

No. S243805

Supreme Court
OF THE
State of California

AMANDA FRLEKIN, ET AL.,
Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,
Defendant and Respondent.

SUPREME COURT
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On a Certified Question from the United States
Court of Appeals for the Ninth Circuit
Case No. 15-17382

Opening Brief on the Merits

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I. QUESTION PRESENTED

Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 7?

II. INTRODUCTION

In stores across California, Apple runs a highly profitable retail business selling small—and valuable—electronic devices. Instead of adequately securing these devices from theft, Apple requires its retail store employees to participate in mandatory—but unpaid—security searches, or "Checks," of their bags, purses, packages, and iPhones. On the busiest days, the Checks can take 20 to 40 minutes to complete.

The question referred to this Court by the Ninth Circuit is whether the Check time is compensable under California law. It is.

It meets either, or both, of the two "independently define[d]" tests for compensable "hours worked" in Wage Order 7. *See* 8 Cal. Code Regs. §11070, ¶2(G); *Frlekin*, 870 F.3d at 871 (citing *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 582 (2000)).

As defined in Order 7, "hours worked" includes:

- (1) "the time during which an employee is subject to the control of an employer" (the "'control' test"); and/or
- (2) "all the time the employee is suffered or permitted to work, whether or not required to do so" (the "'suffered or permitted to work' test").

8 Cal. Code Regs. §11070, ¶2(G) (emphasis added).

(1)

The Check time meets the “control” test.

As the Ninth Circuit explained, the Checks take place “on site,” and employees may not leave the store until they submit to the Check procedure. *Frlekin v. Apple, Inc.*, 870 F.3d 867, 872 (9th Cir. 2017). The employees are placed under the physical direction of a store manager or a guard, who “compel[s]” the employees to take specific “actions and movements.” *Id.* at 873. Among other actions, employees must open up their bags, unzip internal compartments, pull out their iPhones and technology cards, and display the contents. Employees who refuse to comply with these directions, or who refuse to be Checked, are subject to discipline, including termination. *Id.* at 870.

In the Ninth Circuit’s words, “employees who bring a bag or package to work and therefore must follow the [employer’s] search procedures are clearly under the ‘control’ of the employer.” *Id.* at 871. In fact, Apple “*concede[d]*” that it “controlled” its employees “while awaiting, and during,” the Checks. *Id.* (emphasis added).

Hence, under a “textual analysis,” the Check time easily meets the “control” test. *Id.*

Nevertheless, the district court granted summary judgment in Apple’s favor. It disregarded the employer’s conceded “control” over the Check time, reasoning that the time was not “required” because employees could supposedly “avoid” the Checks by “choosing” to leave their purses and iPhones at home.

This was error for several reasons.

First, the Wage Order's plain text provides no support for this view. Under the plain text, time is compensable "during which" employees are "control[led]." The test is not limited to "unavoidable" or "required" activities.

In fact, the adoption history of the "control" test shows that the district court's interpretation of the test is even narrower than a weaker prior compensability standard that the IWC purposely abandoned in 1947, and replaced with the "control" test. The Wage Order should not be construed to reinstate an older, abandoned standard. Instead, the "control" test should be applied in accordance with its plain language.

Second, the district court misread *Morillion*, in which this Court held that mandatory bus-ride time from a meeting place to the fields was compensable under the "control" test. 22 Cal.4th at 582-87. The employer exercised no other "control" in *Morillion*, so it was "dispositive" that the employees could not "choose" to "avoid" the compulsory bus rides. *Id.* at 587, 589 n.5.

This case, however, involves other employer "controls" not present in *Morillion*. As the Ninth Circuit recognized, employers have a "greater" interest in theft prevention than in how employees travel, so they tend to exercise "greater" levels of control over security search time than over travel time. *Frlekin*, 870 F.3d at 872-73.

The *Morillion* employees were free to sleep and read during the bus rides. 22 Cal.4th at 586. In this case, by contrast, the employees were required to physically perform employer-directed tasks during the Check time. 870 F.3d at 873. They were "restrained from leaving the work place" until the Checks were completed, prevented

from using the Check time “effectively for [their] own purposes,” and subjected to discipline if they refused to submit to the Check procedure. 22 Cal.4th at 583, 586, 587.

