Case No. S234969

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DOUGLAS TROESTER, ET AL.,

Plaintiffs and Appellants,

v.

STARBUCKS CORPORATION.,

Defendant and Respondent.

On a certified question from the United States Court of Appeals for the Ninth Circuit
Case No. 14-55530

On appeal from the United States District Court, Central District of California
Hon. Gary Allen Feess, Presiding
District Court Case No. 2:12-cv-07677-GAF-PJW

APPLICATION FOR LEAVE TO FILE AND PROPOSED BRIEF OF AMICI CURIAE WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW, BET TZEDEK, CENTRO LEGAL DE LA RAZA, ET AL., IN SUPPORT OF PLAINTIFFS AND APPELLANTS TROESTER, ET AL.

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I. INTRODUCTION

Pursuant to California Rule of Court 8.520(f), non-profit organizations the Women's Employment Rights Clinic of Golden Gate University School of Law, Bet Tzedek, Centro Legal de la Raza, National Employment Law Project, and Legal Aid At Work, hereby request permission of this Court to file the attached brief as *amici curiae* in support of Plaintiffs and Appellants, Douglas Troester, et al. This application is timely made within 30 days of the filing of the last party brief. The proposed brief sets forth the proper standard for determining when weaker federal law may be imported into California law, explains the significant differences between the federal and state definition of "hours worked" and the plain language of the wage orders, which makes clear that California workers must be paid for all hours worked, and highlights how importation of the federal de minimis rule would significantly diminish California's higher statutory protections.

II. STATEMENT OF INTEREST

Amici curiae annually assist thousands of low-wage workers with employment-related legal problems, including hundreds of claimants with claims for unpaid wages. *Amici* have experience in representing workers on unpaid wages claims in court and administrative hearings. Many of

these claims focus on workers not being properly or timely paid wages for all hours worked, as required by California labor law.

The issues presented in this case have a direct impact on the low-income workers for whom *amici curiae* provide services. In addition, *amici curiae* are interested in preserving the higher protections afforded to California workers. Because wage and hour violations in low-wage industries are pervasive, it is imperative that California wage laws that provide greater protections are not eliminated. Importing weaker federal law into California wage orders will exacerbate the already dismal working conditions that these workers face.

A brief description of the work and mission of *amici curiae*, explaining their interest in the case, is as follows:

A. Women's Employment Rights Clinic of Golden Gate University School of Law

The Women's Employment Rights Clinic (WERC) is a clinical program of the Golden Gate University School of Law focused on the employment issues of low-wage workers. WERC advises, counsels and represents clients in a variety of employment-related matters, including individual and systemic claims for wage and hour violations. WERC regularly litigates the issue of payment for "all hours worked." WERC submitted an *amicus* brief and argued before the California Supreme Court on behalf of low-

wage worker advocates in *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833.

B. Bet Tzedek

Founded in 1974, Bet Tzedek is non-profit law firm that provides free legal services to residents of Los Angeles County. Through its Employment Rights Project, Bet Tzedek represents a variety of low-wage workers, including those working in the garment, restaurant, warehouse, construction, car wash, and janitorial industries, who have been illegally denied wages that they have earned.

C. Centro Legal de la Raza

Centro Legal de la Raza (Centro Legal) was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually with support ranging from advice and referrals to full representation in court, in the areas of housing law, employment law, consumer protection, and immigration law. Centro Legal's employment law practice focuses on assisting low-wage workers who face wage theft in the workplace. Centro Legal's clients are often victims of wage theft including being required to work without compensation before clocking in and after clocking out. The question of whether an employer can use the federal de minimus rule in determining employee compensation is one of major concern for all nonexempt

employees in California, particularly for low-income employees. Accordingly, the outcome of this matter is of considerable interest to Centro Legal and to the hundreds of low-wage workers it assists annually.

D. National Employment Law Project

The National Employment Law Project ("NELP") is a non-profit organization with almost 40 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, especially the most vulnerable ones, receive the full protection of labor and employment laws; and that employers are not rewarded by skirting those most basic rights. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers to minimum wage and overtime protection as well as adequate working conditions. NELP currently is providing technical support and assistance to wage and hour advocates from the private bar, public interest bar, labor unions and community worker organizations in California. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work has given us the opportunity to learn about job conditions around the country and to appreciate the critical need for enforcement of wage and hour laws through private litigation due to the lack of public enforcement of these laws. NELP has been an amicus in most of the recent wage and hour cases before the California Supreme court.

