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.

unlawful." Lab. Code § 1197 (emphasis added). Here, too, the Legislature's clear and unmistakable intent is embodied in the choice of language allowing for no exception: "***the payment of a lower wage than the minimum so fixed is unlawful***." Lab. Code § 1197 (emphasis added). Application of a judicially created *de minimis* excuse to the obligation to pay the minimum wage would subvert the unambiguous language of a directive of the Legislature. Again, "[t]here is no need for judicial construction and a court may not indulge in it." *Diamond*, at 1047.

3. The Enforcement Provision Set Forth in Labor Code § 1194 Is Likewise Incompatible with a *De Minimis* Excuse to the Obligation to Pay the "Full" Amount of Minimum Wages and Overtime Compensation

Enforcement provisions for Labor Code §§ 510 and 1197 also manifest the Legislature's intent that nothing less than the full payment of overtime and minimum wage pay for all hours worked is the requirement in California:

> Notwithstanding any agreement to work for a lesser wage, *any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the* ***full*** *amount of this minimum wage or overtime compensation*, including interest thereon, reasonable attorney's fees, and costs of suit.

Lab. Code § 1194 (emphasis added). A statutory right to collect the "full" amount of "all" wages cannot be construed to create an exception not recognized by the California Legislature, and there is no need for this Court to indulge in construction beyond recognizing the clear intent expressed in the Labor Code's provisions.

4. The California Legislature Has Demonstrated Its Ability to Allow Defenses to Specific Labor Code Violations When It Affirmatively Chooses to Do So

The absence of any reference to a *de minimis* excuse in the IWC Wage Orders

or the Labor Code is dispositive on the question of whether such an excuse should be recognized. However, also telling is the fact that when the California Legislature wishes to allow a defense to a Labor Code violation, it is fully capable of doing so, and it has *not* done so here.

Labor Code § 203 incorporates a willfulness element. The statutory requirement that an employee demonstrate a "willful" failure to timely pay all wages due at termination permits "good faith" defenses that negate the "willfulness" element and allows a trier-of-fact to ascertain when the failure to timely pay wages at termination was volitional. *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 235 (2005) ("A good faith belief in a legal defense will preclude a finding of willfulness.").[7] In other words, the Legislature opened the door to defenses to violations of Labor Code § 203 when it enacted a statute containing a "willfulness" element. But here, where the obligations to pay minimum wages and overtime wages are at issue, no such intent to act is an element to those requirements. Lab. Code §§ 510, 1197.

5. Other Provisions of the Labor Code, Including Provisions Criminalizing Employer Conduct, Are Fully Consistent with the Requirement That Employers Must Pay the "Full" Amount of Minimum Wages and Overtime Compensation

Beyond an employee's statutory right to collect all minimum and overtime

[7] The "good faith" defense recognized as a means of negating the "willful" element of Labor Code § 203 was later memorialized in California Code of Regulations, title 8, section 13520. In this regard, too, the absence of any recognized regulatory *de minimis* excuse to the obligations of Labor Code §§ 510 and 1197 speaks as loudly as an affirmative declaration that no such excuse is recognized for the obligation to pay all wages owed for all hours worked.

wages owed, numerous other statutory provisions embody a clear, unequivocal directive that California employers must pay for all time worked. For example, Labor Code § 204 says, "***All*** wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." Lab. Code § 204(a) (emphasis added). And, as for the exceptions noted in Labor Code § 204, they, too, underscore the protective policy embodied by California wage laws. Labor Code § 201 requires the payment of wages earned and unpaid at the time of discharge ("If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."), while Labor Code § 202 requires the payment of wages earned and unpaid to resigning employees. Labor Code § 219 precludes any agreement that would alter or modify the timing of the payment of all wages earned by a departing employee: "[N]o provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

