No. **S234969**

Ninth Circuit No. 14-55530

In the

Supreme Court of California

DOUGLAS TROESTER, et al.,

Plaintiff – Appellant – Petitioner,

vs.

STARBUCKS CORPORATION, et al.,

Defendants – Appellees.

ON GRANT OF REQUEST TO DECIDE ISSUE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.548

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. GARY ALLEN FEESS, PRESIDING
DISTRICT COURT CASE NO. 2:12-CV-07677-GAF-PJW

PETITIONER'S CONSOLIDATED ANSWERING BRIEF IN REPLY TO BRIEFS OF AMICUS CURIAE FILED IN SUPPORT OF RESPONDENT

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I. INTRODUCTION

Four amicus curiae filed briefs in support of Defendant Starbucks Corporation ("Starbucks" or "Defendant"), but they contain nothing that would require this Court to recognize the federal *de minimis* excuse as a defense to California's comprehensive wage and hour laws, when neither the Labor Code nor the clear Wage Orders issued thereunder recognize such a defense.

Since the federal *de minimis* excuse has no application to California wage and hour obligations, amicus curiae Association for Southern California Defense Counsel ("ASCDC") simply repeats Defendant's fallback argument that this Court should impose a judicial maxim (Civil Code § 3533 ["The law disregards trifles."]) to curtail statutory rights under California law that guarantee the payment of all wages for all hours worked. ASCDC's stance, that ten minutes of daily labor by an employee is a "trifle" unworthy of compensation, is a slap in the face to hourly wage workers in California. Significantly, ASCDC offers no authority to dispute Plaintiff's argument that the California "*de minimis*" concept in Section 3533 does not apply to circumstances where a permanent right is infringed and an award of even nominal damages would carry costs. A judicial maxim does not supersede statutory rights, *which include statutory rights such as those at issue here.* ASCDC unhelpfully argues that courts in other states have applied a *de minimis* rule to state wage claims, but California has chosen, as a matter of public policy, to enact some of the strongest employee-protective laws in the country, a fact repeatedly recognized by this Court. It would be an absurd result to then undermine those protections by importing much weaker, employer-focused rules from states choosing an alternative approach for their

wage and hour laws and regulations.

After repeating Defendant's unavailing argument that California's *de minimis* doctrine applies here, ASCDC then offers other arguments already advanced by Defendant. Those arguments are no more compelling the second time around. First, ASCDC, like Defendant, identifies *federal* court decisions in which *federal* courts decided to apply a *de minimis* defense to California wage and hour claims. Second, ASCDC identified *only* the decision of *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508 (2009) to support its claims that "California . . . courts have consistently indicated that the *de minimis* rule applies to California wage claims." (ASCDC Brief, at 26.) And, just like Defendant, ASCDC fails to mention that the only discussion of a *de minimis* defense in *Gomez* was in the context of a promissory estoppel claim, and *Gomez* mentioned no California authority in the curt discussion, relying, instead, on *Lindow*, which concerns the federal *de minimis* defense available to claims arising under the FLSA. Third, ASCDC repeats the same ineffective attack on this Court's prior decisions regarding whether and when a Wage Order can be construed to have imported into California regulations any federal defenses to federal wage and hour claims. As already explained by Plaintiff, those decisions create a very clear framework for ascertaining whether and when any federal defense or standard is imported into any of California's Wage Orders. Fourth, ASCDC argues that a defense to a requirement imposed by the Labor Code or the Wage Order is available unless and until the Wage Order explicitly states that it is *not* available. Under this absurd formulation, the drafters of the Wage Orders would have been required to identify all conceivable defenses, creating a list of permitted and excluded defenses

that included every possible *federal* defense. This Court has heretofore never imposed such a burden on the drafters of the Wage Orders, and no compelling reason is given for why this Court should suddenly do so now. Fifth, ASCDC utilizes a long-discredited form of argument that legislative inaction in the face of erroneous DLSE guidance constitutes approval of that erroneous guidance. None of these arguments assist Defendant.

