No. S243805

Supreme Court

OF THE

State of California

AMANDA FRLEKIN, ET AL.,

Plaintiffs, Appellants, and Petitioners,

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

Consolidated Answer to Amicus Curiae Briefs

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Secondary Authorities

I. INTRODUCTION

To prevent and deter theft, many California employers require their employees to participate in mandatory onsite security searches, such as the "Checks" Apple imposes on its retail sales employees in this case. Employer-side interests, including those who filed four amici curiae briefs supporting Apple,[1] would prefer not to have to compensate their employees for any of this time—regardless of how heavily the employer-dictated search process might burden the employees.

The employer-side amici would disregard the *discipline* Apple exacts from employees who fail or refuse to submit to the Checks. They would disregard the fact that Apple *confines its employees to store premises*, not allowing them to leave until the Checks are completed. They would disregard the "compelled" "actions and movements" in which Apple's employees must engage, under a manager's immediate physical supervision. *See Frlekin v. Apple, Inc.*, 870 F.3d 867, 870-73 (9th Cir. 2017).

To support their position, the amici characterize Apple's Check policy as an employee 'benefit," as if it were comparable to health insurance or a company car. According to the amici, the Check policy allows employees the "benefit" of carrying their purses, backpacks, and iPhones to work. They say that if this Court holds the Check time compensable, employers across California will immediately start banning bags at work.

The amici are wrong.

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[1] Brief for Amici Curiae California Employment Law Council et al. ("CELC Br."); Amicus Curiae Brief of the Chamber of Commerce et al. ("Chamber Br."); Amicus Curiae Brief of Retail Litig. Center, Inc., et al. ("RLC Br."); Brief of Washington Legal Found. as Amicus Curiae ("WLF Br.").

Under the Wage Orders' plain text, none of the "controls" Apple concededly exerts over its employees "during" the Checks may be disregarded. The "level" or "extent" of those "controls" is "determinative."[2] In arguing otherwise, the amici misconstrue this Court's key precedent, *Morillion,* in the same way Apple did.

As for the claim that Apple will just ban bags altogether, rather than pay for the time, nothing in the record suggests that Apple has ever actually considered such a step, which Apple itself calls "draconian."[3] To the contrary, there are many reasons to suppose that Apple, and other California employers, are unlikely to go that far. Presumably, they would like to keep their skilled employees. In Apple's case, the ban would have to extend to its own employees' iPhones and all Apple-branded devices. More fundamentally, if imposed for the purpose of theft prevention (as opposed to other reasons, such as workplace safety), an outright ban on purses, bags and smartphones is probably unlawful. In other words, amici's argument is nothing more than unfounded speculation, which is no cause to depart from the Wage Orders' plain text.

In addition to meeting the "control" test, the Check time also meets the independent "suffered or permitted to work" test. Recently, the Sixth Circuit examined the pre-1947 federal definition of the term "work," and easily perceived that security search time meets that definition. *In re Amazon.com, Inc. etc. Wage and Hour Litig.*

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2 *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 840 (2015) (quoting *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 587 (2000)).

3 Answer Brief on the Merits ("ABM") 36-37. "OBM" and "RBM" refer to plaintiffs' opening and reply briefs on the merits. Other abbreviations have the same meanings as in plaintiffs' merits briefs.

(Busk v. Integrity Staffing Solutions, Inc.), ___ F.3d ___, 2018 WL 4472961, *8-*9 (6th Cir. Sept. 19, 2018) (hereafter "*Amazon.com*").

The California definition of compensable "work" is even broader and more protective than federal law. If security search time meets the federal definition, it certainly meets the California one. While the employer-side amici claim that compensable "work" should be limited to so-called "primary activities" or "job-related duties," the Wage Orders do not say this, and importing such a qualifier, in the guise of construing the word "work," would contravene the IWC's intent. Either way, the Checks are, in fact, are related to the duties of these retail sales employees' jobs.

One employer-side amicus, WLF, claims that the plain-language definitions of "control" and "work" are supposedly too "vague" to be enforceable. Such an argument can be concocted only by mischaracterizing plaintiffs' contentions in this case, then offering a series of hypotheticals that can only be described as farcical. WLF also claims this Court's ruling should apply prospectively only, but this argument, too, is seriously flawed, resting as it does on a misunderstanding of what the Wage Orders have said for over 70 years, together with a misreading of *Morillion*.

For all of these reasons, the employer-side amici's arguments should be rejected.

II. ARGUMENT

A. Amici Offer No Argument that Defeats the Conclusion That the Check Time Is Compensable Under the "Control" Test

As explained in plaintiffs' main briefs, the Wage Orders' plain language dictates

that the Check time, which Apple concededly "controlled,"[4] is compensable under the "control" test. The employer-side amici dispute this conclusion, offering arguments based on the Wage Orders' text as well as the case law, including *Morillion*. They also offer various inapposite hypotheticals, and they contend that employers will simply ban all bags from the workplace if the Check time is held compensable.

None of these arguments has merit.

1. Amici's Arguments Concerning the Wage Orders' Plain Text Are Meritless

The adoption history of the "control" test shows that the IWC deliberately abandoned less-protective prior language, under which only certain listed "required" acts were compensable, and replaced it with the broader, present-day "control" test. OBM 17-30; RBM 14-25. Apple did not contest the plain meanings of the words "control" or "require," though it had every incentive to do so.[5] Only one employer-side amici brief, that of CELC (at 7-8), even attempted any textual arguments on the "control" test.

Citing several partial dictionary definitions, CELC contends that "control" means "direct," and that "direct" is synonymous with "require." CELC Br. 7. Thus, CELC claims, "control" means the same thing as "require." *Id.* But as explained in plaintiffs' opening brief, the plain-language definitions of the two words are *not* identical (OBM 23), and CELC offers no definition of the word "require," so its syllogism is both incomplete and incorrect.

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4 *Frlekin*, 870 F.3d at 871.

5 *See generally* ABM 44-50.

If CELC's view were correct, the IWC's deliberate choice to jettison the word "require" and replace it with "control" would become a meaningless amendment. Courts do not presume that regulatory bodies like the IWC make pointless changes to the text of their regulations. *See, e.g., Viking Pools, Inc. v. Maloney*, 48 Cal.3d 602, 609 (1989); *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805 (1952). This is particularly unlikely in the IWC's case, given that all textual changes to the Wage Orders must be preceded by extensive statutorily-mandated proceedings, including public hearings.[6]

The IWC's chosen word "control" is broad enough to capture both "required" actions and those that are "directed," "restrained" or "regulated" by an employer. OBM 23-24 (discussing dictionary definitions of "control" and "require"). CELC overlooks the fact that it is possible to "direct" a non-"required" activity. The plain-language definition of the word "direct" includes to "guide (something or someone),"[7] and to "manage," "regulate," "supervise or oversee."[8] It is not limited to "required" or "compulsory" actions. For example, a police officer may "direct" a driver who chooses, but is not required, to turn left. The noun form of the word, "direction," includes both "[a]n act of

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[6] *See, e.g.*, Lab. Code §§1173, 1178, 1181. These requirements were codified in 1937, but date back to "the uncodified 1913 act that created the IWC." *Martinez v. Combs*, 49 Cal.4th 35, 52 (2010) (citing Stats. 1913, ch. 324).

[7] *Black's Law Dictionary*, "direct," *vb.*, sense 3 (10th ed. 2014) ("to guide (something or someone); to govern"). CELC cites sense 4 of this definition. *See also American Heritage Dictionary*, "direct," *v.tr.*, sense 2 (5th ed. 2018) ("give guidance and instruction to").

[8] *American Heritage Dictionary, supra*, "direct," *v.tr.*, sense 1.

guidance" and "an instruction on how to proceed"[9]—neither of which presupposes a "required" or "compulsory" act.