"[T]he Legislature's decision to criminalize certain employer conduct reflects a determination [that] the conduct affects a broad public interest. . . ." *Earley*, 79 Cal. App. 4th at 1430. California's Labor Code criminalizes an employer's violations of the "Payment of Wages" provisions set forth in the Labor Code, at Division 2, Part 1, Chapter 1, Article 1, the "Working Hours" provisions set forth in the Labor Code, at Division 2, Part 2, Chapter 1, and the "Wages, Hours and Working Conditions" provisions set forth in the Labor Code at Division 2, Part 4, Chapter 1. Labor Code § 216 states, in part: "[A]ny person, or an agent, manager, superintendent, or officer

thereof is guilty of a misdemeanor, who: (a) Having the ability to pay, willfully refuses to pay wages due and payable after demand has been made." Labor Code 553 states, "Any person who violates this chapter is guilty of a misdemeanor." Labor Code § 1199 states, in part: "Every employer . . . is guilty of a misdemeanor . . . who does any of the following: . . . (b) Pays or causes to be paid to any employee a wage less than the minimum fixed by an order of the commission. (c) Violates or refuses or neglects to comply with any provision of this chapter or any order or ruling of the commission."[8] As one Court noted, "[u]nder Labor Code section 1199 it is a crime for an employer to fail to pay overtime wages as fixed by the Industrial Welfare Commission." *Earley*, 79 Cal. App. 4th at 1430.

6. The Wage Orders Directly Implement the Plain Language of the Labor Code, Offering No Basis for Asserting the Existence of a *De Minimis* Excuse Based Upon Federal Law

In addition to the armada of Labor Code provisions manifesting an intention hostile to a *de minimis* excuse to the payment of all wages, the IWC Wage Orders confirm that California law is incompatible with such a *de minimis* excuse. Wage Order No. 5 provides that both for minimum wage and overtime, employees must be paid for "all hours worked." Specifically, Wage Order No. 5 mandates as follows:

> Every employer shall pay to each employee wages not less than nine dollars ($9.00) per hour for ***all hours worked***, effective July 1, 2014, and not less than ten dollars ($10.00) per hour for all hours worked, effective January 1, 2016. . .

Wage Order No. 5 § (4)(A) (emphasis added).

[8] The criminalization of civil violations is rare under California law. That the Legislature did so with respect to so much of the Labor Code expresses the Legislature's intent with striking clarity.

> Employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 1/2) times such employee's regular rate of pay ***for all hours worked*** over 40 hours in the workweek

Wage Order No. 5 § 3(A)(1). Wage Order No. 5 defines "hours worked" as including "***all the time*** the employee is suffered or permitted to work, whether or not required to do so . . . ." (Emphasis added.)[9] And Wage Order No. 5 also requires employers to maintain accurate time records "showing when the employee begins and ends each work period." Wage Order No. 5 § 7(A)(3). As with the clear statutory language in the Labor Code provisions discussed herein, the Wage Order's directives that employees must be compensated for "***all***" time worked and the requirement imposed upon employers to maintain accurate time records are both inconsistent with a *de minimis* exception.[10]

C. Based Upon Its Prior Precedent, This Court Has Already Effectively Determined That the FLSA's *De Minimis* Exception Is Not Incorporated into California Law.

This Court has, on multiple occasions, been asked to adopt weaker federal wage and hour standards into California's stronger, employee-protective laws. *See, e.g., Morillion*, 22 Cal. 4th at 592. When asked to do so, this Court has routinely rejected such requests, holding that federal standards are not incorporated absent express language indicating an intent to do so. *Mendiola,* 60 Cal. 4th at 842-843.

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[9] As noted above, the relevant language in other wage orders is identical, but Wage Order No. 5 is specifically cited because it applies to Starbucks employees.

[10] While no California Court has evidently felt it necessary to opine on the meaning of the word "all," it being a well-understood and unambiguous word, one dictionary defines "all" to mean "the whole amount, quantity or extent of," "the whole number of sum of," "every" and "any whatever." *See*, http://www.merriam-webster.com/dictionary/all (last viewed October 25, 2016).

Even the timing of legislative and regulatory enactments, frequently cited by this Court as suggestive of intent, *Martinez*, 49 Cal. 4th at 59-60, confirm that the FLSA's De Minimis Exception Is Not Incorporated into California Law.

