No. S234969

SUPREME COURT
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Supreme Court

OF THE

State of California

DOUGLAS TROESTER,

Plaintiff, Appellant and Petitioner,

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

Application for Leave to File and Brief of Amici Curiae Consumer Attorneys of California and California Employment Lawyers Association in Support of Plaintiff and Appellant

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rule of Court 8.520(f), Consumer Attorneys of California ("CAOC") and California Employment Lawyers Association ("CELA") respectfully request leave to file the attached amici curiae brief in support of plaintiff, appellant and petitioner Douglas Troester.

CELA is a statewide organization of over 1,100 California attorneys who devote the major portion of their practices to representing employees in a wide range of employment cases, including wage and hour class action lawsuits similar to Troester. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting employee rights in wage and hour cases.

CELA has appeared as *amicus curiae* in many cases before this Court, including *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; and *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 associated consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of illegal business practices, including wage and hour violations. CAOC's members have taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the civil justice system and the Legislature. CAOC has participated as amicus curiae in precedent-setting decisions involving employee rights under California law, including both *Duran* and *Brinker*.

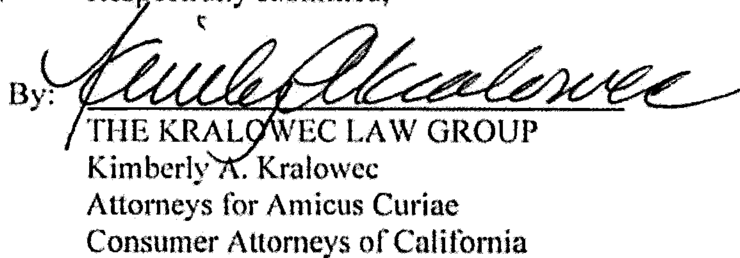
CAOC and CELA's members, and their clients, have an abiding interest in the correct development and interpretation of California's worker-protection laws,

including the requirement that employers pay for "any" and "all" time worked. The proposed joint amici curiae brief of CELA and CAOC will assist the Court in three ways. First, it will discuss authorities not cited in the briefing to date, all of which recognize that express statutory provisions, such as those in the Labor Code and Wage Orders, take precedence over the "maxim of jurisprudence" regarding "trifles," on which Starbucks and its amici rely. Second, the proposed brief will provide a detailed discussion of the adoption history of California's Wage Order and Labor Code provisions requiring employers to record and pay for "*any*" and "*all*" employee time worked. Finally, the proposed brief will add new analysis of California authorities demonstrating that a "de minimis" rule does not comport with the employee-protective purpose of the California Labor Code and Wage Orders.

Pursuant to Rule of Court 8.520(f)(4), CAOC and CELA affirm that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amici curiae, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CAOC and CELA respectfully submit that their proposed brief may be of assistance to the Court in deciding the matter, and therefore request the Court's leave to file it.

Dated: May 30, 2017 Respectfully submitted,



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I. INTRODUCTION

Under California law, employers are required to track, record, and pay for "***any***" and "***all***" "hours worked" by their employees.[1] This includes "***all the time***" during which the employees are "suffered or permitted" to work or are under employer "control."[2] Federal law has a less protective definition of "hours worked," as well as a weaker timekeeping requirement, under which time considered "de minimis" need not be recorded or paid.[3] But California has never adopted these weaker standards for recording time or compensating employees, and California's Labor Code and Wage Orders contain no analog to the federal "de minimis" defense. Such a defense simply does not exist under California's more protective provisions.

Starbucks and its supporting amici cite a "maxim of jurisprudence" from the Civil Code concerning "trifles."[4] According to Starbucks and its amici, this "maxim" supports a judicial modification of the "***any***" and "***all***" requirement. However, California's "maxims of jurisprudence" cannot be applied to impair express statutory rights. Any reliance on the "trifles" maxim is therefore misplaced.

Adopting a "de minimis" defense in California would contravene not only the text of the Labor Code and Wage Orders, but also their adoption history, which dates back more than a century. The adoption history demonstrates that neither the IWC nor the Legislature ever contemplated that the requirement to track, record and pay for "***any***" and "***all***" time worked would be relaxed through a "de minimis"

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1 Lab. Code §§510(a), 1174(d); Industrial Welfare Commission ("IWC") Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (emphasis added). Undesignated statutory references are to the Labor Code.