In short, the words "control," "require," and "direct" are not interchangeable synonyms. The IWC selected the phrase "subject to the *control* of an employer," not "subject to the requirement" or "direction of an employer." It chose this word knowingly, in order to "broaden" the definition of compensable "hours worked."[10]

CELC contends that the final phrase of the "suffered or permitted to work" test—"whether or not required to do so"—would become "surplusage" unless the word "control" in the "control" test is construed as synonymous with "required." CELC Br. at 7-8. That contention finds no support in the Wage Order's text.

First of all, CELC asserts (incorrectly) that "the Legislature" (CELC apparently means the IWC) supposedly "*added*" the final phrase to the "suffered or permitted to work test." CELC Br. at 8 (emphasis added). Based on that incorrect assertion, CELC suggests that the IWC chose *not* to add the same phrase to the "control" test. *Id.* But the phrase was not "added" in 1947. It dates back to the Orders' earliest definition of "hours worked."[11] In 1947, the IWC *retained* the phrase as part of the "suffered or permitted to

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9 *Black's*, *supra*, "direction," *n.*, senses 3, 4; *see also American Heritage Dictionary*, *supra*, "direction," *n.*, sense 1 ("management, supervision or guidance of a group or operation").

10 *See* OBM 20-22; RBM 18-19; MJN Ex. 12 at 22-23.

11 *See* Wage Order 7NS ¶2(f) (Apr. 5, 1943, eff. Jun. 21, 1943) (MJN Ex. 4).

work" test, while at the same time omitting a list of illustrative examples from that test.[12] Simultaneously, the IWC chose to *remove* the word "require" from the first test, and *replace* it with the broader word "control." These amendments achieved the IWC's goal of "broadening" the definition of compensable "hours worked," while also making plain that "required" activity is not an element of *either* test.

CELC also overlooks the fact that the final phrase modifies the word "work," not the word "control." While it makes sense to say "suffered or permitted to work, whether or not required to do so," it would have made no sense to say "subject to the control of an employer, whether or not required to do so." Instead of appending a syntactically incorrect phrase to the first test, the IWC accomplished the same thing by substituting a broader word, "control," in place of the prior word, "require."

Far from "surplusage," the final phrase ensures that the "suffered or permitted to work" test encompasses both "required" and non-"required" "work"—so long as the "work" was "suffered or permitted" by an employer, which means the employer knew or should have known it was occurring. *Morillion*, 22 Cal.4th at 584-85. The "control" test, in contrast, is not limited to "work," but instead embraces all "*time* during which an employee is subject to the control of the employer."

Each word and phrase of the "control" test plays a role. The word "time" makes plain that non-"work" that the employer decides to "control" is compensable, such as the bus-ride time in *Morillion*. *Id.* at 582. The phrase "during which" directs the focus onto

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[12] *Compare id. with* Wage Order 7 R ¶2(h) (Feb. 1, 1947, eff. Jun. 1, 1947) (MJN Ex. 5); *see* OBM at 20-21 (discussing wording changes between 1943 and 1947 Orders); RBM 15-17 (same).

the "controlled" time itself, not what may have preceded it. The phrase "subject to" ensures that on-call time, for example, is compensable.[13] And the word "control," which the IWC selected to replace the narrower word "require," ensures that all "controlled" time, whether "required" or not, is treated as compensable.

The two "independent" tests (*Morillion*, 22 Cal.4th at 582) thus function together to protect employees broadly and ensure they are compensated for all "hours worked."

In a footnote, CELC contests plaintiffs' reliance on the DLSE's conclusions in a brief it filed with the Office of Administrative Law ("OAL").[14] This brief explained that the 1947 wording changes "clearly indicated that the [IWC] intended to *broaden* the definition" of compensable "hours worked." MJN Ex. 12 at 22-23 (emphasis added). This explanation is consistent with what this Court has already recognized—that the IWC intended to ensure that California law would be *more* protective than federal law, including not only the Portal-to-Portal Act, but also other aspects of pre-1947 wage law.

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[13] *See, e.g.*, *Mendiola*, 60 Cal.4th at 840-41 ("on call" *time*, performed by an employee engaged to wait, can meet the Wage Order's "control" test and be compensable although no "work" is occurring); *Black's*, *supra*, "subject," senses 2, 3 ("exposed, liable, or prone" to something; "dependent on or exposed to (some contingency)"); *Merriam-Webster's Collegiate Dictionary*, "subject to" (11th ed. 2003) ("affected or *possibly* affected by (something)" (emphasis added)), *cited in Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 265 (2016).

[14] CELC Br. at 9 n.4. No other employer-side amicus disputes the DLSE's statements. CELC claims the statements are not "contemporaneous" with the 1947 amendments, but in appropriate cases, this Court relies on DLSE statements post-dating the relevant IWC action by decades. *See, e.g.*, *Mendoza v. Nordstrom, Inc.*, 2 Cal.5th 1075, 1090 (2017) (citing 1986 DLSE opinion letter as "a useful source of guidance" on the meaning of Wage Order language adopted more than 30 years earlier); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 15 (2016) (citing 2012 DLSE brief for guidance on meaning of Wage Order language dating back to 1911).

Troester v. Starbucks Corp., 5 Cal.5th 829, 839-41, 845 (2018); *see also Mendiola*, 60 Cal.4th at 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592. The IWC "gave little weight" to concerns that animated federal law in the 1940s, and "placed more importance on the policy of ensuring that employees are fully compensated for all time spent in the employer's control." *Id.* at 845. CELC cannot identify any "statutory or regulatory history" to support a contrary view. *See id.* at 841.

Far from "vague observation[s]," the DLSE's brief carefully reviewed the 1947 wording changes and provided background information on what led the IWC to adopt those amendments. RBM at 18-19 (discussing DLSE's brief, MJN Ex. 12 at 18, 22-24, 27). As the DLSE's brief explains, and as an independent review of the wording changes confirms, the IWC's purpose was to broaden the scope of "hours worked" in order to more robustly protect California employees.

2. Amici's Reliance on *Morillion* and Other Decisional Law is Misplaced

(a)

The employer-side amici rely heavily on decisional law, primarily *Morillion*, to argue that "control" is not enough to satisfy the plain language of the "control" test.[15] However, they misconstrue *Morillion* in the same manner Apple did,[16] and offer nothing new on how it should be read. A careful reading of *Morillion* reveals that the Court did

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[15] CELC Br. 3, 8-10; Chamber Br. 11-12, 13-14; RLC Br. 9-10; WLF Br. 4, 13-14.

[16] For example, like Apple, the RLC brief (at 9) assumes that by definition, employees are under "the 'control' of [the] employer" whenever they set foot on a company bus. *See also* Chamber Br. at 15. As explained in plaintiffs' reply brief, that assumption is a false one, based on an incorrect reading of *Morillion*. RBM 27-28.

not contravene the Wage Orders' plan language by holding that only "unavoidably required" time can meet the "control" test. *Morillion* did not present those facts, and also involved a lesser degree of employer control than the present case—as already thoroughly explained in plaintiffs' main briefs. OBM 30-38; RBM 21-28.

Courts applying *Morillion* have had no difficulty holding that all time "during which" an employer exercises "control" is compensable—notwithstanding the employees' supposed ability to "choose" to "avoid" it.[17] This Court, in *Mendiola*, recognized that time during which security guards were required to remain on site was "controlled" under *Morillion*, even though the guards could have avoided this "control" by requesting permission "to leave the worksite." *Mendiola*, 60 Cal.4th at 837, 841.[18]

The Court reached this conclusion because, under the Wage Orders, "the *extent*" or "*level*" "of the employer's control" during the time in question is what is

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17 *See, e.g., Bono Enters., Inc. v. Bradshaw*, 32 Cal.App.4th 968, 972, 974-75 (1995) (time "controlled" under *Morillion* although employees could have avoided the restraint (on-site meal periods) by choosing to make "prior arrangements"); *Ridgeway v. Wal-Mart Stores, Inc.*, 107 F.Supp.3d 1044, 1054-55 (N.D. Cal. 2015) (time "controlled" under *Morillion* although employees could have avoided the restraint (on-site layover time) by requesting and obtaining "prior" permission to leave); *Cervantez v. Celestica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009) (employer's rule prohibiting employees from leaving the facility once they entered, without passing again through security, meant that all pre-shift time was "controlled"—even though the employees were not required to "arrive early" and thus could have avoided the "controlled" pre-shift time).

