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 Brief on the Merits

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I. INTRODUCTION

To protect its "valuable goods" from theft, Apple requires all retail sales staff carrying bags or personal technology to participate in on-site security Checks. *Frlekin v. Apple, Inc.*, 870 F.3d 867, 870-73 (9th Cir. 2017). During the Checks, the employees are confined to store premises and "compelled" to participate in employer-directed actions. *Id.* at 872-73. Apple enforces its Check policy through threat of discipline; anyone who refuses to participate can be fired. *Id.* at 870-72 (citing ER 115).

Apple contends that the Check time is not compensable under either of the Wage Orders' two "independent" tests for "hours worked,"[1] but in 61 pages of briefing, Apple does not address, or even mention, the *discipline* Apple imposes. The discipline is the elephant in Apple's living room. Of the three "controls" Apple exerts, the discipline is the enforcement mechanism. Without it, the employees could not be forced to participate in the Checks, and Apple's Check policy would mean nothing.

Yet, according to Apple, the discipline should be disregarded—as should *both* of Apple's other "controls" over the Check time: confining employees to store premises and requiring them to engage in employer-directed actions—simply because the employees "chose" to bring their bags or personal technology to work.

Apple is wrong.

Apple's position contravenes the Wage Orders' text. The Check time is compensable because it is time "*during which* employees are subject to the *control* of an employer." 8 Cal. Code Regs. §11070, ¶2(G). The IWC purposely abandoned a less

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[1] *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 582 (2000).

protective prior test—covering only "required" time—in favor of the broader "control" test. Under plain-language definitions, the Checks are not just "controlled," but also "required." Apple's proposed standard—"*unavoidably* required"—is weaker than the abandoned prior test and finds no support in the Orders' text or adoption history.

Apple's position also contradicts *Morillion*. There, as here, the employees were "controlled" through an employer's threat of *discipline*. Contrary to Apple's view, *Morillion* did not hold that *only* "unavoidably required" time can meet the "control" test. Instead, *Morillion* favorably cited *Bono*, in which the employees could have avoided the employer's "control" (mandatory on-site lunches) by "choosing" to make "prior arrangements" to lunch offsite. 22 Cal.4th at 582-83 (citing *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal.App.4th 968, 972, 974-75 (1995)).

In this case, Apple's threefold controls exceed those exerted in *Morillion*. Apple's controls include not only discipline, as in *Morillion*; but *also* confining employees to store premises, as in *Bono*; *and* requiring them to perform employer-directed tasks. These "controls" are greater than what *Morillion* found sufficient.

The Checks are also compensable "work" that Apple knowingly "suffered or permitted" to occur on its property. Seeking to engraft an element unstated in the Wage Orders, Apple argues that the Orders embrace only "work" "related" to the employees' "regular job duties." But the Wage Orders do not say this, and inferring such an element would make California law no more protective than federal law—the opposite of the IWC's intent when it broadened the definition of "hours worked." Moreover, the Checks

are plainly job-related duties, or Apple could not have enforced them through job-related discipline.

Hoping to prevent this Court from fully considering the issues presented by the Ninth Circuit's question, Apple relies at length on a non-existent "stipulation" and certain district court rulings concerning class members with "special needs" to bring their bags to work. As will be seen, these rulings were far narrower than Apple would have the Court believe. This Court is no more precluded than was the Ninth Circuit from considering the ordinary, everyday reasons why employees carry their bags and iPhones to work. *See Frlekin*, 870 F.3d at 873. Finally, no prejudice would result from restating the certified question to cover personal technology.

As this Court recently reconfirmed, the Wage Orders exist "primarily for the benefit of the workers themselves," and are intended to "accord them a modicum of dignity and self-respect." *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 952 (2018). Apple would have the Court disregard the Orders' "remedial purposes" (*id.* at 953) and strip California workers of the "dignity" of carrying their belongings to work without being confined to their employer's premises and searched for no pay.

Apple's arguments should be rejected, and the Ninth Circuit's question answered "yes."

II. ARGUMENT

A. Apple's Procedural Arguments Lack Merit

Attempting to block this Court's full consideration of the case, Apple makes two procedural arguments, both of which fail.

1. Apple Misunderstands the District Court's Orders Regarding Class Members With a "Special Need" to Bring Bags to Work

The purported "stipulation" repeatedly mentioned by Apple[2] is nothing more than the district court's recognition that some class members may have had a "special need," rather than an ordinary, everyday need, to bring their bags to work.

In the district court's words, "[some] employees may need to bring a bag to work" because of "special needs" "they cannot control, such as a need for **[1]** medication, **[2]** feminine hygiene products or **[3]** disability accommodation." SER 40:23-25; *see* ER 549:3-5, 553:17-21. The court's concern from such "special needs" employees dated back to its earliest orders and proceedings. *See id.*[3]

Plaintiffs' theory of liability, in contrast, has always been that the Wage Orders required Apple to compensate *all* class members for the Check time—not merely those with "special needs." SER 14:1-27, 35:8-19, 38:9-10; MAR 43:21-47:18; 67:12-70:2. The case does not seek relief for Apple's failure to make disability accommodations for "special needs" class members and/or for gender discrimination. ER 594-601.

Accordingly, when the district court proposed that the class notice should inform the class that "special needs" would not be litigated, plaintiffs had no objection, because it was irrelevant to Apple's liability. *See* SER 36:12-13 ("we would be amenable to" the court's proposal). Apple must compensate *all* employees for all "hours worked," not just those with "special needs." MAR 54:9-12, 55:8-19, 56:8-20, 57:13-19, 60:20-61:2. The

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2 ABM 10, 14-15, 22, 29-32, *passim*.

3 *Accord* Motion to Augment the Record ("MAR"), filed herewith, at 38:17-39:1; 50:10-13, 51:3-4, 52:25-53:2.

court decided that the class notice should also invite class members to intervene if they wished to pursue a "special needs" theory. ER 553:18-28, 557:9-14; SER 38:20-25.

