CASE NO. S243805

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AMANDA FRLEKIN ET AL.,
Plaintiffs and Appellants,

v.

APPLE, INC.,
Defendant and Respondent.

On a Certified Question from the United States Court of Appeals for the Ninth Circuit,
Case No. 15-17382

APPLICATION BY *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

WILLIAM TURLEY, Esq. (122408)
DAVID T. MARA, Esq. (230498)
THE TURLEY & MARA LAW FIRM, APLC
7428 Trade Street
San Diego, CA 92121
Attorneys for Amicus Curiae Consumer Attorneys of California

CASE NO. S243805

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AMANDA FRLEKIN ET AL.,
Plaintiffs and Appellants,

v.

APPLE, INC.,
Defendant and Respondent.

On a Certified Question from the United States Court of Appeals for the Ninth Circuit,
Case No. 15-17382

APPLICATION BY *AMICUS CURIAE* CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

WILLIAM TURLEY, Esq. (122408)
DAVID T. MARA, Esq. (230498)
THE TURLEY & MARA LAW FIRM, APLC
7428 Trade Street
San Diego, CA 92121
Attorneys for Amicus Curiae Consumer Attorneys of California

Table of Contents

Table of Authorities

Cases

Statutes

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following application and brief are made by the Consumer Attorneys of California ("CAOC").

CAOC is a non-profit organization of attorneys and is not a party to this action. Pursuant to California Rule of Court 8.208, CAOC hereby states that no entity or person has an ownership interest of 10% or more in CAOC, and CAOC knows of no person or entity that has a financial or other interest in the outcome of the proceeding under Rule 8.208.

Date: July 9, 2018

Respectfully Submitted,

By: _____

David Mara, Esq.
The Turley & Mara Law Firm, APLC
7428 Trade Street
San Diego, CA 92121

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF AND APPELLANT

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE AND ASSOCIATE JUSTICES

The undersigned respectfully requests permission to file a brief as amicus curiae in the matter of *Frlekin et al. v. Apple, Inc.,* Case No. S243805, under California Rules of Court, rule 8.520(f) in support of Plaintiffs and Appellants, Amanda Frlekin et al., on behalf of Consumer Attorneys of California ("CAOC").

CAOC, founded in 1962, is a voluntary non-profit membership organization of approximately 3,000 consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of unlawful and harmful business practices, including consumer fraud, personal injuries, wage and hour violations, and insurance bad faith.

CAOC has taken a leading role in advancing and protecting the rights of injured citizens and employees in both the courts and the Legislature. This has often occurred through class actions for violations of California's Labor Code and Unfair Competition Law, which is codified at Cal. Bus. & Prof. Code §17200, *et seq*. In recent years, CAOC has participated as amicus curiae in many cases, including: *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257; *Williams v. Superior Court* (2017) 3 Cal.5th 531; *Aryeh*

v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; *Parks v. MBNA America Bank, N.A.* (2012) 54 Cal.4th 376; *Kwikset v. Superior Court* (2011) 51 Cal.4th 310; and *In re Tobacco II Cases* (2009) 46 Cal.4th 298. CAOC has also participated as an amicus in numerous cases pending at the appellate level.

CAOC has a substantive and abiding interest in ensuring all workers are compensated for all time under the employer's control and for all time they are suffered or permitted to work. CAOC also has a substantive interest in ensuring that California's protective standards regarding employee hours worked remains intact and are interpreted with an eye towards the protection of workers.

In response to California Rules of Court, rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. Except for the authors themselves, no party, counsel for a party, or other person made a monetary contribution to fund the preparation of the following amicus brief.

///

///

///

///

///

The proposed brief follows.

Executed in San Diego, California, this Ninth day of July, 2018.

Respectfully submitted,

By: _____
David Mara, Esq.

The Turley & Mara Law Firm, APLC
7428 Trade Street
San Diego, CA 92121

Attorneys for Amicus Curiae Consumer Attorneys of California

To the Honorable Tani Cantil-Sakauye, Chief Justice and Associate Justices:

I.
INTRODUCTION

This Court's decision in *Morillion v. Royal Packing Co.* answers the question at issue here. In *Morillion*, the Court found that, for purposes of the Wage Order's definition of "hours worked" under the independent control test, "[t]he level of employer's control over its employees, *rather than the mere fact that the employer requires the employees' activity, is determinative.*" *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587.