18 The only defense amici brief discussing *Mendiola* overlooks this fact. CELC Br. 11 & n.6. CELC's reliance on an unpublished order, *Osman*, is misplaced because there, the restraint was imposed not by the employer, but by the U.S. government. *Osman v. Tatilek Support Servs., Inc.*, 2017 WL 945024, *5 (C.D. Cal. Mar. 1, 2017).

The Chamber's brief (at 17-18) cites two other orders, but those merely followed the district court's erroneous order in this case, so they are unhelpful. *In re Amazon.com, Inc. etc. Litig.*, 2017 WL 2662607, *2-*3 (W.D. Ky. Jun. 20, 2017); *Scott-George v. PVH Corp.*, 2016 WL 3959999, *7-*9 (E.D. Cal. Jul. 22, 2016).

"'determinative.'" *Id.* at 840 (quoting *Morillion*, 22 Cal.4th at 587 (emphasis added); citing *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1535 (2008) ("the *amount* of 'control' exercised by the employer" (emphasis added)); *Bono*, 32 Cal.App.4th at 974-75 (same)).

One employer-side brief attempts to distinguish *Bono*, a case favorably cited in *Morillion*, by claiming that "the restrictions placed on employees" in *Bono* were "mandatory" rather than optional. CELC Br. 11 n.6. Not so. The employees in *Bono* could have avoided the restraint of otherwise mandatory on-site meal periods by making "prior arrangements to reenter the plant after leaving for lunch." 32 Cal.App.4th at 972. This distinction was "extremely significant," because those employees who *did* make such "prior arrangements" were not "subject to the employer's control." *Id.* at 978 n.4.[19] Consistent with the rule that the Wage Orders "must be liberally construed to accomplish" the "primary objective of protecting workers," the time was compensable in *Bono*. *Id.* at 974-75.

The *commuting* cases on which the employer-side amici rely, starting with *Overton* and *Alcantar*, are distinguishable from this case.[20] Once again, the amici offer

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[19] CELC appears to believe this footnote means something it does not. The footnote is not part of *Bono*'s analysis of compensability under the "control" test. *See* 32 Cal.App.4th at 974-75. It appears three pages later, in a separate section of the opinion discussing the DLSE and Labor Commissioner's authority to make "factual determinations" when assessing a particular employer's compliance with the Wage Orders. *Id.* at 978 & n.4.

[20] *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263 (2006); *Alcantar v. Hobart Service*, 800 F.3d 1047 (9th Cir. 2015).

no new or different analysis of either decision.[21] As already explained in plaintiffs' prior briefs, the *Overton* employer imposed no "control" of any kind on employees who took the free shuttle, and in *Alcantar*, the governing legal standard was neither contested nor briefed. OBM 35, 38-39; RBM 26-27.

In addition to *Alcantar* and *Overton*, CELC cites a third commuting case, *Stevens v. GCS Service, Inc.*, 281 Fed.Appx. 670 (9th Cir. 2008)[22] *Stevens* is best read together with one of Apple's cited commuting cases, *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010). In both cases, employers "required" their employees to drive the company car to work, but in *Rutti*, the time was compensable because the employer exercised "control" during the drive, while in *Stevens*, the employer did not. *Rutti*, 596 F.3d at 1061-62; *Stevens*, 281 Fed.Appx. at 672; *see* 9th Cir. AOB 33-35. If *only* "required" activities can meet the "control" test, as CELC claims, then *Stevens* would have had no occasion to consider the degree of "control" exercised by the employer *during* the drives. As *Rutti* and *Stevens* illustrate, conduct can be "required" without being "controlled," and vice versa. What matters is the "*extent*," "*level*," or "*amount*" of "control." *Mendiola*, 60 Cal.4th at 840; *Ghazaryan*, 169 Cal.App.4th at 1535 (emphasis added).

CELC cites the DLSE Enforcement Manual in support of the argument that if employees "voluntarily come in before their regular starting time or after remain after

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21 CELC Br. 16-17; Chamber Br. 14-15; RLC Br. 15.

22 CELC cites a fourth commuting case, *Novoa v. Charter Comm'ns, LLC*, 100 F.Supp.3d 1013 (E.D. Cal. 2015), but *Novoa* is distinguishable for reasons explained in plaintiffs' Ninth Circuit opening brief (9th Cir. Dkt. 12 at pp. 41 n.23, 42-45), and the Ninth Circuit agreed it merited no discussion (870 F.3d at 871-73).

their closing time," the time is not compensable. CELC Br. 19 (citing DLSE Manual §47.2.2). But CELC ignores the next section, which states that such time *is* compensable if "the employee ... has been directed by the employer to be on the premises," which is true of the Checks. DLSE Manual, §47.2.2.1.[23]

(b)

The employer-side amici strain mightily, as Apple did, to try to equate the Checks with optional employee benefits like health insurance or the "optional free transportation" discussed in *Morillion* (22 Cal.4th at 594). Apple has claimed that the Check policy is supposedly meant to "benefit" employees by allowing them to bring their purses, bags and iPhones to work.[24] The employer-side amici repeat that artifice,[25] but the Ninth Circuit saw through it. *Frlekin*, 870 F.3d at 872-73. Apple has no policy stating that these jobs come with the following "benefits": two weeks' paid vacation; health and dental; and getting to bring an iPhone X to work instead of a Samsung Galaxy Note 9.

To the contrary, the Check policy is a requirement imposed by Apple in the "Employee Conduct" manual. ER 114-115. It comprises a key part of Apple's theft

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[23] CELC's reliance on *Alonzo v. Maximus, Inc.*, 832 F.Supp.2d 1122, 1129 (C.D. Cal. 2011), is misplaced. There, unlike here, the employer did not direct the employees to be onsite or perform employer-directed tasks. *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010), involved federal law, not California law, and is inapposite.

[24] ABM 36-37, 57, *passim*; Defendant-Appellee's Brief (9th Cir. Dkt. 28-1) at 33, 50, 55.

[25] CELC Br. 17-18 (citing employee benefit cases); Chamber Br. 13 (equating the Checks with "tak[ing] advantage of an employer's proffered program"); RLC Br. 9-10 (equating the Checks to the "company bus"); WLF Br. 4 (claiming that Apple offered its employees the "optional benefit" of "bringing a bag to work").

detection and prevention policy.[26] The Check policy presupposes that everyone routinely brings their purses, bags, and iPhones to work. 870 F.3d at 870 (quoting ER 115). It applies broadly to "[a]ll employees"—with a narrow exception if an employee carries no bag or iPhone to work on a given day. *See id.* (quoting ER 115). The policy is not comparable to employee benefits like a free shuttle or health insurance. The "Employee Conduct" manual, where the Check policy appears, says nothing about any employee benefits.[27] The policy stems from Apple's own voluntary choice of business model. Apple has become a trillion-dollar company[28] by choosing to sell small "valuable goods" in a retail setting (*id.* at 873),[29] while at the same time choosing not to adequately secure those goods from theft.[30]

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26 *See Frlekin*, 870 F.3d at 873; ER 200-01 ("Shrink Analysis and Action Plan"), 206 ("Internal Theft" policy), 363 [at 54:21-55:14] (admitting Checks are for purpose of theft detection and deterrence); MAR 14 ("Loss Prevention" rules), 20-22 ("Internal Theft" and "Shrinkage" policies).