Importantly, plaintiffs did not "stipulate" to this procedure, as Apple claims. ABM 10, 28, 32. Rather, the district court thought of it, then ordered it. *See* ER 552:27 ("the Court raised [this] concern"), 553:18-28, 557:9-14; SER 38:20-25; MAR 59:25-60:16, 62:20-63:7 ("I'm making [the notice procedure] up as I go").

The district court approved class notice language—unquoted in Apple's brief—expressly tied to the "special needs" the court had identified:

> 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).[4]

Consistent with these directives, plaintiffs have not argued that class members were "required" to bring bags or iPhones to work because of a "special need" for medication, disability accommodation, or to carry feminine hygiene products.[5] But nothing bars this Court from considering people's ordinary, everyday need to bring their

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[4] The last sentence was included over plaintiffs' objection. MAR 73:12-74:7.

[5] Apple's obligation to pay for all "hours worked" should not depend on whether the employees were women with a "special need" to carry feminine hygiene products. In 1947, when the Orders covered *only* "women and minors" (*see* Order 7R, ¶1 (MJN Ex. 5)), the IWC probably understood that employees covered by the Orders routinely carried purses or bags containing such products. In 1976, when the IWC expanded the Orders to cover men, it retained the broad definition of "hours worked." Men and women alike should be able to carry bags without adverse, and disparate, pay consequences.

bags and iPhones to work, or the flip side of the "convenience" coin—that leaving these items at home would be extremely inconvenient.

The Ninth Circuit recognized this:

> The case ... involves only those employees who voluntarily brought bags to work purely for personal convenience. ***It is thus certainly feasible for a person to avoid the search by leaving bags at home. But, as a practical matter, many persons routinely carry bags, purses, and satchels to work, for all sorts of reasons.*** Although not 'required' in a strict, formal sense, many employees may feel that they have little true choice when it comes to the search policy, especially given that the policy applies day in and day out.

Frlekin, 870 F.3d at 873 (emphasis added).[6] In other words, bags are brought "voluntarily" precisely *because* people need them, "for all sorts of reasons." *Id.*

In plaintiffs' opening brief, one alternative three-page argument rested on the Ninth Circuit's reasoning just quoted. OBM 40-42. Seizing on this, Apple contends that almost every other argument in plaintiffs' brief is somehow "precluded." *E.g.*, ABM 10, 22, 29, 32. In fact, all of plaintiffs' arguments are consistent with the Ninth Circuit's understanding of the record. For this Court to consider all of them would neither "broaden" nor "expand" the certified question, as Apple incorrectly claims. ABM 28-32.

2. No Prejudice Would Result From Restating the Certified Question to Cover Personal Technology

In a further attempt to prevent the Court from considering all issues, Apple opposes plaintiffs' request to restate the certified question to expressly cover personal technology devices. ABM 28-29. Checks were mandatory for employees carrying bags

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6 *See* ER 549:5-7 (employees carry "food, clothing, keys" and other everyday belongings in their bags).

and/or Apple-branded devices.[7] Apple references these devices repeatedly (ABM 13, 29-30, 37, 53), and concedes "the result would be the same" if the question were restated. ABM 29.

The Court may restate the question "[a]t any time." Cal. Rule of Ct. 8.548(f)(5). The Court's order accepting the question stated that "the issue is rephrased as follows," but, perhaps inadvertently, the wording was not rephrased. *Compare* Order dated Sept. 20, 2017 *with Frlekin*, 870 F.3d at 869. To avoid confusion on remand, the Court is respectfully asked to grant the pending request to restate the question.

B. The Check Time is Compensable Under the "Control" Test

1. Apple May Not Retract its Concession That it "Controlled" its Employees During and While Awaiting the Checks

As the Ninth Circuit determined, Apple "concede[d]" that its employees were "clearly" under its "control" "while awaiting, and during, the search." *Frlekin*, 870 F.3d at 971; *see* ER 8:18-20. Apple tries to backtrack (ABM 42-43), but the record is clear:

> THE COURT: .... So what I think you're saying is: Okay, ***we concede control.*** Once you're standing in the line waiting to go home ... because they don't have enough people there to get you through the line in a hurry—I know you say that never happens, but probably it does happen every now and then. So when you're waiting for your turn in a long line on a cold winter day trying to get home, all of those factors are true. ***You are under of the control of Apple. Right?***
>
> But you're [sic] point is: Well, you didn't have to be in that line to begin with. It wasn't a requirement that you get in the line. ... [I]t was only a requirement that you stand in line if you elected to bring any of those things for your personal convenience. ***So, therefore, you say the requirement part is not met. That's your argument.***

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[7] Letters filed Sept. 1, 2017 (at 9-10) and Sept. 29, 2017; OBM 41 & n.51 (citing record).

> [APPLE'S COUNSEL]: ***That is correct, your Honor, as to the control theory.***

ER 47:20-48:13 (emphasis added).

2. Apple's Position that "Control" is Not Enough to Meet the "Control" Test Conflicts With the Wage Orders' Plain Text and Adoption History

Apple's concession is consistent with the plain-language definition of the word "control"—a definition Apple does not contest. During the Checks, Apple "controlled" its employees by "exercis[ing] restraint or direction" upon their "free action," by "regulat[ing]" their conduct, and by "hold[ing]" them "in restraint." ABM 23 (citing four dictionaries plus *Bono*, 32 Cal.App.4th at 975).

Apple's "controls" were threefold. First, Apple imposed the Check procedure under "threat of sanctions and loss of employment"—the ***discipline*** Apple's brief ignores. *Frlekin*, 870 F.3d at 871. Second, the employees "may not leave the premises" until the on-site Checks are conducted. *Id.* Third, during the Checks, employees are "compelled" to perform employer-directed "actions and movements." *Id.* at 873. Whether "a few seconds" (ABM 13) or up to 45 minutes (OBM 11), the time is "controlled."