E. Legal Aid At Work (formerly Legal Aid Society Employment Law Center)

Legal Aid At Work (former Legal Aid Society – Employment Law Center) (LAAW), founded in 1916, is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, LAAW has addressed the employment issues of its low-wage worker clients through a combination of direct services, community education, impact litigation, administrative representation, and policy advocacy. Each year, LAAW assists thousands of workers – in a range of low-wage industries– many of whom have been the victims of wage theft. LAAW has also filed amicus curiae briefs on issues pertaining to low-income workers, including cases before this Court. See e.g., *Paratransit, Inc. v. Unemployment Ins. Appeals Bd.* (2014) 59 Cal.4th 551; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094.

III. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

The proposed brief of *amici curiae* presents arguments that materially add to and complement the brief on the merits of Plaintiffs and Appellants, Douglas Troester, et al., without repeating those arguments. *Amici curiae* have significant experience representing low-wage workers on claims for unpaid wages in court and in the administrative process before the Labor Commissioner. The brief will provide critical assistance to the Court in understanding (1) the significant differences between the state and

federal definitions of "hours worked"; (2) the plain language of the Industrial Welfare Commission ("IWC") wage orders, which require that workers in California be paid for all hours worked; (3) how the importation of the federal de minimis rule violates this Court's clear guidance in *Mendiola*; and (4) the impact that the federal de minimis rule would have on California's low-wage workers.

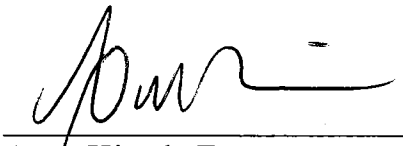
IV. CONCLUSION

All of the *amici curiae* organizations represent and assist scores of low-income clients who are significantly affected by the issues in this case. Amici curiae's experience and expertise will assist the Court in understanding the full reach of the application of the de minimis rule on often-overlooked sectors of California's economy.

For all of the foregoing reasons, *amici curiae* respectfully request that the Court grant *amici curiae's* application and accept the enclosed brief for filing and consideration.

Dated: April 12, 2017

Respectfully Submitted,



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Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH CRC 8.520(f)(4)

Amici curiae hereby certify under the provisions of California Rule of Court 8.520(f)(4)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Amici curiae further certify under California Rule of Court 8.520(f)(4)(B) that no person or entity other than amici curiae and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Executed on April 12, 2017, at San Francisco, California.

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BRIEF

INTRODUCTION

This Court has repeatedly recognized that California, in most instances, protects the rights of workers to a greater extent than federal law. (See e.g. *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 797; *Martinez v. Combs* (2010) 49 Cal. 4th 35, 67; *Mendiola v. CPS Security Solutions* (2015) 60 Cal. 4th 833, 842-843; see also *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 4th 314, 324; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49.) California's fundamental public policy favors full and prompt payment of wages for all hours worked. (*Smith v. Superior Court* (2006) 39 Cal. 4th 77, 82; accord *Pineda v. Bank of America, N.A.* (2010) 50 Cal. 4th 1389, 1400.) This policy recognizes that the average worker depends on her wages for the necessities of life for herself and her family. (See e.g. *In re Trombley*, (1948) 31 Cal. 2d 801, 809-10; see also *Kerr's Catering Serv. v. Dep't of Indus. Rel.*, (1962) 57 Cal. 2d 319, 330 (public policy has consistently acknowledged that laws requiring the full and prompt payment of an employee's wages were based in large part "on the welfare of the wage earner").)

California's Industrial Welfare Commission ("IWC") and the Legislature has made explicit that an employer must pay its employees at least the minimum wage for all hours worked. (See e.g. Cal. Code Regs.,

tit. 8, § 11050, subd. (4)(B); *Gonzalez*, 215 Cal. App. 4th at 40-41; *Armenta*, 135 Cal. App. 4th 314 at 324.) The definition of hours worked under California law is significantly more expansive than the federal definition, and includes all the time the employee is subject to the control of the employer. (*Morillion v. Royal Packing Co* (2002) 22 Cal.4th 575, 584.) This Court has recognized the significant differences between the state and federal definitions of hours worked. (*Id.* at 592.) When California seeks to apply the federal definition of "hours worked," it does so explicitly. (See e.g. Cal. Code Regs., tit. 8 section 11040 subd. (2)(K), (applying federal definition of hours worked to healthcare industry).) Absent such express language, courts may not infer that the IWC intended to apply less protective federal law. (*Mendiola*, 60 Cal. 4th at 842-843.) Thus, under California law, employers must pay for all hours worked, with limited exceptions not applicable in this case.