Amicus curiae California Retailers Association ("CRA") offers only two arguments in support of Defendant. First, CRA, like ASCDC, identifies a number of *federal* cases applying the federal *de minimis* defense to wage and hour claims. Using these *federal* cases, CRA argues, for example, that it would be "highly impractical, if not impossible to track" time spent standing in a security checkpoint line, and, by implication, that such time should not be compensable. (CRA Brief, at 8-9.) But that time is time for the benefit of the employer, where the employees are under its control, and it is time that occurs every day, day after day, allowing the employer to gain at the expense of the employees. Moreover, even CRA must concede that in the example of security checkpoints, the procedures and timeclock locations are in every conceivable instance determined *by the employer*. Simply moving the timeclocks so that they are situated before a security check line would eliminate the issue. And, as in the security checkpoint example, Starbucks devised its closing procedures, creating a system where employees were required to clock out and then perform additional tasks. How then can CRA or Starbucks credibly express outrage or surprise that when employer-created procedures result in underpayment of wages, the employees will eventually enforce their rights? Under California law, unlike *federal* law, when

(1) employees are under an employer's control or (2) the employer knew or should have known that the work was occurring, an employer then incurs an obligation to pay them for that time. Any California *de minimis* excuse would subvert a clearly defined standard that identifies when an employer will incur an obligation to pay its employees.

Second, CRA argues that, as a matter of policy, this Court should adopt a new standard for determining when California's clear and employee-protective wage payment obligations actually need to be followed. Under CRA's approach, this Court should create a "totality of the circumstances" exception that would allow a trier of fact to decide that any compensable activity isn't really "work" that requires payment of a wage. (CRA Brief, at 13.) Where ASCDC would have this Court declare ten minutes per day to be a "trifle," thereby stretching the meaning of "trifle" to an absurd extreme, CRA advocates a different standard that would allow arbitrarily long periods of time to be declared non-compensable. CRA reveals its real view of California's wage payment obligations when it says, "But employees have no reasonable expectation to be compensated for every split second or trivial inconvenience associated with having a job." (CRA Brief, at 14.) Again, CRA simply disregards California's settled law on wage payment obligations. When (1) employees are under an employer's control or (2) the employer knew or should have known that the work was occurring, the employees *do* have a reasonable expectation that all such time will be compensated.

CRA completes its attack on California's employee-protective public policy by arguing that lunch break interruptions are okay (CRA Brief, at 15), by arguing that

not paying employees who help customers after they clock out is okay (*id.*), and by describing burdensome outcomes that it cannot support with anything other than vague generalities. For example, CRA argues that if security checks must be "on the clock," the employer would have to compensate employees for "non-compensable" time. (CRA Brief, at 16.) But CRA fails to identify how standing in line for a security check is anything other than time under the employer's control, and thus compensable, particularly given that timeclock placement and security line procedures are always devised by the employer. Employers were already obligated to compensate employees for time under the employer's control. That some might not have done so is irrelevant to the existence of the obligation.

Amicus curiae California Chamber of Commerce ("CCC") offers nothing that is not included in the Briefs of CRA and ASCDC, and in the same way. For example, CCC claims that California has long recognized the *de minimis* excuse in the wage and hour law context. CCC, like ASCDC (and Defendant), cites *Gomez* as the only California case that allegedly did so, but, like ASCDC (and Defendant), CCC neglects to mention that *Gomez* discussed a promissory estoppel claim (not a claim arising under the Labor Code), and applied only *federal* law, citing *Lindow*. Then CCC cites to numerous *federal* court decisions and decision in other states, not acknowledging that *federal* courts and courts in other states do not have the authority to determine the scope of obligations arising under California's employee-protective wage and hour laws. CCC ends its analysis of inapposite authority by declaring that paying employees for a few minutes of work is an "absurd result" that "cannot be what the Legislature intended." (CCC, at 15.) CCC's conclusion is unsupportable and grossly

dismissive of employee labor. The California Legislature has made it abundantly clear over the years that it fully intended to craft comprehensive, employee-protective policies as the public policy of California, and intended the Wage Orders to detail and extend those protections further in the form of lawfully implemented regulations. Employers cannot subdivide employee tasks into smaller and smaller increments and then declare that the small increments it has created as so absurdly small that they ought not be compensated. And what employee would enthusiastically agree if approached by an employer and asked if he or she would like to work for free for ten minutes every day? It is absurd that CCC would think that anyone other than an employer seeking to shave labor costs on the backs of its employees would think that is okay.