The employees in this case were under a *greater* level of control than in *Morillion*, not a lesser one. As this Court later confirmed in *Mendiola*, it is the “level of the employer’s control” that is “determinative” under the Wage Orders.¹

Morillion did not hold that even the highest levels of employer “control” must be disregarded whenever an activity can theoretically be “avoided” through a pre-activity “choice.” Such a holding does not appear in *Morillion* because the case did not present those facts, and because it would have contravened the Wage Order’s text.

As the Ninth Circuit understood, practically speaking, employees have no meaningful “choice” to leave their purses and iPhones at home. *Frlekin*, 870 F.3d at 872. For this reason, the Checks are no more “optional” than the bus rides in *Morillion*.

In short, the Check time is “compensable” under the “control” test.

(2)

The Check time is also compensable under the “suffered or permitted to work” test. 8 Cal. Code Regs. §11070, ¶2(G).

The district court held that the Checks were not “work,” but by its plain meaning, “work” means physical or mental effort to accomplish an end. The Checks easily meet that description, and they were also “suffered or permitted” by an employer, Apple.

¹ *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833, 840 (2014) (quoting *Morillion*, 22 Cal.4th at 587).

While not an essential element of this test, the Checks also benefited Apple by “advanc[ing] [Apple’s] interest in loss prevention.” *Frlekin*, 870 F.3d at 873.

Apple *should* pay for “work” that it “suffered and permitted” (and also “controlled”) in order to protect its own “valuable goods” from theft. *See id.* The district court erred by importing a less-protective federal standard into California law.

In sum, the Check time meets either, or both, of the two tests for compensable “hours worked.” Accordingly, the answer to the Ninth Circuit’s question is “yes.”

III. STATEMENT OF FACTS

A. The Operative Complaint

This certified class action, commenced in 2013, challenges Apple’s practice of failing to compensate its employees for time spent undergoing onsite security searches of their bags and technology—searches done while the employees are under Apple’s control, on Apple’s premises, and for Apple’s benefit as a theft-prevention measure. Excerpts of Record (“ER”) 583-84, ¶¶1-4, 589-91, ¶¶28-31. On behalf of themselves and the certified class, plaintiffs seek relief for Apple’s failure to pay minimum and overtime wages for all “hours worked,” as defined in the applicable Wage Order.² ER 584, ¶4, 594-95 ¶¶42-50; *see also* ER 596-99 ¶¶51-68.

B. Order Granting Class Certification

In 2015, the district court granted class certification of the California claims. ER 544-58; *see Frlekin*, 870 F.3d at 870. In its order, the court directed the parties to file

² The complaint asserts violations of Wage Order 4, the relevant provisions of which are identical to Wage Order 7, cited in the Ninth Circuit’s question. *Compare* 8 Cal. Code Regs. §11040, ¶2(K) *with id.* §11070, ¶2(G).

summary judgment motions on “the main issue of compensability under California law” (ER 557:17-18), and ruled that “bag searches will be adjudicated as compensable or not based on the most common [factual] scenario, that is, an employee who brought a bag to work purely for personal convenience” (ER 553:23-25).

C. Cross-Motions for Summary Judgment

As directed, after class notice, the parties filed cross-motions for summary judgment in October 2015. ER 605-06; *see* ER 80-86, 379-84.

1. Plaintiffs’ Motion

Plaintiffs’ motion, and their opposition to Apple’s motion, relied on the following facts (*see* ER 82:4-84:2; *see also* ER 4:23-6:28 (district court’s statement)):

Apple’s Check Policy: Since at least 2009, Apple’s hourly paid retail store employees have been subject to a written policy requiring that their bags and Apple devices—including their iPhones, iPads and Apple-branded laptops—be checked every time they exit a store (the “Check Policy”). ER 107-108 [at 32:24-33:20, 33:25-34:6, 34:24-35:4], 115, 386:11-387:2, 392, 394, 396, 398, 400, 402, 404, 406. The Check Policy, which “appl[ies] to all employees of Apple Inc.,” provides as follows:

Employee Package and Bag Searches

All personal packages and bags must be checked by a manager or security before leaving the store.

General Overview

All employees, including managers and Market Support employees, are subject to personal package and bag searches. Personal technology must be verified against your Personal Technology Card (see section in this document) during all bag searches.