A rule that would allow employers to avoid paying employees for up to ten minutes of work per day would be devastating to California's 4.7 million low-income workers who cannot afford to forego a single dollar of their earnings. (Berndthart et. al., *Low-Wage Work in California 2014 Chartbook* (2014) <http://laborcenter.berkeley.edu/lowwageca/> [as of April 9, 2017].) Forty-two percent of low-wage workers in California are the sole earners in their families; sixty-one percent make up the majority of

their families' earnings. (*Ibid.*) Even when combining the wages of all workers in the family, the median family income of California's low-wage workers was approximately $29,000 in 2013 – half of the state's overall median. (*Ibid.*) Low-wage workers in California are more likely to live below the federal poverty line, have a higher than recommended rent burden, and are more likely to rely on public assistance, such as Medi-cal and food stamps. (*Ibid.*) California's low-wage workforce is nearly three-quarters nonwhite and concentrated in two industries — retail trade, and restaurants and other food services. (*Ibid.*) Many of these industries have been found to have rampant workplace violations. (See e.g. Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers* (2010) < http://www.labor.ucla.edu/publication/wage-theft-and-workplace-violations-in-los-angeles/ > [as of April 9, 2017] at p. 53 (estimating that 654,914 workers in L.A. county alone are deprived of $26.2 million of wages every week because of employment and labor law violations).)

Under the de minimis rule employers would be permitted to shave minutes per day and, in the aggregate hundreds of hours per year, from the earnings of California's low-wage workers. Applying the de minimis rule to California wage claims would allow employers to avoid compensating employees for all hours worked, including time the employee was under its

control, in clear violation of California labor law. Such a rule incentivizes employers to adopt policies and practices that deprive employees of wages for time spent completing routine tasks authorized and mandated by the employer. This would put California's low-wage workers at further risk for wage theft. Respondent's practice whereby it mandated employees to complete closing tasks after clocking out is such an example and demonstrates how this rule is easily manipulated to exploit workers under the guise of administrative record-keeping difficulty. The California Legislature and courts have clearly forbidden such practices.

Respondent urges this Court to disregard its own explicit prohibition against incorporating federal law by implication and well-established principals of statutory interpretation to apply the federal de minimis rule to California wage claims. Neither supported by plain language of the wage orders nor IWC regulatory history, the de minimis rule substantially erodes protections afforded to employees in California to be paid for all hours that they are under the control of the employer. In *Mendiola*, this Court clarified that in the absence of express language from the IWC, weaker federal law cannot be incorporated into state law. (60 Cal. 4th at 842-43.) Applying the same reasoning as it did in that case, this Court should reject Respondent's unsupported arguments to import the federal de minimis rule into California statutory wage protections.

ARGUMENT

I. The Plain Language of the Wage Orders and the Legislative Framework and History Make Clear That California Workers Must Be Paid for All Hours Worked.

In refusing to apply less protective federal standards, California courts have repeatedly recognized that in many instances the State has expressed a clear legislative intent to protect the rights of workers to a greater extent than federal law. (See e.g. *Ramirez*, 20 Cal. 4th at 797; *Martinez*, 49 Cal. 4th at 67; *Mendiola*, 60 Cal. 4th at 843; *Armenta*, 135 Cal. App. 4th at 324; *Gonzalez*, 215 Cal.App.4th at 49.) A review of California's wage orders and labor code provisions proves as much. (Compare Lab. Code §510 (requiring daily and weekly overtime) with 29 U.S.C. §207 (requiring only weekly overtime); Compare Labor Code § 351 (forbidding the use of a tip credit to meet a minimum wage obligation with 29 U.S.C. §203, subd. (m) (allowing tips to be credited towards an employee's minimum wages); Compare Cal. Dept. of Industrial Relations, History of Cal. Minimum Wage at https://www.dir.ca.gov/iwc/MinimumWageHistory.htm [as of April 9, 2017] with U.S. Dept. of Labor, History of Fed. Minimum Wage Rates Under the Fair Labor Standards Act 1938-2009 (showing higher state minimum wage rates).)

This Court has cautioned against "confounding federal and state labor law" and explained "that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." (*Martinez*, 49 Cal. 4th at 68,citing *Ramirez*, 20 Cal.4th at 798.) Courts must give the IWC's wage orders independent effect in order to protect the commission's delegated authority to enforce the state's wage laws and, as appropriate, to provide greater protection to workers than federal law affords. (*Martinez*, 49 Cal. 4th at 68.)

In this case, the plain language of the wage orders establish the Legislature's clear intent that workers in California be paid for all hours worked absent limited exceptions not applicable here.

A. California's definition of hours worked is more expansive than the federal definition and includes all the time an employee is subject to the control of an employer.

Respondent wholly disregards the significant differences between the federal and state definitions of hours worked to argue that use of a single identical word ("all") in the wage orders and the Fair Labor Standards Act (FLSA) proves there is no conflict between state and federal law and urges application of the de minimis rule to state law. (Respondent Brief at pg. 20-21, 23.)