2 Wage Order 5-2001, *supra*, ¶2(K) (emphasis added). This brief focuses on Wage Order 5-2001, and its predecessors, because that is the Order applicable to the restaurant employees in this case. The other industry Orders are in accord.

3 29 C.F.R. §§778.223, 785.47; *see* 29 U.S.C. §203(o) (Portal-to-Portal Act).

4 Civ. Code §3533.

defense. To the contrary, over the past seventy years, both the IWC and the Legislature have had numerous opportunities to relax the requirement by conforming it to federal law, yet they consistently refused to do so.

In short, when the IWC and Legislature decreed that "***any***" and "***all***" time worked must be tracked, recorded and paid, they meant what they said.

Finally, even if the Labor Code and Wage Orders leave room for judicial adoption of a "de minimis" defense (they do not), such a defense would contravene other essential principles of California employee-protection law. California courts have consistently declined to elevate employer convenience, burden or "practicality"—the rationales behind the federal "de minimis" defense—over employees' statutory rights, including the right to full payment for time worked. Our courts have also broadly interpreted California's "control" test as capturing small increments of time, which the federal "de minimis" defense would disregard. All of this further confirms that a "de minimis" defense is incompatible with California's more expansive worker-protection laws.

As will be seen, California has long provided employees with stronger protections than federal law, and the requirements to track, record and pay for "***any***" and "***all***" time worked are no exception. The Court should not weaken these protections by adopting the federal "de minimis" defense. The answer to the Ninth Circuit's certified question should be an unequivocal ***no***.

II. DISCUSSION

A. The "Maxims of Jurisprudence" Cannot Vitiate the Protective Minimum Standards of the Labor Code and Wage Orders

One of Starbucks' primary contentions is that Civil Code section 3533, concerning "trifles," takes precedence over every statutory enactment in the Labor Code and Wage Orders. *E.g.*, Respondent's Answer Brief on the Merits ("ABM")

at 17-19.[5] According to Starbucks' view, section 3533 effectively modifies each such provision, regardless of the provision's plain language or the employee-protection purposes undergirding the provision. *See id.*

That is not how the maxims of jurisprudence operate under California law.

As this Court held long ago, the maxims of jurisprudence cannot vitiate other express statutory rights. *See, e.g., People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 476 (1950) (a statute's "express terms may not be nullified or defeated by a maxim" (citing *Lass v. Eliassen*, 94 Cal.App. 175, 179 (1928); *Moore Grocery Co. v. Los Angeles Nut House*, 90 Cal.App. 792, 795 (1928)); *Roe v. Superior Court*, 243 Cal.App.4th 138, 148 (2015) (the maxims "are not immutable principles that dictate how a statute is to be interpreted"); *Davcon, Inc. v. Roberts & Morgan*, 110 Cal.App.4th 1355, 1365 (2003) (refusing to apply a maxim in a manner inconsistent with "a statutory right"); *Lass*, 94 Cal.App. at 179 ("no maxim ... can be applied to defeat the express terms of a statute").

As the introductory "maxim" acknowledges, the maxims "do not qualify" other statutory enactments, but serve only as "an aid in their just application." Civ. Code §3509. As a result, this Court has recognized that the maxims are not "inflexible legal principle[s]" by which every other "statutory law" is necessarily modified. *Bickel v. City of Piedmont*, 16 Cal.4th 1040, 1048 n.4 (1997).[6]

Regardless of the maxims, where statutory construction is concerned, the Court's central "objective" "is to ascertain and effectuate the underlying legislative

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5 *See also* Amicus Curiae Brief of Chamber of Commerce of the United States at 10 (hereafter "Chamber Amicus Brief"); Amicus Curiae Brief of Association of Southern California Defense Counsel at 21 (hereafter "Defense Counsel Amicus Brief").