Failure to comply with this policy may lead to disciplinary action, up to and including termination.

Do

- Find a manager or a member of the security team (where applicable) to search your bags and packages before leaving the store.

Do Not

- Do not leave the store prior to having your personal package or back [sic] searched by a member of management or the security team (where applicable).
- Do not have personal packages shipped to the store. In the event that a personal package is in the store, for any reason, a member of management or security (where applicable) must search that package prior to it leaving the store premises.

ER 115; *see also* ER 5:5-28 (quoting policy), 394-406; *Frlekin*, 870 F.3d at 870.

The technology card policy requires Apple Employees to record all their Apple-branded devices on a “Personal Technology Card,” including the descriptions and serial numbers of the products. ER 115, 117-18, 170 [at 18:22-19:3], 241-42. Every time an Apple Employee leaves a store “for any reason,” he or she “must ensure the sales leader verifies the serial numbers on [the] card against the product [the employee is] carrying.” ER 117; *see* ER 201 (checks “must be conducted” “*every time* an employee leaves the store” (emph. added)), 230 (“check out with a manager any time you leave the store”).³

Apple does not compensate employees for time spent on the Checks. ER 110 [at 85:10-12], 239, 307 ¶8, 322, 326; *see* ER 6:25-28; *Frlekin*, 870 F.3d at 870 (“Employees

³ Checks are conducted not only at the end of the day, but also at lunch. ER 117, 118, 197 ¶4, 303, 307 ¶6, 346 ¶14, 352 ¶14, 392 (“before you leave the store for any reason (such as lunch, end of day)”).

receive no compensation for the time spent waiting for and undergoing exit searches, because they must clock out before undergoing a search.”).

Checks were conducted in every Apple store during the class period. ER 244-53, 94:25-95:2, 255-89; *see* ER 6:18-19 (district court’s fact summary).

The Checks Are Mandatory: Apple’s bag and technology Check Policy is a mandatory policy. ER 69-70 [at 48:23-50:6], 112 [at 100:20-101:2], 115, 193-94, 200-01, 203, 206, 208, 220-21, 228, 230, 242. Employees do not have the right to choose whether they want to comply. ER 112 [at 100:20-01:2], 239, 241-42 (identifying Personal Technology Card policy as one of several “important Apple policies” and “as an Apple employee, you are obligated to follow ALL Apple policies”).

Apple refused to relax the policy, even after employees complained to senior management about its unfairness. *E.g.*, ER 123:26-124:2, 314-15, 317-19, 322, 324, 326. One employee who complained about Checks was told: “you don’t get to pick and choose what policies to follow.” ER 239.

Apple Employees Are Subject to Discipline for Not Submitting to Checks: Apple alerts employees that “[f]ailure to comply with [the Check] policy may lead to disciplinary action, up to and including termination.” ER 115, 392-406; *see Frlekin*, 870 F.3d at 870. Employees who failed to comply with the Check Policy have been forced to attend “Warning Meeting[s]” (ER 232); been cited for “Behavior to be Corrected” (ER 234-35); and been subject to a “Coaching Tracker” (ER 237).

Apple Dictates All Aspects of How Checks Are Conducted: The procedures for conducting Checks are determined by Apple and described during leadership training and

in corporate documents published on Apple communication platforms. *E.g.*, ER 109 [at 63:8-14], 206, 300.

First of all, employees must track down a manager (or security guard) to perform the Check. ER 392 (“It is your responsibility to find a manager or member of the security team ... to search your bags and packages before leaving the store.”), 115 (“Find a manager ... to search your bags”), 394-406 (same).

The managers are then instructed to, among other things: (i) “[a]sk the employee to open every bag, brief case, back pack, purse, etc.”; (ii) “[a]sk the employee to remove any type of item that Apple may sell”; (iii) “verify the serial number of the employee’s personal technology against the personal technology log”; (iv) “[v]isually inspect the inside of the bag and view its contents”; (v) “ask the employee to unzip zippers and compartments so you can inspect the entire contents of the bag”; (vi) “[i]f there are bags within a bag, such as a cosmetics case, be sure to ask the employee to open these bags as well”; and (vii) “ask the employee to remove” any “questionable item” from the bag. ER 300; *see also* ER 6:1-17 (district court’s fact summary).