Amicus curiae Employers Group and Amicus curiae California Employment Law Council ("EG & CELC"), in their Brief, also offer nothing different than a repeat of arguments included by the other Amicus Briefs filed in support of Defendant. First, EG & CELC argue, for reasons already addressed by Defendant, that the *de minimis* rule must be added to the existing, clear tests under California law that specify when time worked must be compensated by the employer because it would be more convenient for employers if they could simply forego paying employees for some tasks or some time worked. Second, EG & CELC argue that a *de minimis* excuse is consistent with California law because (1) the DLSE recognized the federal *de minimis* excuse, and (2) "rounding" was held lawful by a Court of Appeal. But, as this Court has recognized, the DLSE is not empowered to create regulations. And, as already noted by Plaintiff, the "rounding" decision, *See's Candy*, actually held that

any "rounding" system must be neutral, both facially and as applied, ensuring that *all* wages are paid "without imposing any burden on employees." Truncation through a *de minimis* rule application is contrary to that directive, and *See's Candy* supports Plaintiff's construction of California's employee-protective laws and regulations. Third, EG & CELC argue that abuse of a *de minimis* rule would be addressed by applying the factors discussed in *Lindow*. In other words, in the face of a comprehensive set of laws, regulations, and construing authority from this Court defining the employer's obligation to pay wages, EG & CELC would have this Court create a new paradigm for employer wage payment obligations and also craft a set of rules based entirely on *federal* law to determine when the new paradigm applies. This Court must decline the invitation to serve as a legislative or regulatory body that supplants the Labor Code and the Wage Orders and instead confirm that the declared public policy of the State of California, as embodied in existing statutory and regulatory requirements, is wholly sufficient to define when employers must compensate employees.

II. ARGUMENT IN RESPONSE TO AMICUS BRIEFS

A. Wage Theft Remains a Serious Problem for Low Wage Workers in California, and Imposing a *De Minimis* Excuse on Those California Employees Would Only Serve to Insulate Certain Forms of Wage Theft from Corrective Action

According to a report by the Economic Policy Institute, a nonprofit think tank in Washington, minimum-wage violations by California employers deprive the state's workforce of nearly $2 billion in earnings, increasing the financial vulnerability of

already at-risk populations and creating a drag on the state's overall economic health. Dominic Fracassa, *Wage theft costs low-paid California workers $2 billion per year*, San Francisco Chronicle, May 26, 2017, http://www.sfchronicle.com/business/article/Wage-theft-costs-low-paid-California-workers-2-11177052.php (last visited July 5, 2017). The San Francisco Chronicle's summary continued, saying, "Employees who are supposed to be getting paid the minimum wage in California are, on average, losing $64 per week and about $3,300 annually — 22 percent of their earnings — from employers shortchanging their hourly workers." *Id.* An average of 34,000 wage claims are filed with the labor commissioner's office each year, or about one every four minutes, and that figure does *not* include private lawsuits. *Id.*

Grafting the federal *de minimis* defense onto California's *existing* laws and regulations defining employers' well-settled compensation obligations will only serve to magnify an existing wage theft problem that State Labor Commissioner Julie Su recognizes as a pernicious harm. *Id.* With many federal courts mechanically holding that 10 minutes per day is *de minimis* (despite *Lindow*) a similar treatment by California courts would ensure that minimum wage workers lose roughly $10 more dollars per week, or another $500 per year. To a minimum wage worker, that is no "trifle."

B. Despite Arguing That a *De Minimis* Doctrine Exists Under California Law, Neither Defendant nor Any Amicus Supporting It, Acknowledge That California's *De Minimis* Doctrine Does Not Apply to the Types of Permanent, Statutory Rights at Issue Here

Amicus ASCDC duplicates Starbucks' argument that California has a *de minimis* defense. But, even with the benefit of having Plaintiff's Reply Brief to review, ASCDC is unable to dispute that the California *de minimis* doctrine does not apply to circumstances where a permanent right is infringed and an award of even nominal damages would carry costs, such as here, where non-waivable statutory rights are implicated.

As previously explained by Plaintiff, the generalized maxim of jurisprudence set forth in Civil Code § 3533 has never been applied to the statutory requirements set forth in the California Labor Code, and ASCDC offered no example to refute that observation. Nor did ASCDC refute the holdings of this Court stretching all the way back to *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454 (1893), which reasoned that, in addition to the fact that the *de minimis* concept normally has no application in the arena of contract law, the *de miminis* concept does not apply where a permanent right is infringed and an award of even nominal damages would carry costs. *Kenyon*, 100 Cal. at 458-59. This Court should decline the request to expand a vague maxim of jurisprudence into a license to shave compensable time from employee wages. If a defense of the sort advocated by Defendant and its Amicus partners is to be created, it is the Legislature's exclusive purview to determine whether that should occur in the context of the statutory obligations set forth in the Labor Code.