6 *Superseded by statute on other grounds as stated in DeBerard Properties, Ltd. v. Lim*, 20 Cal.4th 659, 668 (1999). *See also* Civ. Code §4 (a statute is "to be liberally construed with a view to effect its objects and to promote justice").

intent." *Moore v. California State Bd. of Accountancy*, 2 Cal.4th 999, 1012 (1992). That "fundamental rule" "overrides ... any maxim of jurisprudence, if application of the ... maxim would frustrate the intent underlying the statute." *Id.* (citing Civ. Code §3509 and numerous decisions) (emphasis added); *see also In re Joseph B.*, 34 Cal.3d 952, 957 (1984) (the maxims "shall always 'be subordinated to the primary rule that the intent shall prevail ...'" (quoting *Estate of Banerjee*, 21 Cal.3d 527, 539 (1978)); *Irwin v. City of Manhattan Beach*, 65 Cal.2d 13, 21 (1966) (the maxims are not "inflexible rule[s]," and the Court's "quest after legislative purpose" "remains paramount"); *J. Paul Getty Museum v. County of Los Angeles*, 148 Cal.App.3d 600, 605 (1983) (maxims inapplicable to plain statutory language or "where application of the maxim would frustrate legislative intent" (citing *Williams v. Los Angeles Metropolitan Transit Auth.*, 68 Cal.2d 599, 603 (1968)).

The "trifles" maxim of section 3533 is no exception to these rules. Courts have routinely declined to apply it when its application would be inconsistent with a statute (or other vested legal rights), or would frustrate the Legislature's purpose in enacting the statute. *E.g.*, *In re Garcia*, 58 Cal.4th 440, 458 (2014) (rejecting "de minimis" argument where express statutory language resolved question); *Knoke v. Swan*, 2 Cal.2d 630, 631 (1935) (refusing to apply "trifles" maxim to vitiate requirements of Revenue and Taxation Code; invalidating tax sale because of 2-cent discrepancy); *Walker v. Emerson*, 89 Cal. 456, 458-59 (1891) (maxim does not apply to trespass to land claimed to be "de minimis"); *Costerisan v. Tejon Ranch Co.*, 255 Cal.App.2d 57, 61 (1967) (refusing to apply maxim to questions of "permanent right[s]"); *see also* Petitioner's Reply Brief on the Merits at 9-11 (citing additional cases).

Here, as explained below, the applicable statutes and Wage Orders expressly require employers to pay for "***any***" and "***all***" time worked. "The case is not one, therefore, for the application of equitable doctrines, but rather one for the construction of an act of the Legislature." *Lass*, 94 Cal.App. at 179; *see J. Paul*

Getty Museum, 148 Cal.App.3d at 606 (given evidence of "legislative intent" and statute's "express language," "there is no need to resort to any maxim of statutory construction to discern the intent and scope of the [statute]").

As also explained below, the Wage Orders and Labor Code are highly specific enactments that post-date the maxims (adopted in 1872) by several decades. The maxims therefore must yield to the long-established rule that "later enactments supersede earlier ones, and more specific provisions take precedence over more general ones." *State Dept. of Public Health v. Superior Court*, 60 Cal.4th 940, 960 (2015) (citations omitted).

Notably, neither Starbucks nor its supporting amici have cited any California appellate decision applying the "trifles" maxim to relax an employer's obligation to pay for "all" time worked. The latter requirement is a fundamental employee-protection rule that has been part of the Wage Orders for many years. If the "trifles" maxim modified it, the maxim would have been addressed in a case by this time. It has never been used in that context, and should not be now.

Instead, this Court's interpretation of the Wage Orders and Labor Code should be guided—as it has always been—by the underlying employee-protection purpose of those enactments. *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 262 (2016); *Peabody v. Time Warner Cable, Inc.*, 59 Cal.4th 662, 667 (2014) ("[s]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees"); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-27 (2012) (same); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1103 (2007) (same).

B. As the Regulatory and Legislative History Shows, California Workers Must Be Paid for "*Any*" and "*All Hours Worked*," Not Some Lesser Subset of Hours Worked

The current Wage Orders and Labor Code require employers to record and pay for "***any***" and "***all***" employee time worked. Labor Code §510; Wage Order 5-

2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (emphasis added). The enactment history of these provisions demonstrates that neither the IWC nor the Legislature ever contemplated that any "trifles" maxim would weaken that unambiguous requirement. To the contrary, the Wage Orders and Labor Code are explicit that California employers may not record—or pay for—anything less than "***any***" and "***all***" "hours worked."