The Checks require active employee participation. *E.g.*, ER 303 (during Checks, “the guard may ask you to see in all the pockets, etc. in your bag” and “ask you to move things around in your bag so they can see effectively”); 314 (“we are asked by a manager to pull the [technology] card out of our wallet, show him the serial numbers listed on the card, then pull our devices out, find the serial number in the settings, and show the manager that the serial number[s] on the devices match the serial numbers on the card. Then we are subjected to a bag search, and finally, we are allowed to leave the store.”);

345 ¶8 (Checks involve inspection of “each compartment of each employee’s bag”); 351 ¶6 (managers would “physically search through the compartments” of employees’ bags).⁴

In addition, Apple: (i) instructs Store Managers to implement the mandatory Checks (ER 200-01, 203, 205-06, 208, 210, 212, 214-15, 217-18, 220-21, 223, 225, 300); (ii) decides whether Apple Employees should be disciplined for not complying with the Check Policy (ER 115, 232, 234-35, 237, 239); (iii) issues Personal Technology Cards for Apple Employees to identify their Apple products (ER 115, 117-18, 170 [at 18:22-19:3], 241-42); and (iv) prepares written instructions describing the Check Policy and other Apple policies (ER 115, 200-01, 206, 300, 392-406).

Apple Employees Are Confined to Store Premises During and While Waiting for Checks: Until the Checks are completed, Apple Employees are confined to their stores and are not allowed to leave the premises, which means they may not run personal errands, get meals or engage in other personal activities outside the store until a Check is done. ER 66 [at 129:16-25], 147 ¶6, 151 ¶5, 155 ¶3, 166 ¶6, 175 ¶5, 179-80 ¶6, 183 ¶3, 184 ¶5, 190 ¶6, 197 ¶4, 198 ¶8, 230, 232, 293 ¶4, 306 ¶3, 307 ¶8, 311 ¶3, 314, 345 ¶5, 346 ¶11, 329 ¶4, 350-51 ¶5, 356 ¶5, 371 ¶5; *see Frlekin*, 870 F.3d at 870.

⁴ See also ER 411:9 (“I open up my bag and lift up my Apple shirt so they can see in the bag”); 460:15-17 (“I open the bag for the manager” and “move [things] around” “so that the manager can see under them”); 477:24-25 (“the manager asks me to move [items in my bag] so he or she can see in the bag”); 488:20-21 (“I normally have my backpack or purse open and prepared for the bag check”); 508:27 (“[t]he employee opens his or her bag”); 529:20-23 (“The employee approached a manager and opened his or her bag Occasionally, the manager asked the employee to move a large item in the bag (such as a sweatshirt) out of the way so that the manager could see within the bag”).

The employees are confined to the premises not just during the actual performance of the Check, but also while searching for a store manager to conduct it, which sometimes means waiting for the manager to finish assisting a customer, and while lining up behind other employees for everyone to be Checked. *E.g.*, ER 122 ¶7, 127-28 ¶5, 131 ¶4, 135-36 ¶5, 140 ¶6, 143-44 ¶¶5-7, 147 ¶7, 152 ¶6, 156-57 ¶6, 162 ¶6, 167 ¶7, 171 [at 31:1-3, 31:21-23] 175 ¶7, 179 ¶6, 184 ¶5, 190 ¶6, 198 ¶7, 293-94 ¶5, 297 ¶5, 298 ¶8, 302, 307 ¶¶6-8, 312 ¶6, 330 ¶¶5-7, 334 ¶6, 338-41 ¶¶67-74 & ¶¶92-93, 345-46 ¶¶8-9, 351 ¶8, 357-58 ¶9, 371-72 ¶6, ¶10.⁵

On the busiest days, the Checks can take as long as 45 minutes including wait time, none of which was compensated. *See, e.g.*, ER 298 ¶8, 339 ¶67, 341 ¶92. Estimates of the average time required for the Checks (including wait time) ranged from 5 to 20 minutes or more. *E.g.*, ER 144 ¶7, 293-94 ¶5, 307 ¶6, 345-46 ¶¶8-9, 351 ¶8, 357-58 ¶9, 371-72 ¶¶6, 9. Employees are often Checked more than once per day, because Checks are required both at the end of the day and when the employees leave for lunch. *See id.*

Checks Are Conducted by Apple Store Managers or Security Personnel:

Checks are carried out on the premises by “a manager” or, in stores with security guards, a “member of the security team.” ER 115; *see* ER 5:18-20 (quoting policy), 206, 210, 292, 392-406; *see also* ER cites two paragraphs above.