C. It Is Irrelevant to California Wage and Hour Law That Federal Courts Apply a Federal Defense to Wage and Hour Claims

As did Defendant, Amicus Briefs from ASCDC, CCC, and CRA take pains to list *federal* court decisions in which *federal* courts decided to apply a *de minimis* defense to California wage claims. Setting aside the absence of any reasoned analysis in those *federal* decisions about what this Court might do if presented with the question it now considers, federal courts do not issue controlling decisions on questions of California law. Rather, those decisions simply assume either that the federal *de minimis* defense has been imported into California law or that an identical excuse to full wage payments exists under California law, though it is not explained at all in the cited federal decisions why either condition would be true.

And, as did Defendant, Amicus Briefs from ASCDC and CCC mention *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508 (2009) to support the claims of the following ilk: "California . . . courts have consistently indicated that the *de minimis* rule applies to California wage claims." (ASCDC Brief, at 26.) However, as Plaintiff already explained, the only discussion of a *de minimis* defense in *Gomez* was in the context of a promissory estoppel claim, and *Gomez* itself mentioned *no* California authority in the minimal discussion, relying, instead, on *Lindow*, which concerns the federal *de minimis* defense available to claims arising under the FLSA. *Gomez* failed to offer any explanation or justification for how a federal defense to a federal law was appropriately transplanted into California law.

Tacitly recognizing that federal authority does not govern California law, Amicus CCC retreats to a fallback position, simply asserting that paying employees for a few minutes of work is an "absurd result" that "cannot be what the Legislature

intended." (CCC, at 15.) And, using the same federal cases, Amicus CRA argues that it would be "highly impractical, if not impossible to track" time spent standing in a security checkpoint line, and, by implication, that such time should not be compensable. (CRA Brief, at 8-9.) CRA argues that if security checks must be "on the clock," the employer would have to compensate employees for "non-compensable" time. (CRA Brief, at 16.) But CRA fails to identify how standing in line for a security check is anything other than time under the employer's control, and thus compensable. California's Legislature has long disagreed with CRA's view, enacting comprehensive protections for employees.

Neither CRA nor the other Amicus Briefs advocating for Starbucks discuss what is, perhaps, the most fatal fact here. *Employers* decided what procedures are followed when employees start and end shifts. *Employers* decide how employees will clock in and out for shifts. *Employers* decide where timeclocks are placed. When employees have no choice but to follow the procedures imposed by their employers, there is no way around the inescapable conclusion that such time is compensable time spent under the employer's control.

Tellingly, the Amicus briefs supporting Defendant inadvertently expose the true motivations underlying their arguments. For instance, CRA never explains why it would be "highly impractical, if not impossible to track" time spent standing in a security checkpoint line. This is so because timeclocks can be moved, and employees could clock in before going through a security checkpoint and clock out after exiting through the checkpoint. What CRA likely intends (as do Defendant, and other Amicus Brief filers) is that time not directly spent making money for the employer

should not be compensable. Amicus CRA views time spent going through a security checkpoint, at the employer's direction and for the employer's benefit, to be dead time with respect to business operations and thus unworthy of being treated like time spent by an employee on core duties.

Amicus CRA reveals contempt for tasks done at the employer's direction but falling outside an employee's primary functions. CRA attempts to convince this Court that, as a matter of policy, it should adopt a new standard for wage payment obligations, creating a "totality of the circumstances" exception that would allow a trier of fact to decide that any compensable activity isn't really "work" that requires payment of a wage. (CRA Brief, at 13.) Seeking to vitiate California's extant wage payment obligations, CRA says, "But employees have no reasonable expectation to be compensated for every split second or trivial inconvenience associated with having a job." (CRA Brief, at 14.) Ensuring that there is no doubt about the contempt with which it views wage payment obligations, Amicus CRA takes the time to argue that lunch break interruptions are okay (CRA Brief, at 15) and not paying employees who help customers after they clock out is okay (*id.*). In a feeble effort to distract from what permeates its Brief, CRA mentions burdensome outcomes that would result from this Court's refusal to import a federal defense into California law, but it cannot provide anything other than vague generalities to describe these "burdens."