1. This Court Has Repeatedly Rejected Requests to Impose Weaker Federal Wage and Hour Law Standards into California's Employee-Protective Wage and Hour Laws and Regulations.

Defendants have repeatedly asked this Court to shield them from liability for violations of California's wage and hour law using protections set forth in federal law and applicable only to the FLSA, and this Court has rightly and repeatedly rejected those attempts to use federal law to undermine the protections that California law affords to employees. For example, in *Mendiola*, this Court refused to apply the sleep exemption that exists under the FLSA to California wage claims, thereby excluding "sleep time" from 24-hour shifts. *Id.,* 60 Cal. 4th at 843-49. And in *Ramirez v. Yosemite Water Company, Inc.*, 20 Cal. 4th 785 (1999), this Court rejected an argument that federal authorities should be used to determine definition of an outside sales person for purposes of the outside sales person overtime exemption in Wage Order No. 7-80. As this Court explained:

> The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations . . . . The FLSA explicitly permits greater employee protection under state law.

Ramirez, at 795.

In *Morillion*, in deciding when employees should be compensated for travel time on employer owned buses, this Court declined to adopt the federal definition of

the term "hours worked." *Id.*, 22 Cal. 4th at 592. This Court explained that California law can and often does offer greater protection to employees than federal law does: "Our departure from the federal authority is entirely consistent with the recognized principle that state law may provide employees with greater protection than the FLSA." *Id.* This Court refused to import federal standards that would weaken state law protections absent convincing evidence that the IWC had intended this in drafting the applicable Wage Order:

> Absent convincing evidence of the IWC's intent to adopt the federal standard . . . we decline to import any federal standard, which expressly eliminates substantial protections for employees, by implication.

Id. Moreover, this Court's recognition that California law offers far greater protections for employees as compared to federal law confirms that the facially evident construction of the relevant Labor Code provision (e.g., Section 510, 1194 and 1197) – namely, that employers must pay for "any" and "all" time worked – is both the correct construction based upon Legislative intent and the preferred construction in light of California's employee-protective laws and regulations.

2. <u>This Court Has Held on Multiple Occasions That the FLSA's Weaker Standards Will Not Be Presumed to Be Incorporated into Wage Orders Unless the IWC Explicitly Indicated That It Was Doing So.</u>

There is also no confusion as to the intent behind the IWC's Wage Order provisions, or whether any federal law standards are incorporated therein. The IWC demonstrated that it was fully capable of referring to federal law standards in Wage Orders when it affirmatively intended to do so. As this Court observed, because the IWC knows how to incorporate federal law, and expressly indicates when it is doing

so, the absence of an express incorporation reflected its intent *not* to incorporate federal standards:

> Finally, we note that where the IWC intended the FLSA to apply to wage orders, it has specifically so stated.

Morillion, at 592.

In *Mendiola,* this Court again declined to incorporate a federal regulation regarding compensation for employees who reside part time at the employers' premises into a Wage Order, holding as follows:

> Federal regulations provide a level of employee protection that a state may not derogate. Nevertheless, California is free to offer ***greater protection***.

Mendiola, 60 Cal. 4th at 842-843 (emphasis added). As in *Morillion*, this Court said that the absence of an express adoption by the IWC of the federal standard was dispositive:

> Other language in Wage Order No. 4 indicates that the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so. . . . The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference.

Id. at 843. But this Court went further in *Mendiola*, holding that intent to incorporate federal law by the IWC would only be found where express exemption language analogous to federal law was utilized by the IWC:

> The relevant issue in deciding whether the federal standard had been implicitly incorporated was whether state law and the wage order contained an *express exemption* similar to that found in federal law.

Id. at 846.

These authorities leave no room for doubt that the IWC Wage Orders cannot be construed as silently importing a *de minimis* excuse for failure to pay *all* wages owed because the IWC did not express any intention to do so. *Morillion*, at 592.

