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

Reply to Defendant's Supplemental Brief

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I. INTRODUCTION

The parties agree that restating the certified question to encompass both "tech" Check and bag Check time does not change the analysis or the outcome. The parties vehemently disagree, however, on what the analysis and the outcome should be.

Plaintiffs' positions are unchanged. Contrary to Apple's view, and as explained in plaintiffs' supplemental brief and below, all Check time, including "tech" Check time, is compensable under the "control" test, the "suffered or permitted to work" test, or both.

II. DISCUSSION

A. "Tech" Check Time Is Compensable Under the "Control" Test

Apple's supplemental brief presents no argument that can defeat the conclusion that under Wage Order 7, the "tech" (and bag) Check time is "controlled" and thus compensable. *See* Apple's Supp. Br. at 6-8.

Notably, Apple's supplemental brief says nothing about the Wage Order's plain text. *See id.* The text is the starting point for any analysis of whether the time is compensable, because the text is "[t]he best indicator" of the IWC's intent. *See, e.g., Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 264 (2016) (citing *Reynolds v. Bement*, 36 Cal.4th 1075, 1086 (2005)). Under plain-language dictionary definitions, "control" means to "exercise restraint or direction" upon; to "regulate" or "hold [someone] in restraint." *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal.App.4th 968, 975

(1995) (citing *Oxford English Dictionary* (2nd ed. 1989)); *American Heritage Dictionary*, "control," *tr.v.*, senses 2, 3 (4th ed. 2000), *cited in Augustus*, 2 Cal.5th at 265.[1]

Apple does not explain how the time "during which"[2] Apple required its employees to remain on store premises, "compelled" them to perform manager-directed "actions and movements,"[3] and imposed discipline on them "up to and including termination"[4] if they refused to comply with these directives, is not time "during which" Apple "exercise[d] restraint or direction upon" its employees, "regulate[d]" their actions, or "h[e]ld [them] in restraint."

Apple does not address this because Apple has no answer to it. The "tech" Check time, like the bag Check time, is plainly "controlled," as Apple has already recognized and conceded. *See Frlekin v. Apple, Inc.*, 870 F.3d 867, 871 (9th Cir. 2017).

Nor has Apple anything to say about the IWC's decision to intentionally jettison the prior "required" test and to replace it with the broader, more employee-protective "control" test, which remains the governing test today. *Compare* Wage Order 7S (Apr. 5, 1943, eff. Jun. 21, 1943), ¶2(f) (Plaintiffs' Motion for Judicial Notice ("MJN"), Ex. 4) *with* Wage Order 7 R (Feb. 8, 1947, eff. Jun. 1, 1947) (MJN, Ex. 5).

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1 *Accord American Heritage Dictionary*, *supra*, "control," *tr.v.*, sense 1 ("to exercise authority or dominating influence over; direct"); *Black's Law Dictionary*, "control," *vb.*, sense 1 (10th ed. 2014) ("to exercise power or influence over"); *Webster's Collegiate Dictionary*, "control," *vb.*, sense 2a (11th ed. 2003) ("exercise restraining or directing influence over").

2 8 Cal. Code Regs. §11070, ¶2(G).

3 *Frlekin*, 870 F.3d at 872.

4 ER 115, *quoted in Frlekin*, 870 F.3d at 870.

Finding no support for its positions in the Wage Order's text, Apple turns to the case law, once again relying heavily on *Morillion* and *Overton*,[5] but saying nothing new about either decision. Apple's arguments boil down to the notion that "control" is not enough to meet the "control" test, but neither case holds this. Plaintiffs' prior briefs have already exhaustively discussed Apple's erroneous readings of *Morillion* and *Overton*. *See* Opening Brief on the Merits ("OBM") at 30-38; Reply Brief on the Merits ("RBM") at 20-28; Answer to Amicus Curiae Briefs ("AACB") at 15-18.

