workplace *tool*. And the law treats the preparation of computer tools in the exact same manner as the preparation of other physical tools. Indeed, this Court has already said as much: "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." *Aguilar*, 948 F.3d at 1281 (quoting *Peterson*, 400 F. Supp. 3d at 1135).

Even taking for granted that it is the job of Congress, not this Court, to provide the sort of legislative update Nelnet is asking for, it is hard to contemplate Congress ever taking such a step. Nelnet's proposed reinterpretation would upset decades of settled workplace custom, force potentially more than 100 million American workers to perform considerable amounts of work for free, and transfer untold billions of dollars in hard-earned wages to employers. These considerations should weigh heavily against engaging in the sort of interpretive adventure proposed by Nelnet.

Nelnet claims that failing to adopt its novel theory will cause a host of practical problems. Br. at 30–32. Even if these objections were a permissible basis for judicial interpretation, they are overblown.

Nelnet first cites the ongoing COVID-19 pandemic as a reason to conclude that "the computer has become *the* workplace" in the modern economy. *Id.* at 30. This assertion is extraordinary. Congress enacted the FLSA "[i]n the midst of the Great Depression…to combat the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." *Schilling v. Schmidt Baking Co., Inc.*, 876 F.3d 596, 599 (4th Cir. 2017) (citations omitted). Conditions are tragically similar today. Nearly one in eight American

households does not have enough to eat.[1] And wage theft is on the rise.[2] It is difficult to fathom why the worst economic and humanitarian crisis since the Great Depression provides any occasion to radically reinterpret the FLSA to *diminish* the concept of compensable work. If anything, present circumstances provide a strong reminder of why the FLSA should be interpreted "to the furthest reaches consistent with congressional direction." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 396 (1985) (citations omitted).

Nor is Nelnet correct when it asserts that "[a]ccepting the computer for what it is—namely, a digital workplace—allows for a more seamless application of statutory and decisional law adopted for physical-work environments." Br. at 30. Nelnet worries that "employees could argue that logging in to a virtual desktop session from home or responding to work emails on a smartphone prior to their commute count as their first principal activity such that subsequent personal activities constitute compensable work under the continuous workday doctrine." *Id.* at 30–31. But Nelnet forgets that employers are not categorically required to compensate employees for all time between principal

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[1] *America at Hunger's Edge*, N.Y. Times, Sept. 2, 2020, https://www.nytimes.com/interactive/2020/09/02/magazine/food-insecurity-hunger-us.html.

[2] Noam Scheiber, *Stiffing Workers on Wages Grows Worse With Recession*, N.Y. Times, Sept. 3, 2020, https://www.nytimes.com/2020/09/03/business/economy/wage-theft-recession.html.

activities. Bona fide breaks from work activities exceeding 20 minutes 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). If, for example, an employee performed some work at home and then spent an hour showering, eating, and traveling to the workplace, the employer would not have to pay the employee for that hour. *Id.* Employers are also free to prohibit nonexempt employees from performing work activities outside their regular working time—most employers have such policies. If, however, employers want nonexempt employees to perform such early-morning work, they have to pay for that work. Employers cannot resolve the tension between their business needs and compliance obligations by simply pointing out that the whole problem would go away if employees worked for free.

Nelnet claims that "[u]nder the district court's logic, boot-up and log-in time from home would be noncompensable, but, if the steps were performed in the office, they would be compensable." Br. at 32–33. There is nothing in the law or the district court's decision to support this claim. All beginning-of-shift activities—whether performed at the traditional workplace or at home—are judged under the same standard. They are compensable if they are "integral and indispensable" to the employees' principal activities. *Steiner*, 350 U.S. at 252–53; *Integrity Staffing*, 574

U.S. at 33; 29 U.S.C. § 254(a). The location where the work is performed is not relevant to that question.

In sum, this Court cannot engage in the sort of judicial interpretive update Nelnet proposes here. And even if it could, there are sound reasons to reject Nelnet's proposals as inconsistent with the FLSA's text and animating purpose.

## II. THE DISTRICT COURT INCORRECTLY HELD THAT TIME SPENT BY CALL CENTER REPRESENTATIVES BOOTING UP COMPUTERS AND LOADING SOFTWARE TOOLS MAY BE DISREGARDED AS DE MINIMIS.

Given the strength with which traditional legal sources demonstrate that the time spent by Call Center Representatives logging on to computers and loading software tools is compensable, it becomes even less tenable to disregard the plain text of the FLSA and Portal Act by invoking the judge-made de minimis rule.

### A. Appellants Have Not Waived Their Challenges to Nelnet's De Minimis Defense.

At the outset, Nelnet's waiver arguments are misplaced. Appellants raise no new arguments on appeal.

