CASE NO. S253677

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff-Appellant and Petitioner,

v.

AMN SERVICES, LLC,
Defendant and Respondent

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division One, Case No. D071865
San Diego Superior Court Case No. 37-2014-00012605-CU-OE-CTL
Hon. Joel Pressman, Judge

REPLY IN SUPPORT OF PETITION FOR REVIEW

William B. Sullivan (Bar No. 171637)
Eric K. Yaeckel (Bar No. 274608)
Sullivan Law Group, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 Telephone
helen@sullivanlawgroupapc.com
yaeckel@sullivanlawgroupapc.com

David A. Niddrie (Bar No. 89990)
Rupa G. Singh (Bar No. 214542)
Niddrie Addams Fuller Singh, LLP
600 W Broadway, Ste 1200
San Diego, CA 92101
(619) 744-7017 Telephone
dniddrie@appealfirm.com
rsingh@appealfirm.com

Attorneys for Plaintiff-Appellant and Petitioner Kennedy Donohue

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I.
INTRODUCTION

None of the arguments in Defendant's Answer undermines the need for a grant of review to ensure the uniform development of two aspects of employment law that are of widespread importance.

First, Defendant argues that the Court of Appeal never held that time rounding can excuse a failure to provide meal periods, but only that Plaintiff failed to prove that the class was denied meal periods without payment of statutory penalties. To the contrary, the Court of Appeal authorized the use of time rounding practices to meal periods, and therefore excused bright-line compliance with meal period laws: "[Time rounding] applies to the timekeeping of meal periods as well as to the timekeeping of the beginning of an employee's shift[.]" (*Donohue v. AMN Services, LLC* (2018) 29 Cal.App.4th 1068, 1090 (*Donohue*).) What's more, the Court of Appeal did so at Defendant's request: ""[T]here is no basis on which to deny application of AMN's California-compliant rounding policy to a recruiter's meal period." (*Id.* at 1089.)

As a corollary, Defendant asserts that Plaintiff mistakenly conflates the different issues of time rounding and meal period violations. But it was the Court of Appeal that connected these

admittedly separate issues, over Plaintiff's objections: "Donohue's position that AMN's rounding policy may *never* be applied to meal period time punches is insupportable on the present record." (*Id.* at 131-132 [emphasis in original].) As Plaintiff noted in the Petition, and Defendants fail to dispute, overtime laws protect workers' financial interests while meal and rest period laws protect their health. Thus, Plaintiff agrees that time rounding and meal period violations are separate and should be kept that way, starting with undoing the Court of Appeal's improper joinder of these issues.

Second, Defendant argues that *Donohue* does not conflict with other cases that limit application of the rebuttable time record presumption proposed in a concurrence in *Brinker v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004 (*Brinker*). But Defendant's argument that the rebuttable presumption applies only "in the context of class certification" underscores the problem because *Brinker* itself offers no such limitation, nor have numerous Courts of Appeal applied it in that way. (Answer, at p. 4.) Defendant's claim that there is no conflict on this issue ignores the fact that one published decision limits the presumption to the class certification stage, another allows it to establish liability and damages at trial if

used with other evidence, several decisions allow it to establish violations or damages without regard to stage, and this Court has de-published opinions professing to limit the presumption. In short, there is a decided split of authority as to the rebuttable presumption.

Finally, Defendant argues that Plaintiff failed to allege that time rounding does not apply to meal period violations in the operative pleading, and thus waived the argument. Not so. Defendant asserted time rounding as a defense to the meal period claims. Recognizing that pleadings frame the issues for summary judgment, the trial court noted Defendant's objection that Plaintiff allegedly waived this issue. But the trial court found no waiver; rather, it tackled the issue, stating that the rationale for allowing "rounding for work time would be the same for meal periods." (XIII AA 3472.) On appeal, Plaintiff clearly argued that time rounding should not be extended from the overtime to the meal period context. Far from finding the question waived, the Court of Appeal answered it squarely, albeit incorrectly.

Thus, review is necessary to address (1) whether time rounding can be used for meal periods without eviscerating them, and (2) when and how the *Brinker* rebuttable presumption should apply to do

justice to its purpose and rationale.

II.
ARGUMENT

A. The Court of Appeal in *Donohue* Did Rule That Time Rounding Can Excuse Meal Period Violations, Improperly Conflating Time Rounding Practices, Overtime Law, and Meal Period Protections

Plaintiff agrees with Defendant that time rounding and the duty to provide compliant meal periods are two "distinct" issues. But it was the *Donohue* Court that disagreed. Contrary to Defendant's assertion, the Court of Appeal indisputably joined these separate issues for the first time in a reported decision, ruling, over Plaintiff's opposition, that time rounding practices apply to meal period laws:

> We reject Donohue's suggestion that the court blindly apply section 512, subdivision (a), and title 8, section 11040, subdivision 11(A), without consideration of rounding—a wage and hour procedure that has been accepted in California since at least 2012[.]

