No. S243805

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

AMANDA FRLEKIN, et al.,

Plaintiff and Appellant,

vs.

APPLE, INC.,

Defendant and Respondent.

U.S. Court of Appeals for the Ninth Circuit
No. 15-17382
U.S. District Court, Northern District of California
No. C 13-03451 WHA (lead), No. C 13-03775 WHA (consolidated),
No. C 13-04727 WHA (consolidated)
Honorable William Alsup

BRIEF FOR *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL AND EMPLOYERS GROUP IN SUPPORT OF RESPONDENT

Service on the California Attorney General and Santa Clara County District Attorney required by Business and Professions Code Section 17209 and Rule 8.29(a) and (b) of the California Rules of Court

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I. INTRODUCTION

"[R]ules that deny factfinders recourse to common sense . . . are neither necessary under our case law nor consistent with it." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). Here, common sense answers the question that the Ninth Circuit has certified to this Court. The Ninth Circuit asks whether an employee must be compensated for time resulting from a choice that the employee makes "voluntarily" to suit the employee's "personal convenience." The answer is "no," and these common-sense examples show why:

- An employee voluntarily commutes to work in a company-owned vehicle for her own convenience (and to save herself money). However, the employer for insurance reasons prohibits using the car for personal errands or for transporting passengers. Employees who choose to drive a company car thereby forego certain freedoms — but they do it voluntarily, so driving to and from the office is not compensable work.
- An employee voluntarily showers and shaves at work, after going to the gym, for his own convenience. The employee is required to clean up after himself when using the employer's facilities. Although clean-up is required for anyone who elects to shower at work, the activity is voluntary and not compensable work.
- Because of limited space at work stations, employees who bring bulky items to work are required to store them in designated lockers. Anyone who brings those items to work must walk to designated areas, and

deposit and remove the items from lockers. But the activity is voluntary and not compensable work.

- A company provides employees with a free parking lot, which employees may use (or not use) as they see fit. Persons who use the parking lot are prohibited from eating, drinking, or littering in it, and they must leave their car keys with a parking attendant. Use of the parking lot comes with restrictions, but using the parking lot is voluntary and not compensable work.
- An employee voluntarily changes into a uniform at work, even though he or she had the option to put it on at home before going to work. The employee changes in a designated locker room at work. Employees who choose not to change at home must comply with the employer's requirement to change clothes only in the locker room. But the activity is voluntary and not compensable work.
- Employees are invited to an optional party at an amusement park, outside of normal work hours. Employees who choose to bring their children are required to supervise them. However, the event remains voluntary and not compensable work.
- Employees are permitted to bring pet dogs to work, but only if they walk them regularly in designated areas to prevent "accidents." Employees who choose to bring dogs to work must comply with the rule, but the activity is voluntary and not compensable work.

The law comports with common sense. California law does not require, and has never required, employers to compensate employees for (1) activities performed as a result of the employees' voluntary choice, (2) that they were not hired to perform.

Wage Order No. 7 ("Wage Order") requires employers to pay employees for their "hours worked," defined as the time that employees are: (a) "subject to the control of" their employer, or (b) "suffered or permitted to work, whether or not required to do so." 8 CAL. CODE REGS. § 11140(2)(G). Voluntary activities unrelated to the duties that employees were hired to perform are not compensable.

This Court applied the "control" test in *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000). There, agricultural employees who were "required" to ride an employer's buses to travel to and from the fields had to be paid during the transportation time, because they were then "subject to the control" of the employer. *Id.* at 578, 586. Two factors compelled that result: (1) The employer "required" the bus ride, and (2) the employer exercised "control" during that "compulsory" activity. *Id.* at 587. The Court never suggested — and no case has held — that *optional* activities satisfy the control test.

As for the "suffered or permitted to work" test, it does not require payment for voluntary activities that are not *work related*. As the Court explained in *Morillion*, that test applies when "an employee is working but is not subject to an employer's control . . . such as unauthorized overtime [that] the employer has not requested or required." *Id.* at 584-85 (citations omitted). "Work" refers to activity by an employee that furthers or relates to duties that the employee was hired to perform. To *amici*'s knowledge, no

California court ever has applied the test outside the context of off-the-clock work, or interpreted the test to require payment for tasks that are not work related.