Given the high degree of "control" Apple imposed during the Check process, Apple's only hope is to argue that "control" is not enough to meet the "control" test. ABM 43. This argument, however, ignores the Wage Orders' text, which is the first source of meaning and the "best indicator" of the IWC's intent.[8]

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[8] *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 264 (2017); *see Martinez v. Combs*, 49 Cal.4th 35, 63 (2010).

a. Apple's Text-Based Arguments Assume that the IWC Adopted a Meaningless Amendment in 1947

As a preliminary matter, Apple does not—because it cannot—dispute that the Wage Order's "control" test does not use the word "required" (let alone "unavoidably required"). Nor can Apple dispute that in 1947, the IWC amended the definition of "hours worked" to remove the word "required" and substitute the word "control." Apple does not disagree that "require" and "control" have different plain-language meanings, and that the latter word is broader—in fact, broad enough to encompass both "required" and non-"required" tasks. *See generally* ABM 44-50.

Instead, Apple makes two text-based arguments, both of which boil down to the assertion that the IWC's amendment from "required" to "control" was meaningless.

First, Apple cites the phrase "whether or not required to do so" from the "suffered or permitted to work" test; points out its *absence* from the "control" test; and argues that the *absent* phrase "suggests" the "control" test covers *only* "required" conduct. ABM 44-45. Second, Apple claims that by deleting from the "control" test both the word "require" and the list of "things an employee is 'required' to do," the IWC intended to "*simplify* the Wage Order's language," with no attendant change in meaning. *Id.* 45-46.

These arguments cannot be squared with the Wage Order's text. Simply put, the IWC kept the word "require" in the "suffered or permitted to work" test, and removed it from the "control" test. When "different word[s]" are used in the same regulation, "it must be presumed" that a "different meaning" was "intended." *Rashidi v. Moser*,

60 Cal.4th 718, 725 (2014); *see Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1117 (1999).

The final phrase of the "suffered or permitted to work" test dates back to 1943. OBM 19-20. When the IWC amended the definition in 1947, it chose to leave the wording of the second test untouched—except to omit a sentence with illustrative examples. *Compare* Wage Order 7NS, ¶2(f) *with* Order 7 R, ¶2(h).

But the IWC materially *changed* the wording of the first test.

Instead of either retaining the word "require" or appending "whether or not required" to the first test—both of which would have been easy edits—the IWC chose a substantive change. It modified the *operative word* of the first test, changing it to "control," while at the same time deleting the prior list of specified compensable activities entirely. Together, these changes show that the IWC intended that more time would become compensable under the new test than the prior test would have captured.

"Control" and "require" are not synonyms. If the IWC meant "require," it easily could have kept the word "require," which was already in the 1943 language. Notably, it did not. If the IWC had intended to capture only a broader range of "required" activities, as Apple claims, the fix would have been easy: "subject to a *requirement* of an employer." Instead, the IWC chose a materially different fix: "subject to the *control* of an employer."

Under well-established rules of statutory interpretation, when the words of a statute are changed, a change in meaning is presumed.[9] Moreover, Courts do not presume that regulatory bodies like the IWC enact purposeless amendments.[10]

In arguing that the wording change means nothing and should be ignored, Apple cites three inapposite cases. ABM 47. Apple's quoted language from *Perine* was not a court holding; it was a statement by the author of an amendment to a federal statute regarding "its purpose."[11] From *Flesher*, Apple quotes the special rules, inapplicable here, governing "general revision or codification" of an entire act.[12]

Culbertson held, unremarkably, that because the Legislature had *retained* a criminal statute's core language signifying two individuals, the amendment "simplifie[d] and clarifie[d]" the statute, which continued to require, for purposes of a sentencing enhancement, evidence of the two *participants'* ages, not the aider and abettor's age.[13]

In contrast to *Culbertson*, the core language here was *altered*, not retained—"require" was changed to a materially different word, "control." No such amendment was considered in *Culbertson*, and nothing indicates that the IWC intended merely to

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9 *People v. Mendoza*, 23 Cal.4th 896, 916 (2000); *Estate of Simpson*, 43 Cal.2d 594, 600 (1954).

10 *Viking Pools, Inc. v. Maloney*, 48 Cal.3d 602, 609 (1989) ("We cannot presume [the amendment] was a meaningless and idle gesture."); *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805 (1952) (amendments are not construed as "idle acts").

11 *Perine v. William Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974).

12 *Ex parte Flesher*, 81 Cal.App. 128, 136-37 (1927).

13 *People v. Culbertson*, 171 Cal.App.3d 508, 515 (1985). Also, there was no wording change "from 'coparticipant' to 'participant,'" as Apple claims. ABM 47. The change was from "Any person participating" to "Any person who participates ...." 171 Cal.App.4th at 511, 515 n.4.

"simplify and clarify" the definition of "hours worked." Apple's construction, which would strip the amendment of any meaning, should be rejected.

b. Apple's Text-Based Arguments Assume That the IWC Narrowed the Test for Compensable Time in 1947, Instead of Broadening It

As the DLSE explained in a formal brief filed with the Office of Administrative Law, "[t]he IWC's 1947 change in the language of the Orders which defined 'hours worked' clearly indicated that the Commission intended to *broaden* the definition." MJN Ex. 12 at 22-23 (emphasis added).

To accomplish this, the IWC "replaced" the disjunctive list of specified compensable activities from the 1942 Orders, and "simply provided that the employer must pay for all hours the employee is '*subject to the control*' of the employer," a definition "unknown in federal law." *Id.* at 23-24 (emphasis in original). These changes "clearly indicate" that the "disjunctive language contained in the 1942 Orders was not as restrictive as the Commission felt necessary." *Id.* at 24.[14]

The new definition, still in the Orders today, "is broad in and of itself," and "there is little doubt" that it was "designed to encompass *much more* than 'all the time during which an employee is necessarily *required* to be on the employer's premises, on duty or at a prescribed work place.'" *Id.* at 27 (citation omitted) (emphasis added). While "control" certainly "*may* encompass activities described by the eliminated language,"[15] the IWC's "broadened" definition also covers "much more." *Id.*

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14 *Accord* MJN Ex. 7 at 4 (quoting same language).

15 *Morillion*, 22 Cal.4th at 592 (emphasis added).