Adopting the federal *de minimis* rule, or anything approximating it, would lessen protections for California employees, a result this Court has previously rejected absent a clear and unequivocal statement of intent to do so by the IWC. *Id.* There is simply no basis for claiming that the IWC intended there to be a *de minimis* exception in the wage orders. The IWC would have said so if it did. Thus, there is no *de minimis* exception.

3. The History of IWC Action, When Examined in Conjunction with Federal Legislation and Federal Court Rulings, Further Confirms That the IWC's Exclusion of Any "*De Minimis*" Exception to the Duty to Pay All Wages Was Intentional.

The timing of legislative, regulatory, and court action can also supply indicia of intent on the part of legislative and regulatory bodies, since it is "a well established rule of statutory construction that the Legislature is presumed 'to have knowledge of existing judicial decisions and to have enacted statutes in light thereof.'" *P. Intermountain Express v. Natl. Union Fire Ins. Co.*, 151 Cal. App. 3d 777, 783 (1984). Empowered to implement the statutory directives of the California Legislature, the IWC must be presumed to have adopted the Wage Order regulatory framework with an awareness both of (1) the policies declared by the California Legislature by statute, and (2) the existing federal statutory and decisional law impacting employees throughout the county. Thus, as this Court previously observed, it is meaningful that the IWC adopted its definition of "hours worked" namely "the time during which an employee is subject to the control of an employer . . . including ***all the time*** the employee is suffered or permitted to work" in 1947. *Martinez*, 49 Cal. 4th at 59-60. The IWC acted at that time so as to expand employee protections in

response to Congress's 1947 enactment of the Portal to Portal Act. *Id.* This change also occurred *after* the U.S. Supreme Court's 1946 creation of the *de minimis* exception in *Anderson*. Of *further* significance, Wage Order 5 was last revised in 2001, 15 years after the Ninth Circuit's extensive discussion of the *de minimis* standard in *Lindow*. There is no basis for concluding that the IWC intended to *sub silentio* adopt the rule announced in *Anderson* as part of California's wage and hour law landscape when the actions of the California Legislature and the IWC were taken to ***expand*** employee protections and ***limit*** the impact of federal law on California employees.

D. California Law Has a Strong Public Policy of Construing Wage and Hour Laws to Protect Employees, and Adoption of any *De Minimis* Rule Would Be Contrary to That Policy.

"Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide." *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal. 4th 217, 227 (2007). "[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and established." *Smith v. Superior Court*, 39 Cal. 4th 77, 82 (2006); *accord Pineda v. Bank of America, N.A.*, 50 Cal. 4th 1389, 1400 (2010). "Public policy favors employees in their efforts to recover overtime compensation." *Eicher v. Adv. Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1383 (2007), citing *Gould v. Maryland Sound Industries, Inc.* 31 Cal. App. 4th 1137, 1148 (1995) (broad public interest in enforcing overtime laws). This public policy favoring the protection of employees and their right to receive all wages due is rooted in a recognition of "the

economic position of the average worker and, in particular, his dependence on wages for the necessities of life, for himself and for his family." *Ex Parte Trombley*, 31 Cal. 2d 801, 809 (1948). Evidencing the importance of this public policy, one that has existed in California for more than a century, it is a criminal offense for an employer to willfully fail to pay wages owed. Labor Code § 216.

1. As This Court Has Observed, California Has Been Protecting Employees for More Than 100 Years

California's strong policy of protecting employees has been clearly stated for more than a century, beginning no later than the enactment of California's original minimum wage statute in 1913. *Martinez*, 49 Cal. 4th at 52-53. The enactment was a result of national recognition of "the low wages, long hours, and poor working conditions, under which women and children often labored." *Id.*, at 53. "California's legislation called for a commission to study and then adopt minimum wage rates and to make it a crime not to pay minimum wage." *Id.* This predated the 1938 passage by Congress of the FLSA. *Id.* The California Legislature subsequently expanded the IWC's jurisdiction to extend to all employees, not just women and children. *Id.*, at 55. Further, the Legislature has "restated the (IWC's) responsibility in even broader terms "with a continuing duty to adopt new wage orders 'if the commission finds that 'wages paid to employees may be inadequate to supply the cost of proper living." *Id.*; Lab. Code § 1178.5(a).