(*Donohue*, 29 Cal.App.5th at 1087.) It is precisely because the Court of Appeal failed to appreciate the fundamental differences between time rounding practices, meal period law, and overtime law that it created time rounding as a new "exception" to longstanding, bright-line compliance with meal period laws.

Rounding was originally approved as a proper time calculation

tool where the "net effect is to permit employers to *efficiently calculate* hours worked without imposing any burden on employees." (*See's Candy Shops, Inc. v. Superior Court (Silva)* (2012) 210 Cal.App.4th 889, 903 (*See's I*); emphasis added.) The decades-old federal rounding regulation adopted in *See's I*, 29 CFR 785.48, is titled "Use of Time Clocks," and was based on a concern that there would be long lines of employees waiting to punch a paper time card on a physical time clock. (*Id.*, 210 Cal.App.4th at 903.) Even if this rationale exists in today's business world to calculate the total hours worked, there is no comparable inefficiency in calculating meal periods, either in the underlying action or generally. Rather, as in this case, employees clock in and out for meal periods using a computer application that is precise to the minute. (IX AA 2324, 2368-2372.) Rounding in this case is actually more inefficient, as Defendant has to first record the precise times employees clocked in and out to start and end meal periods, and *then* take the extra step of rounding that time for recording. (IX AA 2337-2339.)

Moreover, as explained in Plaintiff's petition, and not disputed or addressed by Defendant, there is an entirely different purpose for overtime laws than meal and rest period laws—overtime laws ensure

fair compensation for hours worked, whereas meal periods protect employees from overwork and "ensur[e] the health and welfare of employees." *(Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1113; *accord Lazarin v. Superior Court (Total Western, Inc.)* (2010) 188 Cal.App.4th 1560, 1571.) Whereas rounding might make sense to calculate whether a full 8-hour day or more of work, it does not make sense in the context of 30-minute meal periods.

Defendant alternately argues that *Donohue* did not allow time rounding to create an "exception" to bright-line meal period entitlements; that no unstated exception exempts meal periods from time rounding anyway; and that there was no proof of meal period violations. As further discussed, Defendant is mistaken on all counts.

1. Because Rounding Negatively Impacts Meal Periods, the *Donohue* Appellate Court Authorizes Encroachments Into Previously Bright-Line Meal and Rest Period Entitlements

Defendant argues that Plaintiff asserts "straw man" arguments. But Plaintiff challenges *Donohue* based on its express rulings, and its resulting impact, not non-existent fears.

Contrary to Defendant's characterizations, *Donohue* did unwittingly approve delayed and shortened meal periods, authorizing employers to be able to "round" away an employee's right

to a full 30-minute meal period within the first five hours of work. No prior case had authorized time rounding in the meal or rest period context, recognizing implicitly that even de minimis encroachments would erode these important health and safety protections. (*See, e.g.*, *Troester v. Starbucks Corp.* 5 Cal.5th 829, 844-845 [noting the Supreme Court previously "implicitly rejected the argument that a de minimis intrusion into a 10-minute rest period would pass muster under the statute"]; *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 524 [declining to adopt de minimis defense in the context of late meal periods].) Multiple amicus submissions on both sides of the issue also establish that this is not an imaginary concern; rather, all parties agree that rounding of meal periods will impact the employees in this case and millions of others across the state.

Thus, the disputed question between the parties—and for this Court's review—remains as follows: whether time rounding can ever be applied in a fair or "neutral" manner to meal periods. Plaintiff re-submits that it cannot because employees have nothing to "gain" through time rounding. Rather, they consistently lose both (1) the right to a timely and complete meal period and (2) the right to a meal period statutory penalty where a proper meal period is denied.

Defendant continues to stress that, as a whole, its time rounding system was neutral as there was no under payment of *wages* and employees benefitted with overtime pay (Answer, at p. 8.) This sidesteps the issue. Rounding time punches at the start or the end of the day has no bearing on whether it is neutral in the context of an employer's separate obligation to provide compliant meal periods. Rounding time punches for meal periods was far from neutral, as Plaintiff's expert established by analyzing the impact of rounding on meal period time punches. As he demonstrated, rounding led to over 46,000 meal breaks that were either short (less than 30 minutes) or late (after the end of the fifth hour of work.) (IX AA 2404-2405, at ¶¶ 14-15.) Employees also did not receive meal period penalties for these occasions. (IX AA 2327; 2335-2336; 2351; 2353-2354.) In fact, there was no mechanism, and no right, for an employee to even request meal period penalties in these instances, as Defendant's computer system considered only rounded times, and did not flag these violations for further review. (IX AA 2327; 2335-2336; 2351; 2353-23542365-2366.)

