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 OPENING BRIEF ON THE MERITS

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I. QUESTION PRESENTED FOR REVIEW

The Ninth Circuit requested and this Court agreed pursuant to California Rules of Court, Rule 8.548, to decide the following question:

> Does the federal Fair Labor Standards Act's *de minimis* doctrine, as stated in *Anderson v. Mt Clements Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1982), apply to claims for unpaid wages under the California Labor Code sections 510, 1194 and 1197?

II. INTRODUCTION

According to all governing statutory and decisional authority in California, an employer must compensate an employee if the employee performs work for the employer and the employer knew or should have known that the work was performed. Thus, the question posed by this appeal is simple: does California wage and hour law require employers to pay for ***all*** off-the-clock work that the employer either knows or should know is occurring? The answer to that question is a resounding, unambiguous "Yes," based upon California's Labor Code provisions, the governing Wage Order of the Industrial Welfare Commission ("IWC"), and decisional authority that includes authority issued by this Court.

The failure to pay employees all their wages for all time worked constitutes an injustice recognized as such for thousands of years: "But the wages of one who labors are not accounted to him as a favor, but as that which is owed to him." Romans 4:4 (Aramaic Bible, English transl.) The bright-line requirement under California law that employers must pay wages for all time worked by their employees was this state's response to that form of injustice. But the recognition of a *de minimis*

exception to an employer's obligation to pay for all hours worked would undermine California's decisive steps to remedy that injustice through statutory mandates.

In this matter, Defendant Starbucks Corporation ("Starbucks") contends that California should recognize a *de minimis* excuse to its obligation to pay all wages for all hours worked. Seeking to avoid its employer obligations with a defense akin to the obsolete *de minimis* defense created over 70 years ago by federal courts under the Fair Labor Standards Act ("FLSA"), Starbucks would impose upon employees an equitable defense that the California legislature refused to adopt, and the IWC refused to impose. However, consistent with California's well-defined framework of statutory and regulatory law that leaves no room for such a court-created *de minimis* excuse, this Court repeatedly held – most recently in 2015 – that when the IWC intends to incorporate federal law into California's wage and hour regulatory framework, it *expressly* says so:

> The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference.

Mendiola v. CPS Sec. Solutions, Inc., 60 Cal. 4th 833, 843 (2015). This Court should reject the similar attempt to impose weaker federal law protections here.

California's robust and comprehensive body of statutory law regulating the employee-employer relationship is also, in and of itself, sufficient to conclude that employers must pay for ***all*** off-the-clock work that they either know or should know is occurring. Labor Code § 510 requires payment for all overtime worked. Lab. Code § 510(a). And Labor Code § 1197 declares it unlawful to pay less than the minimum wage set by the applicable IWC Wage Order. Lab. Code § 1197.

The requirements set forth in the Labor Code are not toothless. The California Legislature has deemed the obligation to promptly pay all wages owed to employees so fundamental a right that it has criminalized what otherwise has the characteristics of a civil matter to underscore the gravity of its policy pronouncements crafted to protect employees. While, employees are authorized by statute to enforce any deviation from the requirements set forth in Labor Code §§ 510 and 1197 civilly, Labor Code § 1194, California's Labor Code *criminalizes* an employer's violations of numerous Labor Code provisions. *See*, Lab. Code §§ 216, 553, and 1199. A statutory right to collect the "full" amount of "all" wages, backed by criminal sanction, cannot be construed to create an exception not recognized by the California Legislature.[1]

Beyond the Labor Code provisions that embody California's requirement that employers pay employees for *all* time worked, the IWC Wage Orders confirm that payment for "all hours worked" is incompatible with the hoary *de minimis* defense that arose under federal law in a bygone era. Wage Order No. 5 also mandates a minimum wage payment for "all hours worked" and a premium rate of pay for "all hours worked" overtime. Wage Order No. 5 §§ 3(A)(1) and (4)(A). Wage Order No. 5 defines "hours worked" as including "***all the time*** the employee is suffered or

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[1] And, in addition to an employee's statutory right to collect all minimum and overtime wages owed, other statutory provisions embody a clear, unequivocal directive that California employers must pay for all time worked. *See, e.g.*, Lab. Code § 204(a) ("All wages" earned are due and payable on a regular schedule); Lab. Code § 219 (precludes any agreement that would alter or modify the timing of the payment of all wages earned by a departing employee).

permitted to work, whether or not required to do so . . . ." (Emphasis added.)[2]