2. As This Court Has Observed, California Protects Its Employees with Laws More Favorable to Them Than Federal Law, and California's Wage and Hour Laws Must Be Construed to Protect Employees to the Fullest Extent

California's minimum wage and overtime laws are more favorable to

employees than federal law, a fact routinely recognized by this Court. According to *Morillion*, "hours worked" which an employee must be paid at least the minimum wage for includes both the time that an employee is "suffered or permitted to work" and the time that an employee is under the employer's control whether or not they are actually working. *Morillion*, 22 Cal. 4th at 582. By contrast, federal law does not require compensation when the employee is subject to the employer's control, but is not "suffered or permitted to work." *Id.*, at 589. California minimum wage law also differs from federal minimum wage law in that it does not allow averaging to determine whether an employee has been paid more than the minimum wage. *Armenta v. Osmose, Inc.,* 135 Cal. App. 4th 314, 324 (2005). In *Armenta*, the Court of Appeal examined the language of the Labor Code and focused on sections 221, 222, and 223, which prohibit an employer from withholding "any part of the wage agreed upon." *Id.*, at 324. As the Court of Appeal explained, these "[Labor Code] statutes reveal a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally." *Id.* The Court of Appeal also noted California's minimum wage is also higher than the federal minimum wage and does not allow for various exceptions recognized under federal law. *Id.*

The very strong policy of protecting employees with comprehensive and expansive wage, hour, and working condition laws has led to the settled understanding that California wage and hour law including the Labor Code and Wage Orders is to be liberally construed so as to protect the rights of employees. *McClean v. State of California,* 1 Cal. 5th 615, 622 (2016) ("In light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours, and working

conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."); *Von Nodurth v. Steck*, 227 Cal. App. 4th 524, 532 (2014) ("The provisions of both the Labor Code and the wage orders are to be liberally construed with an eye to promoting employee protections, and must be interpreted in the manner that best effectuates that protective intent.").

3. The Adoption of a *De Minimis* Excuse to Dilute the Obligation to Pay All Wages for All Time Worked Would Injury California Employees and Diminish a Century of Policies Created to Expressly Protect Employees

The *de minimis* rule as applied by federal district courts to FLSA claims is injurious to California workers and contrary to settled California public policy. While it is unclear that either *Anderson* or *Lindow* support a rule that daily time periods of ten minutes or less are *de minimis*, multiple federal district courts, including in this case, have nevertheless imposed such an anti-employee standard. Such a standard is antithetical to California law.

Courts determining damages in employment cases have often accepted the figure of 250 working days in a year. *See, e.g., Stevedoring Services of America, Inc. v. Guthrie*, 115 Fed.Appx. 405 (9th Cir. 2004). Under a ten-minute *de minimis* rule, an employee will work without compensation for an hour after 6 days. As such, the ten-minute rule allows an employer to require an employee to work 41 hours (approximately one week's worth of wages) without compensation each year. At California's current $10.00 an hour minimum wage that means the employee would be owed $416. For a low wage employee that is a significant amount of money. As

has been widely reported, according to a study by the Federal Reserve, 46% of Americans do not have enough money in the bank to cover a $400 emergency bill. *See* "The Shocking Number of Americans Who Cannot Cover a $400 Emergency Expense," Washington Post, May 25, 2016.

In the aggregate, the amount of money at stake for employees is staggering. There are 16 million nonfarm employees in California. *United States Department of Labor California Economy at a Glance*, available online at http://www.bls.gov/eag/eag.ca.htm (last viewed October 25, 2016). Those employees would potentially lose $6.6 billion each year as a result of a ten minute *de minimis* benchmark. 1.8 million Californians work in the leisure and hospitality industry. *Id.* Those employees potentially would lose $748,800,000 each year as a result of a ten minute *de minimis* bench mark.