27 ER 114 (index to "Employee Conduct" manual, covering Apple's "business conduct" rules, "confidentiality" rules, "entrance and exit" policies, "harassment" policy, "insider trading" policy, and other rules that are "expected of you").

28 "Apple is the first $1 trillion company in history," *The Washington Post* (Aug. 2, 2018), *available at* https://www.washingtonpost.com/business/economy/apple-is-the-first-1-trillion-company-in-history/2018/08/02 [viewed 10/4/18].

29 "Apple makes vast margins on its products," including a "staggering 58% of the iPhone's retail price," and other products "are thought to enjoy similarly extravagant margins." "Upsetting the Apple cart," *The Economist* 83 (Sept. 15, 2018). In Q3 2018 alone, Apple's net revenue came to $11.5 billion (https://www.apple.com/newsroom/2018/07/apple-reports-third-quarter-results/ [viewed 10/4/18]), and its cash on hand exceeded $243 billion (https://www.cnbc.com/2018/07/31/apple-q3-cash-hoard-heres-how-much-money-apple-has.html [viewed 10/4/18]).

30 "Security cameras capture rash of brazen Apple Store robberies in California," *ABC7 News* (Sept. 4, 2018), available at https://abc7news.com/technology/video-rash-of-grab-and-run-thefts-plague-california-apple-stores-/4112085/ [viewed 10/4/18]; "Apple

Accordingly, the employer-side amici's heavy reliance on employee benefit cases is misplaced. The Checks are not an employee "benefit." They are an employer-imposed rule with an exception. Truly optional employee benefits do not come with the high levels of employer "control" exercised by Apple during the Checks, nor does "disciplinary action, up to and including termination," typically follow for employees who take advantage of their benefits. *Frlekin*, 870 F.3d at 870.

CELC cites a district court order, *Watterson*, involving a group medial insurance plan.[31] As the Ninth Circuit recognized, there, as in *Overton*, the employer neither "required" the employee to do anything, such as sign up for the plan, nor disciplined her for failing to do something. *Watterson v. Garfield Beach CVS, LLC*, 694 Fed.Appx. 596, 597 (9th Cir. 2017). Instead, *Watterson* concerned an offsite activity—a wellness screening—involving no employer direction or supervision whatsoever, and no threat of employer discipline of any kind. *Id.* It is therefore distinguishable from this case, which (a) does not involve employee benefits; and (b) involves a mandatory "on-site" task, a series of "compelled" "actions and movements" performed under a manager's immediate

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Store mob thefts are surging. Why can't the company make the devices worthless?" *San Francisco Chronicle* (Sept. 1, 2018), *available at* https://www.sfchronicle.com/crime/article/Apple-store-mob-thefts-are-surging-Why-can-t-13198014.php [viewed 10/4/18].

As explained in the California Correctional Peace Officers' Association's amicus brief ("Peace Officers' Br."), Apple has apparently chosen a store layout design that enhances customer experience (and thus sales) at the expense of security. Peace Officers' Br. at 18-19 & n.4. Apple is free to make that choice, but not to shift the burden and cost of the choice onto the backs of its employees by forcing them to undergo *unpaid* security searches.

[31] CELC Br. 17-18 (citing *Watterson v. Garfield Beach CVS LLC*, 120 F.Supp.3d 1003 (N.D. Cal. 2015)).

supervision, and enforced through the employer's "threat" of discipline—including "loss of employment"—for not performing them as directed. *Frlekin*, 870 F.3d at 871, 873.

Another benefit case cited by CELC is similarly distinguishable.[32] In *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), a fast food restaurant offered its employees one discounted meal per shift, but only if the meal was eaten in the restaurant. *Id.* at 954. The employees performed no employer-directed tasks while eating the meal, no manger physically supervised them, and the employer imposed no discipline for anything the employees did or did not do. *See id.* On those distinguishable facts, the Ninth Circuit held that time spent eating the meals was non-compensable. *Id.* at 956-57.

In so holding, the panel relied heavily on *Morillion*'s discussion of "optional free transportation" offered by employers without condition or "control." *Id.* at 957 (citing *Morillion*, 22 Cal.4th at 594). The employer's "discounted meal policy," the panel explained, was "*intended* as a benefit to employees," and "the employer could discontinue [it]" entirely if the meal time were held compensable. *Id.* (emphasis added). The panel was therefore willing to overlook the condition the employer tied to the "benefit"—namely, no discounted meals unless they are eaten on premises. *See id.*

Certainly, employers should not be discouraged from offering discounted lunches, or other truly "'optional'" "benefit[s] or service[s]," to their employees. *Rodriguez*, 896 F.3d at 957 (quoting *Morillion*, 22 Cal.4th at 594). As shown by *Overton* and *Watterson*, responsible employers can and do design their benefits to operate in ways that completely

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32 Supp. Authority Letter of CELC et al., filed July 20, 2018.

avoid employer "control."[33] That is what this Court contemplated in *Morillion*, when it held that "employers may provide optional free transportation to employees without having to pay their for their travel time"—"as long as" the benefit is offered free from employer "control." 22 Cal.4th at 594. *Rodriguez* overlooked this.

The Chamber contends that if the Check time in this case is compensable, then other employers will be "reluctant to continue offering" benefits such as onsite child care, cafeterias and fitness centers. Chamber Br. 23-24. But this assumes that employees are confined to the employer's premises or otherwise under their employer's "control" while using those facilities. The Chamber cites nothing to support that assumption. The Chamber argues that some employees using onsite child care might "experience" the "temporary restriction" of being unable to abandon their child, or of making sure the child's belongings are gathered up to take home after work (*id.* at 23), but none of this is a function of any "control" by the employer, and it would not make any of the time compensable.[34]

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[33] *Overton*, 136 Cal.App.4th at 269-74; *Watterson*, 694 Fed.Appx. at 597; *see also Stevens*, 281 Fed.Appx. at 672 (employer avoided "controlling" the employee's commute time while driving the company car).

[34] The Chamber also suggests that employees who must clean up after using the office kitchen might claim compensation for that time. Chamber Br. 23. One real-life employer avoided hiring janitorial staff by forcing its employees to clean out the cockroaches from the microwave without pay—shifting that cost and burden to its employees. Amicus Curiae Brief of Bet Tzedek Legal Services at 15 n.2. In that example, the time should be compensable, as it should be here. As *Bono* recognized, compliance is a "case-by-case" question specific to each employer's policies. 32 Cal.App.4th at 978.

The Chamber's concern misses the mark because, fundamentally, this case does not involve employee benefits of the kind considered in *Overton*, *Watterson*, or *Rodriguez*. If employers wish to offer employee benefits without risking payroll impact, they need only follow the lead of the *Overton* and *Watterson* employers. They should not confine their employees to the worksite, and they should not force their employees, by threatening discipline or job loss, to participate in "compelled" "actions and movements" under a manager's immediate physical supervision. 870 F.3d at 871, 873.

(c)

In a last-ditch effort to shift the focus away from the extensive (and conceded) "control" Apple exercises during the Checks, the CJA relies on tort-law principles to argue that "control" "should be assessed at the outset of a predictable chain of events rather than the endpoint." CJA Br. 15-16. But this ignores the Wage Orders' text, under which compensability depends on whether "control" is exerted "during" the activity in question. The argument also fails factually, because the first acts in this chain of events are (a) Apple's choice to operate a retail business selling small "valuable goods," and (b) Apple's choice to adopt the Check policy instead of securing the goods from theft. Apple is also responsible for the last act in the chain—the "controlled" Checks themselves.

When it comes to an employer's mandatory duty to comply with the Wage Orders, there is no such thing as "comparative fault," nor is there any rule that employees "assume the risk" that an employer will violate the Orders by withholding earned wages. To import such tort-law concepts into wage-law cases would gut the time-honored rule that the Orders are construed liberally to protect employees. *Troester*, 5 Cal.5th at 839.