As the statutory language and this Court's previous decisions make abundantly clear, the IWC definition of "hours worked" is substantially different from the federal definition. (*Morillion*, 22 Cal.4th at 592.) All of the IWC wage orders define "hours worked" as follows:

> The time during which an employee is subject to the control of an employer, and includes **all the time** the employee is suffered or permitted to work, whether or not required to do so.

(See Cal. Code Regs., tit. 8, §11040, subd. (2)(K); *Morillion*, 22 Cal.4th at 579 [emphasis added].)

While the FLSA does not explicitly define "hours worked," it does define "employ" to mean "suffer or permit to work." (29 U.S.C. §203(g); *Morillion*, 22 Cal.4th at 588-589.) The federal regulations define "hours worked" as including:

> (a) all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and
>
> (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so.

(29 C.F.R. §778.223; *Morillion*, 22 Cal.4th at 589.)

Based on the legislative history, this Court has concluded that the IWC definition of "hours worked" substantially differs from the federal definition. (*Morillion*, 22 Cal.4th at 592.) Specifically, in *Morillion*, this Court noted that the IWC adopted its current definition of hours worked in

response to Congress' enactment of the Portal-to-Portal Act, which eliminated from compensation certain preliminary and postliminary activities performed prior or subsequent to the workday. (*Id.* at 591-592; 29 U.S.C. §§251-262; 29 C.F.R. §785.9.)

The IWC's 1947 amendments added the "control" phrase and qualified it to include "suffer or permit." This Court unequivocally held that the 1947 amendments expanded the "hours worked" definition to go beyond the federal law. (*Morillion*, 22 Cal.4th at 592.) The "control" language acts as an independent factor from "suffer or permit" and thus "[u]nder California law, it is only necessary that the worker be subject to the 'control of the employer' in order to be entitled to compensation." (*Id.* at 584 [internal citations omitted].) This Court also explained that the words "suffer or permit" means with knowledge of the employer. (*Id.* at 582.) Thus, under California's definition of hours worked, off the clock work is considered compensable if the employer exercised control over the employee or if the employer knew or should have known that the employee was working. When the Legislature intends for the more limited federal definition of hours worked to apply, it explicitly says so. (See e.g. Cal. Code Regs., tit. 8, § 11040, subd. (2)(K), Cal. Code Regs., tit. 8, § 11050, subd. (2)(K).) Presumably, if the state and federal definitions were

analogous, there would be no need to explicitly refer to the federal definition.

In light of the distinct differences between the federal and state definitions of hours worked, it is inappropriate to import the federal de minimis rule, which would significantly diminish California's more expansive definition. The de minimis rule would permit employers to exclude time that the California Legislature has deemed falls under this definition, i.e. time the employee is subject to the control of the employer; as is the case here. There is no evidence that the Legislature intended such a result. To the contrary, the Legislature has been clear that such time squarely falls under the definition of hours worked and is, thus, compensable. The operative question in determining compensability is whether or not the employee was under the control of the employer. (See *Morillion*, 22 Cal.4th at 584.)

B. The plain statutory language is clear that California requires payment of wages for all hours worked with limited exceptions not applicable here.

The language in California's wage orders and statutes is unambiguous that employees must be compensated for all time that qualifies as hours worked under California's more expansive definition.

(See e.g. Cal. Code Regs., tit. 8, § 11050, subd. (4)(B) (employees must be paid at least the minimum wage for all hours worked).)[1]

Section 3 titled "Hours and Days of Work" of the wage orders provides that an employer must pay an employee at least the minimum wage for **all hours** worked and that an employee must be compensated at one and one-half (11/2) times his regular rate of pay for **all hours** worked over eight and including twelve (12) hours in any workday. (See e.g. Cal. Code Regs., tit. 8, § 11050, subd. (3)(A)(1)(a-c) (emphasis added). When the IWC intends for to carve out a period from "all hours", it explicitly says so. (See e.g. Cal. Code Regs. tit. 8, § 11050 subd. (3)(J) (permitting the exclusion of uninterrupted sleep time from compensable hours as applied to ambulance drivers and attendants working in the public housing-keeping industry).)

California statues similarly provide that an employee must be compensated for any hours during which the employee is under the control of the employer. (See e.g. Labor Code § 510 (an employee must be compensated for "any work in excess of eight hours" in one workday and "any work" in excess of forty hours in a workweek).)

---

[1] All other wage orders include identical language. (See e.g. Cal. Code Regs., tit. 8, § 11010, subd. (4)(B).)