In truth, any rule which permits employers to require regular unpaid work in any measurable increment is unfair to employees. Even two minutes of uncompensated work daily results in significant lost income both for employees individually and in the aggregate. For an individual employee earning the minimum wage, a recurring two-minute period of unpaid work each day would result in $83 a year in unpaid time, a sum that is of great significance to those workers who can least afford even that amount of under-compensation. 16 million nonfarm employees would lose $1.32 billion in the aggregate every year at the minimum wage rate. The 1.8 million leisure and hospitality employees in California would lose $149,760, 000 in the aggregate every year at that rate. These numbers represent not only wages in the wallets and bank accounts of California workers, but also unemployment

insurance and other employer taxes that employers are underpaying if they are time shaving based on a purported but nonexistent *de minimis* rule.

Even if there was an argument for allowing this in 1946, when employees had to use manual punch cards or time clocks, and all payroll was manually calculated by people rather than computers, there is no justification for it in this era of electronic timekeeping. For example, Starbucks' timekeeping system is capable of recording time to the minute. (*E.g.*, 3 ER 433; 4ER 555.) Allowing a *de minimis* rule will lead to a situation where employees are docked pay if they are a few minutes late (the employer relying upon its time-keeping system to detect any minute deviation from the employee's scheduled starting time), but not paid for working a few minutes past their scheduled hours (when an employee if forced out of necessity and/or because of employer directives to perform tasks after clocking out). For example, retail employees will certainly suffer with the recognition of a *de minimis* excuse as employers treat shifts as commenced at clock-in, but for asserted inventory control reasons, force employees to clock out *and then wait* to undergo security checks where their personal belongings are searched for pilfered items. Of course, the retail employers will declare that it is simply impossible to pay employees for the time it makes them wait, off-the-clock, to have their personal belongings rummaged through before they can leave.

Additionally, it should be noted that it is unclear what the federal *de minimis* test even is. In a 2014 opinion, the United States Supreme Court cast doubt on the continuing viability of the *de minimis* doctrine set forth in *Anderson*. In *Sandifer v. United States Steel Corporation*, 134 U.S. 870, 880 (2014), the Court declined to

apply the doctrine to claims for donning and doffing uniforms and protective gear under the Portal to Portal Act. The Court also noted in dicta that federal Department of Labor regulations currently apply a *de minimis* test more stringent than is set forth in *Anderson*:

> [T]he current regulations of the Labor Department apply a stricter *de minimis* standard than *Anderson* expressed. They specify that: "[a]n 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."

The Labor Department's formulation, of course, is inconsistent with the ten-minute daily benchmark applied by the Court in this case. As such, while adopting a *de minimis* rule might embolden some employers to underpay employees, it would leave employers and employees with no certainty about what their legal obligations and rights are. It would confuse the clear guidance provided by the statutes, wage orders and case law in California.

E. California Law Rejects a *De Minimis* Exception in Various Contexts, and the Result Should Be No Different Here, Where the Strong Policy of Employee Protection Mandates Greater Protections for Employees Than Those Supplied by Federal Law.

Under California law, "neither a fiction nor a maxim may nullify a statute." *See, e.g., City of San Diego v. Hass*, 207 Cal. App. 4th 472, 500 (2012). The Court of Appeal applied this principle to statutory claims for overtime under the Labor Code in *Ghory v. Al Lahham*, 209 Cal. App. 3d 1487, 1492 (1989). In *Ghory,* the Court of Appeal rejected the defendants' attempt to use the equitable defense of unjust enrichment to defeat a claim for unpaid overtime stating: "Principles of equity cannot be used to avoid a statutory mandate." *Id.* This Court has, in other contexts,

established that the *de minimis* defense is an equitable "maxim of jurisprudence" that, under California law, cannot be applied to negate statutory legal obligations that must be followed strictly. *See, Knoke v. Swan*, 2 Cal. 2d 630, 631 (1935) (maxim "de minimis non curat lex" does not apply to tax sales); *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454, 458 (1893) (maxim has no application "where a contract right is violated"). Thus, the *de minimis* excuse asserted by Defendant here cannot overcome the clear and unambiguous requirements imposed on it as an employer operating under California law.

