## APPLICATION FOR TRANSFER TO THE SUPREME COURT

Pursuant to Rule 83.04, Appellant Missouri Department of Corrections ("MDOC" or "the State") respectfully applies for a post-opinion transfer to the Supreme Court.

## Questions of General Interest and Importance

1. Did the circuit court err in entering a judgment of over $113 million against MDOC under the federal Fair Labor Standards Act ("FLSA") for failing to pay compensation to corrections officers for routine pre-shift and post-shift activities, when the activities at issue constitute quintessential "preliminary" and "postliminary" activities that are *not* compensable under the federal Portal-to-Portal Act, 29 U.S.C. § 254(a)(2)?
2. Do the corrections officers' preliminary and postliminary activities constitute compensable "principal activities" under the FLSA solely because the officers are expected to remain alert and respond to "unusual" emergencies if they arise during pre-shift and post-shift time, when numerous cases have held that such requirements do *not* transform non-compensable time into compensable time?
3. Even though they indisputably lacked a cause of action against MDOC arising directly under FLSA, could the corrections officers evade this legal barrier by re-casting their FLSA claims as breach-of-contract claims, even though numerous cases have rejected similar attempts to re-cast non-viable statutory claims as breach-of-contract claims?

## INTRODUCTION

This case involves one of the largest judgments against the State in the history of Missouri—a judgment that not legally supportable. Plaintiffs-Appellants, a class of almost 14,000 current and former corrections officers ("Plaintiffs"), obtained a judgment of over $113 million against the Missouri Department of Corrections ("MDOC") for alleged underpayment of compensation for pre-shift and post-shift activities under the FLSA. This judgment rests on two errors that will generate substantial confusion in future litigation.

*First,* the activities for which Plaintiffs sought compensation—*i.e.*, checking into the facilities where they work, passing through security, receiving job assignments, collecting keys and radios, walking to their job posts, and waiting in line to do so—are *not* compensable under the FLSA. Innumerable cases recognize that such activities are non-compensable "preliminary" and "postliminary" activities under the Portal-to-Portal Act. Plaintiffs sought to evade this barrier by arguing that they must be alert and respond to emergencies during such activities, but numerous cases reject that argument as well.

*Second*, Plaintiffs had no cause of action against MDOC under the FLSA. They sought to evade this hurdle by re-casting their FLSA claims as breach-of-contract claims, based on Labor Agreements containing the bare recital that MDOC would comply with FLSA. Numerous cases reject this end-run approach as well.

This case presents questions of general interest and importance. The enormous liability for Missouri's taxpayers is a matter of public importance, and the Court of Appeals' opinion conflicts with many cases and will generate confusion for future FLSA litigation in Missouri. The State respectfully requests that this Court grant transfer.

## STATEMENT OF PERTINENT FACTS

The federal Fair Labor Standards Act (FLSA) requires employers to compensate employees for overtime worked in excess of a 40-hour work week. But the Portal-to-Portal Act excludes from FLSA coverage "activities which are *preliminary* to or *postliminary* to" an employee's "principal activities." 29 U.S.C. § 254(a)(2) (emphasis added); *see also Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 516 (2014).

The "principal activities" of MDOC's corrections officers are "supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." D433, ¶ 2. Each officer's job shift to perform such principal activities "begins at the time that the officer arrives at his or her assigned job post within the correctional center and generally ends when the officer is relieved from duty and departs from that job post." D448, ¶ 11.

Officers typically engage in pre-shift and post-shift activities before arriving at and after leaving their job posts. These activities vary among facilities, but they often include: (1) logging officers' arrival at and departure from the facility; (2) reporting to a Central Observation Post to receive assignments; (3) passing through security gates; (4) obtaining work assignments; (5) "picking up or returning equipment such as keys and radios"; (6) "walking to and from the entry/egress points to duty post and possibly waiting in line" to do so; and (7) "passing pertinent information from one shift to another." D535, at 5-6.

Consistent with the Portal-to-Portal Act, for decades, MDOC has not paid compensation for such pre-shift and post-shift activities. D448, ¶ 16. Typically, "[d]uring no portion of such Pre-Shift Time are [officers] required to supervise, guard, or escort any inmates." *Id.* ¶ 18. Rather, these activities "create for [MDOC] a safe and secure facility

where we properly identif[y] staff and we properly equip them." D435, at 11. These activities are "not part and parcel or directly related to offender supervision or reform or rehabilitation." *Id.* "For instance, we don't employ these corrections officers to pick up keys or carry radios or go through our security gate." *Id.* at 12. The pre-shift time "is expended to help ensure that officers and other staff safely arrive at and are able to perform the job duties for which they have been hired." D433, ¶ 10.