Under the "broadened" definition, any time "the employee is not allowed to leave the premises" is compensable time. *Id.* at 18. That includes "during the meal period, before the shift begins *or after the shift ends.*" *Id.* at 24 (emphasis added). "So long as the employer controls the activities of the employee," the time is compensable. *Id.*

Like the DLSE, this Court has repeatedly recognized that the 1947 amendments were adopted "in response" to the federal Portal-to-Portal Act, and that the IWC intended to make California law more protective than federal law. *Mendiola*, 60 Cal.4th at 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592. Given that the pre-1947 language mirrored that of the 1939 federal Interpretive Bulletin, the changes must be construed to make *more* time compensable than before, not *less* and not the *same*.

Apple has almost nothing to say about this adoption history, except to claim that the DLSE supposedly "did not discuss" exactly what the DLSE did discuss, namely, that the IWC intended to "broaden" the definition of "hours worked." ABM 47-49.[16] Apple identifies nothing from the regulatory history in support of any other view.

Apple claims the issue is whether the employees were "required" "to bring bags to work." ABM 32. That is a red herring. Under any plain-language definition, the Checks themselves were "required," or the employees would not have participated in them. Indeed, Apple enforced the Check policy through threatened—and actual—

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[16] Apple confusingly refers to the DLSE's brief as a "letter" (ABM 47-49), when it was actually a formal brief filed with the OAL in a contested matter challenging the DLSE's authority to issue opinion letters. MJN Ex. 12. Nor are there both a "letter" and "another related opinion," as Apple misleadingly claims. ABM 49. There is a single DLSE brief, quoted in a letter and opinion of the OAL, in which the OAL adopted the DLSE's arguments. *See* MJN Exs. 7, 8, 12.

discipline. OBM 8 (citing record). Moreover, the policy "compelled" the employees to perform employer-directed tasks (870 F.3d at 873) and "required" them to "remain on the premises" until the tasks were completed. MJN Ex. 12 at 24.

These "controls" are more than sufficient to meet the "control" test. Apple cannot deny that the Wage Order makes compensable all time "*during which*" employees are "controlled." This language focuses the compensability analysis on the controlled activity, not what occurred before it.

Apple responds to this plain text by citing decisional law (ABM 50-51), but as discussed below, the decisions do not help Apple. The Wage Orders' plain text does, in fact, mean that employees "must be compensated '*during*' any time [they are] subject to any kind of restraint by the employer." ABM 50 (emphasis added). To construe the test as Apple urges—to disregard what happened "during" the "controlled" time, and consider only "*unavoidably* required" tasks—would *narrow* the pre-1947 test, not "broaden" it.

3. Apple's Reliance on Decisional Law, Including *Morillion*, is Misplaced

To engraft an unstated element onto the Wage Orders, Apple relies heavily on *Morillion* and a series of other commute-time cases. ABM 21-28, 33-42. However, Apple's discussion of *Morillion* elides the facts, which show that Apple exerted a higher level of control than the employer in *Morillion*. Moreover, *Morillion* did not hold, as a matter of law, that no activity can ever be considered "controlled" unless the activity is "unavoidably required." *Morillion* simply did not present those facts, and such a holding would have been contrary to the Wage Orders' plain text.

As the Ninth Circuit recognized, there are material differences between Apple's Checks and the travel time considered in *Morillion* and other commuting cases. One of the most material is that, unlike most ordinary commuting time, the Checks took place on Apple's store premises during the regular work day. Principles drawn from commuting cases should not apply mechanically to onsite security searches like Apple's Checks.

a. Apple Exerted "Control" in Three Ways That Make the Check Time Compensable Under *Morillion*

Contrary to Apple's position, the Check time is compensable under the standard stated in *Morillion*. OBM 30-32. Although Apple exerted "control" differently than the *Morillion* employer, the time in question was nevertheless "controlled" and compensable in both cases. Indeed, Apple exercised a *greater* level of "control" during the Checks than the *Morillion* employer did during the bus rides.

Apple exerted "control" in three ways: (1) adopting a written policy enforced through threat of discipline; (2) confining employees to store premises, which prevents them from leaving for the day and going home; and (3) requiring employees to engage in employer-directed, "compelled" tasks. OBM 24-25.

Apple ignores the first "control" completely, then claims that the other two "controls" are "irrelevant." Apple is wrong.

(1) "Control" Through Threat of Discipline

Here, as in *Morillion*, the employer adopted a mandatory written policy that it enforced through threat of discipline. 22 Cal.4th at 586-87; 870 F.3d at 870-71. The

Morillion employer threatened "verbal warnings and lost wages," while Apple threatened the greater penalty of "termination." *See id.*

Here, as in *Morillion*, the written policy plus discipline was not the *only* "control" the employer exerted. In *Morillion*, the Court variously described the bus rides as "compulsory," "requir[ed]," and "compel[led]" by the employer. *Id.* at 587-89 & n.5. That "control" was dispositive in *Morillion* because the employer exerted no other "control" during the rides. *See id.* at 586 (employees free to read or sleep).

Apple, in contrast, exerted two other "controls" not present in *Morillion*: the employees were **(a)** confined to store premises and **(b)** had to line up and perform employer-directed tasks. Those "controls" had the same effect as the "controls" considered in *Morillion*. They prevented employees from using the time "effectively for [their] own purposes," and "foreclosed" "numerous activities in which they might otherwise [have] engage[d]." 22 Cal.4th at 586. Together with the threat of discipline, which Apple ignores, these "controls" are dispositive.

(2) "Control" Through Confining Employees On Site

Apple "controlled" its employees by confining them to store premises during the "on-site" Check time. 870 F.3d at 872. Apple calls this "irrelevant" (ABM 35), but under this Court's precedents, it is highly relevant. As stated in *Morillion*, "'[w]hen an employer directs, commands or restrains an employee ***from leaving the work place*** ..., that employee remains subject to the employer's ***control***.'" *Morillion*, 22 Cal.4th at 583 (quoting *Bono*, 32 Cal.App.4th at 975) (emphasis added). In *Mendiola*, the Court quoted

that very language in holding that the "level of the employer's control over its employees ... is determinative." 60 Cal.4th at 840.

Apple claims that to consider all the controls Apple exercised *during* the Checks is to "look[] at the incorrect point in the process." ABM 25. According to Apple, the focus should be on events occurring hours *before* the Checks—namely, the employees' pre-activity "decision" not to leave all their personal belongings at home. *Id.*

But this argument contradicts the Wage Orders' text. All time "*during which*" the employees were subject to employer control is compensable.