In *Gallamore v. Workers Compensation Appeals Boards*, 23 Cal. 3d 815 (1979), this Court considered whether a *de minimis* exception applied to claims for penalties against employers who unreasonably delay paying workers' compensation benefits. This Court's task proved to be simple. Since no such exception was stated in the relevant statute, there was no such exception:

> Carrier argues that the Board should have discretion to ignore minor, *de minimis* delinquencies in determining whether to assess a penalty. The language of section 5814, however, does not recognize any such exception.

Gallamore, at 822-23.

Notably, the only published California opinion which applies the *de minimis* doctrine in a wage and hour suit applied it to a common law promissory estoppel claim, *not* the statutory claims. *Gomez v. Lincare Inc.,* 173 Cal. App. 4th 508, 520 (2009). Even the decision in *Gomez* is consistent with the principle that the equitable *de minimis* excuse is inapplicable in the face of statutory rights.

F. The DLSE's Attempt to Adopt a *De Minimis* Rule Is an Improper Underground Regulation, Is Not Entitled to Any Deference, and Should be Explicitly Rejected by This Court

Starbucks will undoubtedly argue that because the DLSE has adopted a *de minimis* rule in its Enforcement Manual, this Court should defer to the DLSE's interpretation. DLSE Enforcement Policies and Interpretations Manual 47.2.1. Such an argument is unavailing.

The DLSE's interpretation, stated in its Enforcement Manual, is an improper "underground regulation," i.e. a regulation which was implemented without following the procedures set forth in the Administrative Procedures Act. *See Tidewater Marine Western Inc. v. Bradshaw*, 14 Cal. 4th 557, 574 (1996). As this Court declared with respect to that very Enforcement Manual, an underground regulation is entitled to no deference. *Id.*, at 577.

In *Tidewater,* this Court held that a portion of the DLSE Enforcement Policies and Interpretations Manual which set forth a rule for determining whether California's Wage Orders apply to marine vessels operating off the coast of California was an invalid underground regulation. As *Tidewater* explains, subject to certain exceptions not relevant here, all regulations must be promulgated in accordance with the APA. There is a two-part test for determining whether an agency policy is a regulation. First, it sets forth a general rule that will decide a class of cases. Second, it implements, interprets or makes specific the law enforced by the agency. *Id.* at 570.

The DLSE's adoption of a *de minimis* rule for enforcement of the Wage Order, meets both prongs of that test and constitutes an underground regulation. It is a general rule which governs a class of cases, and it interprets and implements the law

enforced by the DLSE. Therefore, it is entitled to no deference. For all the reasons set forth above, it is also not a correct statement of California law and should be disregarded, this Court having previously held that it is under no obligation to abide by the DLSE's interpretations (particularly when inconsistent with California law). *Mendiola,* 60 Cal. 4th at 848; *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th at 1105. And the DLSE's DLSE Enforcement Policies and Interpretations Manual leaves no doubt that it intends to adopt federal, rather than state, wage and hour standards with respect to the *de minimis* doctrine:

> It should be noted, however, that for enforcement purposes, the Division utilizes a de minimis test concerning certain activities of employees (See Lindow v. United States 738 F.2d 10 57 (9th Cir. 1984)).

DLSE Enforcement Policies and Interpretations Manual, § 46.6.4. Here, the DLSE cites only to *Lindow*, indicating no basis under California law for its decision to enforce California law. Elsewhere, the DLSE says:

> In recording working time, 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); Lindow v. United States 738 F .2d 10 57 (9th Cir. 1984)) 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.

DLSE Enforcement Policies and Interpretations Manual, § 47.2.1. Again, only federal law is cited by the DLSE as forming the basis of its enforcement policy, with no indication of any Wage Order, Labor Code statute, or California Court decision authorizing, or even suggesting the correctness of, its approach. Faced with the DLSE unsupported reliance upon the weaker wage and hour standards existing under

federal law, this Court should reject the DLSE's enforcement decisions for what they are, a failure to follow and apply clear and unequivocal California law as to the obligation of employers to pay all minimum wages and overtime wages for any and all time worked.