MDOC recognizes a limited exception to this policy for emergency situations. "In some instances, before arriving for the start of his or her shift at an assigned post or after ending his or her shift at that post, [an officer] may respond to an incident involving a disturbance or altercation between inmates." D448, ¶ 19. Understandably, officers are expected to remain alert and respond to such emergencies if they occur, even during pre-shift and post-shift time. *See* D397, at 17 (officers must answer a "duress call" or "respond to [an] emergency" such as "a fight or some type of duress activity" if one arises during pre-shift time); D405, at 5-6 (officers "would be expected to respond" to inmate fights and assaults on guards if they occur during pre-shift time); D398, at 11 (officers are "expected to respond" to "incidents and attacks" if they arise on pre-shift time). "In such instances, the [officer] who so responded is entitled upon application to be paid overtime compensation for the pre-shift time spent in responding to such incident." D448, ¶ 19. Such emergency situations are "unusual," however. D435, at 7; D397, at 17. During the "typical" shift, no emergency arises during pre-shift or post-shift activities. D435, at 7.

Plaintiffs have been on notice of MDOC's policy regarding non-payment for pre-shift and post-shift activities since at least 2005. D429, at 2. Since 2005, MDOC and the

officers' union have executed two Labor Agreements. Both Agreements contain generic recitals that MDOC will comply with FLSA in the payment of overtime. *See* D426, at 18 (2014 Labor Agreement, § 12.2) ("The Employer will comply with the Fair Labor Standard Act (FLSA) . . . regarding the accrual and payment of overtime."); D427, at 16 (2007 Labor Agreement, § 11.2) (same). No other language in the Labor Agreements addresses compensation for pre-shift and post-shift activities, and both parties were aware that MDOC did not pay compensation for such activities when the Agreements were executed.

Plaintiffs brought a class action against MDOC, claiming that MDOC had violated FLSA, and thus breached the Labor Agreements, by failing to pay for pre-shift and post-shift activities. The circuit court granted Plaintiffs summary judgment on liability under their breach-of-contract claim. D493, at 2. The circuit court then held a jury trial on the question of damages alone. Before trial, the circuit court struck MDOC's well-qualified expert witnesses in a one-line order, and permitted only Plaintiffs' dubiously qualified expert to testify at trial. D329. After trial, the court entered a judgment of over $113,714,632 against MDOC, plus post-judgment interest at 9 percent. D535, at 2. The Court of Appeals for the Western District affirmed the judgment. Slip Op. 17.

## GROUNDS FOR TRANSFER

### I. The Court of Appeals' Decision Conflicts with Numerous Federal and State Authorities Regarding the Compensability of Pre-Shift and Post-Shift Activities, and Will Generate Confusion in Future FLSA Cases in Missouri.

In affirming the circuit court's grant of summary judgment, the Court of Appeals disregarded extensive authority holding that the pre-shift and post-shift activities at issue

are not compensable under the Portal-to-Portal Act. By creating conflicts with many cases, Court of Appeals' opinion will create confusion in future FLSA litigation in Missouri.

The Court of Appeals did not dispute that the sorts of activities at issue here—such as checking in, passing through security, waiting in line, picking up ordinary equipment like keys and radios, and walking to one's post, *see* D535, at 5-6—typically are not compensable under the Portal-to-Portal Act. *See* Slip Op. 5-6. In fact, there is widespread consensus in state and federal courts that such activities are quintessential "preliminary" and "postliminary" activities. *See, e.g., Busk*, 135 S. Ct. at 516 (passing through post-shift security was not compensable); *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 591-94 (2d Cir. 2007) ("passing through multiple layers of security" at a nuclear power plant, and collecting ordinary equipment, were not compensable); *Aguilar v. Management & Training Corp.*, Civil No. 16-00050 WJ/GJF, 2017 WL 4804361 (D.N.M. Oct. 24, 2017), at *1, *6-15 (corrections officers' time spent "(a) waiting at the prison, (b) clearing security, (c) taking and returning equipment, and (d) meeting and reporting to other detention officers" was not compensable); *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (receiving one's assignment and walking up to 15 minutes to one's post were not compensable); *see also* 29 C.F.R. § 790.7(g) ("checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks" are not compensable). Plaintiffs' pre-shift and post-shift activities are indistinguishable from activities deemed non-compensable in these and many other cases.