Apple urges this Court to roll back that patterned analysis where the level of employer control is determinative of whether employees are under the compensable control of an employer. Instead, it urges this Court to focus exclusively on the factor it rejected as dispositive of compensable control - that the security searches in question here are not unconditionally required by Apple.

It is not surprising that Apple would urge the Court to rewrite the analysis it articulated in *Morillion*. Based on a straight-forward application of it, Apple concedes its employees are under its control during the bag checks. Thus, to have any hope of prevailing and justifying its refusal to pay its employees undergoing admittedly controlling bag searches, Apple had to

create a legal fiction from this Court's clear decision in *Morillion* – that the compensable control only lies in restrictions and activities that the employer unconditionally requires and employees cannot avoid.

Aside from rendering as outcome determinative that which this Court expressly rejected as dispositive of compensable control, i.e., whether the activities to which employees are subject are required and unavoidable, Apple's flawed view of the test would make it impossible to assess the level of control over employees during the bag searches. As will be shown, the level of control to which employees are subject during bag checks has nothing to do with whether the bag checks are required and unavoidable. Thus, to focus exclusively on whether the searches are strictly and unconditionally required, would be to focus on anything but the level of control over employees during the searches.

In addition to making it impossible to assess the level of control over employees during Apple's bag checks, injecting "unavoidable activity" into the control analysis should be rejected for three reasons.

First, restricting the control test to only unavoidable activities would result in absurd consequences where employees heretofore considered under the employer's control would not be compensated unless they were actually performing work. For instance, employees who are not required, but freely accept the employer's offer, to report to work, would be said, under Apple's

interpretation, to have been able to avoid the employer's control during the workday. Thus, if Apple's view of the control test were to stand, these employees would not be entitled to compensation when they are subject to the control of the employer unless they were actually working, which would contradict this Court's holding in *Morillion*. See *Morillion, supra,* 22 Cal.4 at 581 (ruling that "an employee who is subject to an employer's control does not have to be working during that time to be compensated under [the Wage Orders]").

Second, Apple's proposed addition to the control test, whereby employees could only be said to be under the employer's control during unavoidable activities, could lead to the evisceration of the control test as an independent means to prove entitlement to compensation altogether. This because an employee's decision to work for an employer and show up for work is always considered voluntary and at the will of the employee. *Cal.Lab.Code sec.* 2922; *Guz v. Betchel Nat. Inc.* (2000) 24 Cal.4th 317, 336.

Third, as Apple's proposed test completely disregards the control it concedes to exert during the bag search, there would be no limit to the amount of control it could exert over employees during the search. Because the search would be considered an avoidable activity, the analysis would stop there, and employees could be subject to a search procedure with boundless employer controls over them and without any compensation. As an avoidable

activity, and thus outside of compensable control under Apple's proposed test, employees could be subject to invasive searches that last for hours without any compensation.

Finally, even under Apple's proposed standard, employees undergoing Apple's bag checks would still be subjected to the employer's control and entitled to compensation. As this Court explained in *Morillion*, to be free of employer control for purposes of "hours worked," the employee must be free to use the time "effectively for his or her own purposes."

Bags carry belongings people need to truly use their time effectively for their own purposes. Bags, for instance, carry important items like workout clothes, meals and snacks, and breast pumps. Individuals wanting to use their time effectively for their own purposes to enjoy pursuits that require a bag would only be free to do so by submitting to Apple's controlling bag search. Thus, even under Apple's proposed control test, Apple employees undergoing bag checks are subject to its control, because subjecting themselves to Apple's control is the only way they are free to engage in all pursuits.

II.