Nor does the case law aid Apple's argument. In *Morillion*, the employees had no relevant pre-activity decision to make. However, in *Bono*—which *Morillion* favorably cited—the employees were not allowed to leave the plant during lunch "*unless* they ma[d]e prior arrangements to reenter." 32 Cal.App.4th at 972 (emphasis added). Their on-site lunch time was "controlled," and thus compensable, because they were "restrain[ed]" from "leaving the workplace"—even though they could have "chosen" to "avoid" the "restraint." *Id.* at 974-75, *cited in Morillion*, 22 Cal.4th at 582-83.

Similarly, in *Cervantez*, the employees were "controlled" during pre-shift time inside the employer's facility—even though they were not required to "arrive early" and could have avoided the "controlled" pre-shift time. *Cervantez v. Celestica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009).

Recently, in *Sali*, the Ninth Circuit easily perceived that under *Morillion*, employees can be "restricted ... in a manner that amount[s] to employer control" in many ways, including "being required to remain on the employer's premises *or* being restricted

from engaging in certain personal activities." *Sali v. Corona Reg. Med. Ctr.*, 889 F.3d 623, 637 (9th Cir. 2018) (emphasis added) (citing *Morillion*, 22 Cal.4th at 584-87). Here, Apple's Check policy imposes both of those restraints.

In short, the compensability analysis focuses on the "controls" the employer exercised "*during*" the time in question. Apple's policy, which confined employees to store premises *during* the Checks, meets the "control" test.

(3) "Control" Through Employer-Directed Tasks

Apple's third "control" was requiring its employees to perform employer-directed tasks during the Checks. *Frlekin*, 870 F.3d at 872-73; OBM at 8-10, 24-25 (citing record). In the Ninth Circuit's words, the employees had to line up and perform "actions and movements" "compelled" by a manager. 870 F.3d at 873.

Apple claims that employer-directed tasks are "irrelevant" to the "control" test, citing *Morillion*'s "*Vega* footnote." ABM 33-34. Apple is wrong. Nothing in the footnote holds that employer-directed tasks can *never* be considered in assessing whether time is compensable under the "control" test. *See* 22 Cal.4th at 589 n.5 (citing *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994)[17]). To the contrary, the footnote suggests that if the employees *had been* "free to choose" not to ride the bus—that is, if the "dispositive" fact in *Morillion* had been absent—then other facts, including employer-directed tasks, would have been relevant and dispositive, as they are here. *See id.*.[18]

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17 *Abrogated on other grounds as stated in Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 227-28 (5th Cir. 2017).

18 *See also Griffin v. S&B Engineers & Contractors*, Inc., 507 Fed.Appx. 377, 382-83 (5th Cir. 2013) ("[t]he voluntary use of transportation" was "not dispositive" in *Vega*).

Apple also claims that employer-directed tasks should be irrelevant to the "control" test because, according to Apple, such tasks would fall within the "suffered or permitted to work" test instead. ABM 40-41. Apple takes issue with one of plaintiffs' hypotheticals, claiming that if the *Morillion* employees had to clean farm implements during optional bus rides, the time would meet the latter test. *Id.*

That is certainly true, but it does not mean the time is not *also* "controlled." The two tests are "independent," not mutually exclusive. 22 Cal.4th at 582; Part II.C.3, *infra*. Employer-directed tasks are highly relevant to compensability under *both* tests. If they were irrelevant to the "control" test, as Apple claims, then *Morillion*'s "Vega footnote" would not have mentioned them. Here, they are dispositive of "control."

b. Apple Misreads *Morillion* and its Progeny

(i)

Apple contends that the only fact from which "control" can ever be found—as a matter of law—is an employer-imposed "require[ment]" that the employees cannot "choose" to "avoid." ABM 21-28. Apple calls this a "well-settled" "rule" (ABM 26-27), but *Morillion* did not hold this.

As discussed above, that the bus rides were "required" was "dispositive" in *Morillion* only because the employer exercised no other "control" during the rides, such as employer-directed tasks. *See* 22 Cal.4th at 579, 582, 586, 589 & n.5. By favorably citing *Bono*, *Morillion* recognized that time can be "controlled" in other ways, and that pre-activity "choices" do not eviscerate those "controls." *Id.* at 582-83.

Apple's other cited cases provide no better support. In *Overton*, the employees were not "required" to drive to work or park in the distant lot, and if they chose to, they were not "required," on threat of discipline, to ride the employer's shuttle. *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263, 266-68 & n.6, 271-73 (2006). Hence, the shuttle-ride time was not compensable. *See id.* Had the employer "required" any of those things, that would have been a "key factor" in finding "control"—but the employer did not. *Id.* at 271; *see* OBM 35-36 (discussing *Overton*).

In *Rutti*, the employer not only "required" the employees to drive the company's vehicle, but *also* exercised "control" during the commute by "forbidding" employees from "attending to any personal business along the way." *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1061-62 (9th Cir. 2010). Apple did not mention those facts from *Rutti*. If "required" were dispositive under *Morillion*, as Apple claims, then *Rutti* would have had no occasion to consider the level of "control" the employer exercised *during* the drives.

Finally, in *Alcantar*, the plaintiff did not challenge the district court's ruling that his commute time was non-compensable unless he was "required" to use the company vehicle. *Alcantar v. Hobart Service*, 800 F.3d 1047, 1050, 1055 (9th Cir. 2015). Instead, he argued that his purported "choice" not to was "illusory." *Id.* at 1050.[19] The Ninth Circuit found triable issues on that point, and reversed—without considering whether the controls imposed *during* the commute were already sufficient to make the time compensable. *See id.* at 1050, 1055-56.

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[19] *See* MJN Exs. 9, 10 (*Alcantar* appellate briefs).

In sum, none of these cases contains the "rule" Apple claims, and none holds that an employer's "controls" exercised *during* the activity in question must be ignored.

(ii)

Apple's reading of *Morillion* is wrong because it rests on a false premise.

