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IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN et al.,
Plaintiffs and Appellants,

v.

APPLE, INC.,
Defendant and Respondent.

SUPREME COURT
FILED
JUL 2 3 2018
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ON A CERTIFIED QUESTION FROM THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 15-17382

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT APPLE, INC.

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Pursuant to California Rules of Court, rule 8.520(f)(1), the Chamber of Commerce of the United States of America (U.S. Chamber), California Chamber of Commerce (CalChamber), and Civil Justice Association of California (CJAC) request permission to

file the attached amicus curiae brief in support of defendant and respondent Apple, Inc.[1]

The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3 million businesses and professional organizations of every size. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases implicating issues of vital concern to the nation's business community.

CalChamber is comprised of over 13,000 member employers, both large and small. CalChamber is dedicated to improving California's business climate by providing businesses with a voice in state politics, legislative activities, and judicial matters. CalChamber is interested in helping the law develop so that employers are encouraged to invest resources back into the economy and their local communities.

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[1] No party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution to fund the preparation or submission of the brief other than the amici curiae, their members, or their counsel. (See Cal. Rules of Court, rule 8.520(f)(4).)

CJAC is a 40-year-old nonprofit organization whose members are businesses, professional associations, and financial associations. CJAC provides a voice for achieving greater fairness, economy and certainty in the civil justice system, working to reduce excessive and unwarranted litigation that discourages innovation and drives up the cost of goods and services for all Californians.

The proposed amicus brief explains how this Court's decision can affect California's businesses, as well as their employees and consumers. Amici discuss how, if California employers must pay for time required to accommodate their employees' choices made purely for personal convenience, employers will be disinclined to make those accommodations, and the interests of California's employees, employers, and consumers will suffer.

July 9, 2018

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AMICUS CURIAE BRIEF

INTRODUCTION

More than $15 billion worth of goods are stolen each year from retailers in this country by their employees. Apple, Inc. is particularly vulnerable to such thefts because its costly products are small and easy to conceal. Apple, like other retailers, has responded to this problem by requiring employees who choose to bring bags into the workplace to have their bags checked when they leave work.

There are many reasons why someone might bring a bag to work. Carrying a bag is an understandable necessity for some. But this case is not about them. It is about individuals carrying a bag to work as a matter of personal preference and convenience. Plaintiffs' counsel in this action has sought to represent the broadest possible class, so they have argued that an employee is entitled to compensation for time spent undergoing exit searches of bags *voluntarily* brought to work *purely* for the employee's *personal convenience*. The Court should reject this argument.

Because the searches at issue here result from employees' decisions to advance their own convenience, each employee

"controls" whether these searches takes place. Under *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*), the fact that temporary restrictions of an employee's activity result from the employee's free choice means that the employer need not pay for the time an employee expends as a result of that choice. And because the security checks are not integral to plaintiffs' job responsibilities, that time does not otherwise qualify as compensable hours the employees were suffered or permitted to "work."

Apple could have advanced its interest in minimizing employee theft by requiring that all bags remain outside the workplace, subject to exceptions for necessity. Instead, Apple chose to accommodate its employees' convenience by permitting employees to bring bags into the workplace with the understanding that those bags would be subject to search when they leave work. Forcing employers to pay for this time would discourage them from accommodating employee convenience. It would also place California further out of step with the rest of the country, increasing the cost of California's goods and services and encouraging businesses to invest elsewhere.

ARGUMENT

I. An employee's time expended because of his or her decision made purely for personal convenience does not constitute hours worked.

A. An employee who partakes in a security check of a bag brought purely for the employee's personal convenience is not "subject to the control" of the employer.

This Court has held that the "hours worked" for which an employee must be compensated include hours where an employee is "subject to the control of an employer," and also hours where an employee is "suffered or permitted to work." (*Morillion*, *supra*, 22 Cal.4th at p. 582, internal quotation marks omitted.)