What this Court's precedents actually hold, consistent with the Wage Order's text, is that compensability depends on the "extent," "level" or "amount" of "the employer's *control*" "during" the time in question—not on whether the activity was "unavoidably required," which is Apple's unsupported reading. *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 840 (2015) (citing *Morillion*, 22 Cal.4th at 587; *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1535 (2009)) (emphasis added).[6]

In Apple's view, the *only* relevant fact is whether the employer "unavoidably required" an activity—*not* whether the employer exercised "control" during the activity. But under that approach, the Court would have to ignore the heavy restrictions on the

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[5] *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000); *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263 (2006).

[6] *Accord Stoetzl v. Department of Human Resources*, 7 Cal.5th 718, 747 (2019) (*Morillion* "focused on the word 'control,'" which was "the basis of our decision"); *Mendiola*, 60 Cal.4th at 837, 841 (on-site time compensable even though it could be avoided by seeking permission "to leave the worksite"); *Bono*, 32 Cal.App.4th at 972, 974-75 (mandatory on-site time was "controlled" and compensable although employees could take actions to avoid it); *Ridgeway v. Wal-Mart Stores, Inc.*, 107 F.Supp.3d 1044, 1054-55 (N.D. Cal. 2015) (same); *Cervantez v. Celistica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009) (same).

employees' freedom of movement that Apple exercised "during"[7] the "tech" (and bag) Check time—including the employer-imposed prohibition against leaving store premises to go home until after the Checks are completed—in favor of an Apple-invented test, unstated in *Morillion* let alone in the Wage Order. *Morillion* itself forbids such rewriting of the Wage Order's text. 22 Cal.4th at 585.

If Apple has its way, and the "tech" (and bag) Check time is deemed non-compensable, nothing would prevent employers from getting all sorts of free tasks out of their employees by the simple expedient of imposing "optional" conditions—such as if you "choose" to bring your purse or your iPhone to work, you will be required to stay late after your shift and clean the break room (including the cockroaches in the microwave),[8] under a manager's immediate physical supervision, on pain of discipline including termination. If the Check time is non-compensable, Apple (and other employers) will have no incentive to expedite the Checks, to mitigate the wait times for the Checks, or lessen the Checks' intrusiveness into the employees' persons and belongings.[9] Such an outcome would disregard the Wage Orders' "remedial purposes," would intrude upon employees' "dignity and self-respect," and would set off a "race to the bottom" among California employers who wish to subject their employees to intrusive personal searches

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7 8 Cal. Code Regs. §11070, ¶2(G).

8 *Cf.* Amicus Curiae Brief of Bet Tzedek Legal Services at 15 n.2 (citing similar real-life example). In that hypothetical, according to Apple, the time would not be compensable under the "suffered or permitted to work" test, either, because cleaning out cockroaches is not part of the "regular job duties" the employees were hired to perform. As discussed in the next section, this is not how California law works.

9 *See id.* at 14.

without any payroll consequence. *See Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 952, 953, 960 (2018). To avoid these adverse effects, the Check time should be held compensable, in accordance with the Wage Orders' plain text, regulatory history and the relevant decisional law.

Left with no other arguments to support its positions, Apple once again resorts to claiming that plaintiffs supposedly "stipulated away" their right to argue that "the choice to bring bags or personal devices to work was not a 'true choice.'" Apple's Supp. Br. at 6-7; *see id.* at 5-6. But even if Apple's characterization of the record were correct (it is not, as discussed below), the "tech" Check time remains "controlled" and compensable within the meaning of Wage Order 7, which looks to the degree of "control" exercised by the employer "during" the Check time itself. *Mendiola*, 60 Cal.4th at 840 (citing *Morillion*, 22 Cal.4th at 587). This conclusion does not turn on the factual point that Apple claims was "stipulated away."

What is more, Apple mischaracterizes what actually occurred below. The district court was concerned that some class members may have had a "special need" to bring bags or personal technology devices to work, such as a need to carry medications or as a disability accommodation. *See* RBM at 10-11 (citing record). This is clear from a portion of the class notice that Apple's supplemental brief neglects to quote:

> Plaintiffs will NOT assert that Apple must compensate Apple Employees for Checks when Apple Employees were required to bring bags and/or personal Apple technology ***due to any "special needs," such as the need to carry prescription medication or feminine hygiene products.*** The Class will litigate this case EXCLUSIVELY on the theory that Class Members voluntarily chose to bring bags and/or personal Apple technology to work purely for personal convenience.