Defendant's expert did not dispute these findings, but Defendant—like the Court of Appeal—continues to fault Plaintiff's

expert for only analyzing the impact of rounding on meal periods. Not only was that the expert's assigned task, but there is no other way to isolate the impact of time rounding on meal periods than to analyze it separately. This is not an uncommon set of facts or a matter of "cherry picking" favorable examples, as Defendant argues. Any employee whose meal periods are similarly rounded will experience the same issues. What Defendant fails to address, and the Court of Appeal failed to appreciate, is that the "gain" of an occasional meal period longer than 30 minutes on one day will never offset the "loss" of a full 30-minute break, and of a meal period penalty, on another day.

2. Defendant's Claim That It Provided Lawful Meal Periods is Belied by the Record, Including Its Chosen Employees' Testimony and Rounding System's Design

Defendant also claims that **"**there was no violation of California's meal period law" and therefore no meal period penalties are owed. (Answer, at pp. 7-8.) But the record tells a different story.

While employer's need not "police" meal breaks, they must ensure that employees are not being required to work for the required thirty minutes—or pay the extra hour of pay mandated by Labor Code section 226.7. (*Brinker*, 53 Cal.4th at 1039; *accord*

Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, 962-63 ["[E]mployers have an affirmative obligation to ensure that workers are actually relieved of all duty."]) Defendant's own time records provide key evidence that it did not provide full 30-minute meal periods, confirming over 40,000 instances where employees came back from lunch early. Plaintiff Donohue also repeatedly testified in her deposition that "our lunches were really short because we had to be on the phones," that "literally" no one took breaks because of the "top down . . . pressure" to get back on the phones to recruit candidates. (X AA 2619; *id.* at 2618, 2623.) She also swore in her declaration that she was "routinely discouraged from taking meal and rest breaks" and "was, in fact, called back to my desk—over the intercom—on several occasions when attempting to take meal and rest breaks." (X AA 2652; *id.* at 2626-2627.)

Defendant itself notes that 30 out of 39 of its Nurse Recruiters—all current employees Defendant picked to interview—reported "that they 'always' or 'usually' take uninterrupted lunches of at least 30 minutes on workdays at AMN." (Answer, at p. 7.) But this means that even if accepted as true 9 employees (approximately 22.5%) of this self-selected sample did not

get uninterrupted lunches of 30 minutes.

A key design flaw in Defendant's rounding system also masked the problem, making it appear as if there was no policy of delaying or shortening meal periods. Defendant's "prompt" system flags time records when employees miss or delay meal periods so employee can comment why and ask for a meal period penalty. But, because the system ignores actual reported times and considers only rounded times, no automatic "prompt" ever issued to employees on the 46,000 plus "short" and "late" meal periods identified by Plaintiff. (IX AA 2327; 2353-2354; 2365-2366.)

Rounding thus systematically shortened and delayed meal periods. When that occurred employees never waived their right to a compliant meal period nor waived their right to a statutory meal period penalty.

B. Neither *Brinker* Itself, Nor Courts Applying Its Concurrence, Express the Limitation on Its Scope That Defendant Claims is a Foregone Conclusion

Because all California employers must keep accurate time records of employee meal periods (Cal. Code Regs. tit. 8, § 11050(7)(A)(3)), there can be no dispute that applying the *Brinker* concurrence's rebuttable presumption properly is an important issue

of law with far-reaching consequences. The problem is that the presumption has not purposefully been applied only "in the context of class certification" (Answer, at p. 4), and that no basis or rationale has been offered by cases professing to limit it as such (*Id.*, at p. 12).

There is no basis to conclude that time records are adequate to give rise to rebuttable presumption of potential violations at class certification, but become inadequate with the passage of time, unable to give rise to the same presumption at summary judgment hearings or trial. The original *Brinker* concurrence contemplated the time record presumption as a burden-shifting means to establish potential *violations* of meal period laws without any limitation:

> If an employer's records show no meal period for a given shift over five hours, "a rebuttable presumption arises that the employee *was not relieved of duty and no meal period was provided*. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement.