While Defendant Starbucks (and the litany of employer organizations that will no doubt seek to influence the outcome here) will decry the absence of a *de minimis* excuse for failing to fully compensate their employees, a *de minimis* excuse is unnecessary in California.[3] Far from lacking protections and standards, California already clearly defines the standard for adjudicating employee claims of any off-the-clock work, including small and infrequent amounts of such time. In order to establish liability under the standard set forth in the Wage Orders, the employee must show that the employer either knew or should have known that the work was occurring. *Morillion v. Royal Packing Company*, 22 Cal. 4th 575, 585 (2000) ("The words 'suffer' and 'permit' as used in the statute mean 'with the knowledge of the employer.'"). Under California law, an employer must pay for all work that it knows or should know is occurring (as well as for any time where it exercises control over the employee, such as when it instructs the employee to compete specific tasks).

Unquestionably, incorporating the *de minimis* rule into California law would be contrary to California law and policy, as well as injurious to California employees. Some federal district courts interpreting the *de minimis* rule have held that daily time periods of ten minutes are *de minimis*. As explained below, the incremental effect of

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[2] The relevant language in other wage orders is identical. Wage Order No. 5 is cited herein because the Wage Order for Public Housekeeping it applies to Starbucks employees.

[3] Employer claims of burden also ring hollow. The *employer* is required to keep records of the hours worked including when the employee began and ended work. Lab. Code § 1174; Wage Order No. 5 § 7(A)(3). The *de minimis* excuse seeks to disregard that record-keeping obligation, along with the obligation to pay all wages for all hours worked.

tolerating uncompensated time periods of up to ten minutes is that employees will work up to one workweek every year without pay. This is a significant amount of money for an individual low wage worker, and a vast sum of money in the aggregate.

California's statutes and Wage Orders are clear. There is no basis for creating an exception to those requirements, undermining the policies embodied by statute and regulation while injecting needless complexity into an employee's attempt to ascertain what work is entitled to compensation.[4] The Labor Code and the Wage Orders already include a bright line rule – employers must pay for all hours worked. In other contexts, California Courts routinely reject pleas for a *de minimis* defense to statutory obligations, and, consistent with those holdings, this Court should hold, consistent with Labor Code §§ 510, 1194 and 1197 (as well as other sections discussed herein), and consistent with this Court's recent decision in *Mendiola*, that there is no *de minimis* excuse to claims for unpaid wages under California law.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Because Starbucks Required Employees to Complete Tasks After Clocking Out, Starbucks Knew (or Should Have Known) That Employees Worked Off-the-Clock and Without Compensation

Petitioner Douglas Troester worked for Starbucks as a shift supervisor. (Certification Order at 3.) As testified to by Mr. Troester and five other Starbucks'

[4] The California Legislature, in 2013, amended Labor Code § 226 to define what would constitute an "injury" under the wage statement statute. As amended, an employee suffers injury if an employer knowingly fails to provide a wage statement stating the total hours worked and the gross wages earned. Lab. Code § 226(a), (e). A *de minimis* excuse would substantially impede an employee's ability to determine whether a wage statement accurately stated the required information.

California store employees, Starbucks trained closing shift employees to clock out on Starbucks' computer system before initiating the store closing procedure on a separate computer. (3 ER 438, 503-505, 519-521; 4 ER 765-766, 772-773, 779, 785-786, 792-793.) Petitioner's evidence in the trial court in opposition to summary judgment showed that during the class period, when Troester worked a closing shift, he had to clock out on Starbucks' computer system, and then initiate a "store close procedure" on a separate computer. (Certification Order at 4.) This procedure would transmit sales, profit and loss, and inventory data to Starbucks' headquarters. (*Id.*) He would also lock the store, and walk co-workers to their cars as required by Starbucks' safety guidelines. (*Id.*) These tasks took 4 to 10 minutes on a daily basis. *Id.* During the seventeen months that Mr. Troester worked for Starbucks, the aggregate amount of unpaid closing shift time was approximately 12 hours and 50 minutes which amounts to roughly a full day-and-a-half in unpaid minimum wages. (*Id.*)

At the end of 2010, Starbucks changed its procedures so that store employees no longer had to run a store closing procedure after clocking out. (3 ER 437, 4 ER 577-578, 691.)

B. The Trial Court's Summary Judgment Order Held That Any Off-the-Clock Work Less Than Ten Minutes in Length Was "*De Minimis*" and Did Not Need to Be Compensated

On August 6, 2012, Douglas Troester filed a class action complaint in the Superior Court for the State of California, County of Los Angeles, on behalf of himself and all non-exempt Starbucks employees in California who performed store closing tasks from mid-2009 to October 2010. Starbucks removed the case to federal

court, and moved for summary judgment.