For these reasons, and those that follow, the California Employment Law Council and Employers' Group respectfully request that the Supreme Court reaffirm *Morillion*, endorse the position adopted by the district court in this case, and answer "No" to the question certified by the Ninth Circuit.

II. INTEREST OF *AMICI*

Amicus California Employment Law Council ("CELC") is a voluntary, non-profit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 80 private sector employers in the State of California who collectively employ well in excess of a half-million Californians.[1] CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.[2]

Amicus Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,800 California employers

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[1] Respondent Apple, Inc. is not a member of CELC.

[2] *See, e.g., Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016); *Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014); *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012); *Harris v. Superior Court*, 53 Cal. 4th 170 (2011); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007).

of all sizes and every industry, which collectively employ nearly 3,000,000 employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is uniquely able to assess both the impact and implications of the legal issues presented in employment cases such as this one, and accordingly, has been involved as *amicus* in many significant employment cases.[3]

III. EMPLOYEE TIME IS COMPENSABLE ONLY IF ONE OF TWO STANDARDS IS SATISFIED: THE "CONTROL" TEST OR THE "SUFFERED OR PERMITTED TO WORK" TEST

The Wage Order defines "hours worked" as (1) "the time during which an employee is subject to the control of an employer," and (2) "the time the employee is suffered or permitted to work, whether or not required to do so." 8 CAL. CODE REGS. § 11070(4)(B) & (2)(G). In *Morillion*, this Court ruled that those two phrases are

[3] *See, e.g., Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014); *Reid v. Google Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group*, 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009); *Amalgamated Transit Union v. Superior Court*, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007).

"independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'" 22 Cal. 4th at 583. The factors are discussed, respectively — and shown to be inapplicable here — in Section A and B below. As shown in Section IV, no compensation is owed (in the words of the Ninth Circuit's certified question) as a result of an employee's "voluntar[y]" choices, made for the employee's "personal convenience."

A. For The "Control" Test To Apply, An Employer Must (1) Require An Activity, And (2) Sufficiently Restrict The Employee During The Activity.

1. The plain meaning of "control" demonstrates the Legislature's intent to treat only required activities as compensable.

"Wage orders are quasi-legislative regulations and are construed in accordance with the ordinary principles of statutory interpretation." *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 43 (2013). The fundamental aim of statutory construction is to "ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.'" *Martinez v. Combs*, 49 Cal. 4th 35, 51 (2010) (quoting *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001)). "In this search for what the Legislature meant, '[t]he statutory language itself is the most reliable indicator, so [courts] start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context." *Martinez*, 49 Cal. 4th at 51. "In doing so, [courts] employ a number of canons of statutory construction" to aid in identifying legislative intent. *Droeger v. Friedman, Sloan & Ross*, 54 Cal. 3d 26, 50 (1991).

Under the well-established plain-meaning rule, the first step in determining legislative intent is "looking . . . to the words of the wage order, construed in light of their ordinary meaning." *Rodriguez v. E.M.E., Inc.*, 246 Cal. App. 4th 1027, 1034 (2016); *accord Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988). "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." *Wasatch Property Management v. Degrate,* 35 Cal. 4th 1111, 1121-22 (2005) (citing The Oxford English Dictionary to interpret the meaning of "terminate"); *see also Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 569 (2004) (citing Black's Law Dictionary to interpret the meaning of "prevailing party").

"Control" consistently is defined to mean "to direct." *See* BLACK'S LAW DICTIONARY (10th ed. 2014); AMERICAN HERITAGE DICTIONARY (5th ed. 2018); OXFORD ENGLISH DICTIONARY (2d ed. 1989). "Direct," in turn, means telling or ordering another person to do something. *See* OXFORD ENGLISH DICTIONARY ("[to] give (someone) an official order or authoritative instruction"); BLACK'S LAW DICTIONARY ("[t]o instruct (someone) with authority"); AMERICAN HERITAGE DICTIONARY ("[t]o give commands or direction"). In *Morillion*, this Court favorably cited *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal. App. 4th 968 (1995), which interpreted "control" to mean "directs, commands or restrains." 22 Cal. 4th at 583.