(*Brinker*, 53 Cal.4th at 1053, emphasis added.) Other opinions addressing the presumption on appeal happened to involve class certification. But they also contemplate the use of time records as a means to either establish a rebuttable presumption of violations, and do not limit the presumption in any way to only the class certification

stage. (*See, e.g., Safeway Inc. v. Superior Court (Esparza)* (2015) 238 Cal.App.4th 1138, 1160 ["a significant portion of the missed, shortened, and delayed meal breaks *reflected meal break violations* under section 226.7;" emphasis added].) Another Court of Appeal has found the time record presumption sufficient to empower an award of *damages*, which obviously occurs well beyond the class certification stage:

> If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. [internal citations omitted.] *Under such circumstances, a court may award damages*[.]

(*ABM Indus. Overtime Cases* (2017) 19 Cal.App.5th 277, 311.) Yet another court has recognized that, even though summary judgment presents a "different procedural context" than class certification, the employer rebutted any presumption that might exist through time records that its employees were working during the grace period through admissible evidence to the contrary. (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 254.)

In contrast to this backdrop, there is one published decision (besides *Donohue*) rejecting the rebuttable presumption as useful beyond the class certification stage. (*See Serrano v. Aerotek, Inc.*

(2018) 21 Cal. App. 5th 773, 781 [time records did not create presumption of violations at summary judgment because employer had no duty to ensure employees actually took meal breaks].) But even that decision rejected the presumption because of how the plaintiff offered it—the employer's "failure to review time records and investigate whether meal period violations were occurring was a breach of its own duty to provide meal period" (*ibid.*)—and not because of any inherent limitation in the rebuttable presumption being useful at summary judgment. Moreover, the same Court of Appeal as *Donohue* very recently affirmed the use of testimony "coupled with" time record evidence to establish meal period liability on a representative basis at trial. (*Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 523-524.) Because there was plenty of testimony about Defendant's failure to provide timely breaks in the underlying action (X AA 2618, 2619, 2626, 2627, 2652, 2623), the categorical rejection of the time record presumption at summary judgment in *Donohue*, even with other evidence, directly conflicts with *Carrington*.

In addition to this indisputable conflict, neither Defendant nor the cases applying the rebuttable time record presumption offer a

rational basis why it should only apply at class certification, and not at summary judgment or at trial. Just because class certification is procedural and the latter stages on the merits should not matter because the presumption is *rebuttable* at each stage. Contrary to Defendant's arguments, Plaintiff does not suggest that deficient time records *automatically* create liability. Rather, consistent with the presumption's straightforward purpose—a means for plaintiffs, who otherwise lack proof, to show late or missing breaks according to an employer's own records—it should be as useful and no less controvertible at any stage. But courts disagree about the scope and application of the presumption, supporting the need for review.

C. Plaintiff Did Not Waive, But Preserved and Raised, Whether Time Rounding Led to Meal Period Violations, Which the Trial Court and Court of Appeal in *Donohue* Expressly Addressed

Defendant is wrong that Plaintiff waived her argument regarding liability for meal period violations or that the trial court found such waiver.

Plaintiff alleged in the operative, second-amended complaint that Defendant failed to provide compliant meal periods that were at least 30 minutes long and within the first five hours. (I AA 13; 28.) Defendant tried to *defend* this meal period claim based, in part, on

time rounding. Whether rounding failed to cure, but instead exacerbated, short or late meal periods is not something Plaintiff could anticipate (or be required) to plead. Even so, Plaintiff alleged throughout the complaint that an "illegal rounding policy" led to numerous labor code violations. (I AA 10, 14, 27-28.)

Moreover, the parties extensively litigated whether rounding caused late and short meal periods before the trial court. The class certification order thus confirmed that defenses such as "make-up time" and "Rounding" policies remained at issue and were questions appropriately resolved on a class-wide basis. (IV AA 1018.) In its summary judgment order, the trial court noted that Defendant sought adjudication on the certified meal period claim by arguing, among other things, that "Plaintiffs' theory that the rounding practice resulted in meal period violations is not pled in the operative Complaint." (XIII AA 3472.) But instead of finding any waiver, the trial court addressed the issue on the merits, stating that even if "no case has ever applied rounding to 'meal breaks.' . . . the rationale behind allowing rounding for work time would be the same for meal break time." (*Ibid.*) Plaintiff then raised this question extensively on appeal, which the Court of Appeal squarely (if incorrectly) answered,

over Defendant's unsuccessful objection that Plaintiff waived the meal period claim. (Resp. Op. Br., at pp. 16-17; App. Reply Br., at pp. 2-4 ; *Donohue*, 29 Cal.App.5th at pp. 1087-1091.)