⁵ *See also* ER 140 ¶ 6 (“The security checks were time consuming because after I clocked out, I would have to search around the store for a manager (who was often busy helping customers or performing other tasks) and then wait in line for other employees to go through security checks and then go through the actual security check myself”); 175 ¶ 7 (“The time spent looking for or waiting for a manger and then waiting in line for other employees to finish their security checks took up the bulk of the time.”).

Apple Knows or Should Know That Apple Employees Go Through Checks:

Apple: (i) created the Check Policy (*see* ER 114-15); (ii) has received complaints about Checks (*see* ER 314-15, 317-19, 322, 324, 326); and (iii) acknowledged in discovery that every Apple Store has conducted Checks on its premises (*see* ER 244-53). Apple management is also aware of the waiting times caused by the mandatory Checks.⁶

The Checks Benefit Apple By Preventing and Deterring Theft: Apple implemented the Check Policy, and conducts the Checks, in order to prevent and deter theft. ER 170 [at 20:7-10], 200-01, 206, 208, 217-18, 227-28, 232, 234, 363 [at 54:21-55:14], 377. The Checks are part of both Apple's "Shrink Analysis and Action Plan" and Apple's "Internal Theft" policy. ER 200-01, 206. Managers are to "be very thorough with bag checks and tech cards, as these are key components to the impression of [merchandise] control in the store." ER 212.

Apple's Retail Sales Jobs Include Responsibility for Theft-Prevention:

Apple's "Loss Prevention" policy states that it is part of all employees' "responsibility" to take action "if [they] become aware of an internal theft issue or a possible internal theft issue." ER 201; *see also* ER 200 ("Internal Theft" policy; same), 205 ("Shrink Analysis and Action Plan"; "entire staff" is "accountab[le]" for internal theft).

⁶ *See, e.g.*, ER 302 ("We know sometimes there is not a guard present at the front door [to perform Checks] because they are opening the side door for shipment, a vendor, etc. and you have to wait until the guard returns to check out."); 194, 221 ("I know it can be a challenge to find a leader at times [to conduct Checks]....").

2. Apple's Motion

Apple's motion rested entirely on three basic facts that it asserted were determinative of the compensability question, namely:

- (1) Employees who did not bring a bag to work, and who left their "personal Apple technology," including their iPhones, at home, would not be checked. ER 382:20-384:2 (citing ER 392-406, 419, 423-24, 440, 446, 450, 468, 478, 481, 493, 496-97, 508, 512, 516, 520, 524, 528-29, 532-33, 536, 539-40).
- (2) Some employees never, or rarely, brought a bag to work and some employees rarely brought their iPhones to work. ER 384:5-26 (citing ER 411, 414, 419, 423, 433-34, 455, 459, 464, 468, 472, 476-78, 485, 488, 496-97, 500-01, 543).
- (3) The district court granted class certification based on the assumption that employees brought bags, iPhones, and other personal Apple technology to work for "personal convenience." ER 380:11-15 (citing ER 553:23-25).

Based on these facts, Apple argued that time spent waiting for and undergoing Checks was not compensable under California law. ER 380.⁷

⁷ Apple's opposition to plaintiffs' motion rested on the same three facts. ER 72:15-74:28. Apple also mentioned some other facts, but characterized these as either "not relevant" or "irrelevant" to compensability. ER 75:3, 76:5, 77:6, 77:23.

3. The District Court's Order

The district court conducted a lengthy hearing on the cross-motions (*see generally* ER 23-52), during which Apple conceded that its employees were under its “control” while awaiting and during the Checks. ER 47:20-48:13; *see Frlekin*, 870 F.3d at 871.

Nevertheless, the district court granted Apple's motion and denied plaintiffs' motion. ER 8-21; *see Frlekin*, 870 F.3d at 870. The court held that the Check time was not compensable under the “control” test because employees could “choose” not to bring a bag or personal technology to work in the first place. ER 8:14-21. It further held that the Check time did not meet the “suffered or permitted to work” test because the Checks were not “work.” ER 19:1-21:15.