On March 7, 2014, the trial court issued an order granting the motion for summary judgment. *Troester v. Starbucks Corporation*, 2014 WL 1004098 (N.D. Cal. 2014). The trial court held that the federal *de minimis* doctrine set forth in the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) applies as a defense to California state law wage and hour claims. *Troester,* at *3.

In applying the *de minimis* doctrine the trial court cited to factors set forth by the Ninth Circuit in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1982), including "1) the practical difficulty of recording the additional time; 2) the aggregate amount of compensable time; 3) and the regularity of the additional work." *Troester,* at *3. The district court also cited to federal authorities holding that daily time periods of ten minutes or less qualify as *de minimis*. *Troester*, at *3.

The trial court found that the first two *Lindow* factors were satisfied. *Troester*, at 4. As to the third factor, whether the uncompensated work occurs regularly, the trial court concluded that even where the uncompensated work occurs daily the *de minimis* doctrine applies, as long as the first two factors are met. *Troester*, at 5. The trial court concluded that: "the few minutes that Plaintiff spent closing the store at the end of his shift were far from substantial and fall well within the 10 minute *de minimis* benchmark." *Troester*, at 5. Based on its analysis and conclusion that California law includes a *de minimis* defense, the trial court granted summary judgment.

C. Proceedings in The Ninth Circuit

Mr. Troester appealed the trial court's order granting summary judgment. The Ninth Circuit held oral argument in the case on April 6, 2016. On June 2, 2016, the Ninth Circuit issued an order pursuant to California Rules of Court, Rule 8.548(a)(1), requesting that this Court decide whether the federal *de minimis* doctrine applies under California law. This Court granted the request on August 17, 2016.

IV. DISCUSSION

A. Statutory and Regulatory Framework

1. The Statutory and Regulatory Framework Defining California Wage and Hour Law

Wage and hour law in California is governed by the Labor Code and, with much more detailed particularity, the Wage Orders promulgated by the IWC. *Martinez v. Combs*, 49 Cal. 4th 35, 52 (2010), as modified (June 9, 2010) ("Section 1194 is the direct successor of, and its operative language comes immediately from, section 13 of the uncodified 1913 act (Stats. 1913, ch. 324, § 13, p. 637) that created the IWC and delegated to it the power to fix minimum wages, maximum hours and standard conditions of labor for workers in California."). The Labor Code and the Wage Orders operate in concert to establish California's "standard conditions of labor." Lab. Code § 1198; *Indus. Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 700-701 (1980); *see also*, *Martinez*, at 52-62, for this Court's extensive discussion of the broad powers conferred on IWC by the California Legislature and constitutional amendment.

The Wage Order applicable to this case is Wage Order No. 5, which applies to

the Public House Keeping Industry. Wage Order No. 5 subd. 2(P)(1) ("Public Housekeeping Industry" includes any establishment "where food in either solid or liquid form is prepared and served to be consumed on the premises.").[5] California's Labor Laws, including the Wage Orders, are enforced (but *not* enacted) by the Division of Labor Standards Enforcement (DLSE). *Morillion v. Royal Packing Co.,* 22 Cal. 4th 575, 581 (2000).

The IWC Wage Orders have the force of law and are interpreted like statutes. *Kilby v. CVS Pharmacy Inc.,* 63 Cal. 4th 1, 11 (2016) ("The IWC's wage orders are to be accorded the same dignity as statutes."). Consistent with California's over-arching policy of employee protection, the Wage Orders are "liberally construed to protect and benefit employees." *Id.* Tremendous deference is shown by Courts to the IWC's orders. *Martinez*, at 60 ("The Legislature and the voters have repeatedly demanded the courts' deference to the IWC's authority and orders.")

The DLSE's Enforcement Policies and Interpretations Manual – last updated in 2013 in any respect and thus issued prior to this Court's clear guidance in *Mendiola* – directly conflicts with the IWC Wage Orders in that it improperly sets forth a *de minimis* standard based upon federal law. *See* DLSE Enforcement Policies and Interpretations Manual, at Sections 47 and 48. But, the DLSE's interpretations of Wage Orders and statutes are not binding on Courts. *Mendiola,* 60 Cal. 4th at 848; *see also*, DLSE Enforcement Policies and Interpretations Manual, at Section 1

[5] For purposes of the issues in this case, the other Wage Orders are substantively identical to Wage Order No. 5. There are 17 industry and occupation Wage Orders and one minimum wage order.