Plaintiffs contend they are entitled to compensation because they satisfy the "control" test. (OBOM 16.) But *Morillion* clarifies that the definition of "hours worked" is not satisfied by temporary restrictions on an employee's activity stemming from the employee's decision to take advantage of an employer's proffered program. (See *id.* at p. 594.)

Morillion examined whether the time employees spent traveling to and from agricultural fields on employer-provided buses is compensable. (*Morillion*, *supra*, 22 Cal. 4th at p. 578.) The employer "required" that its employees commute on its buses, and no one could work in the fields without riding on those buses. (*Id.* at p. 579.) The Court held the required nature of the bus use "dispositive," concluding that the travel time constituted " 'hours worked' " for that reason. (*Id.* at p. 587; see *id.* at p. 589, fn. 5 [fact that employees in another case "were free to choose—rather than required—to ride their employer's buses to and from work" is a "dispositive, distinguishing fact"].) The Court also clarified that "employers do not risk paying employees for their travel time merely by providing them transportation" because "[t]ime employees spend traveling on transportation that an employer provides but does not require its employees to use" is not compensable. (*Id.* at p. 588.)

Subsequent authority follows *Morillion* in holding that time spent on employer-provided transportation is not compensable unless the use of the employer-provided transportation is *required.* *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 271, for example, holds that time spent taking an employer-provided shuttle

from the only parking lot made available to certain employees was not compensable because the employer did not require its employees to park there and take the shuttle. And *Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047, 1055, holds that employees must show they were "as a practical matter, required to commute in [employer's] vehicles" for that commute time to be compensable.

What was *not* dispositive in any these of these cases was whether the employee was free of employer restrictions after choosing to take advantage of the employer's program. For instance, it was not relevant whether an employee using employer-provided transportation might have been required to use a seatbelt, or refrain from eating, chewing gum, or playing loud music. Nor was it relevant whether an employee was required to take a shuttle all the way to its destination after embarking, or that a shuttle might make the employee stop or take a detour to pick up other people.

Instead, the relevant point in time for assessing whether an employee is subject to the control of the employer is *before* the employee decides to allow certain restrictions on his or her activities in exchange for a more convenient way to get to work. If that decision is up to the employee, then the subsequent restrictions on

the employee's activities resulting from that decision were of no moment.

The principle that "control" is assessed at the outset of a predictable chain of events rather than the endpoint is not limited to employee decisions to use employer-provided transportation. California law generally places responsibility for the consequences of a chosen path on a party whose initial choices prompt a predictable response. For example, a person cannot recover for risks of injury inherent in a sport in which he voluntarily participates. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154 [primary assumption of risk doctrine].) A person may be liable for an intentional tort if he intends to do an action knowing that a result is likely to occur, even if he does not specifically intend the end result. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 [intentional interference with prospective economic advantage claim].) And a person cannot recover for battery if his harm results from a reasonable response to his actions. (See CACI No. 1304 [self-defense affirmative defense].)

Here, plaintiffs stipulated to litigate this case on the theory that bags were brought to work " 'voluntarily' " and " 'purely for personal convenience.' " (ABOM 10.) Apple did not require any

employee to bring a bag to work. Rather, Apple permitted employees to bring bags to work for their convenience subject to Apple's reasonable, advance-disclosed condition that, upon leaving work, the bags were subject to inspection. Plaintiffs therefore knew that their bags would be subject to check when they made the personal and absolutely discretionary decision to bring them into work. (See ABOM 12-13.) Because it was the employees, not Apple, who controlled the decision to arrive at work with a bag that was not necessary for work, the employees were not "subject to the control" of Apple when the bags were checked. Like time spent on employer-provided transportation, the time spent checking a bag brought by an employee is not compensable if the time involved results from the employee's choice made to pursue his or her own convenience.