DISCUSSION

a. Restricting Compensable Control to Only Activities that are Required and Unavoidable as Apple Urges Strictly Conflicts with this Court's Decision in *Morillion v. Royal Packing Co.*, in Which this Court Held "The Level of the Employer's Control Over Its Employees, rather than the Mere Fact that the Employer Requires the Employees' Activity, is Determinative"

The test in California for whether employees are under an employer's control and entitled to compensation has never been whether the employees could avoid the employer's control. As this Court made clear in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, when determining whether an employee's activity is under the employer's control entitling him or her to compensation, the import is not whether the employer requires the activity and thus whether employees can avoid it, but the level of control employers exert over employees during the activity: "The level of the employer's control, *rather than the mere fact that the employer requires the employees' activity, is determinative.*" *Morillion, supra,* 22 Cal.4th at 587.

Apple turns the analysis of compensable control on its head. Disregarding the plain and carefully worded decision in *Morillion*, Apple argues that employees can only be said to be under the compensable control of the employer if the activity in question is unconditionally required by the employer and cannot be avoided by the employee. From this flawed premise, Apple concludes that its security searches – during which Apple concedes

employees are under the company's control – cannot rise to the level of compensable control, because employees can avoid the searches by not bringing personal belongings with them to and from the workplace. Apple's outcome determinative test that predicates compensable control exclusively on whether the controlling activity in question is required and unavoidable was specifically rejected by this Court in *Morillion* and therefore must fail.

In *Morillion,* this Court focused on "whether an employer that requires its employees to travel to a work site on its busses must compensate the employees for their time spent travelling on those busses." *Morillion, supra,* 22 Cal.4th at 578. That is, the Court analyzed whether the time the workers spent travelling to and from the work site was "compensable as 'hours worked'" under the Industrial Welfare Commission Wage Orders ("Wage Orders"), which define "hours worked" as the "'time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.'" *Id.,* quoting from Wage Order No. 14-80, codified at *Cal.Code Regs., tit. 8* section 11140. The *Morillion* Court held that "the time [workers] are required to spend traveling on their employer's buses is compensable under [the Wage Orders] because they are 'subject to the control of an employer' and do not also have to be suffered or permitted to work' during this travel period." *Id.,* quoting from Wage Order No. 14-80, codified at

Cal.Code Regs., tit. 8 section 11140.

In reaching this conclusion, this Court ruled that the analysis of compensable control centers not on whether the activity in question is required or unavoidable, but on the "level of the employer's control: "The level of the employer's control, *rather than the mere fact that the employer requires' the activity is determinative.*" *Morillion, supra,* 22 Cal.4th at 587 (emphasis added). If the dispositive fact was that the employer unconditionally *required* the bus travel, the Court would have stopped there. Of course, it did not. Rather, the *Morillion* Court zeroed in on the "level of the employer's control" *occasioned by the control of requiring employees to take the buses:* "When an employer requires its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are 'subject to the control of an employer,' and their time spent traveling on the buses is compensable as 'hours worked.'" *Morillion, supra,* 22 Cal.4th at 587.

The Court made clear that its opinion does not predicate control on the mere fact of whether the activity or restriction is something the employer requires and the employee cannot avoid. Royal Packing, the employer in *Morillion,* argued that, if the mere fact that an employer requires a particular activity was dispositive, employer control would encompass "all activity the employer 'requires,' including all commute time" and "grooming time."

Royal argued that, employers who require workers to report to a workplace - even if they do not mandate a particular mode of transportation - would be said to control employees during their commute time because getting to the workplace is required and unavoidable. Likewise, Royal argued that employers who require workers to show up to work clean and groomed would be said to control the workers during their grooming time, because being clean and groomed is required and unavoidable.

The *Morillion* Court rejected these arguments. Reiterating that the level of control exerted during the activity in question is dispositive of the test, this Court carefully fashioned the control test away from a bright-line rule that would predicate compensable control on the singular, outcome determinative fact of whether the activity in question was required and unavoidable:

> Royal does not consider the level of control it exercises by determining when, where, and how plaintiffs must travel. In contrast to Royal's employees, employees who commute to work on their own decide when to leave, which route to take to work, and which mode of transportation to use. By commuting on their own, employees may choose and may be able to run errands before work and leave from work early for personal appointments. The level of the employer's control, rather than the mere fact that the employer requires the activity, is determinative. *Morillion, supra,* 22 Cal.4th at 587.