According to Apple, employees are always, by definition, "controlled" from the moment they set foot on a company bus—even if the bus ride is optional—because the simple act of being on a bus "foreclose[s]" other activities. ABM 24-25, 38-39, 42. Apple claims that *Morillion* "made clear that the bus rides *themselves* resulted in significant employer control," and "acknowledged" that "*any* time spent on an employer's bus" is "controlled" time. ABM 24, 38 (emphasis added).

Morillion did not say any of this.

The *Morillion* employees were "controlled"—*not* because they set foot on a company bus, but because the "when, where and how" of their commute was "determin[ed]" by their employer. 22 Cal.4th at 586. They could not "decide when to leave, which route to take to work, and which mode of transportation to use." *Id.* at 586-87. They could not "choose ... to run errands before work [or] to leave from work early for personal appointments." *Id.* at 587. In contrast, truly "optional" bus rides, which impose none of these restraints, are *not* deemed "controlled." *Id.* at 594.

If, as Apple claims, optional company bus rides are always, by definition, employer-"controlled," then the time would have been compensable in *Overton*.

The flaws in Apple's reasoning are evident from Apple's inability to articulate the argument without inventing a new and non-existent test for it—the so-called "restrictive

and required" test. ABM 23; *id.* at 24-25, 38-39. However, *Morillion* sternly warned against "redefining 'hours worked'" by "substitut[ing] other words" for the Wage Orders' "express language," which is what Apple's invented test does. 22 Cal.4th at 585.

c. Principles Drawn From Commuting Cases Should Not Dictate the Outcome of On-Site Security Search Cases

As the Ninth Circuit recognized, principles derived from commuting cases—including Apple's cited decisions—should not be mechanically extended to on-site security search cases. *Frlekin*, 870 F.3d at 873. In such cases, "both the level of control and the employer's business interest are greater" than in commuting cases. *Id.* at 872-73. This case is a prime example. To protect its "valuable goods," Apple confined its employees on-site and "compelled" their "actions and movements." *Id.* at 973.

Apple misunderstands the Ninth Circuit's discussion of this point. ABM 35-36. The Ninth Circuit was not talking about just *any* "interest" or "benefit" to the employer, as Apple claims, but the *specific* "interest in preventing theft." 870 F.3d at 873. Because of the employer's "greater" interest in theft prevention, the employer typically exercises a greater "level of control" *during* the searches (*id.*)—which is, after all, the "determinative" factor. *Mendiola*, 60 Cal.4th at 840.

In security search cases, an employee's "antecedent choice" should not "obviate[] the compensation requirement." *Frlekin*, 870 F.3d at 873. The compensability analysis should recognize that people "routinely carry bags, purses and satchels to work, for all sorts of reasons," which means employees have "little true choice" to "avoid" being searched. *Id.*; *see* ER 549:5-7. While Apple vigorously asserts that this point is

procedurally barred, Apple does not dispute the truth of the Ninth Circuit's observations, or that employees have an ordinary, everyday need to carry their bags—and especially their iPhones, which are essential communication devices—to work. *See* OBM 41-42.

Instead of requiring Checks, Apple claims it could prohibit employees from bringing bags and iPhones "into the store altogether." ABM 36-37. But there is no *evidence* that Apple has ever considered taking that concededly "draconian" step. *Id.* Such a step would interfere with Apple's ability to hire and retain qualified staff.

Apple's unpaid Checks already engender significant employee dissatisfaction,[20] and a draconian rule prohibiting bags and iPhones would strip Apple's sales staff of their "dignity." *Dynamex*, 4 Cal.5th at 952. Far from "penaliz[ing] Apple" (ABM 37), the Check policy allows Apple to have the type of workforce it wants for its stores. It allows Apple to run a profitable business selling small, valuable devices. And it allows Apple to avoid the expense of other, potentially costlier ways of securing its merchandise.

"Controlled" security search time, conducted on the employer's premises and enforced through threat of discipline, should be compensable. Any other rule would lead to the very "type of 'race to the bottom'" deprecated in *Dynamex*. 4 Cal.5th at 960. If employers can impose mandatory, onsite security searches without payroll impact, more and more California employees will be subjected to them, for no additional pay.

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[20] ER 215 (employee "deemed it insulting" to be Checked); 220 (Check policy is "not an easy pill for our team to swallow"); 225 (tech Checks are "a huge shock to the person"); 239 (employee believed the Checks "violated her rights as an employee and a person since she was off the clock"); 314 (Checks are "both insulting and demeaning to Apple employees" and treat employees "as criminals"); 319 ("Why [do] we have to be treated as a thief?").

C. The Check Time Satisfies the "Suffered or Permitted to Work" Test

The Check time not only meets the "control" test, but also satisfies the "suffered or permitted to work" test, and is compensable for that alternative reason.

1. The Checks Involve Exertion to Achieve an End

As plaintiffs' opening brief explained, "work" means physical or mental exertion to accomplish an end, especially "for the benefit of an employer." OBM 44-45 (citing *Black's Law Dictionary* (10th ed. 2014); *American Heritage Dictionary* (4th ed. 2000); *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003)). This definition is the "common" and "ordinary" meaning of the word "work." *See Augustus*, 2 Cal.5th at 265. Apple does not contest the definition, and offers no other.

The Checks plainly meet this definition. They involve the effort and exertion of "compelled" "actions and movements" needed to "follow [Apple's] search procedures." *Frlekin*, 870 F.3d at 871, 873. They accomplish Apple' stated goal of deterring theft of "valuable goods," which benefits Apple. *Id.*; *see* OBM 8-10, 45 (citing record).

Apple's only response is to pretend there is "no dispute" that the Checks were "passively awaited." ABM 54. In fact, the Ninth Circuit described the Checks otherwise.

2. "Work," to be Compensable Under California Law, Need Not Relate to an Employee's Regular Job Duties

Instead of offering a supported definition of "work," Apple claims that an unstated element should be added to the test. According to Apple, an activity cannot be "work" unless the activity relates to "to the job the employees were hired to perform." ABM 53-55. This argument ignores the Wage Order's text, which includes no such qualification.

The IWC did not say "suffered or permitted to engage in job duties the employee was hired to perform." Instead, it used the plain-language word "work."