(acknowledging that the Manual does not constitute a regulation and citing authority for the proposition, including authority from this Court). As this Court explained:

> Although entitled to consideration and respect, the agency's construction of wage orders is not binding on this Court . . . [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.

Id., citing *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1105 (2007); *see also*, *Yamaha Corp. of America v. State Bd. of Equalization* 19 Cal.4th 1, 7–8 (1998). Moreover, when the DLSE's construction "flatly contradicts" a prior interpretation, it is not entitled to "significant deference." *Henning v. Industrial Welfare Com.*, 46 Cal. 3d 1262, 1278 (1988).

Under Wage Order No. 5 (and the other Wage Orders), employers must pay employees the minimum wage for all "hours worked." Wage Order No. 5 subd. 4(A). Hours worked includes all time that the employee is subject to the control of the employer and includes all time that the employee is "suffered or permitted to work" by the employer "whether or not required to do so." Wage Order No. 5 Subd. 2(K); *Morillion*, at 585-586. An employer suffers or permits work where the employer knows (or should know) that work is occurring and fails to prevent it. *Martinez v. Combs*, 49 Cal. 4th 35, 70 (2010).

California's Wage Orders are separate and distinct from any federal wage and hour law. This Court has explained that Wage Orders should only be construed as incorporating federal law where a Wage Order expressly states an intention to do so. *Mendiola,* 60 Cal. 4th at 843; *Martinez.* at 67, citing *Morillion*, at 592 ("Where the IWC intended the FLSA to apply to wage orders it has specifically so stated.").

The requirement that employers pay minimum wage and overtime is an important public policy. As one Court of Appeal explained: "Straight time wages (above the minimum wage) are a matter of private contract between the employer and the employee. Entitlement to overtime compensation, on the other hand is mandated by statute, and is based on an important public policy." *Earley v. Superior Court,* 79 Cal. App. 4th 1420, 1430 (2000); Lab. Code § 1197.

2. The Federal *De Minimis* Doctrine

The *de minimis* doctrine was first applied to wage claims arising under the FLSA in the United States Supreme Court's *Anderson* decision. In *Anderson*, a class of pottery workers, employed in a giant pottery plant spanning eight acres, alleged they had not been fully compensated for their time at work, including preliminary activities such as switching on machinery, and putting on aprons and overalls, as well as time walking from employee lockers to working places. *Anderson,* 328 U.S. at 683. As a result, they were not paid overtime compensation that was required by section 7(a) of the FLSA.

Turning back the clock to 1946, long before computerized timeclocks, servers, and payroll systems existed, and long before software almost instantaneously calculated the wages and withholdings of employees, the *Anderson* Court observed that when a FLSA claim "concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities or working conditions or by the policy of the FLSA. It is only when an employee is required to give up a substantial measure of his time

and effort that compensable working time is involved." *Anderson*, at 692; 29 C.F.R. 785.47. But *Anderson* arose in the context of a situation where there was uncertainty as to how long employees spent on work activities, in light of the technologies of the day (the day being 1946). Thus, *Anderson* should properly be confined to situations in *federal* claim suits and read with an understanding of its historical origins.

Ninth Circuit first articulated its construction of the *de minimis* doctrine in *Lindow*. *Lindow*, observing that no fixed *de minimis* "rule can be applied with mathematical certainty," held that four factors must be considered when determining if an activity is *de minimis* as a matter of federal law: (1) the amount of time spent on the additional work, (2) the administrative difficulty in recording time, (3) the size of the aggregate claim, and (4) the regularity of the work. *Lindow*, 738 F.2d at 1062-64 (emphasis added).

The *de minimis* doctrine has been codified in federal law at 24 C.F.R. § 785.47, though even the Wage and Hour Division of the Department of Labor, issuing its regulation in 1961 confirmed that the *de minimis* doctrine did not apply where an employer arbitrarily refused to count all hours worked:

> In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. ***An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.***

29 C.F.R. 785.47. (Emphasis added.) And *Lindow*, citing the regulation, held that regularly occurring work is unlikely to fall beneath the *de minimis* threshold:

> Finally, in applying the de minimis rule, we will consider whether the claimants performed the work on a regular basis. *See Smith v. Cleveland Pneumatic Tool, Co.*, 173 F.2d 775, 776 (6th Cir.1949) (unpaid working time de minimis where "not a daily occurrence"); *Hodgson v. Katz & Besthoff, # 38, Inc.*, 365 F.Supp. 1193, 1197 (W.D.La.1973) (court considered whether work "happened with a fair amount of regularity"); 29 C.F.R. § 785.47 (***employer should compensate "fixed or regular" working time, however small***); *see also Atkins v. General Motors Corp.*, 701 F.2d 1124, 1129 (5th Cir.1983) (2 isolated instances over 6 to 8 weeks *de minimis*); Marshall v. Fabric World, Inc., 23 W.H. Cases 414, 421 (M.D.Ala.1977) (sporadic work *de minimis*). Similarly, the uncertainty of how often employees performed the tasks and of how long a period was required for their performance are also relevant. See *Nardone v. General Motors, Inc.*, 207 F.Supp. at 341; 29 C.F.R. § 785.47.