Apple completely misreads *Morillion* and its ruling that the employer's requirement of an activity is not determinative of its control over employees. Where *Morillion* expressly ruled that the mandatory nature of activities is not determinative of control, Apple argues there can be no control under *Morillion* unless the employer mandates the activity. It argues that, under *Morillion*, employer control cannot be found over employees' activity where the employer does not mandate the activity and employees may "freely [choose] to avoid" the activity. (Answer Brief on the Merits ["ABM"] pg. 34).

Apple concedes that the bag checks are controlling and employees who are required to undergo them are "subject to the control of an employer." Apple argues, however, that the time spent during bag checks would only be compensable under *Morillion* if the employees could not avoid the searches: "In sum, if, like the employer in *Morillion* that required employees to ride its buses to work, Apple had required employees to bring bags to work and then searched those bags, under *Morillion,* the time spent undergoing the bag checks would constitute compensable time under the 'subject to the control of an employer' prong of the 'hours worked' definition." (ABM, pg. 32).

Apple, thus, restricts the focus of the control test in a way this Court expressly refused in *Morillion*. Completely ignored is the singularly important factor *Morillion* outlined for determining whether employees are

"subject to the control of an employer" within the meaning of the Wage Orders: "The level of the employer's control..." Thus, the fact that Apple does not require the bag searches in the strictest sense because employees could choose to avoid the searches by not taking bags or belongings from the work place is not, under *Morillion*, dispositive or determinative of whether the searches constitute compensable control. The level of control Apple concedes employees are exposed to during the searches, under *Morillion*, is determinative.

Therefore, under *Morillion*, Apple's reading of the control test as being restricted to only required and unavoidable activities must fail. As the following shows, the only way to asses *Morillion's* determinative factor of the level of control during the bag checks is to focus on Apple's control exerted over employees *during* the checks, control that Apple has freely conceded it exerts.

b. The Only Way to Assess *Morillion's* Determinative Factor of the Level of the Employer's Control in the Bag Search Context is to Focus on the Control Exerted Over Employees During the Bag Checks, Regardless of Whether the Searches Were Unavoidable

It is undisputed that Apple employees who bring bags out of the work place are required, on the pain of discipline, to undergo Apple's searches. Because it contends employees have the choice to not bring bags to and from

the work place, Apple argues employees can avoid the controlling search, which thereby renders the search time non-compensable control.

Disregarding this Court's ruling in *Morillion* that whether the activity in question is required is not determinative of control, Apple argues that, because the bus rides in *Morillion* were unconditionally required, compensable employer control can only exist in activities the employer requires and the employee cannot avoid. To illustrate this point, Apple cites to non-compulsory travel cases - *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 and *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417 - wherein the courts found no control because the employers did not require employees to take any specific mode of transportation to and from the work place.

Morillion and the non-compulsory travel cases cited to do not stand for Apple's over-arching principle that control exists only in required and unavoidable activities. Apple overlooks the fact that, in the compulsory/non-compulsory travel cases, all of the employer control stems from the employer mandate that employees take the employer's specified mode of travel. That is, assessing the determinative factor of the level of control in the compulsory/non-compulsory travel context necessarily entails an analysis of whether the mode of travel was or was not required.

As this Court made clear in *Morillion,* employers who require employees to take a certain mode of travel control employees "by

determining when, where, and how [employees] are to travel." In contrast, when employees are free to choose between the employer's optional transportation service or some other mode, that singular control in the commute time context is entirely removed. As this Court explained in *Morillion*:

> ...[W]e emphasize that employers do not risk paying employees for their travel time merely by providing them transportation. Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as 'hours worked.' Instead, by requiring employees to take certain transportation to a work site, employers thereby subject those employees to its control by determining when, where, and how they are to travel. *Morillion, supra,* 22 Cal.4th at 588.

Control in the bag search context – unlike the compulsory travel context focused on in *Morillion* – does not stem from whether or not the search is unconditionally required and unavoidable. As Apple concedes, employees undergoing the searches are under Apple's control regardless of the fact that Apple claims they can be avoided. Unlike in the compulsory travel context in *Morillion*, the level of the employer's control over employees during bag searches is totally unaffected by the fact that the employee could have avoided the search. This is because, if an employee brings a bag out of the workplace, he or she is going to be searched. If the

searches are unconditionally required, the level of control over the employee during the search is absolutely unchanged.