G. Federal Courts Have Warned That the *De Minimis* Doctrine Is Easily Abused, Even Searching for Ways to Minimize the Impact of This Anti-Employee Rule

Starbucks and other employers may, faced with the decisive authority discussed above, may argue that the Labor Code statutes should be interpreted so as to avoid "absurd" consequences (suggesting that it is "absurd" to think an employer might have to pay its employees for *all* hours worked). *People v. Mendoza*, 23 Cal. 4th 896, 908 (2000). However, the genuinely absurd result would be permitting employers not to pay California employees for work done. The California Legislature has chosen to define employer obligations and employee rights in such a definitive manner that a *de minimis* excuse is incompatible with California law, despite whatever parade of horribles Starbucks and any amici might invent.

Despite employer claims of calamity, some federal courts have questioned, or even criticized, the potential for abuse engendered by the *de minimis* defense to FLSA claims, finding ways to limit its application or avoid it altogether. The Ninth Circuit, for example, allows claim aggregation to avoid application of the doctrine: "Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim." *Lindow*, at 1063. And the court in *Addison v. Huron Stevedoring Corp.*, 204 F2d 88 (2d Cir. 1953) warned about the potential for harm to low wage workers, holding that even a dollar a week could he

considered more than *de minimis* to such individuals:

> We would promote capricious and unfair results, for example, by compensating one worker $50 for one week's work while denying the same relief to another worker who has earned $1 a week for 50 weeks.

Addison, 204 F.2d at 95 (holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman"). Significantly, *Addison* is cited as authority for the requirement stated in 29 C.F.R. § 785.47 that employers may not arbitrarily refuse to count hours worked. But that is precisely the risk to which California workers would be exposed, as California employers found ways, each more creative than the next, to arbitrarily refuse to count hours worked by their employees.

If the *de minimis* excuse sought by Starbucks was imposed on California's employees, an employer in California could refuse to pay its employees for four hours of work each year because it was accrued one minute at a time over 250 days, but that same employer could never successfully refuse to pay an employee for four hours worked in one day. The incongruity is palpable; it defies reason to deny an employee pay for hours worked because they were accrued over many days instead of one. But applying this formulation of the *de minimis* excuse to California's most vulnerable wage earners would yield the very result that *Addison* warned against more than 70 years ago.

V. CONCLUSION

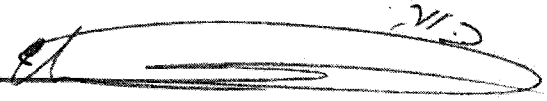
Based on the plain language of the applicable statutes and Wage Orders, precedent rejecting the importation of federal standards into California law where

employee rights would be impaired, and the longstanding rule that equitable maximums do not negate statutory rights, this Court should rule that there is no *de minimis* excuse available to employers in California who have failed to pay ***all*** minimum wages and overtime pay owed to their employees pursuant to California law.

Dated: October 31, 2016.

Respectfully submitted,

SETAREH LAW GROUP

By: 

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CERTIFICATIONS

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Dated: November 1, 2016.

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By: 

H. Scott Leviant

CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 9495 Wilshire Blvd., Suite 907, Beverly Hills, CA 90212.

2. That on November 1, 2016 declarant served the PETITIONER'S OPENING BRIEF ON THE MERITS by depositing a true copy thereof in a United States mail box at Beverly Hills, California in a sealed envelope with postage fully prepaid and addressed to the parties listed as follows:

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3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of November, 2016 at Beverly Hills, California.

By: _____
H. Scott Leviant

CERTIFICATE OF CONFORMITY WITH ELECTRONIC BRIEF

[DO NOT INCLUDE IN ELECTRONIC COPY]

I hereby certify that the Opening Brief to which this Certificate of Conformity is attached is, aside from the attachment of this Certificate, identical in all respects to the electronically filed Opening Brief submitted using the Court's Electronic upload website.

The paper copies of the Opening Brief were printed from the PDF file generated by Microsoft Word, the program in which the original Opening Brief was created.

Dated: November 1, 2016. SETAREH LAW GROUP

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