Plaintiffs appear to imply that the choice to bring a bag to work is *never* truly voluntary in modern society, given the enormous convenience bags afford people. (See OBOM 40-42.) Although carrying a bag to work may be ubiquitous and convenient in today's culture, "that does not equate it to a[n] [indispensable] right" such that employees have no choice but to carry bags. (*Scott-George v. PVH Corp.* (E.D.Cal., July 22, 2016, No. 2:13-0441-TLN-AC) 2016

WL 3959999, at p. *9 [nonpub. opn.].) Because employees know they "could choose to avoid any security-related delay by leaving personal items [like bags] outside the secure area," they cannot show they are "entitled to compensation under the 'control' prong of the hours-worked definition." (*In re Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation* (W.D.Ky., June 20, 2017, No. 3:14-290-DJH) 2017 WL 2662607, at pp. *1, *3 [nonpub. opn.] [applying California law].)

Indeed, employers are not required to pay for time that is far less voluntary for employees and even more vital in modern society. The vast majority of employees (except perhaps those who work remotely 100 percent of the time) have to shower, dress, and commute to work from some other location in order to do most jobs. Yet *Morillion* held that the time employees spend grooming and commuting to work is not compensable under the control test of "hours worked." (*Morillion, supra,* 22 Cal.4th at pp. 586-587.) Given that these activities are unquestionably indispensable to holding down many jobs today, it would make no sense to suggest that far more voluntary choices—like carrying a bag—could satisfy the control standard.

B. An employee who partakes in a security check of a bag voluntarily brought purely for the employee's personal convenience is not "suffered or permitted to work."

Plaintiffs next argue that even if they do not satisfy the "control" test discussed above, they are nonetheless entitled to compensation because the "hours worked" for which an employee must be compensated also includes hours where an employee is "suffered or permitted to work." (*Morillion*, *supra*, 22 Cal.4th at p. 582, internal quotation marks omitted.) But the "suffered or permitted to work" test's "historical roots show that its purpose was to impose liability on employer[s] for employment relationships that fell outside the traditional common-law context," so it "lacks relevance where the primary issue is whether the plaintiff's activities constituted work in the first place," as is the case here. (*Saini v. Motion Recruitment Partners, LLC* (C.D.Cal. Mar. 6, 2017, No. SACV 16-01534 JVS (KESx)) 2017 WL 1536276, at p. *11 [nonpub. opn.], citing *Martinez v. Combs* (2010) 49 Cal.4th 35, 69; see *Gunawan v. Howroyd-Wright Employment Agency* (C.D.Cal. 2014) 997 F.Supp.2d 1058, 1063-1065.) Indeed, unless the issue is what it means that someone is "suffered or permitted" to work, the test boils down to the circular tautology "work" means "work,"

which is entirely unhelpful in determining what activities qualify as compensable work. Because the issue here is whether bag checks constitute "work" at all, the "suffered or permitted to work" test provides no useful guidance here and the court should not apply it.

But even if this Court were to disagree and consider the test, it would not be satisfied. Because the applicable wage order does not define "work" (see Cal. Code Regs., tit. 8, § 11070), this Court should look to federal law for guidance.[2] (See *AHMC Healthcare, Inc. v. Superior Court* (June 25, 2018, B285655) __ Cal.App.5th __ [2018 WL 3101350, at p. *5] ["Because California's wage laws are patterned on federal statutes, in determining employee wage claims, California courts may look to federal authorities for

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[2] Although *Morillion* did not find federal authority persuasive in interpreting the " 'control' " prong of " 'hours worked,' " that was because federal law "expressly and specifically exempts travel time as compensable activity," whereas California law does not. (*Morillion, supra*, 22 Cal.4th at pp. 590-591.) Here, federal law and California law are parallel, as neither expressly nor specifically exempts security checks as compensable activity. (Cf. 29 U.S.C. § 254(a) [exempting "activities which are preliminary to or postliminary to" principal activities, but saying nothing about security checks].) Therefore, this Court should consider how federal law applies its generally applicable definition of compensable time to security checks. (*Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F.App'x 712, 714 (*Gillings*) ["*Morillion* establishes no bar against reliance on persuasive federal case law where California and federal law are parallel"].)

guidance in interpreting state labor provisions"].) Like California law, the federal Fair Labor Standards Act (FLSA)—the "federal counterpart" to California's wage-and-hour laws (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009)—defines " 'employ' " to include "suffer or permit to work" (29 U.S.C. § 203(g)), and the federal regulations define "hours worked" to include "all time during which an employee is suffered or permitted to work whether or not he is required to do so" (29 C.F.R. § 778.223 (2017); see *Gillings*, *supra*, 583 F.App'x at p. 714 ["*Morillion* itself relied, in part, on a federal case defining the meaning of 'suffer or permit to work' in 29 U.S.C. § 203(g) to construe a nearly identical phrase in an order issued by a California regulatory agency"]).