Courts presume when the language is unambiguous that the Legislature meant what it said and the plain meaning governs. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, 1103.) Words must be given their usual and ordinary meanings in context. (*Ibid*; Martinez, 49 Cal. 4th at 51.) In interpreting the wage orders, courts have applied the usual rules of statutory construction. (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027.) The language in the wage orders provides the best guidance for what the IWC intended. (*Murphy*, 40 Cal. 4th at 1103.) "If the statutory language is clear and unambiguous our inquiry ends." (*Ibid.*)

Here, the plain language of the wages orders and statutes is clear. The dictionary defines "all" as "the whole, entire, total amount, quantity, or extent of," "every member or part of," and "the whole number or sum of." (Merriam-Webster's Collegiate Dict. (11th Edition) <https://www.merriam-webster.com/dictionary/all> [as of April 9, 2017].) Absent any language indicating an exception to the contrary, the IWC's use of the word "all" does not permit the exclusion of any time worked from compensable hours. The Legislature's use of the word any in California statues further supports such an interpretation.

Relying on the plain language of the wage orders and the policies underlying state labor law, California courts have recognized on multiple

occasions that workers must be paid for all hours worked and have refused to import weaker federal standards. (*Mendiola*, 60 Cal. 4th at 848 (declined to import FLSA rule excluding sleep time from compensable hours into wage orders without express statutory language); *Morillion*, 22 Cal. 4th at 595 (travel time compensable when farm workers under control of employer, contrary to FLSA's exclusion of travel time from compensability); *Bono Enterprises Inc. v. Bradshaw* (1995) 32 Cal. App.4th 968, 975, disapproved on other grounds in *Tidewater Marine Western Inc.* (1996) 14 Cal.4th 557, 573 (meal breaks compensable under California law if employee unable to leave the premises unlike FLSA where employee can be restricted to take off-duty, unpaid meal breaks on employer premises); *Armenta*, 135 Cal. App. 4th at 324 (federal averaging methodology violates California's minimum wages laws); *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 49 (piece rate formula, permissible under federal law, violates California's minimum wage requirements.).) As these decisions demonstrate, a federal rule that carves out certain compensable time as unpaid is incongruent with California's clear public policy that workers be paid for all hours worked.

Ignoring the plain language of the state statutes and the body of case law interpreting it, Respondent argues that because at times the FLSA uses the word "all" that it is appropriate to import wholesale the federal de

minimis rule. (Respondent Brief at p. 20-21, 23.) However, the use of a single identical word does not indicate the IWC's intent to adopt a federal exemption or definition. Unlike California law, the FLSA does not include an absolute requirement that a worker be paid for all hours worked and makes several exceptions to "all" hours worked as non-compensable. (See e.g. 29 U.S.C. § 251 et seq. (eliminating commute time and preliminary and postliminary activities from compensable time).) Courts have recognized these exceptions signify a departure from California's statutory protections. (See e.g. *Morillion*, 22 Cal. 4th at 590.)

Importing the federal de minimis rule would permit an employer to avoid compensating an employee for mandated off the clock work that would otherwise be considered compensable under California's definition of hours worked. Despite Respondent's assertions to the contrary, California does not allow this otherwise compensable time to go unpaid. (Respondent Brief at 24 (arguing that the de minimis rule is concerned with whether or not short periods of compensable time must be paid).)

II. This Court Has Forbidden the Importation of Less Protective Federal Law Absent Express Statutory Language.

California law includes no exception similar to the federal de minimis rule; there is no evidence whatsoever that the Legislature intended to carve out any time an employee spends performing work from

compensable hours as permitted under the rule. This Court has cautioned against judicial policymaking where the Legislature is silent. (*Morillion*, 22 Cal.4th at 585.) "[W]hatever may be thought of the wisdom, expediency, or policy of the act, ...we have no power to rewrite the statute to make it conform to a presumed intention that is not expressed." (*Ibid.* [internal citations omitted]; see *Martinez*, 49 Cal.4th at 61.) Absent express statutory language, a court may not presume that the IWC intended to apply less protective federal law. (*Mendiola*, 60 Cal. 4th at 846.)

A. There is no express language indicating the IWC's intent to adopt the federal de minimis rule.

The federal de minimis doctrine is crafted by judicial decision in *Anderson v. Mt. Clemens*(1946) 328 U.S. 680. In *Anderson*, the court held that an employer need not compensate an employee for otherwise compensable time if such time was "insubstantial" or "insignificant" in light of the burden the employer would face in recording such time. (*Id.* at 692-693 (noting that such time must be "computed in light of the realities of the industrial world").) The court held that:

> " ... [when the time worked] concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities or working conditions or by the policy of the Fair Labor Standards Act."

(*Id.* at 692.)

The de minimis rule was then codified as part of the FLSA regulations:

> "In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded."

(29 CFR 785.47.)