If employer control only attaches, as Apple argues, to required, unavoidable activities, the level of employer control – *Morillion's* determinative factor – could not be assessed in situations where, as here, substantial employer control over an employee's activity has nothing to do with whether the activity was unconditionally required. Thus, the only way to assess *Morillion's* determinative factor of the level of control over employees during the bag searches at issue here is to actually focus on the control Apple concededly exerts over employees *during* the bag checks.

Apple contends *Morillion* compels a different conclusion. It argues that the control exerted over employees in the mandatory vs. optional bus ride cases are under the same employer controls during bus rides, but for the requirement in the mandatory case, such as *Morillion.* Thus, Apple reasons, Apple employees undergoing controlling bag checks are similar to those employees riding optional buses, as in *Overton* and *Vega.* That is, both are subject to employer control that does not rise to the level of compensable control because the activities are avoidable and not required.

Apple makes this leap by a sleight of hand reading of *Morillion,* where it contends *Morillion's* description of the substantial level of control over employees during bus rides that are required is no different than the control

exerted over employees riding optional buses:

> Given that *Morillion* deemed bus rides to be highly restrictive, its holding that the time employees spend using optional employer-provided transportation is not compensable could not have turned on the assumption that employees are 'free of any form of employer 'control' while using that transportation. Indeed, the same general restrictions – being unable to use travel for one's own purposes, and being foreclosed from doing activities such as eating breakfast and running errands – exist for both required and optional bus rides. Moreover, if Plaintiffs' reading of *Morillion* were correct, its discussion of *Vega* would have made no sense. The optional bus rides there were an average of 4.5 hours long – and presumably even more restrictive than those in *Morillion* – but the Court still deemed the result in *Vega* to be 'consistent with [its] opinion.' (ABM, pg. 38-39).

This is a gross misreading of *Morillion.* In *Morillion,* this Court made it patently clear that the restrictions discussed above are *only* present when the employee has no other choice but to take the employer's mode of transport:

> When an employer *requires* its employees to meet at designated places to take its buses to work and *prohibits* them from taking their own transportation, these employees are 'subject to the control of an employer,' and their time spent traveling on the buses is compensable as 'hours worked.'

> Interpreting the plain language of 'hours worked,' we find that plaintiffs' *compulsory travel time*, which includes the time they spent waiting for Royal's buses to begin transporting them, was compensable. Royal *required* plaintiffs to meet at the departure points at a certain time to ride its buses to work, and it *prohibited* them from using their own cars, subjecting them to verbal warnings and lost wages if they did so. By '*directing and commanding*' plaintiffs to travel between the designated departure points and the fields on its buses, Royal 'controlled' them within the meaning of 'hours worked' [in the Wage Orders]. *Morillion, supra,* 22 Cal.4th at 587 (emphasis added).

Indeed, the *Morillion* Court spelled it out in plain English that the mandatory nature of the bus rides "*thereby*" subjects employees riding the buses under the compensable control of the employer:

> Instead, by *requiring* employees to take certain transportation to a work site, employers *thereby* subject those employees to its control by determining when, where, and how they are to travel. Under the definition of 'hours worked,' that travel time is compensable. *Morillion, supra,* 22 Cal.4th 588 (emphasis added).

As the above language from *Morillion* makes certain, the determinative factor of the level control in the compulsory vs. non-compulsory travel context is assessed purely through whether the employer

travel modality is required. Without the mandate, there is none of the *Morillion* control exerted over employees who avail themselves of an employer's optional travel service.

The same simply cannot be said of bag searched employees who can potentially avoid an admittedly controlling bag search by not bringing bags to and from the workplace. Unlike the employee taking an optional bus ride, the bag searched employee – regardless of whether the search is unconditionally required – is subject to the employer's control during the search, a fact Apple freely concedes.