In *Integrity Staffing Solutions, Inc. v. Busk* (2014) 574 U.S. __ [135 S.Ct. 513, 515, 190 L.Ed.2d 410] (*Busk*), the United States Supreme Court unanimously held that time spent for Amazon.com warehouse workers to undergo security screenings was not compensable under the FLSA. The question turned on whether the security screenings were " 'an "integral and indispensable part of the principal activities" ' " an employee is employed to perform. (*Id.* at p. 517.) Because the screenings were not an intrinsic element of

retrieving products from warehouse shelves or packaging them for shipment, the screenings were not compensable. (*Id.* at p. 518.)

Here, the bag checks are not part of what Apple employees are employed to do. Apple employees are hired to sell products, assist customers, and troubleshoot Apple products. (See ABOM 53.) The definition of "work" that plaintiffs propose—anything involving physical or mental effort to accomplish something (OBOM 44)—is detached from an employee's job responsibilities and would sweep in a range of activities, such as commuting and grooming, that are clearly not compensable (see ABOM 55). Accordingly, the bag checks cannot be compensable "work" that the employees were "suffered or permitted" to do.

II. Businesses, employees, and consumers benefit from a rule that does not require employers to pay extra for their efforts to flexibly accommodate employees' convenience and individual preferences.

A. Adopting plaintiffs' rule would discourage employers from offering programs that enhance employees' lives.

Many employers offer their employees benefits that allow for convenient, on-site access to services to promote a full and healthy

life. For instance, many employers offer on-site child care as a benefit, including at least 17 Fortune 100 companies. (*The Fortune 100 Companies that Offer On-Site Day Care to Employees* (May 31, 2017) The Outline <https://bit.ly/2KrW3V3> [as of July 5, 2018].) Many employers have on-site cafeterias, and those that do often provide subsidized meals. (Deng, *Let Them Eat Lunch* (Nov. 10, 2014) Slate <https://slate.me/1xEMot6> [as of July 5, 2018].) Many companies also offer on-site fitness centers. (See Cheng, *Hulk Out at these Companies with Onsite Gyms* (Jan. 14, 2017) Digital Astronauts <https://bit.ly/2Kttre3> [as of July 5, 2018].)

Employees who choose to take advantage of these programs may experience temporary restrictions on their activities. For instance, an employee may not be free to leave for the day while his or her child remains at on-site child care, and the employee's departure from work may be delayed by the process of picking up his or her child and making sure that items required by the child care (such as diapers or changes of clothes) are provided. Or an employer may have a rule that employees must clean up after themselves in a cafeteria, or wipe down equipment in a gym, before leaving.

If the district court's order granting summary judgment is reversed, California's employers may be understandably reluctant to continue offering these types of valuable. If an employer cannot exercise some control over its employees while they are using its programs, it risks undermining the ability to create sensible rules that help make the programs work for everyone. And if an employer must pay its employees for time spent using its discretionary programs, it unnecessarily increases the costs of providing perks, accommodating employees' convenience, or other practices that are aimed at enhancing the employees' well-being.

Here, Apple had a choice about how to respond to its employees' desires to bring a bag to work. Unfortunately, theft by employees is a large source of lost revenue facing many retailers, especially those such as Apple who sell small, high-value products, and this cost is ultimately borne by consumers. According to an industry study, the cost of vanishing merchandise to the U.S. retail economy is about $48.9 billion. (*2017 Nat. Retail Security Survey* (2017) Nat. Retail Federation <https://bit.ly/2NqA6Do> p. 6 [as of July 5, 2018].) It is estimated that employee theft accounts for 30 percent of that figure, or about $15 billion per year. (*Id.* at p. 8.)