Amicus filers EG & CELC are more transparent, outright arguing that it would be more convenient for employers if they could simply forego paying employees for some tasks or some time worked, treating it as a "trifle." But ten minutes per day is not a "trifle," which means, as used here, "Something of little importance or value. A

small amount; a jot." American Heritage Dict. (5th ed. 2017). And, while it may also be true that it would be more convenient to forego all payments to employees, the Legislature did not include a convenience exception to the Labor Code's requirements that permits the importation into California law of federal wage payment defenses to wage and hour laws with different standards than the clear and employee-protective standards that exist here.

Beneath much of the arguments by Respondent's Amicus filers lies an argument designed to erode employee protections in California, but it must be identified and rejected as nothing more than a fiction that runs headlong into existing and long-settled California law. CRA says that "employees have no reasonable expectation to be compensated for every split second or trivial inconvenience associated with having a job." (CRA Brief, at 14.) CCC declares that paying employees for a few minutes of work is an "absurd result" that "cannot be what the Legislature intended." (CCC, at 15.) What these statements, and the arguments of other Amicus filers for Respondent, share is the assumption that when a work shift is arbitrarily subdivided into numerous activities, tasks, or moments of short duration, it is okay to throw one or more of those events out and not compensate employees for them, even though they occurred with the employer's knowledge, even though they were for the employer's benefit, or even though they happened at the direction of the employer. And there is no limit to the manner in which even short-duration casks can be further subdivided to create the appearance of a demand for a very small amount of compensation. This Court must reject the invitation to endorse this practice which is nothing more than a request by employers to decline to pay employees for some

arbitrarily defined amount of work time each day.

D. The Court of Appeal's Decision on Rounding in *See's Candy* Offers No Succor to Defendant or Its Amicus Filers

Amicus filers EG & CELC argue that a *de minimis* excuse is consistent with California law because "rounding" was held lawful by a Court of Appeal. In *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012), a Court of Appeal addressed the propriety of rounding under California law, but the conclusion of that Court supports Plaintiff, not Defendant or its Amicus filers. Specifically, *See's Candy* said:

> Assuming a rounding-over-time policy is neutral, ***both facially and as applied***, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked ***without imposing <u>any</u> burden on employees***.

See's Candy, at 903 (emphasis added). The Court went on to state:

> Fundamentally, the question whether *all* wages have been paid is different from the issue of how an employer calculates the number of hours worked and thus *what wages are owed.*

See's Candy, at 905. In sum, *See's Candy* held that any "rounding" system must be neutral, both facially and as applied, ensuring that *all* wages are paid "without imposing any burden on employees." Truncation through a *de minimis* rule application is contrary to that directive.

E. The Duplicative Assault on This Court's Prior Decisions Concerning Whether and When Wage Orders Can Be Construed to Have Imported Federal Law into California Regulations

Amicus ASCDC repeats Defendant's ineffective attack on this Court's prior

decisions regarding whether and when a Wage Order can be construed to have imported into California regulations any federal defenses to federal wage and hour claims. As explained more fully in Plaintiff's Reply Brief on the Merits, this Court has articulated a clear standard for identifying the infrequent instances where the IWC incorporated portions of the FLSA into any of the Wage Orders. Bluntly stated, elements of the FLSA are incorporated only when the IWC says that they are:

> We have observed "that where the IWC intended the FLSA to apply to wage orders, it has specifically so stated."

Mendiola v. CPS Sec. Solutions, Inc., 60 Cal. 4th 833, 847 n. 17 (2015), citing *Morillion v. Royal Packing Company*, 22 Cal. 4th 575, 592 (2000). Beyond that clear rule, this Court has identified additional requirements that must be satisfied before any court can limit employee protections by imposing weaker federal protections, and the decisions of this Court setting forth those requirements are relevant here.

1. *Mendiola* applies here, holding that "the IWC knows how to expressly incorporate federal law and regulations when it desires to do so."

In *Mendiola*, this Court explained, "[O]ther language in Wage Order 4 demonstrates that the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so." *Mendiola*, 60 Cal. 4th at 843; *see also Mendiola*, 60 Cal. 4th at 847 n. 17 ("***Wage Order 4 itself demonstrates that the IWC knows how to expressly incorporate federal law and regulations when it desires to do so***."). Here, neither Defendant nor any Amicus filer has identified anything in either the Labor Code or the governing IWC Wage Order that suggests the IWC intended to import a federal court-created defense to the FLSA that is, in virtually

every way, less protective of employees than California law. No such presumption exists if it would in any way lessen employee protection:

> Because application of part 785.22 would "eliminate[ ] substantial protections to employees," we decline to import it into Wage Order 4 by implication.