Federal courts apply a three-factor test developed by the Ninth Circuit in *Lindow v. United States* to determine if time should be considered as de minimis, which examines: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work. (*Lindow*, (9th Cir. 1984) 738 F.2d 1057, 1062-64.) While federal courts have categorized these periods of time to be "trifles" and "split second absurdities", they have simultaneously interpreted the de minimis rule to allow up to ten minutes a day of regularly scheduled work to be non-compensable. (*Id.* at 1062-63; see e.g. *Farris v. County of Riverside* (C.D. Cal. 2009) 667 F. Supp. 2d 1151, 1165-66 (partially granting a motion for summary judgment on the basis that activities that took nine minutes and six minutes were de minimis as a "matter of law" and noting that ten minutes is the "standard threshold for determining if something is de minimis").)

Thus, the de minimis rule, as applied by federal courts, permits an employer to avoid compensating an employee for hundreds of hours of work in the aggregate. For a low-wage worker these are not merely "trifles," but potentially hundreds of dollars of earned wages.

California law includes no exemption similar to the de minimis rule in its wage and hour laws. There is no reference to the federal de minimis rule in California's wage orders or statutes. Further, neither California's Legislature nor the IWC has identified policy concerns similar to those addressed in the FLSA. Rather the de minimis rule, which is focused on the potential burden faced by the employer due to obsolete concerns regarding the administrative difficulty of recording time, is inapposite to California's policy and practice of ensuring that workers be paid for all hours worked. (See Section I (B) *supra.*)

Indeed, California already employs its own limiting principle to wage and hour cases consistent with this policy and practice: that the employer is liable if it knew or should have known that an employee was performing work or if it exercised control over the employee. (*Morillion*, 22 Cal. 4th at 585.) Thus, unlike the obsolete rationale of the de minimis test, California law ensures that scrupulous employers are protected while those employers that mandate work and then attempt to avoid paying for such work, as in this case, are properly penalized.

B. This Court has repeatedly prohibited the importation of federal wage law by implication.

Respondents ask this Court to do what it has strictly forbidden: import a less protective federal standard absent express language. Respondent argues that if a wage order is silent it is presumed to incorporate federal law. (Respondent Brief at pg. 24.) In fact, in multiple decisions this Court has held exactly the opposite and unequivocally rejected incorporating weaker federal standards by implication. (*Martinez*, 49 Cal.4th at 68; *Morillion*, 22 Cal.4th at 592-593; *Ramirez*, 20 Cal. 4th at 798; *Mendiola*, 60 Cal. 4th at 848.) This Court has repeatedly admonished against the wholesale importing of federal law where the language and intent of the two differ substantially:

> "In the absence of statutory language or legislative history to the contrary, we have no reason to presume that the Legislature, in delegating broad authority to the IWC, obliged the agency to follow in each particular a federal agency's interpretation of a common term."

(*Ramirez*, 20 Cal. 4th 785, 798; see also *Martinez*, 49 Cal.4th at 68.)

In *Mendiola*, this Court clarified that the IWC intends to "import federal law only in those circumstances where it made specific reference." (60 Cal. 4th at 843.) There, this Court refused to import a federal law permitting the exclusion of sleep time from compensable hours because the wage order at issue contained no express exemption similar to the federal

sleep rule. (*Id.* at 843; see also *Morillion*, 22 Cal.4th at 590.) This Court found that the absence of such specific language "seriously undermine[d] the notion that the IWC intended to incorporate [a federal exception] sotto voce" and rejected eliminating substantial protections afforded to California's workers absent any evidence of the IWC's intent to do so. (*Mendiola*, 60 Cal. 4th at 847.)

C. The IWC is explicit when it adopts less-protective federal standards and knows how to do so.

As the Court recognized in *Mendiola*, the IWC knows how to explicitly incorporate federal law and regulations when it wishes to do so. (*Id.* at 843.) When the IWC intends to apply the federal law, it does so explicitly by incorporating the federal law into its wage orders. (*Id.* at 843; *Martinez*, 49 Cal.4th at 67; *Morillion*, 22 Cal.4th at 592.) When the IWC intends for a provision to apply to all wage orders it incorporates an identical provision referencing federal law across all wage orders. (See *Martinez*, 49 Cal. 4th at 67 (exemptions for administrative, executive and professional employees similar in all wage orders).)

The IWC is not ambiguous about its intent to rely on the federal law, and does so by clearly referencing the FLSA. (*Id.* at 67; *Mendiola*, 60 Cal. 4th at 843.) For instance, the IWC wage orders expressly incorporate specific federal regulations to define executive, administrative and

professional employees. (*Martinez*, 49 Cal. 4th at 67.) Additionally, the IWC has explicitly adopted the more limited federal definition of "hours worked" for employees in the healthcare industry covered by Wage Order 4 or Wage Order 5. (Cal. Code Regs., tit. 8, § 11040, subd. (2)(K); Cal. Code Regs., tit. 8, § 11050, subd. (2)(K).) In adopting the federal definition, the IWC made clear that its intent was to create uniformity with federal law in the healthcare industry and that the federal definition did not apply to all wage orders. (Statement as to the Basis, Amendments to Sections 2, 3, & 11 of the Industrial Welfare Com. Order No. 4-89 (1993); *Bono Enterprises*, 32 Cal. App. 4th at 977). This Court has rejected presuming federal law applies in the absence of such explicit language where the federal and state statutory schemes are significantly different. (*Martinez*, 49 Cal. 4th at 68.)