In order to reasonably address the risk of employee theft, Apple could have required its employees to leave their bags at home, in their cars, or in lockers, in effect prioritizing Apple's and its customers interests in avoiding theft over its employee's interests in bringing a bag to work. (ABOM 37.) Or Apple could have required its employees to carry only clear plastic bags to deter theft. (See Stevens, *Employee Theft: Clearly a Problem*, San Luis Obispo Tribune <https://bit.ly/2lHPaQk> [as of July 5, 2018] [retailer requires employees to carry clear plastic bags].) Instead, Apple allowed its employees to choose to carry their own bags at work, and in exchange subjected those bags to a quick search at the end of the day to make sure the bags were not used to facilitate theft. If Apple and similarly situated employers must pay extra for this kind of compromise program, they will be less likely to offer it and workers will simply no longer have the option to bring their bags to work.

B. Adopting plaintiffs' rule would bring California further out of step with the rest of the country.

Many businesses in California have employees in other states, and must make decisions about whether to expand their operations

in California or put their resources elsewhere. Under the federal FLSA, security check time is not compensable even when the checks are required. (See *Busk*, *supra*, 135 S.Ct. at p. 518.) Other states look to the FLSA in interpreting their own labor laws, and have determined that security check time is not compensable. (See *In re Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation* (W.D.Ky. 2017) 261 F.Supp.3d 789, 793, 796 [security checks not compensable under Nevada and Arizona law]; *UPS Supply Chain Solutions, Inc. v. Hughes* (Ky.Ct.App., Apr. 27, 2018, No. 2014-CA-001496-ME) 2018 WL 1980775, at p. *7 [Kentucky law]; *Cinadr v. KBR, Inc.* (S.D. Iowa, Feb. 15, 2013, No. 3:11-cv-00010) 2013 WL 12097950, at p. *7 [Iowa law]; *Sleiman v. DHL Express* (E.D.Pa., Apr. 27, 2009, No. 09-0414) 2009 WL 1152187, at p. *6 [Pennsylvania law].) Moreover, amici are unaware of any cases applying non-California state law to hold that avoidable security checks are compensable. (See <https://1.next.westlaw.com> [search results in all federal and state cases for: ("security check" "security screening" "bag check") /p compensat!] [as of July 5, 2018].)

Adopting the rule plaintiffs propose here would bring California further out of step with the rest of the country.

California already requires compensation for time spent undergoing mandatory security checks, which would not be compensable under federal law and the states that have adopted similar rules. This Court should not push California even further from the mainstream by requiring employers to bear the cost when their employees choose to bring bag purely for their own convenience. Ultimately, a decision to require employees to be compensated in California for security checks they willingly accepted out of convenience will result in higher prices for California consumers and disincentives for businesses to hire more employees in California. And as discussed above, such a decision would make national employers less willing to offer accommodations or perks to their California employees.

CONCLUSION

This Court should hold that time spent on the employer's premises undergoing exit searches of bags brought to work purely for personal convenience by employees is not compensable as "hours worked."

July 9, 2018

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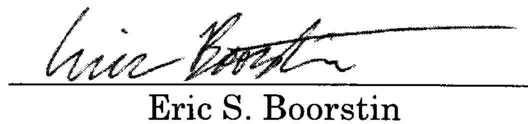
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 3,776 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: July 9, 2018



Eric S. Boorstin

PROOF OF SERVICE

Amanda Frlekin et al. v. Apple, Inc.
California Supreme Court Case No. S243805

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

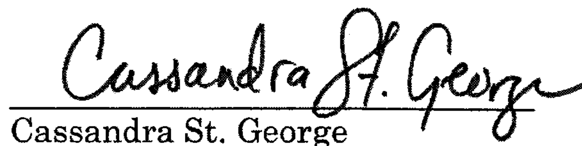
On July 9, 2018, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, AND CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT APPLE, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 9, 2018, at Burbank, California.



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California Supreme Court Case No. S243805

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