3. The Hypotheticals Posited by the Employer-Side Amici Are Inapposite

CELC and WLF each offer a series of exaggerated hypotheticals that bear no resemblance to the facts of this case. CELC Br. 1-2; WLF Br. 3, 7-10. The Court need not "prejudg[e]" any of these hypotheticals, and may instead "decide" the referred question based "only" on "the facts of this case as described by the Ninth Circuit." *Troester*, 5 Cal.5th at 943.

To answer the referred question, the Court need only consider whether "time during which" employees are undergoing mandatory security searches is compensable if the employees are (a) confined to store premises during the searches; (b) compelled to engage in employer-directed "actions and movements" under a manager's immediate supervision; and (c) subject to discipline, up to and including termination, if they refuse to participate. *See Frlekin*, 870 F.3d at 871, 873 (describing pertinent facts).

The answer depends on the "level" and "extent" of the employer's "control" "during" the time in question (*Mendiola*, 60 Cal.4th at 840 (citing *Morillion*, 22 Cal.4th at 587)), so hypotheticals not involving a similar level of "control" are unhelpful.

(a)

In *Morillion*, the employer hypothesized that if the bus-ride time were compensable, then grooming time at home would also become compensable. 22 Cal.4th at 586. This Court disagreed, because employers typically do not "determin[e] when, where and how" their employees must groom—but if they did, that could reach a compensable "level of control." *See id.*

CELC offers a grooming hypothetical that strays far from the facts of this case.[35] Here is a more helpful grooming hypothetical: An employer has a written policy stating that if an employee comes to work ungroomed, he must submit to mandatory employer-supervised shaving. He will be confined to the company bathroom, where a manager will physically direct the employee's arm and hand movements while he shaves, and he will be disciplined if he refuses or fails to shave correctly. In this hypothetical, which more closely resembles the facts of this case, the time is heavily employer-"controlled" and would be compensable under *Morillion*. CELC's grooming hypothetical assumes a significantly diminished, or nonexistent, "level" of employer "control," and is inapposite.

The rest of CELC's hypotheticals are similarly unhelpful. In CELC's commute-time hypothetical, an employer policy allows employees to use the company car, but only if they adhere to certain rules while driving. CELC Br. 1 (first bullet). Whether the driving time is compensable depends on the "extent" or "level" of the specific "controls" the employer imposed "during" the time in question. *Compare Rutti*, 596 F.3d at 1061-62 *with Stevens*, 281 Fed.Appx. at 672 (in two company car cases, the time was "controlled" in one but not the other). This sheds little light on whether the Check time is compensable. Moreover, as the Ninth Circuit recognized, mandatory onsite security search time is materially different from ordinary commuting time. 870 F.3d at 872-73.

CELC offers five more hypotheticals in a bulleted list, but none envisions the high "level" of employer "control" imposed by Apple "during" the Checks. CELC Br. 1-2.

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35 CELC Br. 1 (second bullet, positing an employee whose employer provides shower facilities and who chooses to shower and shave at work).

Many involve no "time during which" the employee is "controlled" at all, such as the parking lot, clothes-changing, and dog-walking examples.[36] CELC claims the time is non-compensable in these scenarios because the activities are "voluntary," but this does not matter. What matters is that no employer determined "when, where and how" any tasks were performed, or otherwise "controlled" any employees' "time."

These hypotheticals are a far cry from Apple's highly-"controlled" Checks.

(b)

WLF's hypotheticals are even more unhelpful than CELC's, and reveal a fundamental misunderstanding of plaintiffs' arguments in this case.[37] WLF asserts that plaintiffs are supposedly advocating a rule that would mean that because you have to be at work on Monday, time spent flying home from your vacation on Sunday is compensable. *See* WLF Br. 3, 7-8. That is nonsense.

WLF seizes on plaintiffs' discussion of the dictionary definitions of the words "control" and "require" in their opening brief. *Id.* at 6 (citing OBM 23, 26). But WLF misperceives plaintiffs' *reasons* for citing those definitions. Together with the IWC's considered decision to substitute "control" for "require," the definitions demonstrate that "control" is a broader concept than "require." The words are not synonyms, which means there is no binary "required-or-not-required" test for "controlled" time, as the district

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[36] One of CELC's hypotheticals involves unidentified "bulky items" stored in lockers, but Apple's Check policy states that employees are not to "have personal packages shipped to the store." 870 F.3d at 870 (quoting ER 115).

[37] WLF's argument that the Wage Orders are supposedly "void for vagueness" is also based on the same fundamental misunderstanding of plaintiffs' positions in this case. WLF Br. 5-10; *see* Part II.C, below.

court erroneously held.[38] To put a finer point on it, there is no binary "avoidably-or-unavoidably-required" test for "controlled" time. The purpose of that discussion was to demonstrate the district court's error. WLF seems to have missed this.

Plaintiffs have said many times that the pertinent question is the "extent" or "level" of employer "control" exercised "during" the time at issue. *See Mendiola*, 60 Cal.4th at 840 (citing *Morillion*, 22 Cal.4th at 587). The "control" test is not a binary question of whether or not the time is "unavoidably required." Such a non-existent "test" would ignore all other "controls" imposed "during" the time in question, even the heaviest, most time-consuming and burdensome ones, contrary to the Wage Orders' plain text. *See* Amicus Curiae Brief of Consumer Attorneys of California at 25-26.

In this case, Apple's "controls" heavily load the scale. The Checks involve employer-directed actions and movements, on the employer's premises, subject to threat of terminating discipline. WLF's hypotheticals—time spent going to bed early or getting ready for work in the morning, for example—fall off the other end of the scale. They have nothing to do with whether the *Check time* in *this* case is compensable. They are so absurd they have nothing to do with anything, really.

No one is claiming that an employee who decides to stay home on a work night instead of going out with friends is "controlled" during that time. WLF Br. at 7-8. Nor would such time become compensable if this Court rules in plaintiffs' favor. The ruling

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38 ER 8-18 (order). Of course, the Checks in this case *are* "required," or employees would not participate in them.

would be grounded in *Morillion* and *Mendiola* and would consider the "extent," "level" and "amount" of employer "control" "during" the time in question.

(c)

Finally, the employer-side amici resort to threats. If this Court holds the Check time compensable, they say, then instead of doing the right thing and paying for the time, Apple and other employers across California will punish their employees by banning all purses, bags, and—in Apple's case—all iPhones from the workplace.[39]

This hypothetical, too, is overblown.

Nothing in the facts stated by the Ninth Circuit,[40] or elsewhere in the record, suggests that Apple has ever considered imposing a "no-bags-or-iPhones-at-work" rule. Apple admits it would be a "draconian" policy (ABM 36-37), and there is little reason to suppose that Apple, or other employers, would actually resort to it.[41] Employers imposing such a policy would find themselves unable to hire and retain competent staff, and would be at a significant competitive disadvantage against other employers with less "draconian" workplace rules.

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39 CELC Br. 20; Chamber Br. 1, 25; RLC Br. 15; WLF Br. 4.

40 *See Troester*, 5 Cal.4th at 843 (declining to "prejudg[e]" "factual permutations" extending beyond "the facts of this case as described by the Ninth Circuit").

41 Apple's CEO Tim Cook expressed disbelief and concern over Apple's unpaid *Check* policy, let alone an outright ban on purses, bags, and iPhones. ER 314 ("Is this true?"). Apple's Senior Director of Field Operations wanted to explore "more intelligent and respectful way[s] of approaching" the problem—not *less* intelligent and respectful ways, such as a banning bags. ER 317.

In fact, imposing such a rule could actually *worsen* an employer's theft problem by fueling employee dissatisfaction,[42] which is a well-recognized root cause of internal theft.[43] For employers like Apple, whose "valuable goods" are small enough to hide in coat pockets, a "no-bags" rule would be largely pointless.[44] In Apple's case, moreover, the rule would have to ban employees from bringing not only their purses, bags and backpacks to work, *but also their iPhones*—an absurd idea that Apple has never remotely hinted at. *See* OBM 41-42 & n.53; Peace Officers' Br. 20-24.