Another longstanding rule of statutory construction confirms that "control" refers to required or compulsory activities. "It is a maxim of statutory construction that courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." *Reno v. Baird*, 18 Cal. 4th 640, 658 (1998)

(internal quotation marks omitted) (applying canon to a wage order); *see also Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1048 n.27 (2012) (the meal period provisions of a wage order "must be read to avoid surplusage"). The rule against surplusage applies here, because the Legislature added the phrase "whether or not required to [work]" to the second test for compensability (whether an employee is "suffered or permitted to work"), but *not* the control test. If the "control" test rendered all activities compensable — "whether or not required" — the use of the phrase in one test but not the other would have no meaning; the phrase would be mere surplusage. Giving meaning to the phrase, on the other hand, would be consistent with the Court's observation in *Morillion* that the "suffered or permitted to work" test "expanded" the meaning of "hours worked." *Id.* at 582.

2. *Morillion* confirms the plain meaning of the Wage Order; only required activities are compensable under the "control" test.

In *Morillion*, a class of agricultural workers sued for compensation for time they spent waiting for employers' buses and riding those buses to and from the fields each day. *Id.* at 579. The employer "*required* plaintiffs to meet for work each day at specified parking lots or assembly areas," then "transported them, in buses that [the employer] provided and paid for, to the fields where plaintiffs actually worked." *Id.* (emphasis added). "At the end of each day, [the employer] transported plaintiffs back to the departure points on its buses. [The employer's] work rules *prohibited* employees from using their own transportation to get to and from the fields." *Id.* (emphasis added).

This Court held that the plaintiffs were "subject to the control" of their employer during the bus rides to and from the fields and owed compensation for their time. *Id.* at 587.

Morillion relied upon the plain language of the Wage Order. *See id.* ("Interpreting the plain language of 'hours worked' . . . , we find that plaintiffs' compulsory travel time . . . was compensable."). The Court did not need to consider legislative history, administrative interpretations, or public policy. *See id.* at 594 (explaining that public policy "considerations . . . do not override the plain language of Wage Order No. 14-80, which supports plaintiffs' claim that their *compulsory* travel time is compensable as 'hours worked.'") (emphasis added).[4]

This Court identified two prerequisites for finding "control" by an employer. First, the employer must *require* an activity. *Compare id.* at 594 (the employer subjected the employees to its control because it "*required* plaintiffs to ride its buses to get to and from the fields") (emphasis added) *with id.* at 588 ("Time employees spend traveling on transportation that an employer provides *but does not require* its employees to use may not be compensable as 'hours worked.'") (emphasis added). Second, the employer must

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[4] Plaintiff places great weight upon the alleged position taken by the DLSE that the 1947 amendment to the Wage Order was "intended to broaden" the definition of "hours worked." But this DLSE statement was written in 1990 — over 40 years after the Legislature amended the Wage Order. It can hardly be authoritative for the intent of the Legislature decades before. "Although we have given some deference to *contemporaneous* interpretations of a statute by an administrative agency . . . here the [interpretation] is not contemporaneous . . . ." *Prospect Med. Grp., Inc.*, 45 Cal. 4th 497, 510 (2009) (emphasis added); *accord Dyna-Med, Inc. v. FEHC*, 43 Cal. 3d 1379, 1389 (1987) (refusing to defer to a noncontemporaneous interpretation). Moreover, here the DLSE did not even address exactly what the Legislature intended, beyond a vague observation that the amendment broadened the scope of "hours worked."

sufficiently restrict the employee during the required activity so that the time cannot be used "effectively for his or her own purposes." *Id.* at 584 (internal quotation marks omitted); *see id.* at 587 ("[t]he level of the employer's control over its employees" is "determinative"). The combination of these two factors led the Court to classify the workers' travel time as "*compulsory* travel time" — a phrase this Court used more than 20 times throughout its opinion, thereby underscoring the importance of the "compulsory" nature of the activity.[5]

In short, *Morillion* teaches that an activity must be required or compulsory in order to qualify as "hours worked" under the "control" test. *Id.* at 587 ("When an employer *requires* its employees to meet at designated places to take its buses to work and prohibits them from taking their own transportation, these employees are 'subject to the control of an employer,' and their time spent traveling on the buses is compensable as 'hours worked.'") (emphasis added); *see id.* at 594 ("As we have emphasized throughout, Royal *required* plaintiffs to ride its buses to get to and from the fields, subjecting them to its control for purposes of the 'hours worked' definition.") (emphasis added); *id.* ("[E]mployers may provide *optional* free transportation to employees without having to pay them for their travel time, as long as employers *do not require* employees to use this transportation.") (emphasis added).