With respect to Appellants' discussion of the de minimis doctrine itself, they merely presented expanded legal support for the same argument made below. "As a court of review, [this Court] may…consider new legal authority." *Reid v. State of Okla.*, 101 F.3d 628, 630 (10th Cir. 1996). Thus, the waiver doctrine does not apply to new or additional

authority cited on appeal in support of arguments or claims made before the district court. *See Elder v. Holloway*, 510 U.S. 510, 515–16 (1994). For similar reasons, courts "have the authority to identify and apply the correct legal standard, whether argued by the parties or not." *United States v. Alameda Gateway Ltd.*, 213 F3d 1161, 1167 (9th Cir. 2000). This is not just normal, but common. "An argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that." *Puerta v. United States*, 121 F.3d 1338, 1341–42 (9th Cir. 1997).

Here, the only relevant "argument" is the claim that the judge-made de minimis doctrine does not trump Appellants' statutory entitlement to compensation. Appellants' discussion regarding the de minimis doctrine's provenance, scope, and interaction with the FLSA is part and parcel of this same argument. Appellants are not, as Nelnet suggests, mounting a facial attack on the de minimis doctrine. Br. at 19. No one questions that the de minimis doctrine exists as a common law rule. But this Court must determine how the de minimis rule interacts with a congressionally enacted statute as well as the facts presented in this case. Doing so requires understanding the nature of the de minimis doctrine itself, as well as the ground rules for adjudicating claims that a statute should be subordinated to a judge-made exception. Appellants'

Br. at 44–48. What Nelnet is really asking for is for this Court to ignore these legal background principles and apply a variant of the de minimis doctrine unmoored from any traditional interpretive rules. The Court is not free to take that step.

Appellants have similarly not waived any factual arguments related to Nelnet's expert report. True enough: Appellants "accept[ed] the findings of the expert with respect to what the [time] records show." Supp. App. 37. But Nelnet is attempting to extend that agreement to cover *inferences*—and wildly unreasonable ones at that—it now wishes to draw from the report's findings.

Consider this example to illustrate the point: an expert opines that it was 70 degrees at a given location on September 1 at noon. One could draw all manner of inferences from this conclusion—reasonable (it was 70 degrees five minutes later), unreasonable (it was 70 degrees a day later), or outlandish (it was 70 degrees a year later). A party who "accepts the findings of the expert with respect to what the records show" is bound only to the conclusion itself, not all possible inferences drawn from that conclusion. A party "admit[s] only that to which it explicitly stipulated," not "how that fact should be interpreted." *Medcom Holding Co. v. Baxter Travenol Lab*, 106 F.3d 1388, 1404 (7th Cir. 1997).

This distinction helps explain why Nelnet's criticisms miss the mark. Appellants do not question Dr. Anderson's credentials, expertise,

or his underlying calculations. Nelnet is correct that Appellants "did not dispute Nelnet's statement of facts detailing Dr. Anderson's findings." Br. at 41. This is because Appellants "accept[ed] the findings of the expert with respect to what the [time] records show." Supp. App. 37. But there is a significant gulf between what Nelnet's expert measured and the actual amount of time it took, on average, for Call Center Representatives to boot up computers and load software applications. Appellants' Br. at 15. Appellants are not bound to accept inferences offered by Nelnet to fill this gap, and neither is this Court.

If these principles feel abstract, this Court should consider directly what Nelnet is asking for. Appellants are entitled to compensation from the time they begin turning on or waking their computers until they clock in. But Nelnet's expert's analysis does *not even attempt* to capture any time before the Call Center Representatives engaged with the Imprivata system. Aplt. App. Vol. 2 at 293. In other words, despite universal, unquestioned agreement that Anderson's report fails to account for the time spent turning on Call Center Representatives' computers, Nelnet is insisting that this Court treat this time as *zero*. The same is true with respect to Anderson's decision to use the median—rather than mean—measurement with respect to unpaid time. Courts need not "blind themselves to…commonsense reality." *J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011). This Court may consider Dr. Anderson's report, together

with the other evidence in the record, and the reasonable inferences drawn from both in light of what the FLSA ultimately requires.

### B. The De Minimis Doctrine Does Not Bar Appellants' Claims.

Nelnet's defense of the de minimis doctrine's application to this case similarly fails to persuade.

Nelnet attempts to avoid the obvious implications of the Supreme Court's dicta discrediting the de minimis doctrine in *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220 (2014), by insisting that the Court's statement was limited to the facts of that case. Br. at 39. But there is no basis to read *Sandifer* that way. The statutory exclusion for "changing clothes" is just as much "all about trifles" as the Portal Act's exclusion for preliminary activities. *See id.* at 234; 29 U.S.C. § 203(o); 29 U.S.C. § 254(a). The Court's reference to "the statute" would also be an odd way to refer to a very specific *statutory provision*. *Sandifer*, 571 U.S. at 234. "The statute," in common parlance, is much more naturally read to mean "the FLSA." Nelnet's most grievous error, though, is suggesting that *Sandifer* approved of the de minimis doctrine in the circumstances contemplated by *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Br. at 39. Nothing in *Sandifer* suggests such a result. It just stated, descriptively, what *Mount Clemens* said. It then observed that the "de minimis doctrine does not fit comfortably within the statute at issue

here, which, it can fairly be said, 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." *Sandifer*, 571 U.S. at 234.