SER 6 (third paragraph under heading 2) (emphasis added). Plaintiffs have advanced no "special needs" arguments inconsistent with the district court's directives.

Well aware of this record, the Ninth Circuit found no procedural bar to considering the ordinary, everyday reasons why people "routinely" carry "bags, purses, and satchels" with them to work. *See Frlekin*, 870 F.3d at 873. After all, if employees carry those belongings "voluntarily," for reasons of "personal convenience," it follows that leaving the belongings at home would be highly inconvenient to them, and that the employees would do it only involuntary. The same is true of "tech" devices, especially essential modern communication devices such as the iPhone. *See, e.g., People v. Valdivia*, 16 Cal.App.5th 1130, 1143 (2017) ("Now it is the person who is not carrying a cell phone ... who is the exception.").[10]

In short, the district court entered no gag order barring plaintiffs from mentioning, or the Court from considering, the reality that most people would prefer not to leave their bags and iPhones at home, for a variety of understandable, everyday reasons. *See generally Frlekin*, 870 F.3d at 873; *see also* OBM 40-42 (discussing points raised by Ninth Circuit).[11]

Apple's unpaid "tech" (and bag) Check policy exploits this reality and shifts the burden and cost of theft control to Apple's employees. But under California law, the

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10 *See also* OBM at 41-42 & nn.52-53 (citing additional authorities).

11 *Accord* Amicus Curiae Brief of Bet Tzedek Legal Services at 17-19 (discussing some of the everyday, non-"special needs" reasons why employees, especially in low wage jobs, carry bags and devices with them).

employer must bear those burdens and costs,[12] especially when the employer is "in a better position" to mitigate the risk of theft by other means.[13] Here, the employer's chosen business model yields billions of dollars in profits by selling valuable small electronics that the employer chooses not to adequately secure.[14] The employer, not the employees, should bear the burdens associated with the employer's business decisions.

In sum, the Check time is, and should be, compensable under the "control" test.

B. "Tech" Check Time Is Compensable Under the "Suffered or Permitted to Work" Test

Apple's arguments on the "suffered or permitted to work" test are equally unsupported. For one thing, Apple's supplemental brief offers no definition of the word "work" as used in Wage Order 7. Apple's Supp. Br. at 9. Apple cites no textual support for its position that under California law, as under federal law, only "regular job duties" employees were expressly hired to perform can be compensable under the "suffered or permitted to work" test. *See id.* at 2, 9.

Apple's position cannot be squared with the plain text of Wage Orders 4, 5 and 7. The Orders say "work," not "job duties." And, as plaintiffs have repeatedly pointed out,

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12 *See, e.g., Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 562 (2007) (citing Lab. Code §2802) (California law is "designed to prevent employers from passing their operating expenses on to their employees"); Lab. Code §402 (prohibiting employers from passing on certain theft prevision costs); 8 Cal. Code Regs. §11070, ¶8 (same).

13 *See Troester v. Starbucks Corp.*, 5 Cal.5th 829, 848 (2018) (employers may not ignore the Wage Orders' requirement to pay for all "hours worked" simply because the time might be hard to track); *see also Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 22 (2016) (employers may not sidestep the Wage Orders' requirement to provide suitable seats by designing the workspace in a way that makes seating difficult).

14 *See* AACB at 20 & nn.28-30 (supporting citations).

Orders 4 and 5 already explicitly limit compensable time under the "suffered or permitted to work" test to certain "assigned duties," and/or state expressly that the test is to be "interpreted in accordance with the provisions of the Fair Labor Standards Act." 8 Cal. Code Regs. §11040, ¶2(K), 11050, ¶2(K). Wage Order 7 includes no such qualifying language. *Id.* §11070, ¶2(G). This was a purposeful decision by the IWC.