For a more fundamental reason, widespread imposition of a "no-bags-or-smartphones" rule is unlikely to occur, regardless of how the Court decides this case. Such a rule would be of questionable legality, at best. If imposed for the purpose of theft prevention, such a rule would contravene the policy reflected in myriad Labor Code and Wage Order provisions stating that the burden and cost of theft prevention is the employer's alone to bear.[45] A "no-bags" rule would also have a disparate impact on

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42 *See* RBM 29 n.20 (evidence of employee dissatisfaction already caused by Apple's unpaid Check policy).

43 "Surveys show that employee satisfaction plays a major role in deterring workplace theft. Employees who feel appreciated are less likely to steal and more likely to report a coworker for theft." Guerin, *Essential Guide to Workplace Investigations* 270 (NOLO Press 2016); *see also* Bassett, *Solving Employee Theft: New Insights, New Tactics* 43 (2008) ("Create a positive work environment and you greatly reduce the possibility that your company will be plagued by employee theft.").

44 CELC's suggestion that employers prohibit all bags except see-through plastic ones is also of questionable legality. CELC Br. 25. Such a rule would implicate privacy concerns and infringe on employees' "dignity and self-respect." *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 952 (2018). In Apple's case, it would not solve the problem anyway, because employees with iPhones would still be Checked.

45 *See, e.g.*, Lab. Code §402 (employer must bear entire cost of bond insuring against risk of theft by employees entrusted with employer's goods); 8 Cal. Code Regs. §11070,

women, who carry bags more often than men,[46] largely because women need to carry feminine hygiene products[47] and also because women's clothing often lacks pockets adequate for essential belongings such as wallets, keys and smartphones.[48]

A "no-bags-or-smartphones" rule would, moreover, run afoul of principles recognized in *Troester*. Apple's theft problem exists due to the high value and small size of the products it chooses to sell, coupled with its failure to adequately secure these devices from theft.[49] Apple is certainly "in a better position" than its employees to mitigate these difficulties. *Troester*, 5 Cal.5th at 848. *Troester* teaches that employers

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¶8 (prohibiting employers from requiring employees to make up "any cash shortage" or pay for "loss of equipment" "unless it can be shown that the shortage ... or loss is caused by a dishonest or willful act, or by the gross negligence of the employee").

46 *See, e.g., Scott-George*, 2016 WL 3959999 at *9 (carrying bags is "normal for women in our culture").

47 The Wage Orders used to require employers to make "sanitary napkins" "readily obtainable at a reasonable price" in workplace bathrooms. *See* Wage Order 7-68, ¶15(c). This provision was deleted in 1976, when the Orders were amended to extend to adult men. Now, only female prison inmates and certain public school students in low-income districts must be provided with feminine hygiene products. Educ. Code §35292.6; 15 Cal. Code Regs. §§1265, 1485. Everyone else must buy and carry their own.

48 *See, e.g.*, "Women's Pockets are Officially Smaller than Men's, Study Reveals," *The Independent* (Aug. 25, 2018) ("on average, the pockets in women's jeans were 48 per cent smaller ... [than] in men's jeans," and "just 40 per cent of the women's jeans could fit an iPhoneX in the front pocket"), *available at* https://www.independent.co.uk/life-style/fashion/womens-pockets-jeans-smaller-men-feminist-issue-the-pudding-a8507671.html [viewed 10/4/18]; "It's official: Women's pockets too small for smartphones," *CNET* (Aug. 21, 2018) ("Women's slacks, dresses and business blazers often have zero pockets," and "[o]nly 40 percent of women's front pockets can fit a wallet *specifically designed to fit in front pockets*." (emphasis in original)), *available at* https://www.cnet.com/news/womens-pockets-too-small-for-smartphones-new-study-confirms/ [viewed 10/4/18].

49 Apple's chosen layout of its retail stores only exacerbates the problem. *See* Peace Officers' Br. 18-19 & n.4; *supra* footnote 30.

facing this sort of "problem" or "difficulty" may not choose to solve it by shifting the "burden" onto their employees. *Id.*; *see also Kilby*, 63 Cal.4th at 21-22. Apple's unpaid Check policy already does this, but the proposed "no-bags-or-iPhones" rule would place an even *greater*, "draconian" burden on Apple's employees. It would flout the remedial purpose of the Wage Orders.

The Wage Orders serve to protect not only employee health and safety, but also employee "comfort,"[50] "dignity and self-respect." *Dynamex*, 4 Cal.5th at 952. A "no-bags" policy would heavily burden the state's most vulnerable workers, who are least able to escape "draconian" workplace rules by switching jobs. *See*, *e.g.*, Bet Tzedek Br. 14-15. If legalized, a "no-bags" policy would be the next milestone in the "race to the bottom" (*Dynamex*, 4 Cal.5th at 960), as employers shift more and more of the burden of theft prevention onto their employees, as by banning coats or clothes with pockets.

The Court need not conclusively decide whether a "no-bags" rule would be unlawful if imposed for theft-prevention purposes. That question is for a future case.[51] For purposes of *this* case, the questionable legality of such a rule debunks the notion that employers across the state will immediately impose blanket "no-bag" rules if the Check time is held compensable. Such an unproven supposition is no reason to construe the "control" test other than in accordance with the Wage Orders' plain text, viewed in the light most favorable to employee protection.

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50 Wage Order 7, 8 Cal. Code Regs. §11070, ¶¶13(A), 15(A), 15(B), 17.

51 Whether a "no-bag" rule would be lawful in a non-retail setting, if imposed for reasons other than theft prevention, such as safety, is also for a future case.

B. Amici Offer No Persuasive Reason Why the Checks Are Not "Work" Under the "Suffered or Permitted to Work" Test

The employer-side amici offer various definitions of the word "work," drawn from federal law and other sources, to support an argument that the Check time does not meet the "suffered or permitted to work" test because it supposedly is not "work." Chamber Br. 19-22; RLC Br. 11-14; CELC Br. 11-15. But in *Amazon.com*, the Sixth Circuit held that security search time easily meets the federal definition of "work," and is therefore compensable under Nevada and Arizona law. Under California law, which is broader and more protective than federal law, the Check time is also compensable.

1. Even Under The Narrower, Federal Definition of "Work," the Check Time is Compensable

The Sixth Circuit's *Amazon.com* opinion arose out of the same litigation as *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513 (2014), in which the U.S. Supreme Court held that time spent by Amazon warehouse employees undergoing mandatory security searches was non-compensable under the Portal-to-Portal Act. In so holding, the U.S. Supreme Court decided that the searches were not part of the "principal activity" the employees were "employed to perform." *Id.* at 518. As a result, the searches were considered "postliminary activities," which the Portal-to-Portal Act excludes from compensability. *Id.* at 518-19.

After remand, the plaintiffs argued that the security search time was nonetheless compensable under Nevada and Arizona law. *Amazon.com*, 2018 WL 4472961 at *2. The Sixth Circuit held that those states followed the federal definition of "work" from

early U.S. Supreme Court opinions, including *Tennessee Coal, Iron & R. Co. v. Muscoda Local. No. 123*, 321 U.S. 590 (1944). *Amazon.com*, 2018 WL 4472961 at *7-*8.

In *Tennessee Coal*, "work or employment" was defined as "[1] physical or mental exertion (whether burdensome or not) [2] controlled or required by the employer and [3] pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. at 598. As the high Court later clarified, however, "'exertion' [is] not in fact necessary for an activity to constitute 'work,'" because "'an employer, if he chooses, may hire a [person] to do nothing, or to do nothing but wait for something to happen.'" *Amazon.com*, 2018 WL 4472961 at *9-*10 (quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Vance v. Amazon.com*, 852 F.3d 601, 610 (6th Cir. 2017)).