Nor can the de minimis doctrine be rehabilitated by pointing out, as Nelnet does, that the DOL has codified the doctrine. Br. at 39–40. The DOL's de minimis interpretive rule made clear that it was simply reporting what courts had done. *See* 26 Fed. Reg. 195. The rule was issued without notice-and-comment rulemaking, and does not purport to be a legislative rule under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *United States v. Mead Corp.*, 533 U.S. 218 (2001). In short, the DOL's de minimis rule is only as sound as the judicial opinions that form its foundations.

In the remainder of its submission, Nelnet doubles down on asking this Court to sanction precisely what the de minimis doctrine forbids: "arbitrarily fail[ing] to count as hours worked any part, however small, of [an] employee's fixed or regular working time." 29 C.F.R. § 785.47.

Nelnet offers no cogent explanation for why it supposedly faces insurmountable practical hurdles to tracking boot-up time. Its submission simply asserts, citing to its undisclosed witness, that tracking the time using software would be too difficult and expensive. Br. at 44. But Nelnet has no answer to this Court's observation that "because employees performed the same activities every day" it "would have been

possible to compute how much time" employees spent performing them. *Aguilar*, 948 F.3d at 1285 (quoting *Kellar*, 664 F.3d at 176–77). It is as if Nelnet is saying, "it would be too difficult to build a helicopter to cross that river," while steadfastly ignoring the bridge just around the bend. The de minimis doctrine does not apply where, as here, "it may be *possible* to reasonably determine or estimate the average time," even if "it may be difficult to determine the actual time" at issue. *Id.* (quoting *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1059 (9th Cir. 2010) (emphasis added)). Such an estimate is certainly possible here. Call Center Representatives work in an extremely controlled environment, and Nelnet knows exactly how much time is at issue. *See id.*; *Kellar*, 664 F.3d at 176–77; *Rutti*, 596 F.3d at 1059. Other employers operating call centers do just such an estimation. *E.g.*, *Burch v. Qwest Comm'ns Intern., Inc.*, No. 06-3523, Dkt. 507 at 6 (D. Minn.) (unpublished). Nelnet's own properly disclosed witness, for his part, could not identify any reasons why Nelnet could not simply implement a traditional time clock or use an estimate to compensate Call Center Representatives for boot-up time.

With respect to "the aggregate amount of compensable time," the second de minimis factor, Nelnet provides little beyond its unadorned disagreement with this Court's assessment in *Aguilar* that as little as $1 in lost wages each week is a sufficiently substantial sum to preclude the application of the doctrine. *Aguilar*, 948 F.3d at 1286 (citing *Lindow v.*

*United States*, 738 F.2d 1057, 1063 (9th Cir. 1984)); 29 C.F.R. § 785.47. Nelnet faults the *Aguilar* panel for not updating the "$1 in lost wages each week" to keep pace with inflation. Br. at 49. But *Aguilar* said what it said—in 2020. Neither this panel nor Nelnet are free to amend *Aguilar* to supply a different number. And even if such a revision of circuit precedent were permitted, it would not be warranted. Poverty level wages, like those earned by Call Center Representatives, have not kept pace with the inflation-adjusted cost of basic goods and services. Drew Desilver, *For most U.S. workers, real wages have barely budged in decades*, Pew Research Center (Aug. 7, 2018). Moreover, the de minimis doctrine is based upon "considerations…[of] industrial realities." 29 C.F.R. § 785.47. There is every reason to believe that "industrial realities" in 2020 do not present nearly as many challenges in tracking time compared to, say, the same realities in 1950. In any event, even the original case to mention the $1 a week figure, *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88 (2d Cir. 1953), did not establish $1 as a weekly floor. On the contrary, it *reversed* a district court that had concluded that anything less than $1 a week was de minimis as a matter of law. *Id.* at 95. Nelnet's claim with respect to the aggregate amount of compensable time is foreclosed by this Circuit's precedent.

Finally, Nelnet is not correct in claiming that Appellants seek to "assign[] dispositive weight to [a] single factor"—the regularity of the

work. Br. at 50. Where, as in this case, the time at issue involves "[an] employee's fixed or regular working time," 29 C.F.R. § 785.47, *all three Lindow* factors typically favor the employees. Not only is the time extremely "regular," *Lindow*, 738 F.2d at 1063, but such regular time aggregates into a significant amount of compensable time much more readily than *irregular* time. *Id.* Finally, as this Court has observed, where "employees perform[] the same activities every day" it is "possible to compute how much time" employees spent performing them based on these regular duties. *Aguilar*, 948 F.3d at 1285 (quoting *Kellar*, 664 F.3d at 176–77).

This case presents no occasion for this Court to take the unprecedented step of disregarding the text of the FLSA under the guise of the de minimis doctrine.

## CONCLUSION

The district court's judgment should be reversed.

Dated: September 16, 2020

Respectfully submitted,

s/Adam W. Hansen

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Dated: September 16, 2020

s/Adam W. Hansen
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I hereby certify that, on this 16th day of September, 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.

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