Apple makes no attempt to reconcile the Orders' text, let alone explain how the qualifying language of Orders 4 and 5 would have any meaning left if Order 7, which is otherwise identical to Orders 4 and 5, is construed to *implicitly* include the same qualifications *expressly* stated in Orders 4 and 5. This textual problem is fatal to Apple's position, and Apple has never offered any supported way around it.

Apple claims that "[d]efining 'work' without any connection to an employee's job responsibilities would be boundless." Not so. To be compensable, the work must be "suffered or permitted" *by an employer*, which means the employer knew or had reason to know the work was occurring. *Morillion*, 22 Cal.4th at 584-85. Here, Apple certainly knew that "tech" (and bag) Checks were taking place on Apple store premises, under a manager's supervision, pursuant to a mandatory, written company policy. Moreover, the Check policy certainly benefited Apple by deterring theft, or Apple would not have gone to such lengths to adopt, implement and enforce the policy.

Apple argues that this plain-language construction of the "suffered or permitted to work" test would render the "control" test "superfluous." Apple's Supp. Br. at 9. But this argument assumes that an employer cannot know about "work" without also controlling it, which is plainly incorrect. Unauthorized overtime is a prime example of

time compensable under the "suffered or permitted to work" test but not the "control" test. On-call time is a prime example of time compensable under the "control" test but not the "suffered or permitted to work" test. The two tests are "independent" (*Morillion*, 22 Cal.4th at 582), and function together to broadly protect employees and ensure they are compensated for all "hours worked." In this case, the Checks are compensable under *both* tests, not neither test, as Apple would have it.

Apple's final point is that the "tech" (and bag) Checks are supposedly unrelated to the "regular job duties" these employees were hired to perform. Apple's Supp. Br. at 2, 9. Plaintiffs have already explained in detail why both "tech" and bag Checks are directly related to these retail sales employees' jobs. *See* Plaintiffs' Supp. Br. at 12-13 (citing record); OBM at 51; RBM at 35-37; AACB at 41.

C. The Usual Rules of Retroactive Application Apply to this Court's Resolution of the Restated Question

Apple's supplemental brief does not mention the issue of retroactivity, or argue that the Court's ruling on the compensability of "tech" Check time should apply prospectively only. *See generally* Apple's Supp. Br. Nor has Apple ever argued that the Court's eventual interpretation of the "suffered or permitted to work" test, either for "tech" Check or bag Check time, should apply other than retroactively. *See* ABM 59-61 (arguing only that the Court's interpretation of the "control" test should be prospective); Apple's Response to Amici Curiae Briefs at 24 (same).

Whatever the Court's ruling on the "control" test may be, it will construe the 72-year-old test stated in the Wage Orders, in accordance with the Orders' plain text, which

the IWC adopted in 1947 for no purpose other than to protect California employees even more broadly than prior law did. The ruling will "vindicate the original meaning" of the Wage Order's text, "putting into effect the policy intended from its inception." *Woosley v. California*, 3 Cal.4th 758, 794 (1992) (quoting *People v. Garcia*, 36 Cal.3d 539, 549 (1984)). To "accomplish that aim" (*id.*), the ruling must operate retroactively in accordance with the well-established general rule, "basic in our legal tradition," that "judicial decisions are given retroactive effect." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (1989); *see also Mendiola*, 60 Cal.4th at 848 & n.18; *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 24-25 (1995); Amicus Curiae Brief of California Employment Lawyers Assn. at 3-9 (citing additional authorities).

III. CONCLUSION

For the reasons discussed above and in plaintiffs' supplemental brief, the answer to the restated question is "yes."

Dated: September 11, 2019

Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 2,727 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(d)(2).

Dated: September 11, 2019

Kimberly A. Kralowec

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. **REPLY TO DEFENDANT'S SUPPLEMENTAL BRIEF; 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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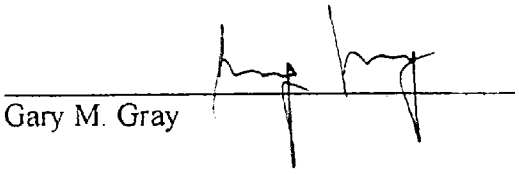

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