The Sixth Circuit easily perceived that security search time meets this definition, even if (as the defendants argued) "exertion" must be shown. *Id.* at *8. "[U]ndergoing security screening," the Court said, "clearly does involve exertion." *Id.* at *9. "The screenings surely are 'required by the employer,'" and "Plaintiffs have alleged that the screenings are 'solely for the benefit of the employers and their customers.'" *Id.* at *8. Hence, the time was compensable under Nevada and Arizona law. *Id.* at *10-*11.

Here, the Check time easily meets the *Tennessee Coal* definition. The Checks involve the "exertion" of lining up and performing "actions and movements." *Frlekin*, 870 F.3d at 871, 873. The time is concededly "controlled" by the employer. *Id.* at 871. The activity is "pursued necessarily and primarily" for the employer's "benefit" by preventing and deterring theft of its "valuable goods." *See id.* at 873.

2. California's Definition of "Work" is Broader and More Protective than the Federal Definition

RLC's amicus brief urges the Court to adopt the three-part definition from *Tennessee Coal*. RLC Br. 13. As mentioned above, however, the is a definition of both "work *and employment*," not merely "work." 321 U.S. at 598 (emphasis added). The U.S. Supreme Court cited dictionary definitions of both "work" and "employ" in devising it. *Id.* at 598 n.11. This concept is obviously different from the Wage Orders' chosen term, "work." In other words, California law materially diverges from the definition in *Tennessee Coal*, both as a whole and when the three parts are separately considered.

Considering the second part first, "controlled or required by the employer" is *not* an element of California's "suffered or permitted to work" test. California's test states that "work" is compensable "whether or not required," and "controlled" time is covered by the "control" test—a separately-stated, "independent" test for compensability. *Morillion*, 22 Cal.4th at 839. Defining "work" to cover only "controlled or required" time, as RLC and CELC both propose[52] would contravene the Wage Order's text and would conflate the two "independent" tests. *See* OBM 45-46.

California also treats the first part, "exertion," differently. While California recognizes that an employer "may hire a [person] to do nothing, or to do nothing but wait for something to happen," this is a codicil of the "control" test, not the "suffered or permitted to work" test. *Mendiola*, 60 Cal.4th at 841 (citations omitted). Hence, as plaintiffs have argued, plain-language definitions of "work" do include some level of

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[52] RLC Br. 13; CELC Br. 13 (arguing that compensable "work" should extend only to tasks an employer "direct[ed] or require[d]").

"exertion," but it need not be particularly demanding. Finding a manager, lining up, and being searched all involves "physical or mental exertion (whether burdensome or not)."[53]

The third *Tennessee Coal* element, "pursued necessarily and primarily for the benefit of the employer and his business," is tied to the definition of "employ" cited in that case, not the definition of "work." 321 U.S. at 598 n.11. California treats this differently. This Court has considered "benefit" to the employer in connection with "on call" time under the "control" test—not the "suffered or permitted to work" test. *Mendiola*, 60 Cal.4th at 841. In the former context, the Court has recognized that time can be compensable "hours worked" even if it "benefits both employees and employers" more-or-less equally. *See Morillion*, 22 Cal.4th at 594 (noting "benefits" of employer-provided transportation). There is no "necessarily and primarily" element in California.

Nonetheless, the benefit to Apple is certainly a relevant factor. The Checks plainly benefit Apple by preventing and deterring theft. Apple would not take the trouble to impose them, pay its managers and security guards to do them, or discipline employees over them, if the Checks did not benefit Apple. If "work" must "benefit" the employer in order to be compensable, that element is met here.

RLC would take this element a step further, arguing not only that "benefit" is an essential element of the "suffered or permitted to work" test, but also that this element should be strictly construed to encompass *only* "work" that "*primarily* benefits" the

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[53] RLC disputes this, claiming that because security searches are supposedly "routine," that means they involve no "exertion." RLC 15. That argument is contrary to *Amazon.com* and cannot be reconciled with the record or the Ninth Circuit's description of the Check time in this case.

employer. RLC Br. 15. But the plain-language definition of "work" does not require "benefit" to an employer at all—not even the early *Black's* definitions cited by RLC.[54] *See* OBM 46-48; RBM 34-35. This part of the *Tennessee Coal* definition encompassed the concept of "*employment*," not "work." 321 U.S. at 598 (emphasis added). To strictly construe the word "work," in the manner RLC proposes, would import a less protective qualification into the Wage Orders without "convincing evidence" of the IWC's intent. *Mendiola*, 60 Cal.4th at 843 (quoting *Morillion*, 22 Cal.4th at 592).[55]

3. Under Broader California Law, "Work" is Not Limited to an Employee's Ordinary Job Duties

The employer-side amici argue that California's definition of compensable "work" should be limited to the "principal activities" or "job-related duties" the employee was "hired to perform." CELC Br. 11-14; Chamber Br. 20-22; RLC Br. 14, 16; WLF Br. 10-11. However, importing such an exception into the definition of compensable "work" would contravene the IWC's intent. This argument, therefore, should be rejected.

As just discussed, the less protective federal definition of "work and employment" from *Tennessee Coal* contained no such limitation. 321 U.S. at 598. The Portal to Portal

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[54] RLC Br. 12 ("Black's Law Dictionary (3d ed. 1933) at the time defined 'work' as 'Any form of physical or mental exertions or both combined, for the attainment of some object other than recreation or amusement.'"); *id.* at 12 n.2 (quoting 1951 edition of *Black's*); *see* OBM 44-45, RBM 30 (discussing plain-language definitions of "work").

[55] Recently, in *Troester*, this Court declined to follow a U.S. Supreme Court opinion of similar vintage—one also reflecting a "less protective" standard—without "convincing evidence" of the IWC's intent to adopt that standard. 5 Cal.4th at 840-41. *Accord Mendiola*, 60 Cal.4th at 843 ("The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference."); *Martinez*, 49 Cal.4th at 60 (1947 amendments were "intended to distinguish state law from its federal analogue," and "provide greater protections than federal law affords").

Act is what introduced an exception for "non-principal activities" into federal law for the first time.[56] Repeatedly, this Court has recognized that the IWC amended the Wage Orders in 1947 precisely in order to ensure that California law would *not* be construed as coextensive with the Portal-to-Portal Act. *Troester*, 5 Cal.4th at 845; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 590-94.

If the IWC wanted to import a "non-principal activities" exception into the "suffered or permitted to work" test, it easily could have done so when it amended that test in 1947.[57] If the IWC believed its Orders already included such an exception, it would not have later amended Orders 4 and 5 to state that "'hours worked' means the time during which an employee is suffered or permitted to work, whether or not required to do so, *as interpreted in accordance with the provisions of the Fair Labor Standards Act*." 8 Cal. Code Regs. §11040, ¶2(K), §11050, ¶2(K) (emphasis added). Nor would the IWC have amended Order 5 to limit compensable "work," for some employees, to "time spent carrying out *assigned duties*." *Id.* §11050, ¶2(K) (emphasis added).

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56 *See Integrity Staffing*, 135 S.Ct. at 517; *Amazon.com*, 2018 WL 4472961 at *9 ("the Portal-to-Portal act excludes some 'work' from ... what is compensable activity" under federal law); Chamber Br. at 21-22 (arguing that under the Portal-to-Portal Act as construed in *Integrity Staffing*, security searches are not "an 'integral part of the principal activities' an employee is hired to perform").

57 Importantly, the IWC's 1947 amendments were not confined to the "control" test. The "suffered or permitted to work" test, too, was amended. The IWC retained the core "suffered or permitted to work" language, while simultaneously deleting as unnecessary a list of illustrative examples of compensable "work," some of which might have been construed as "preliminary" or "postliminary activities" under the Portal-to-Portal Act. *See* OBM 20 (quoting Wage Order 7NS, ¶2(f), making compensable certain "time" "after the beginning and before the end of [the employee's] work day"); *id.* at 21 (quoting Wage Order 7 R, ¶2(h), which omits the illustrative examples). Those omitted activities would now fall within the "control" test.