Notwithstanding this authority, the Court of Appeals relied on a single fact—*i.e.*, that officers are expected to respond to "unusual" emergencies if they arise during pre-shift

and post-shift time—to conclude that all pre-shift and post-shift activities are compensable. Slip Op. 6. The Court of Appeals reasoned that "the officers' requirement to utilize their training to guard against prisoner fights and escape attempts during shift changes" transforms these non-compensable activities into compensable "principal activities." *Id.*

Again, many authorities reject this argument. Employees in security-related fields are routinely required to remain alert and respond to emergencies when on their employers' premises, even when on breaks or performing non-compensable tasks. Yet state and federal courts have repeatedly held that the mere fact that such employees are required to remain alert and respond to emergencies does not transform non-compensable time into compensable time. MDOC cited eleven such cases to the Court of Appeals, and Plaintiffs cited no cases to the contrary. *See Akpeneye v. United States*, 138 Fed. Cl. 512, 529 (2018) (Pentagon security officers were required to remain in uniform and on Pentagon property and be available to respond to emergencies, yet their time was not compensable); *Babcock v. Butler Cty.*, 806 F.3d 153, 157-58 (3d Cir. 2015) (corrections officers were required to remain on-premises in uniform and close to emergency response equipment, and were on call to respond to emergencies, but their time was not compensable); *Roy v. County of Lexington*, 141 F.3d 533, 546 (4th Cir. 1998) (EMS personnel's break time was not compensable even though they were required to respond to emergencies and their breaks were interrupted by emergency calls 27 percent of the time); *Barefield v. Village of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996) (police employees "had to remain . . . in radio contact with the building in case of an emergency," but their time was not compensable); *Henson v. Pulaski Cty. Sheriff Dep't*, 6 F.3d 531, 536 (8th Cir. 1993) (police officers' meal

breaks were not compensable even though officers would "monitor[] . . . their radios for emergency calls to return to service"); *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1134-37 (5th Cir. 1984) (security guards were required to be on-premises 24 hours per day and immediately available to respond to emergencies, but their off-duty time was not compensable); *Agner v. United States*, 8 Cl. Ct. 635, 638 (1985) (security officers at the Library of Congress were required to respond to "emergency call[s]" during non-compensable time spent on employer premises); *Baylor v. United States*, 198 Ct. Cl. 331, 364 (1972) (employees were "required to eat lunch on the employer's premises and to be on a duty status, subject to emergency call during such period," but their time was not compensable); *Joiner v. Bd. of Trustees of Flavius J. Witham Mem'l Hosp.*, No. 1:13-CV-555-WTL-DKL, 2014 WL 3543481, at *6 (S.D. Ind. July 17, 2014) (hospital maintenance specialists "were expected . . . to respond to emergencies" but their time was not compensable); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1059 (S.D. Iowa 2010) (hospital employees "were required to keep their radios on and respond to [emergency] situations that may arise" but the time was not compensable); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 145 (D. Mass. 2003) (police detective had to "remain on call" during lunch and "terminate his lunch period altogether if an emergency arises," but the time was not compensable).

Here, Plaintiffs presented exactly the same argument that was rejected in each of these cases. In each of these cases, employees in security-related positions (such as corrections officers, Pentagon security officers, hospital employees, police detectives, and EMS personnel) were required to remain alert and respond to emergencies during

otherwise non-compensable time spent on the employer's premises. In each case, the employees argued that they should be compensated because they had to remain alert and respond to emergencies if they arose during non-compensable time, as Plaintiffs claim here. In each case, the court concluded that the time was *not* rendered compensable merely because the employees were required to remain alert and respond to emergencies. Here, the Court of Appeals disregarded these authorities without discussing them. Slip Op. 5-6.

The Court of Appeals' error on this point presents a question of general interest and importance. Not only is this case important in itself—it imposes a liability of $113 million plus interest on the State's taxpayers without legal justification—but the Court of Appeals' opinion conflicts with numerous other cases. Compensation for pre-shift and post-shift activities under FLSA is a frequent source of litigation. The Court of Appeals' opinion makes Missouri an outlier jurisdiction and will sow confusion in future FLSA litigation.

## II. The Court of Appeals' Opinion Also Generates Conflict and Confusion by Holding that Plaintiffs Can Manufacture a Non-Existent Cause of Action by Re-Casting Meritless Statutory Claims as Breach-of-Contract Claims.