In the case at bar, Respondent points to no express language in any of California's wage orders or statutes signifying the IWC's intent to incorporate the federal de minimis rule. That is because none exists. To the contrary, the IWC makes clear that workers are entitled to pay for all hours worked. (Cal. Code Regs., tit. 8, § 11050, subd. (2)(K).) Respondent does not, because it cannot, distinguish *Mendiola*. While Respondent admits that the wage orders fail to include any reference to the de minimis rule, it argues that in light of this silence the Court should presume that the

de minimis rule applies to California wage claims. (Respondent Brief at pg. 24.) This Court has already clearly and soundly rejected such reasoning. (*Mendiola*, 60 Cal. 4th at 843, 846.)

III. Court Decisions That Apply the De Minimis Rule Lack Analysis and Authority, and Thus, Are Not Persuasive.

Despite Respondent's assertions to the contrary, courts have not regularly applied the de minimis rule to California wage claims. (Respondent Brief at p. 19.)

The cases Respondent refers to are largely unpublished, pre-*Mendiola*, federal court decisions that assume the de minimis rule applies to state wage claims without "recognizing and appreciating the critical differences in the state scheme." (*Ramirez*, 20 Cal. 4th at 798.) Ignoring this Court's admonishments, these cases provide little to no analysis regarding the significant distinctions between federal and state law. Rather, they improperly conflate federal and state claims and fail to acknowledge the lack of express statutory language regarding the de minimis rule in California law. (See e.g. *Corbin v. Time Warner Et't-Advance/Newhouse P'ship* (9th Cir. 2016) 821 F.3d 1069, 1083 (applying the de minimis rule to deny penalties under Labor Code section 226 because the state claims were "derivative" of FLSA claims); *Mosley v. St. Supery Vineyards & Winery* (Cal. Ct. App. Feb. 27, 2014, No. A137373) 2014 WL 793130 at *8

(relying solely on Ninth Circuit's application of de minimis rule to FLSA claims to apply it to state law claim for penalties pursuant to Labor Code section 203); *Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F. App'x 712, 714 (incorrectly assumed California and federal law was "nearly identical to apply de minimis to wage claim).) These decisions lack analysis and authority and are, therefore, not persuasive authority.

IV. The DLSE's Application of the De Minimis Rule Lacks Analysis and Is Not Entitled to Deference.

Only the Legislature and IWC possess the authority to enact laws and promulgate wage orders. (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 26.) While the Division of Labor Standards Enforcement (DLSE)'s opinion is entitled to consideration in certain instances, it is not binding. (*Mendiola* 60 Cal. 4th 833, 848.) Courts must exercise their own independent analysis of the intent of the IWC and must interpret the language of the wage orders independently. (*Morillion*, 22 Cal.4th at 581-82, 584; *Murphy*, 40 Cal. 4th at 1105, fn7.)

The DLSE references the federal de minimis rule in its Interpretation Manual and opinion letters. (See e.g. DLSE Op. Letter 2010.04.07 at 3; DLSE Enforcement Policies and Interpretations Manual § 46.6.4.) When referencing the de minimis rule, the DLSE cites to and relies exclusively on cases brought under FLSA and provides no explanation as to why the rule

applies to California wage claims. (See e.g. DLSE Enforcement Policies and Interpretations Manual § 46.6.4 (referencing *Lindow v. United States*); DLSE Enforcement Policies and Interpretations Manual § 47.2.1 (referencing *Lindow v. United States* and *Anderson v. Mt. Clemens Pottery Co.*).) Without any clear explanation or analysis as to why the federal rule should be applied to California wage claims, the DLSE's opinion is not entitled to deference in this instance. Further, this Court has already explicitly held that the DLSE's interpretation of hours worked is not entitled to deference. (*Morillion*, 22 Cal. 4th at 575.) Thus, any use of federal law by the DLSE to limit the state definition of "hours work" should be given no weight.

It is of no consequence that the DLSE's reference to the de minimis rule has been longstanding. This Court has on numerous occasions determined that the DLSE's interpretation or application of a regulation has been incorrect despite it being longstanding. (*Morillion,* 22 Cal. 4th at 581-82.)