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[5] *Morillion* acknowledged that employers technically "require" their employees to commute to work. *Id.* at 586. However, even if an activity is required, the second factor (the "level of control" exercised by the employer) renders a commute noncompensable under the control test. *See id.* ("[E]mployees who commute to work on their own decide when to leave, which route to take to work, and which mode of transportation to use."). *Both* factors must be satisfied for work to be "subject to the control of an employer."

In *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), when security guards ended their active patrol shifts, the employer required them to live in trailers to respond to disturbances should the need arise. *Id.* at 837, 841. The guards then had to be accessible by pager or radio and "were obliged to respond, immediately and in uniform, if they were contacted by a dispatcher or became aware of suspicious activity." *Id.* at 841.

Because the on-call activity was required, this Court focused its analysis on "the extent of the employer' control" exercised while the guards were on standby. *Id.* If the guards had not been required by their employer to be on-call, a different result would have followed. *See, e.g., Osman v. Tatitlek Support Servs., Inc.*, 2017 WL 945024, at *6 (C.D. Cal. Mar. 1, 2017) (time spent on premises while the plaintiff was off duty held noncompensable).

Where an employer gives its employees a true choice — such as an option to participate in a certain activity or forego it entirely, such as Apple did here — the activity is not required and therefore does not qualify as "hours worked" under the "control" test.[6]

B. The "Suffered Or Permitted To Work" Test Does Not Apply To Voluntary Activities That Are Not Job-Related.

The text of the Wage Order confirms that "work" requires job-related tasks. The Wage Orders also define "hours worked" to include "all the time the employee is suffered

[6] Plaintiff mis-cites *Mendiola* and *Bono Enterprises* as supporting the proposition that Apple exercised control by confining its employees to its premises during the bag check. That ignores that the restrictions placed on employees in those cases were *mandatory*. In contrast, Apple's employees are not required to bring a bag to work and undergo a bag check.

or permitted to work, whether or not required to do so." 8 CAL. CODE REGS. § 11150(2)(H).

The key term is "work," and principles of statutory interpretation show that "work" requires work-related tasks. Wage orders "are to be given their plain and commonsense meaning." *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1103 (2007). The dictionary defines "work" as "perform[ing] work or fulfill[ing] duties regularly for wages or salary" and explains that "work" is synonymous with "employment," and "occupation" "mean[s] a specific sustained activity engaged in esp. in earning one's living." WEBSTER'S NEW COLLEGIATE DICTIONARY (4th ed. 2015). Similarly, the Oxford English Dictionary defines "work" as "[m]ental or physical activity as a means of earning income." An employee therefore "works," in the ordinary meaning of the term, when the employee engages in tasks or activities to carry out the duties of the job for which he or she is compensated.

In interpreting a statute, courts "consider the statute read as a whole, harmonizing the various elements by considering each clause and section in the context of the overall statutory framework." *People v. Jenkins*, 10 Cal. 4th 234, 246 (1995). Different sections of the Wage Order use "work" interchangeably with "duties" and "labor." *See* 8 CAL. CODE REGS. § 11070(1)(A)(1)(e) (describing the "duties which meet the test of the exemption," *i.e.*, "exempt work"); *id.* § 11070(1)(A)(3) (defining a professionally exempt employee as one "[w]ho customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in subparagraph (a) and (b)," including, for example, "[w]ork that is original and creative in character"); *id.* § 11070(3)(A)(1)

(defining a "day's work," for purposes of overtime provisions, as "eight hours of labor"). Courts interpret identical phrases used in the same statute to bear the same meaning. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (citing the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning'") (citation omitted). By using the terms "duties" and "labor" interchangeably with the term "work," the Wage Order explains that "work" relates to an employee's job-related tasks — not any activity that constitutes an exertion of effort or tangentially benefits an employer.