It is indisputable that Plaintiffs could not have asserted their compensation claims against MDOC directly under the FLSA. The Court of Appeals correctly noted that, in this context, "FLSA does not create a private right of action for its enforcement." Slip Op. 8. Any claim against MDOC arising directly under the FLSA is plainly barred. *See Alden v. Maine*, 527 U.S. 706, 754-55 (1999). The Court of Appeals also acknowledged that, on the dispositive question whether pre-shift and post-shift activities are compensable, the Labor Agreements merely recite that "DOC will comply with FLSA," without imposing any contractual obligation independent of or in addition to FLSA compliance. Slip Op. 9

(noting that the contract "provide[s] that DOC will comply with FLSA," and that Plaintiffs' contract claim turns on "provisions regarding DOC's compliance with FLSA").

Notwithstanding its conclusion that Plaintiffs had no viable cause of action against MDOC for FLSA violations, the Court of Appeals held that Plaintiffs could advance exactly the same claims under a breach-of-contract theory. Slip Op. 9. This conclusion was erroneous. Many cases have held that, if there is no cause of action to enforce statutory obligations, plaintiffs cannot simply manufacture one by re-casting their statutory claims as breach-of-contract claims. *See, e.g., Astra USA, Inc. v. Santa Clara Cty., Cal.*, 563 U.S. 110, 118 (2011) (holding that a constitutional or statutory bar on private suits "would be rendered meaningless" if the bar "could [be] overcome . . . by suing to enforce the contract" instead); *MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 912 (8th Cir. 2004) ("Any attempt by MM&S to bypass the Exchange Act by asserting a private breach of contract claim for violations of section 78s(g)(1) is fruitless."); *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 313 (Pa. 2012) ("Thus, if Congress failed to authorize a private right of action to enforce a statute, then a party cannot sidestep legislative intent by suing to enforce a contract imposing the same obligations as those set forth in that statute"); *Allen v. Fauver*, 768 A.2d 1055, 1059 (N.J. 2001) (rejecting an attempt by corrections officers to reassert their FLSA claims as breach-of-contract claims because "recharacterization of the claim cannot change the essential nature of the claim").

These cases, moreover, provide a specific application of a long-established general principle: "*A promise by a government employee to comply with the law does not transform statutory or regulatory obligations to contractual ones*. The violation of the statute or

regulation will not be enforceable through a contract remedy." *Pressman v. United States*, 33 Fed. Cl. 438, 444 (1995), *aff'd,* 78 F.3d 604 (Fed. Cir. 1996) (emphasis added). A promise to comply with a preexisting legal duty does not support a claim for breach of contract: "Under the preexisting duty rule, a promise to do that which the promisor is already legally obligated to do is unenforceable." *Johnson v. Seacor Marine Corp.*, 404 F.3d 871, 875 (5th Cir. 2005); *see also Seidel v. Lee*, 1996 WL 903947, at *7 (D. Del. 1996). "It is a well-settled principle that an enforceable contract cannot be based upon a duty which one is already legally obligated to perform." *Id.* "That which one is under a legal duty to do, cannot be the basis for a contractual promise." *Floyd v. United States,* 26 Cl. Ct. 889, 891 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS, § 80 (1979)), *aff'd,* 996 F.2d 1237 (Fed. Cir. 1993). Missouri accepts this universal principle. "[A] preexisting duty cannot furnish consideration for a contract." *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. 2008).

Because Plaintiffs had no cause of action against MDOC under the FLSA, they could not assert a breach-of-contract claim based solely on the supposed FSLA violation. Plaintiffs cannot manufacture a non-existent cause of action by re-casting invalid statutory claims as breach-of-contract claims. Moreover, the generic promise to comply with a preexisting legal obligation—such as the obligation to comply with FLSA—is not enforceable in contract. Thus, Plaintiffs' breach-of-contract claims were legally meritless.

The Court of Appeals' opinion disregarded these well-settled doctrines. Instead, the Court of Appeals held that "the officers' claim is a breach-of-contract claim under state law, and it is not *preempted* by FLSA." Slip Op. 9 (emphasis added). The Court of Appeals

thus misapprehended the State's argument. The State did not argue that FLSA preempts state-law breach-of-contract claims. Instead, the State argued that—because the operative provision of the contract merely recites that MDOC will comply with FLSA—Plaintiffs' breach-of-contract claim is nothing but a meritless FLSA claim in thin disguise.

By permitting Plaintiffs to manufacture a non-existent cause of action by re-casting their statutory claims as contractual claims, the Court of Appeals' opinion contradicts many authorities. Again, the Court of Appeals' departure from settled doctrine in this area will sow confusion in a well-settled area of law. The proper resolution of this issue, therefore, presents a question of general interest and importance.

## CONCLUSION

For the reasons stated, the State respectfully requests that this Court grant the State's application for transfer.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2019, the forgoing application and all attachments were served via electronic mail to the following counsel of record:

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