In California, the requirement to track and pay for "***all***" time worked dates back to the earliest Wage Orders. Once, in the early 1940s, the California and federal definitions of "hours worked" were the same. But when Congress and the federal courts began to curtail employee protections in the mid-1940s, California did not. Every time the IWC had an opportunity to follow federal regulators' lead in narrowing employee protections, the IWC conspicuously chose a different path.

In particular, when federal regulators codified a "de minimis" defense by relaxing the federal recording requirement in 1955, the IWC did not follow suit. Instead, less than two years later, it issued new Wage Orders that continued to require employers to both record and pay for "***all***" time worked. The IWC reconfirmed these rules in every subsequent set of Wage Orders, including the 1998 Orders, which purported to eliminate daily overtime. In 1999, when the California Legislature stepped in, that body reconfirmed that in this state, "***any*** work" over eight hours per day must be recorded and paid. Lab. Code §510.

Since the earliest Wage Orders, a central purpose of California's overtime laws has been to ensure employer compliance with maximum hours limits, which exist for the health and safety of workers as well as the public. For that reason, among others, the Wage Orders require that "***all***" time comprising the initial eight hours be recorded (and paid). This plain language, illuminated by the enactment history, leaves no room for employers to choose to disregard working time that they may consider "trifles." Recording and paying for "***all***" time worked is not only a fundamental employee-protection principle, but is also essential to ensure that

California's overtime regulations actually function to limit maximum working hours.

1. Regulatory History Leading to Current Wage Order Language

In the first Wage Order ever adopted, the IWC imposed maximum daily and weekly working hours, applicable to all employees, whether paid on a weekly, hourly, or piece-rate basis. Wage Order 1, ¶¶1, 3 (Fruit and Vegetable Canning Industry) (Feb. 14, 1916, eff. Apr. 14, 1916). Work in excess of the daily or weekly maximum was allowed in cases of "emergency," but only at a higher rate of pay than the minimums established in the Order. *Id.* ¶4.

To enable enforcement and proper payment of all earned wages, including "emergency" overtime, employers were required to "keep a record of the work done and ***the time worked***." *Id.* ¶6 (emphasis added).

The overtime provision was included "[f]or the purpose of limiting the hours of labor." By 1918, "[w]ork after twelve hours was practically prohibited by the requirement of double time rates." Fourth Report of the Industrial Welfare Commission 10 (Cal. State Printing Office 1924); *see also* Fifth Report of the Industrial Welfare Commission 11 (Cal. State Printing Office 1927) ("A penalty was placed on long hours of work by requiring the payment of [overtime wages].").[7]

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[7] *Accord* Statement as to the Basis for Order 5-80, ¶3 (Sept. 7, 1979) ("The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees …."); Statement as to the Basis for Amendments to Section 3 of IWC Order 5-80 Affecting the Health Care Industry at 2 (Jan. 17, 1986) ("the Commission reasserted its previous position that overtime pay is a means of limiting hours of work," and that reducing overtime hours "encourage[s] employers to schedule long hours"); *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 713 (1980) (citing Statement as to the Basis for 1980 Wage Orders, §3, "Hours and Days of Work"); *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal.App.3d 16, 37 (1990) ("The

None of these provisions could have been enforced absent the requirement for employer records of "the time worked." *See* Wage Order 1, *supra*, ¶6. In fact, the uncodified act establishing the IWC in 1913 contemplated employer recordkeeping for enforcement purposes. The 1913 act required employers to "furnish to the commission, at its request, any and all reports or information which the commission may require to carry out the purposes of this act ...." Stats. 1913, ch. 324, §3(b)(1), *cited in Martinez v. Combs*, 49 Cal.4th 35, 54 (2010).

By 1931, this provision had been amended to require employers to maintain records of "the ***hours worked daily***" by each employee. *Id.* §3(a) (as amended). This requirement remains in force today. Lab. Code §1174(d).[8]

Meanwhile, in the first industry order governing hotels and restaurants (the predecessor to Wage Order 5-2001), the IWC adopted the same enforcement structure as in its earliest industry orders. In Wage Order 12 (Hotels and Restaurants) (July 19, 1919, eff. Sept. 17, 1919), the IWC established a weekly minimum wage for full-time employees; an hourly minimum wage for part-time employees; and maximum daily and weekly hours of work for all employees. *Id.* ¶¶1, 3. Work in excess of the maximums was allowed, but only if overtime wages were paid. *Id.* ¶6(f). For purposes of tracking and enforcement, the Order required employers to maintain records of "***the hours worked*** and the amounts earned" by all employees. *Id.* ¶7 (emphasis added).