Thus, to exclusively focus on how the search can be avoided, as Apple urges, would not only disregard, but also make it impossible to assess what this Court held was the determinative factor of the control test – the level of control exerted over the employee. The Court is therefore asked to apply the test in *Morillion,* reject Apple's position that only unavoidable activities can constitute employer control, and find what Apple concedes – that employees are under the control of employers during controlling bag searches, regardless of whether the searches can be avoided.

c. Apple's Interpretation of the Control Test Must Fail, Because, If It Only Covered Required and Unavoidable Activities, it Would Substantially Limit – If Not Eviscerate – the Test's Application Over Workers Heretofore Considered "Under the Control of an Employer" and Could Subject Employees to Limitless Controls Without Compensation

Injecting "unavoidable activity" into the control test must also fail for three crucial other reasons. One, under such a test, employees heretofore considered under the employer's control would not be compensated unless they were suffered and permitted to work. Two, as all work is considered voluntary in California – and thus avoidable – it could be said that all employees could avoid the control of the employer by not showing up for work, which would lead to the evisceration of the control test being an alternate and independent basis for "hours worked." Finally, if the control test covered only unavoidable activities, employees could be exposed to limitless employer controls and not be paid unless they are actually performing work.

i. The Control Test Should Not, As Apple Urges, be Restricted Exclusively to Required and Unavoidable Activities, as Such a Test Would Eliminate the Control Test as an Independent Basis to Show Compensable Hours Worked for Many Workers and May Lead to the Total Evisceration of the Test Altogether

As this Court has held, "an employee who is subject to an employer's control does not have to be working during that time to be compensated under [the Wage Orders]." *Morillion, supra,* 22 Cal.4th at 581. To exemplify this point, the *Morillion* Court cited to *Bono Entriprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21.

In *Bono,* the Court of Appeal found employees were under the control of the employer and had to be compensated, because the employer would not allow them to leave the premises during meal periods. *Bono, supra,* 32 Cal.App.4th at 975. The *Bono* court reached this conclusion, regardless of the fact that there was no evidence the employees performed any work for the employer during their controlled meal periods. *Id.*

Likewise, in *Aguilar*, the Court of Appeal found that employees were under the employer's control and had to be paid during sleep periods, because they were not allowed to leave the employer's premises. *Aguilar, supra,* 234 Cal.App.3d at 30. Like *Bono*, the *Aguilar* court found the employees had to

be compensated, despite performing no work for the employer during controlled sleep time. *Id.*

The backbone of Apple's argument is the security checks – no matter how controlling they are – cannot render employees under the compensable control of the employer because they could avoid the searches by deciding to not bring bags into the work place. Under Apple's proposed test, many controlled workers would not be compensated unless they were actually working during the controlled activity or restriction.

For example, if a restaurant server freely chooses to take another server's shift upon request, he or she would not be entitled to compensation for any time that they are under the employer's control, but not performing work. Thus, if the employer had a policy like *Bono* where employees could not leave the premises during meal periods, the server who was not required to report to work, but freely chose to take another employee's shift, would not be compensated during that meal period that is subject to the employer's control. That worker, like the bag searched Apple employee under Apple's view of the control test, would be said to have freely chosen to submit himself or herself to the employer's control and – no matter how much control exerted of the employee – he or she would not be compensated when controlled but not working.

Likewise, a truck driver who freely accepted the employer's optional

offer to come to work on his or her day off would not be entitled to compensation while being forced to wait for hours for the truck to be loaded unless he or she was performing work. As Apple argues here, that truck driver would be said to have voluntarily accepted the employer's control – no matter how significant – and would only be entitled to compensation for time actually working.

In fact, under Apple's view of the control test, if any of the *Morillion* workers riding on the employer's mandatory bus were there only because they voluntarily decided to pick up an extra shift, they would not be entitled to the compensation this Court said was owed during the controlling bus ride.

Thus, under Apple's proposed control test where only required and unavoidable activities will come under its umbrella, the control test would cease to be an independent "hours worked" basis for many workers, which would violate the Wage Orders and this Court's ruling in *Morillion*. In fact, due to the fact that an employee's decision to work for an employer and show up for work is always considered voluntary and at the will of the employee, Apple's proposed test could eviscerate the control test altogether as an independent basis of compensable hours worked. *Cal.Lab.Code Sec.* 2922; *Guz v. Betchel Nat. Inc.* (2000) 24 Cal.4th 317, 336.