Inferring such a qualification would make California law no more protective than the federal Portal-to-Portal Act, under which an activity is not compensable unless it relates to an employee's "principal" job duties. *See, e.g., Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003); *Young v. Beard*, 2015 WL 1021278, *9-*10 (E.D. Cal. Mar. 9, 2015).

This, in turn, would contravene the intent of the IWC, which purposely expanded the definition of "hours worked" in 1947 to ensure that California law is *not* coextensive with federal law. *Mendiola*, 60 Cal.4th 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592.[21]

What is more, Wage Orders 4 and 5, unlike Order 7, expressly state that "hours worked" is to be "interpreted in accordance with" federal law. 8 Cal. Code Regs. §11040, ¶2(K), 11050, ¶2(K). And, for certain employees covered by Order 5, "work" is limited to "time spent carrying out assigned duties." *Id.* §11050, ¶2(H). These express qualifications would be meaningless if Order 7 were read to already include them.

Instead of addressing these points, Apple cites several unpublished rulings (ABM 54-55), but none helps Apple. *Young* construed federal law, not California law.[22] *Saini*

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[21] *Accord Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 317, 324 (2005) ("nonproductive time" is compensable "hours worked" under California law, which "protect[s] ... California employees to a greater extent than federally").

[22] *Young*, 2015 WL 1021278 at *7-*10.

considered a different question, namely, whether the defendant "employed" the plaintiff within the meaning of "employ," not the meaning of "hours worked."[23]

Betancourt endorsed *Black's* definition of "work," and found the task compensable under that definition because it "benefited" the employer.[24] While *Betancourt* also held, unremarkably, that "a task [one's] employer required" as "part of his responsibilities as an ... employee" was compensable "work," *Betancourt* did not hold that the latter was an essential element of the definition.[25] Finally, *Watterson* is inapposite because the plaintiff "admitted" that the tasks in question "were not work."[26]

In short, Apple cites no authority supporting its proposed qualification of the plain-language term "work." The qualification would contravene both the Wage Orders' plain text and the IWC's intention in adopting that text.

3. The Two Tests for "Hours Worked" are Complementary, Not Mutually Exclusive, As Apple Claims

Apple claims that the plain-language definition of "work" would render the "control" test "superfluous" because any activity meeting the "control" test "would surely also constitute work." ABM 56. This is incorrect. In *Morillion*, the bus rides to the fields met the "control" test, even though the rides were not "work." 22 Cal.4th at 580,

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23 *Saini v. Motion Recruitment Partners, LLC*, 2017 WL 1536276, *7 (C.D. Cal. Mar. 6, 2017) (citing *Martinez*, 49 Cal.4th at 67-68, which involved the same issue).

24 *Betancourt v. Advantage Human Resourcing, Inc.*, 2014 WL 4365074, *6 (N.D. Cal. Sept. 3, 2014).

25 *Id.* at *7.

26 *Watterson v. Garfield Beach CVS, LLC*, 694 Fed.Appx. 596, 957 (9th Cir. 2017).

582. Similarly, in *Bono*, the employees were "controlled" during their lunch hour, although they performed no "work" during that time. 32 Cal.App.4th at 972.

Apple's related argument—that the plain-language definition of "work" would "conflate" the two tests—fails for similar reasons. ABM 56. As held in *Morillion*, the two tests may "be independently satisfied," which means that a "controlled" activity is compensable regardless of whether it *also* constitutes "work." 22 Cal.4th at 584-85. Similarly, "work" "suffered or permitted" by an employer is compensable even if not *also* "controlled." *Id.*

But *Morillion* did not hold that the converse is true, or that the two tests "cover[] distinct *behavior*," as Apple claims. ABM 56; *see also* ABM 40-41.

Under Apple's incorrect reading, an activity could meet *either* the "control" test, *or* the "suffered or permitted to work" test, but not both. According to Apple, behavior establishing that one test is satisfied would be "irrelevant"—even inadmissible—to prove that the other test is also met. *See id.* Nothing in the Wage Orders' text suggests that this is how the tests function, and Apple's own cited case recognizes they do not. *Betancourt*, 2014 WL 4365074 at *6-*7 (holding that the same activity met both tests).

4. The "Suffered or Permitted" Test is Qualified, Not "Overbroad" as Apple Asserts

Apple contends that the plain-language definition of "work" is overbroad, and if not qualified, "virtually anything an employee does" would be compensable. ABM 55. Apple also claims that if "benefit" to the employer is considered, then myriad activities

"an employee might do before arriving at work in the morning," such as "getting dressed," "eating healthy" or "exercising," would be compensable "work." ABM 57.

These arguments overlook the fact that the test is already qualified. "Work," to be compensable, must *also* be "suffered or permitted" by an employer, which means the employer knew, or reasonably should have known, the "work" was occurring. *Morillion*, 22 Cal.4th at 584-85. That element "encompasses a meaning distinct from merely working." *Id.* at 584. The off-site, pre-workday activities Apple identifies would not meet the "suffered or permitted" element of the test.

Here, Apple certainly knew the Checks were occurring, because they took place in Apple's stores pursuant to company policy. Whatever else "suffered or permitted to work" may embrace, it certainly covers an activity like the Checks, which occur on-site, during the ordinary workday; are enforced by threat of discipline; are concededly "controlled"; and also *benefit* the employer by preventing and deterring theft.

Apple claims that under *Martinez*, the benefit to Apple cannot be considered in deciding whether the Checks constitute "work." ABM 56-57. But Apple misconstrues *Martinez*, just as the district court did. *Martinez* considered whether a downstream produce buyer was the plaintiffs' "employer," which turned on the definition of the term "employ," not the separate definition of "hours worked." 49 Cal.4th at 69-70. In *that* context, to establish an employment relationship, "benefit" was neither "a necessary nor a sufficient condition." *Id.*; *see Dynamex*, 4 Cal.5th at 939 (discussing this part of *Martinez*). In *this* case, by contrast, no one disputes that Apple is the "employer."