These same basic requirements and structure were readopted in amended Orders issued in 1920 and 1923. *See* Wage Order 12 Amended (Hotels and

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avowed purpose of the imposition of premium wages is to discourage the employer from working the employee excessive hours.").

8 The requirement was codified in 1937 as Labor Code section 1174, which continues to state that employers must maintain "payroll records showing the ***hours worked daily*** by" all employees. Lab. Code §1174(d). Failure to comply with the recordkeeping requirement is a misdemeanor. *Id.* §1175(d).

Restaurants) (Jun. 1, 1920, eff. Jul. 31, 1920); Wage Order 12 Amended (Hotels and Restaurants) (Jun. 8, 1923, eff. Sept. 13, 1923).

Twenty-two years after the IWC's first Wage Order, Congress enacted the federal Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (Jun. 25, 1938) ("FLSA" or "the Act"), thereby regulating hours and working conditions at the federal level for the first time. *See Martinez*, 49 Cal.4th at 53 ("[California] did not follow a federal model, as Congress would not enact the FLSA until 1938" (footnote and citation omitted)).

The FLSA limited the length of the "workweek" to a specified number of hours, and for time "in excess of" of the maximum, overtime pay was required. FLSA, §7(a). The Act compelled employers to keep records of the "wages, ***hours***, and other conditions and practices of employment maintained by [them]." *Id.* §11(c) (emphasis added). Four months later, the U.S. Department of Labor clarified that employers must record the "[***h***]***ours worked each workday*** and each workweek." 29 C.F.R. §516.1(d), 3 Fed. Reg. 2533 (Oct. 22, 1938) (emphasis added); *see* 29 C.F.R. §516.2(a)(7) (current version). The terms "workday" and "workweek" were, as of that time, undefined. *See Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 516 (2014).

In July 1939, the Wage and Hour Division of the U.S. Department of Labor issued Interpretative Bulletin No. 13, defining "hours worked" as follows:

> As a general rule, ***hours worked*** will include all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed work place, and all time during which an employee is suffered or permitted to work whether or not he is required to do so.

U.S. Department of Labor, Wage and Hour Division, Office of the Administrator, Interpretative Bulletin No. 13 (July 1939) (emphasis added), *quoted in Bowers v. Remington Rand*, 64 F.Supp. 620, 625 (S.D. Ill. 1946); *Mortenson v. Western Light & Tel. Co.*, 42 F.Supp. 319, 321 (S.D. Iowa 1941).

For its part, the IWC was keenly aware of the federal activity in the area of wage and hour regulation, which previously had been left to the states. In 1943, the IWC issued a "New Series" of Wage Orders (known as the "NS" series), which contained definitions for the first time. *E.g.*, Wage Order 5NS ¶2 (Hotels and Restaurants) (Apr. 14, 1943, eff. Jun. 28, 1943). The definition of "[h]ours employed" mirrored that of Interpretative Bulletin No. 13:

> "***Hours employed***" includes ***all time*** during which:
>
> 1. An employee is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed work place.
>
> 2. An employee is suffered or permitted to work, whether or not required to do so. ....

Id. ¶2(f) (emphasis added).

Order 5NS continued to impose a weekly minimum wage for full-time employees; an hourly minimum wage for part-time employees; and maximum daily and weekly hours of work for all employees, above which overtime must be paid. *Id.* ¶¶3(a), 4. The recordkeeping requirement incorporated the newly-defined term "Hours employed," requiring employers to keep "an accurate record" of "Hours employed, which shall show the beginning and ending of hours employed by the employee each work day, which shall be recorded at the time the employee begins and ends employment." *Id.* ¶8(a)(7) (emphasis added).

In 1944 and 1946, the U.S. Supreme Court handed down two opinions construing the FLSA, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), both of which addressed the scope of the "workweek" for purposes of overtime pay. The opinions held that time preliminary and postliminary to periods of productive labor (such as "time spent walking from timeclocks to work benches") should count as part of the "workweek" under the FLSA. *See Integrity Staffing*, 135 S.Ct. at 516.