In this case, the DLSE's application of the federal de minimis rule is inconsistent with the plain language of the statute, this Court's decisions and California's public policy. Such an erroneous interpretation without any analysis as to why less protective federal law applies is not entitled to consideration.

V. Adoption of the De Minimis Rule Would Harm California's Low-Wage Workers, Who Already Face Significant Wage Violations.

California's low-wage workers are concentrated in industries with rampant workplace violations, including wage theft and minimum wage violations. (See Berndthart et. al., *Low-Wage Work in California;* Milkman et al*; Wage Theft and Workplace Violations in Los Angeles* at p. 53.) A 2014 study by the Department of Labor found that more than 300,000 workers in California were not paid at least the legal minimum wage for hours worked. (Department of Labor, *The Social And Economic Effects of Wage Violations* (2014) <https://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf> [as of April 10, 2017].) The study found significant impacts on the lives of workers experiencing these violations. (*Id.* at pg. 1.) For instance, the study estimated, using one measure that approximately 41,000 families in California fell below the poverty line due to wage violations. (*Id.* at pg. 48.) The families of low-wage workers were also more likely to rely on government assistance programs due to wage violations. (*Id.* at pg. 57 (estimating that school breakfast and lunch programs spent an additional $15.6 million in 2011due to wage violations).)

The de minimis rule would have the biggest impact on these low-wage workers and would put this already vulnerable population at an even

greater risk for exploitation. As recent studies indicate, many employers are already illegally shaving minutes off of their employees' earned wages. When a worker only earns minimum wage, the exclusion of even just a few minutes a day can make the difference between paying for utilities or rent.

Adoption of the de minimis rule would permit employers to exclude otherwise compensable time, effectively transferring earned wages from employees to employers. Shifting income away from workers "worsens income inequality, hurts workers and their families, and damages the sense of fairness and justice that a democracy needs to survive." (Brady Meixell et. al, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, Economic Policy Institute (September 11, 2014) <available at http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/ > [as of April, 10, 2017].) The de minimis rule not only violates California labor law, but fails to further California's strong public policy in protecting and advancing the rights of these workers.

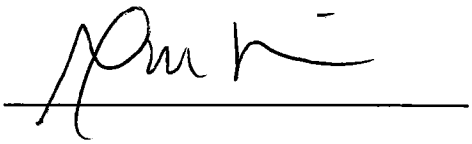
CONCLUSION

The wholesale importing of federal law in the absence of express regulatory language contravenes the higher statutory protections afforded to California's workers. The IWC clearly and explicitly signals its intention to import federal law into the wage orders. It has not done so in this case. There is no reason to infer from silence that it intended to import less

protective federal law. This is especially true in light of California's strong public policy favoring full payment of all earned wages.

Dated: April 12, 2017

Respectfully Submitted,



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STATEMENT OF COMPLIANCE WITH CALIFORNIA RULES OF COURT RULE 8.204(C)

I, ANNA KIRSCH, declare that:

1. I am a Visiting Associate Professor of Law and Staff Attorney at the Women's Employment Rights Clinic at Golden Gate University School of Law, counsel for amici curiae in the above-captioned matter.

2. I certify that the foregoing Proposed Brief of Amici Curiae contains 5,406 words, including footnotes, as counted by the Microsoft Word for Windows program used to generate this brief.

Executed on April 12, 2017 at San Francisco, CA

Anna Kirsch, Esq.
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PROOF OF SERVICE

I, Fe Gonzalez, am over the age of 18 and not a party to the within action; my business address is 536 Mission Street, San Francisco, CA 94105.

On April 13, 2017, I served the foregoing documents described as

APPLICATION FOR LEAVE TO FILE AND PROPOSED BRIEF OF AMICI CURIAE WOMEN'S EMPLOYMENT RIGHTS CLINIC OF GOLDEN GATE UNIVERSITY SCHOOL OF LAW, BET TZEDEK, CENTRO LEGAL DE LA RAZA, ET AL., IN SUPPORT OF PLAINTIFFS AND RESPONDENTS TROESTER, ET AL.

on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

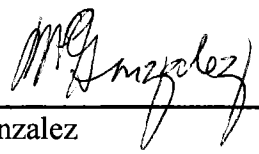
[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

[] BY FACSIMILE ("FAX") In addition to the manner of service indicated above, a copy was sent by FAX to the parties indicated on the service List.

[] BY OVERNIGHT MAIL/COURIER To expedite service, copies were sent via FEDERAL EXPRESS.

[] BY PERSONAL SERVICE I caused to be delivered such envelope by hand to the individual(s) indicated on the service list.

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 13, 2017 at San Francisco, California.



Fe Gonzalez

Douglas Troester, Et Al., v. Starbucks Corporation
Case No. S234969

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