Contrary to the Chamber's argument, therefore, the Court should *not* "look to" federal law for "guidance" in construing Order 7.[58] *Troester*, 5 Cal.5th at 841. Order 7, unlike Orders 4 and 5, has no qualifying language evincing any intent to incorporate definitional or substantive limitations drawn from federal law.[59] Absent "convincing evidence of the IWC's intent," the Court does not "import" "less protective" federal standards "by implication." *Id.* (quoting *Mendiola*, 60 Cal.4th at 843); *Morillion*, 22 Cal.4th at 592.

CELC, too, urges the Court to import what amounts to a "principal activities" qualifier into Order 7. *See* CELC Br. 11-15. According to CELC, the word "work," by definition, is limited to "job-related" "duties" or "services" an employee was hired to perform and is paid for. *See id.* at 12-13. The plain-language definition of "work" belies this,[60] but again, to import that type of "job-related" or "principal activities" qualifier into Order 7 would contravene the IWC's intent. The Court should decline CELC's invitation to import such a qualifier in the guise of construing the plain-language word "work."

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[58] Chamber Br. 20-21. The Chamber makes another incorrect argument—that the "suffered or permitted to work" test is supposedly inapplicable to this case because the test applies only "outside" the "context" of "traditional" "employment relationships." *Id.* at 19-20. The Chamber is mistaken. The rulings it cites construed the definition of "employ," not the definition of "hours worked." *Saini v. Motion Recruitment Partners, LLC*, 2017 WL 1536276, *7 (C.D. Cal. Mar. 6, 2017); *Gunawan v. Howroyd-Wright Employment Agency*, 997 F.Supp.2d 1058, 1063 (C.D. Cal. 2014). In any event, such an argument is waived. Apple has never claimed that the "suffered or permitted to work" test does not apply to this case, only that the test not been *met*.

[59] RLC's claim that the IWC has supposedly "never reworked" the language of the "suffered or permitted to work" test overlooks the historical record. RLC Br. 12.

[60] OBM 44-45, RBM 30. That circular argument would allow employers to unilaterally exclude an activity from the definition of compensable "work" by the expedient of not paying for it.

CELC makes several text-based arguments (CELC Br. at 12-13), but these arguments all ignore the IWC's considered decision to modify Orders 4 and 5, but *not* Order 7, to incorporate less-protective standards such as "principal activities" or "assigned duties." None of CELC's arguments can overcome this unequivocal expression of the IWC's intent. In fact, the IWC's use of the word "duties" in Order 5, in the same sentence as the word "work," confirms that the IWC understands "assigned duties" to be a subset—not a synonym—of "work."[61]

RLC also claims that "work" should be confined to an employee's ordinary "job duties" (RLC Br. 14), but its only cited authority is *Watterson*, where the plaintiff "admitted" that the tasks in question "were not work." 694 Fed.Appx. at 597. None of the definitions of "work" cited by RLC includes such a qualifier. RLC Br. 12-14. RLC cites two early editions of *Black's* defining "work" as "exertions ... for the attainment of some object other than recreation or amusement." *Id.* at 12 & n. 2 (citing 1933 and 1951 editions of Black's). The Check time is a far cry from "recreation or amusement," and easily meets this definition.

Finally, WLF claims that unless "a connection to job duties" qualifier is read into the word "work," the sky will fall. According to WLF, employers will end up paying for "anything the employee does to *stay alive*," including "the employee's every breath." WLF Br. 10-11 (emphasis in original). Nonsense. WLF ignores the mechanism the

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61 *See also, e.g.*, Lab. Code §200(a) (defining "labor" to include the three distinct concepts of "labor, work or service"); *Bono*, 32 Cal.App.4th at 975 ("duty" means an "action ... required by or relating to one's occupation or position" (quoting Webster's New World Dictionary, "duty" (3d Coll. Ed. 1988)). If the IWC had meant "duties" or "services," it would used one of those terms instead of "work."

Wage Orders use to tie the "work" to the employment relationship. The "suffered or permitted" part of the test ensures that employers provide compensation only for "work" the employer knew or reasonably should have known was occurring. *Morillion*, 22 Cal.4th at 584-85. WLF's absurd hypotheticals, such as eating healthy food, brushing one's teeth and the like, fall well outside the scope of compensable "work" under the Orders.[62]

Here, Apple plainly knew the Checks were occurring. They took place on Apple's store premises, pursuant to written company policy. Apple monitored compliance with the Check policy and disciplined those who failed to adhere to it. There is nothing unfair about requiring Apple to pay for the Check time.

Fundamentally, what all the employer-side amici miss is that theft prevention *does* relate to a retail employer's regular job duties. OBM 51; RBM 35-37. Apple would have no power to require the Checks, or to discipline its employees for failing to perform them, if the activity not relate to their jobs. As this Court has recognized, "reasonable attempts to investigate employee theft ... are a normal part of the employment relationship." *Fermino v. Fedco, Inc.*, 7 Cal.4th 701, 717 (1994). If an employee were injured during a routine Check, workers' compensation would be the exclusive remedy for that claim. *Charles J. Vicanti, M.D., Inc. v. State Comp. Ins. Fund*, 24 Cal.4th 800, 821 (2001). Accordingly, if the Court were to infer this unstated qualification into the Wage Orders' text (which it should not), the unstated element would be satisfied.

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62 *See also* Chamber Br. 22 (arguing that "commuting and grooming" would become compensable "work," while also ignoring the "suffered or permitted" part of the test); RBM 33-35 (discussing Apple's similar arguments).

C. The "Vagueness" and "Prospective-Only" Arguments Both Fail

WLF argues at length that the Wage Orders would be void for vagueness if the Check time were held compensable. WLF Br. 5-12. However, as discussed above, WLF can make this argument only by willfully misunderstanding plaintiffs' arguments and the Wage Orders' text. There is nothing unconstitutionally vague about the plain English words used in the Wage Orders. *See Bono*, 32 Cal.App.4th at 979 (rejecting a similar "vagueness" challenge to the Wage Orders' definition of "hours worked").

Similarly, WLF argues that if the Court holds the Check time compensable, that would represent a change in law, and should apply prospectively only. WLF Br. 13-18. This argument, too, rests on a misunderstanding of what the Wage Orders have always required, and on a misreading of *Morillion*. The "retroactivity" argument should be rejected for the reasons stated in plaintiffs' reply brief (at 37) and in the amicus curiae brief of the California Employment Lawyers Association, which is incorporated here by reference.

III. CONCLUSION

For the reasons discussed above, in plaintiffs' opening and reply briefs, and in the amici curiae briefs supporting plaintiffs, the answer to the certified question is "yes."

Dated: October 9, 2018

Respectfully submitted,

By: 

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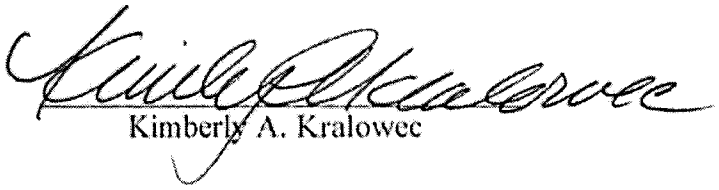
CERTIFICATE RE WORD COUNT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 10,552 words, including footnotes.

Dated: October 9, 2018



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PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by KRALOWEC LAW, P.C., located at 750 Battery Street, Suite 700, San Francisco, California 94111, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS; and**
2. **PROOF OF SERVICE.**

- **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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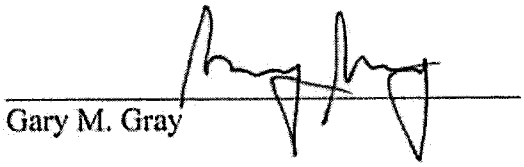

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