To avoid the destruction of the control test as an independent means to show compensable hours worked, this Court is respectfully requested to

reject Apple's argument that only strictly required and unavoidable activities can constitute compensable hours worked under the control test.

ii. Apple's Interpretation of the Control Test Must Be Rejected As Not Falling in Line With One that Serves to Protect Workers, as, Under it, Employees Could be Subject to Limitless Employer Control During Security Checks Without Compensation

Perhaps most problematic with Apple's proposed control test, is the fact that it has no limit to the amount of control employers could exert over its workers during pay-free searches. As Apple makes plain, the level of control during the searches has nothing to do with whether, under its view, employees are subject to the employer's compensable control. Focusing on the control during the searches, it argues, irrelevantly looks "at the incorrect point in the process" for purposes of compensable control. (ABM, pg. 25). The only fact that matters, according to Apple, is that the search could be avoided.

Under Apple's view of compensable control, it could subject its employees to hours upon hours of detaining, invasive, and restrictive searches without pay. So long as there is the specter of choice to avoid the search, under Apple's control test, there is no limit to what it or any employer could subject employees to during searches without having to provide compensation.

As Apple's interpretation would subject employees to limitless controls without compensation, it must be rejected on the grounds on the grounds of it being against the protection of workers. See *Brinker v. Superior Court* (2012) 53 Cal.4th 1004, 1027, citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105 (Wage Order provisions, such as those governing "hours worked," have "long been viewed as part of the remedial worker protection framework" and "must be interpreted in the manner that best effectuates that protective intent").

d. **Apple Employees Undergoing Bag Searches are Controlled Even Under Apple's Proposed Test**

Even under Apple's proposed test, bag searched employees are subject to its control. To be free of the employer's control for purposes of "hours worked," the employee must be free to use his or her time "effectively for his or her own purposes." *Morillion, supra,* 22 Cal.4th at 583. The use of one's time effectively for his or her own purposes in many respects requires the accompaniment of a bag of some sort.

Bags, for example, carry workout clothes for the employee who wants to take a jog during an unpaid meal period or go to the gym after work. Bags carry meals and snacks for employees to eat off the premises during meal and rest periods. Bags enclose books, magazines, personal hygiene products, electronic tablets and phones for employees to use on meal and rest periods. Bags also carry and enclose breast pumps for women who want the discretion

of concealing the unit in a bag and want to perform the task privately outside the workplace. Indeed, who among us does not carry a bag of some sort to and from the workplace?

In each of these examples, employees who desire to take the bag with them out of the workplace and use its contents and their time effectively for their own purposes would have to subject themselves to Apple's controlling bag searches. Just like the workers on the bus in *Morillion* were precluded from using the commute time effectively for their own purposes, Apple workers desiring to use their free time to engage in pursuits requiring them to take a bag out of the workplace would be precluded from doing so without first subjecting themselves to Apple's mandatory control. Thus, Apple workers cannot avoid the searches, as Apple contends, *and* be free to use their time effectively for their own purposes. As such, even under Apple's flawed and dangerous view of the control test, Apple employees undergoing the searches are under Apple's compensable control.

III.

CONCLUSION

This Court should apply its decision in *Morillion* and find the level of control over employees during Apple's bag searches – control Apple concedes to exert – is the relevant focus that renders the time undergoing the searches compensable hours worked. Focusing on the actual and conceded

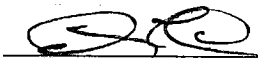
control during the searches is the only way to assess the determinative factor of the level of Control over employees subject to bag searches. Agreeing with Apple's view of the control test would subject employees to limitless controls during searches without compensation and would lead to a substantial destruction, if not evisceration, of the control test in California.

The Court is therefore respectfully requested to interpret the control test with an eye towards the protection of employees and find employees are under Apple's compensable control during bag checks.