Lindow, at 1063. But, despite these admonitions, a number of federal district courts, including courts in California, interpret the *de minimis* doctrine as allowing daily time periods of ten, *or even fifteen*, minutes of unpaid work. *See, e.g., Perez v. Wells Fargo*, 2015 WL 1887534 *8 (N.D. Cal. 2015) (granting motion to dismiss based on 10-minute rule and holding that plaintiff would have stated a valid FLSA claim if she had alleged 20 minutes of unpaid work on a daily or weekly basis). As explained below, this harmful, anti-employee result is anathema to California's comprehensive wage and hour framework enacted, in part, to protect California's employees from the impact of substantially less protective federal wage and hour law.

B. Under the Plain Language of California's Labor Code Provisions and Its Wage Orders, a *De Minimis* Exception Is Inconsistent with California's Declared Policies Regulating Wages, Hours, and Working Conditions

The question of whether a *de minimis* excuse is incorporated into the statutory

obligation to pay minimum wages and overtime wages for all hours worked starts and ends with the statutory language itself because the language expresses the clear an unambiguous intent of the Legislature. "To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." *Hsu v. Abbara*, 9 Cal. 4th 863, 871 (1995); *see also, Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1047 (1999) ("As with any statutory construction inquiry, we must look first to the language of the statute."). If, as here, the statutory and regulatory law is clear, the inquiry ends. *Diamond*, at 1047 (where statutes are clear, "[t]here is no need for judicial construction and a court may not indulge in it."). The key Labor Code provisions, including Labor Code §§ 510, 1194, and 1197, along with the implementing regulations of the Wage Orders are discussed in turn below.

1. Labor Code § 510, and Its Requirement That "Any" Overtime Must Be Compensated Manifests an Intent Incompatible with a *De Minimis* Excuse

California's meticulously detailed body of statutory law regulating wages, hours, and working conditions is, standing on its own, sufficient to conclude that employers must pay for ***all*** off-the-clock work that they either know or should know is occurring (a condition easily met here, since Starbucks exercised control over its employees, telling them to perform tasks after clocking out, necessarily meeting the "know" prong). Labor Code § 510 provides, in pertinent part: "***Any*** work in excess of eight hours in one workday and ***any*** work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate

of pay for an employee." Lab. Code § 510(a) (emphasis added).[6]

The Legislature's use of the word "any" in section 510(a) is incompatible with a nowhere-mentioned *de minimis* excuse to claims for overtime compensation. *Roberts v. United Healthcare Services, Inc.*, 2 Cal. App. 4th 132, 146 (2016) ("The word 'any' has an expansive meaning that is 'one or some indiscriminately of any kind."); *Fierro v. State Board of Control,* 191 Cal. App. 3d 735, 741 (1987) ("The word 'any' has consistently been interpreted as broad, general, and all embracing"); *Pineda v. Williams Sonoma Stores, Inc.,* 51 Cal. 4th 542, 618 (2011) ("The use of the broad word "any" suggests the Legislature did not want the . . . statute to be narrowly construed.") The Legislature's utilization of terms of absolute mandate, coupled with a complete and total absence of any word, phrase, or provision anywhere in the entire Labor Code even hinting at a *de minimis* excuse for the failure to pay all overtime wages owed reveals a clear and unmistakable intent on the part of the Legislature. Thus, "[t]here is no need for judicial construction and a court may not indulge in it." *Diamond*, at 1047.

2. Labor Code § 1197, and Its Pronouncement That to Pay Less Than the Minimum Wage Is "Unlawful," Manifests an Intent Incompatible with a *De Minimis* Excuse

Likewise, Labor Code § 1197 declares it unlawful to pay less than the wages set by the applicable IWC Wage Order: "*The minimum wage for employees* fixed by the commission or by any applicable state or local law, *is the minimum wage to be paid to employees*, and *the payment of a lower wage than the minimum so fixed is*

[6] As used here, "any" means "all" such time.