Further, the Legislature's decision to use the term "work" in the "suffered or permitted to work" test while omitting it from the "control" test must have meaning. The Legislature could have stated the latter standard as "work that is subject to the control of an employer." It did not. The Legislature thereby signaled its intent to apply the "subject to the control" standard to activities that may or may not be job related, but nonetheless are *required* by the employer. The inclusion of "work" in the "suffered or permitted to work" test, by contrast, reflects an intent to tie the standard to activities an employer commonly would recognize as "work": rendering job-related services. If an employer does not direct or require an employee to conduct a task, it would be unfair to expect an employer to know about and be liable for an employee's activities, unless those responsibilities fell within the scope of their job duties as set by the employer. *See Morillion*, 22 Cal. 4th at 585 (the phrase "suffered or permitted to work" in the Wage Orders means "with the knowledge of the employer").

As described at the outset, to *amici*'s knowledge, no California court has applied the "suffered or permitted to work" test outside the context of off-the-clock work, or interpreted it to require payment for tasks that are *not* work related. Indeed, in *Morillion*, this Court explained:

> Along with other amici curiae, the California Labor Commissioner notes that "the time the employee is suffered or permitted to work, whether or not required to do so" can be interpreted as time an employee is working but is not subject to an employer's control. This time can include work such as unauthorized overtime, which the employer has not requested or required. . . . Although our state cases have not interpreted the phrase, federal cases have discussed the meaning of "suffer or permit to work" . . . . The words "suffer" and "permit" as used in the [FLSA] mean "with the knowledge of an employer." Thus, an employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [the FLSA] . . . .

22 Cal. 4th at 585 (internal quotation marks and citations omitted).

Sali v. Corona Regional Medical Center, 889 F.3d 623 (9th Cir. 2018) (applying California law), confirms this interpretation. The court observed that "California's compensable-time standard encompasses two categories of time." *Id.* at 637. Under the first category, the time is compensable "whether or not he or she is engaging in work activities, such as by being required to remain on the employer's premises or being restricted from engaging in certain personal activities." *Id.* This first category turns on the existence of "control" — not "work." In contrast, under the second category, the employer must be "suffered or permitted *to work*," which the court illustrated with "time an employee is *working* but is not subject to an employer's control," such as "unauthorized overtime." *Id.* (emphasis added).

Numerous other California courts, and federal courts interpreting federal law, have interpreted the term "work" to require performance of job-related duties. *See, e.g.*, *Sullivan v. Kelly Servs., Inc.*, 2009 WL 3353300, at *6 (N.D. Cal. Oct. 16, 2009) (the employment agency "suffered or permitted . . . work" because the agency knew that the plaintiff had spent time performing one of her key job duties, *i.e.*, interviewing with the agency's customers to secure an engagement from which the agency would profit); *Augustus v. ABM Security Servs., Inc.*, 2 Cal. 5th 257, 272 (2016) (prohibiting "*work* during any . . . rest period mandated by an applicable order of the Industrial Welfare Commission"; Labor Code section 226.7, "requires employers to relieve their employees of all *work-related duties*") (emphasis added); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1, 19 (2016) (providing employees "with suitable seats when the *nature of the work* reasonably permits the use of seats"; work refers to the "actual or expected tasks" employees perform as part of their job).

IV. TIME SPENT AS A RESULT OF AN EMPLOYEE'S "VOLUNTAR[Y]" CHOICE, FOR REASONS OF "PERSONAL CONVENIENCE," IS NOT COMPENSABLE

The Wage Orders do not require employers to pay for activities that employees voluntarily undertake (even if thereafter subject to restrictions), when those activities are not job-related. The activities hypothesized at the outset of this brief provide illustrations. None constitutes hours worked because: (1) the activities are entirely voluntary and therefore do not satisfy the "control" test, and (2) the employees who perform them are not "suffered or permitted to work" because the activities are not job-