Date: July 9, 2018

Respectfully submitted,

THE TURLEY & MARA LAW FIRM, APLC

By: 

David Mara, Esq.
Attorneys for *Amicus Curiae*
Consumer Attorneys of California

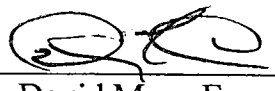
CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.520(c)(1), Counsel for Amicus Curiae, Consumer Attorneys of California, hereby certifies that this Amicus brief in support of Appellant is proportionately spaced, uses Times New Roman 13-point typeface and contains 5,254 words, including footnotes, but excluding the Table of Contents, Table of Authorities, and this Certificate, as determined by our firm's word processing system used to prepare this brief.

Date: July 9, 2018

Respectfully submitted,

THE TURLEY & MARA LAW FIRM, APLC

By: 

David Mara, Esq.
Attorneys for *Amicus Curiae*
Consumer Attorneys of California

PROOF OF SERVICE

I am employed in the County of: San Diego, State of California. I am over the age of 18 and not a party to the within-entitled action; my business address is: 7428 Trade Street San Diego, CA 92121 On July 9, 2018, I served the foregoing document(s) described as:

- **APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT**

- **BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT**

On interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED LIST OF PARTIES SERVED

The envelope was then sealed. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice the sealed envelope would be deposited with the United States Postal Service, with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I also declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.
Executed on July 9, 2018, at San Diego California.

Mathew Adame

SERVICE LIST

Supreme Court of the State of California

Amanda Frlekin. Et. Al. v. Apple, Inc., case number S243805

Kimberly A. Kralowec Kralowec Law, P.C. 44 Montgomery Street, Suite 1210 San Francisco, California 94104 kkralowec@kraloweclaw.com	*Attorneys/or Plaintiffs, Appellants and Petitioners*
Lee S. Shalov McLaughlin & Stem, LLP 260 Madison Avenue New York, New York 10016 lshalov@mclaughlinstem.com	*Attorneys/or Plaintiffs, Appellants and Petitioners*
Peter R. Dion-Kindem Peter R. Dion-Kindem, P.C. 2155 Oxnard Street, Suite 900 Woodland Hills, California 91367 peter@dion-kindemlaw.com	*Attorneys for Plaintiffs and Appellants Taylor Kalin, Aaron Gregoroff, Seth Dowling,and Debra Speicher*
Jeff Holmes 3311 E. Pico Boulevard Los Angeles, California 90023 LaborLawCA@gmail.com	*Attorneys for Plaintiffs and Appellants Taylor Kalin, Aaron Gregoroff, Seth Dowling,and Debra Speicher*
Theodore J. Boutrous, Jr. Gibson, Dunn & Crutcher LLP 333 South Grand Avenue Los Angeles, California 90071 tboutrous@gibsondunn.com	*Attorneys for Defendant and Respondent Apple, Inc.*
Julie Dunne Littler Mendelson PC 501 W. Broadway, Suite 900 San Diego, California 92101 jdunne@littler.com	*Attorneys for Defendant and Respondent Apple, Inc.*

SERVICE LIST

Supreme Court of the State of California

Amanda Frlekin. Et. Al. v. Apple, Inc., case number S243805

Richard Howard Rahm
Littler Mendelson PC
333 Bush Street, Thirty-Fourth Floor
San Francisco, California 94104
rrahm@littler.com

Attorneys for Defendant and Respondent Apple, Inc.

Todd KennethBoyer
Littler Mendelson PC
50 W. San Fernando Street, Fifteenth Floor
San Jose, California 95113
tboyer@littler.com

Attorneys for Defendant and Respondent Apple, Inc.

Michael G. Leggieri
Littler Mendelson PC
1255 Treat Boulevard, Suite 600
Walnut Creek, California 94597
mleggieri@littler.com

Attorneys for Defendant and Respondent Apple, Inc.

Joshua S. Lipshutz
Gibson, Dunn & Crutcher LLP
555 Mission Street
San Francisco, California 94105
jlipshutz@gibsondunn.com

Attorneys for Defendant and Respondent Apple, Inc.

Michael David Singer
Janine R. Menhennet
Cohelan Khoury & Singer
605 C Street, Suite 200
San Diego, California 92101
msinger@ckslaw.com
jmenhennet@ckslaw.com

Attorneys for Amicus Curiae Consumer Attorneys of California