D. Ninth Circuit Proceedings

Plaintiffs filed a timely appeal. ER 53-59; *Frlekin*, 870 F.3d at 871. After full briefing and oral argument, the Ninth Circuit granted plaintiffs' request to certify the legal questions presented by their appeal to this Court. *See* Cal. Rules of Ct., rule 8.548.

As the Ninth Circuit recognized, and as Apple “concede[d],” “employees who bring a bag or package to work and therefore must follow the [employer's] search procedures are clearly under the ‘control’ of the employer while awaiting, and during, the search.” *Frlekin*, 870 F.3d at 871. “Under a strictly textual analysis,” therefore, the Check time is compensable. *Id.* (citing Wage Order 7, ¶2(G)). However:

Although the search is voluntary in that the employee could have avoided it by leaving his or her belongings at home, the employer nevertheless exercises control over the employee who does bring a bag or package to work. It is unclear under *Morillion* whether, in the context of on-site time

during which an employee's actions and movements are compelled, the antecedent choice of the employee obviates the compensation requirement.

Id. at 873.

On September 20, 2017, this Court agreed to decide the questions.

IV. ARGUMENT

Under a plain-language interpretation of the Wage Orders, the Check time meets both of the “independent”⁸ tests for compensability: (A) the “control” test; and (B) the “suffered or permitted to work” test. Because the Check time is compensable under either or both tests, the answer to the Ninth Circuit’s question is “yes.”

A. The Wage Orders’ Plain Text Must Be Liberally Construed to Protect and Benefit Employees and to Effectuate the IWC’s Intent

In construing the Wage Orders, this Court “adopt[s] the construction that best gives effect to the purpose of ... the IWC.” *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 262 (2016) (citing *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-27 (2012); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1103 (2007)). “Time and again,” the Court has “characterized that purpose as the protection of employees” *Id.* (citing *Mendiola*, 60 Cal.4th at 840; *Martinez v. Combs*, 49 Cal.4th 35, 53-54 (2010); *Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690, 702 (1980)).

Hence, the IWC’s Wage Orders “are liberally construed to protect and benefit employees.” *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 11 (2016) (citing *Brinker*, 53 Cal.4th at 1026-27; *Industrial Welfare Com.*, 27 Cal.3d at 702). In fact, this Court considers itself “bound” to “liberally construe” the Wage Orders “to favor the protection

⁸ *Mendiola*, 60 Cal.4th at 839; *Morillion*, 22 Cal.4th at 582.

of employees.” *Augustus*, 2 Cal.5th at 262, 269 (citing *Brinker*, 53 Cal.4th at 1026-27; *Murphy*, 40 Cal.4th at 1103)).

The Court’s analysis of the IWC’s intent “begins with” the Wage Orders’ text, which is “[t]he best indicator” of that intent. *Id.* at 264 (quoting *Reynolds v. Bement*, 36 Cal.4th 1075, 1086 (2005)). *Accord Kilby*, 63 Cal.4th at 16; *Martinez*, 49 Cal.4th at 63. The Court construes the words in accordance with their “most common understanding” and “ordinary meaning,” often relying on plain-language dictionary definitions. *Augustus*, 2 Cal.5th at 265 (citing *Murphy*, 40 Cal.4th at 1103 (words are generally given their “plain and commonsense meaning”)).

B. The Check Time Is Compensable Under the “Control” Test

In the Wage Orders, the operative word of the first test for compensable “hours worked” is “*control*.” The Check time is compensable under the ordinary meaning of this word. Indeed, Apple conceded “control.” *Frlekin*, 870 F.3d at 871.

Nothing in the Wage Order’s plain text supports the district court’s conclusion that an employer’s “control” over its employees should be ignored because of a pre-activity occurrence—such as a pre-activity “choice.” Rather, the Wage Order focuses on, and makes compensable, the time “*during which*” the employees are “controlled.” Here, the time “during which” the employees are “controlled” is the Check time.

The district court’s narrow interpretation of the “control” test contradicts the IWC’s intent in crafting the definition of “hours worked,” as shown by an examination of the historical origin of that definition. The regulatory history shows that in 1947, the IWC purposely substituted the word “control” in place of the word “require”—which was