III.
CONCLUSION

Donohue abrogates settled precedent disallowing even de minimis encroachments to the health and safety protections built into meal period laws. As amicus agree, *Donohue* thus has the potential to erode previously bright-line meal period protections. *Donohue* also adds to the confusion of when and how the *Brinker* concurrence's rebuttable time record presumption should apply, consistent with its proposed purpose and intent. These important issues have percolated sufficiently to warrant review, absent which they will create dissonance in these areas of employment law.

Dated: February 21, 2019 SULLIVAN LAW GROUP, APC

By: /s/ Eric K. Yaeckel
William B. Sullivan, Esq.
Eric K. Yaeckel, Esq.

NIDDRIE ADDAMS FULLER SINGH LLP

By: /s/ Rupa G. Singh
David A. Niddrie, Esq.
Rupa G. Singh, Esq.

Attorneys for Plaintiff-Appellant and Petitioner KENNEDY DONOHUE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Court 8.504(d)(1), we certify that the Microsoft Word computer program used to generate the Plaintiff-Appellant and Petitioner Kennedy Donohue's Reply in Support of the Petition for Review is 3,377 words, including footnotes but excluding the documents and materials allowed to be excluded under Rule 8.504(d)(3).

Dated: February 21, 2019 SULLIVAN LAW GROUP, APC

By: /s/ Eric K. Yaeckel
William B. Sullivan, Esq.
Eric K. Yaeckel, Esq.

NIDDRIE ADDAMS FULLER SINGH LLP

By: /s/ Rupa G. Singh
David A. Niddrie, Esq.
Rupa G. Singh, Esq.

Attorneys for Plaintiff-Appellant and Petitioner KENNEDY DONOHUE

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is Sullivan Law Group, APC, 2330 3rd Ave., San Diego, California 92101.

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/s/ Eric K. Yaeckel
Eric Yaeckel

SERVICE LIST

Mary Dollarhide, Esq. DLA Piper LLP 4365 Executive Drive, Suite 1100 San Diego, CA 92121	Attorneys for Defendant and Respondent (*electronic service via True Filing*)
Betsey Boutelle, Esq. DLA Piper LLP 1000 Louisiana Street, Suite 2800 Houston, TX 77002	Attorneys for Defendant and Respondent (*electronic service via True Filing*)
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, CA 94102	(*electronic service via True Filing*) (*additional paper copy via overnight USPS*)
Clerk of the Court Court of Appeal, 4th App. Dist., Div. 1 750 B Street, Suite 300 San Diego, California 92101	(*electronic service via True Filing*)
Clerk of the Court San Diego Superior Court 330 West Broadway, Room 225 San Diego, CA 92101	(*via USPS*)
Employer Group George S. Howard, Jr., Esq. gshoward@jonesday.com	Amicus Party (*electronic service via True Filing*)
CELC Paul Grossman, Esq. paulgrossman@paulhastings.com	Amicus Party (*electronic service via True Filing*)
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	Mandatory Service per Bus. & Prof. Code §17200 et seq. (*via USPS*)
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **DONOHUE v. AMN SERVICES**
Case Number: **S253677**
Lower Court Case Number: **D071865**

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Betsey Boutelle DLA Piper LLP (US) 299754	betsey.boutelle@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
Eric Yaeckel Sullivan Law Group, APC 274608	yaeckel@sullivanlawgroupapc.com	e-Service	2/21/2019 5:16:17 PM
Mary Dollarhide DLA Piper LLP 00138441	mary.dollarhide@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
Mary Dollarhide DLA Piper LLP (US) 138441	mary.dollarhide@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
Mary Dollarhide DLA Piper LLP (US) 138441	mary.dollarhide@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
Mary Dollarhide DLA Piper LLP (US) 138441	mary.dollarhide@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
Paul Grossman Paul Hastings LLP 35959	paulgrossman@paulhastings.com	e-Service	2/21/2019 5:16:17 PM
Rupa Singh Niddrie Addams Fuller LLP	rsingh@appealfirm.com	e-Service	2/21/2019 5:16:17 PM

214542			
Susan Dovi DLSE Legal 145543	sdovi@dir.ca.gov	e-Service	2/21/2019 5:16:17 PM
Taylor Wemmer DLA Piper LLP (US) 292539	taylor.wemmer@dlapiper.com	e-Service	2/21/2019 5:16:17 PM
George Howard, Jr. Additional Service Recipients	gshoward@jonesday.com	e-Service	2/21/2019 5:16:17 PM

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2/21/2019

Date

/s/Eric Yaeckel

Signature

Yaeckel, Eric (274608)

Last Name, First Name (PNum)

Sullivan Law Group, APC

Law Firm