Mendiola, 60 Cal. 4th at 847. And, just as *Mendiola* held, a "contrary result would have a dramatic impact" in California, where periods of time up to ten minutes or more per day that employers were previously obligated to pay for would suddenly become uncompensated work time.

2. *Ramirez* applies here, holding that similarity of terminology between state and federal wage and hour laws is not enough of a basis upon which to presume that weaker federal protections were intended to dilute stronger state protections

Ramirez v. Yosemite Water Co., 20 Cal. 4th 785 (1999) thoroughly considered an argument that similarity of language in an IWC Wage Order should be construed as adopting the federal construction of a term in common use under federal law (in that case, the "outside salesperson" exemption). Concluding that no such presumption exists, *Ramirez* said:

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

Ramirez, 20 Cal. 4th at 800. *Ramirez* did not limit its holding to the term at issue, holding that, absent statutory language or legislative history to the contrary, the IWC's Wage Orders should not be construed as incorporating federal standards just because common terms are used in the Wage Orders.

A similar result is even easier to reach here. Unlike in *Ramirez*, where a term

in use under federal law was used, with a different definition, by California law, the *de minimis* excuse is nowhere mentioned in either the Labor Code or the IWC Wage Orders.

3. *Morillion* applies here, finding error in the use of federal regulations to interpret IWC Wage Orders because of substantial differences between the two systems.

Morillion also provides a framework for evaluating whether federal regulations offer any guidance in the construction of California law, holding that "substantial" differences between provisions of state and federal law are a sufficient ground for a presumptive rejection of federal law or regulation as a source of interpretive guidance. *Morillion*, 22 Cal. 4th at 589–90. Here, not only does the "knew or should have known" standard of compensable work time exist under California but not federal law, the *de minimis* excuse is incorporated into DOL regulatory interpretations of the FLSA, where no *de minimis* excuse has *ever* appeared within the Labor Code or the IWC Wage Orders. Notably, the FLSA itself contains no broad requirement to pay for *all* hours worked, setting aside the divergent approaches to what constitutes compensable hours worked.

Morillion then held that "convincing evidence" of the IWC's intention to adopt a federal standard must be established before a court can presume to import a standard reducing employee protections. *Morillion*, 22 Cal. 4th at 592. A similar rule, applied here, precludes importation of the federal *de minimis* excuse into California wage and hour law where there is no evidence, let alone convincing evidence, that the Legislature or the IWC intended to do so.

The efforts to distinguish *Morillion* are baseless, given that *Morillion* defines

standards that must be satisfied before any court can construe a Wage Order as importing any federal standard that is less protective of California employees.

F. Amicus Filers Wrongly Suggest That the California Legislature Approved of the DLSE Interpretation by Not Acting to Correct It

Amicus filers EG & CELC attach significance to the fact that the DLSE adopted the federal *de minimis* excuse into its enforcement manual and then the California Legislature did not act to correct that unlawful regulation. But, as this Court has long held, it is a "general principle of statutory construction that legislative inaction is indeed a slim reed upon which to lean." *Quinn v. State of California*, 15 Cal. 3d 162, 175 (1975). And noting the limits on the reach of that "slim reed," this Court has said that "the 'proverbial "weak reed" ' of legislative acquiescence (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1107, 23 Cal.Rptr.3d 417, 104 P.3d 783) cannot reasonably be stretched so far as to abrogate another statute." *People v. Brown*, 54 Cal. 4th 314, 328 (2012), as modified on denial of reh'g (Sept. 12, 2012).

As this Court has said before, "The DLSE's past views offer little help in resolving the issue here." *Mendiola*, 60 Cal. 4th at 848. Where, as here, there is no evidence suggesting that federal courts' construction of federal wage and hour law was intended to be incorporated into California's wage and hour laws and regulations, the DLSE's opinion on that front is of no value:

> [W]hile the DLSE is charged with administering and enforcing California's labor laws, it is the Legislature and the IWC that possess the authority to enact laws and promulgate wage orders. (*Aguilar, supra,* 234 Cal.App.3d at p. 26, 285 Cal.Rptr. 515.)
>
> There is no evidence that the IWC intended to incorporate part 785.22 into Wage Order 4.