Martinez did not hold that "benefit" is irrelevant to determining whether an activity performed at the conceded employer's express behest constitutes "work." Here, the Checks plainly benefited Apple, or Apple would have not have bothered to impose them, have managers spend time on them, or discipline employees for not doing them. *See Frlekin*, 870 F.3d at 873; ABM 36 (conceding that the Checks "promote[d] [Apple's] interest in loss prevention"). Benefit to the employer is a relevant, but not an essential, part of the definition of compensable "work."

Apple claims that the plain-language definition of "work" would embrace "walking from [the] parking lot to the office" or "rummaging [for] a security badge" on the way in. AMB 55. Not so. California law is already clear that routine commute time is generally not compensable (*Morillion*, 22 Cal.4th at 587; *Alcantar*, 800 F.3d at 1054), and this is not a commute case. Holding that discipline-enforced, on-site security Checks are compensable "work" would not alter the general commuting rule.

5. The Checks *Do* Relate to the Employees' Regular Job Duties

In addition to failing legally, Apple's position also fails factually. The Checks do, in fact, relate to the job duties of Apple's retail sales employees, as the Ninth Circuit easily perceived. *Frlekin*, 870 F.3d at 873. If the Checks were unrelated to the employees' jobs, then Apple would have no power to require the employees to participate in them, and no authority to discipline anyone who refused.

Apple's own documents show that all employees bear "responsibility" for "internal theft." ER 200-01, 206; OBM 12 (citing record). Apple's "Loss Prevention" policy states: "Each and every employee is responsible for controlling loss in his/her

store," both "external theft [and] internal theft." MAR 14. "Loss prevention is a team effort to protect the company's products, assets, and brand." MAR 30.[27]

Apple claims that the Checks prevent only *the Checked employee* from stealing (ABM 53-54), but in fact, the Checks "are key components to the impression of [merchandise] control in the store." ER 212. Without "an impression of control," "we are setting up our team to believe that something [stolen] will not be missed." ER 228. The Checks "act as a deterrent" of theft, "like having a speed[] limit is a deterrent for speeding." ER 363:11-14. In other words, the Checks communicate to *the workforce*—not just the Checked employee—that attempts to steal will be discovered.

Apple sought judicial notice of a declaration claiming its employees are not hired "for the purpose of submitting to bag or technology checks." ABM 53 (citing Apple's MJN Ex. A ¶4). But the declaration, even if considered for its truth,[28] would not prove the Checks lack a "*relationship* to plaintiffs' job responsibilities." Apple's own documents, including several this declarant authenticated, state otherwise. MAR 14-22, 24-35; ER 200-01.

It is a road too far for Apple to contend that the Checks bear "no relationship" to "what the employees were hired by Apple to do." ABM 53, 57. In *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590 (C.D. Cal. 2015), the court had no difficulty concluding that similar security searches could be compensable "work" under

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27 *Accord* MAR 22 ("Shrinkage," including "internal theft," "is a controllable expense for which every employee must accept responsibility."); ER 200-01 (same).

28 *People v. Woodell*, 17 Cal. 4th 448, 455 (1998) (judicial notice extends only to fact that affidavit was filed, not truth of statements in it).

the "suffered or permitted to work" test. *Id.* at 613-14. Here, that Apple requires the Checks, on threat of *discipline*, further shows they are compensable "work."

For all of these reasons, and for the more fundamental reason that the Wage Orders do not state that "work" must relate to the employees' regular job duties, the Checks easily meet the "suffer or permitted to work" test.

D. Apple's Retroactivity Argument Would Strip California Employees of the Wage Orders' 71-Year-Old Protections

Apple contends that if the Court finds the Checks compensable "hours worked," that holding should apply prospectively only, because it would upset "settled" law. ABM 59-61. This argument, however, assumes *Morillion* held something it did not.

The "general rule that judicial decisions are given retroactive effect" "is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (1989). When, as here, an opinion "undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim." *Woosley v. California*, 3 Cal.4th 758, 794 (1992). In *Mendiola*, this Court rejected an employer's similar argument concerning the Court's interpretation of longstanding Wage Orders. 60 Cal.4th at 848 & n.18.

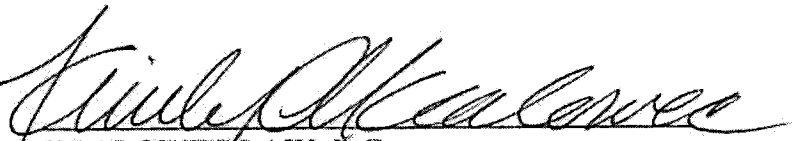
Here, no "compelling and unusual circumstances" justify "departure from the general rule" of retroactive application. *Newman*, 48 Cal.3d at 983. Apple's employees should not be deprived of the possibility of a remedy under a remedial Wage Order amended 71 years ago for no other reason than their protection.

III. CONCLUSION

For the reasons discussed above and in appellants' opening brief, the answer to the certified question is "yes."

Dated: June 8, 2018

Respectfully submitted,

By: 

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 8,394 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(c)(1).

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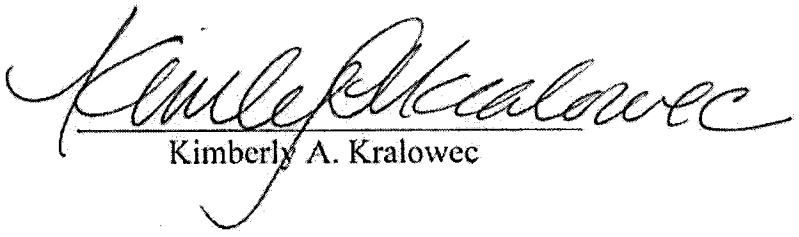

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PROOF OF SERVICE

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

I am a citizen of the United States; am over the age of 18 years; am employed by KRALOWEC LAW, P.C., located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, 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 BRIEF ON THE MERITS;**
2. **MOTION TO AUGMENT THE RECORD; MEMORANDUM IN SUPPORT; DECLARATION IN SUPPORT; PROPOSED ORDER; and**
3. **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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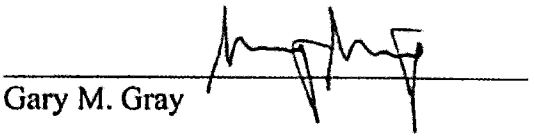

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