No. S243805

Supreme Court

OF THE

State of California

AMANDA FRLEKIN, ET AL.,

Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.,

Defendant and Respondent.

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

Consolidated Answer to Amicus Curiae Briefs

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I. INTRODUCTION

To prevent and deter theft, many California employers require their employees to participate in mandatory onsite security searches, such as the "Checks" Apple imposes on its retail sales employees in this case. Employer-side interests, including those who filed four amici curiae briefs supporting Apple,[1] would prefer not to have to compensate their employees for any of this time—regardless of how heavily the employer-dictated search process might burden the employees.

The employer-side amici would disregard the *discipline* Apple exacts from employees who fail or refuse to submit to the Checks. They would disregard the fact that Apple *confines its employees to store premises*, not allowing them to leave until the Checks are completed. They would disregard the "compelled" "actions and movements" in which Apple's employees must engage, under a manager's immediate physical supervision. *See Frlekin v. Apple, Inc.*, 870 F.3d 867, 870-73 (9th Cir. 2017).

To support their position, the amici characterize Apple's Check policy as an employee 'benefit," as if it were comparable to health insurance or a company car. According to the amici, the Check policy allows employees the "benefit" of carrying their purses, backpacks, and iPhones to work. They say that if this Court holds the Check time compensable, employers across California will immediately start banning bags at work.

The amici are wrong.

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[1] Brief for Amici Curiae California Employment Law Council et al. ("CELC Br."); Amicus Curiae Brief of the Chamber of Commerce et al. ("Chamber Br."); Amicus Curiae Brief of Retail Litig. Center, Inc., et al. ("RLC Br."); Brief of Washington Legal Found. as Amicus Curiae ("WLF Br.").

Under the Wage Orders' plain text, none of the "controls" Apple concededly exerts over its employees "during" the Checks may be disregarded. The "level" or "extent" of those "controls" is "determinative."[2] In arguing otherwise, the amici misconstrue this Court's key precedent, *Morillion,* in the same way Apple did.

As for the claim that Apple will just ban bags altogether, rather than pay for the time, nothing in the record suggests that Apple has ever actually considered such a step, which Apple itself calls "draconian."[3] To the contrary, there are many reasons to suppose that Apple, and other California employers, are unlikely to go that far. Presumably, they would like to keep their skilled employees. In Apple's case, the ban would have to extend to its own employees' iPhones and all Apple-branded devices. More fundamentally, if imposed for the purpose of theft prevention (as opposed to other reasons, such as workplace safety), an outright ban on purses, bags and smartphones is probably unlawful. In other words, amici's argument is nothing more than unfounded speculation, which is no cause to depart from the Wage Orders' plain text.

In addition to meeting the "control" test, the Check time also meets the independent "suffered or permitted to work" test. Recently, the Sixth Circuit examined the pre-1947 federal definition of the term "work," and easily perceived that security search time meets that definition. *In re Amazon.com, Inc. etc. Wage and Hour Litig.*

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2 *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 840 (2015) (quoting *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 587 (2000)).

3 Answer Brief on the Merits ("ABM") 36-37. "OBM" and "RBM" refer to plaintiffs' opening and reply briefs on the merits. Other abbreviations have the same meanings as in plaintiffs' merits briefs.

(Busk v. Integrity Staffing Solutions, Inc.), ___ F.3d ___, 2018 WL 4472961, *8-*9 (6th Cir. Sept. 19, 2018) (hereafter "*Amazon.com*").

The California definition of compensable "work" is even broader and more protective than federal law. If security search time meets the federal definition, it certainly meets the California one. While the employer-side amici claim that compensable "work" should be limited to so-called "primary activities" or "job-related duties," the Wage Orders do not say this, and importing such a qualifier, in the guise of construing the word "work," would contravene the IWC's intent. Either way, the Checks are, in fact, are related to the duties of these retail sales employees' jobs.

One employer-side amicus, WLF, claims that the plain-language definitions of "control" and "work" are supposedly too "vague" to be enforceable. Such an argument can be concocted only by mischaracterizing plaintiffs' contentions in this case, then offering a series of hypotheticals that can only be described as farcical. WLF also claims this Court's ruling should apply prospectively only, but this argument, too, is seriously flawed, resting as it does on a misunderstanding of what the Wage Orders have said for over 70 years, together with a misreading of *Morillion*.

For all of these reasons, the employer-side amici's arguments should be rejected.

II. ARGUMENT

A. Amici Offer No Argument that Defeats the Conclusion That the Check Time Is Compensable Under the "Control" Test

As explained in plaintiffs' main briefs, the Wage Orders' plain language dictates

that the Check time, which Apple concededly "controlled,"[4] is compensable under the "control" test. The employer-side amici dispute this conclusion, offering arguments based on the Wage Orders' text as well as the case law, including *Morillion*. They also offer various inapposite hypotheticals, and they contend that employers will simply ban all bags from the workplace if the Check time is held compensable.

None of these arguments has merit.

1. Amici's Arguments Concerning the Wage Orders' Plain Text Are Meritless

The adoption history of the "control" test shows that the IWC deliberately abandoned less-protective prior language, under which only certain listed "required" acts were compensable, and replaced it with the broader, present-day "control" test. OBM 17-30; RBM 14-25. Apple did not contest the plain meanings of the words "control" or "require," though it had every incentive to do so.[5] Only one employer-side amici brief, that of CELC (at 7-8), even attempted any textual arguments on the "control" test.

Citing several partial dictionary definitions, CELC contends that "control" means "direct," and that "direct" is synonymous with "require." CELC Br. 7. Thus, CELC claims, "control" means the same thing as "require." *Id.* But as explained in plaintiffs' opening brief, the plain-language definitions of the two words are *not* identical (OBM 23), and CELC offers no definition of the word "require," so its syllogism is both incomplete and incorrect.

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4 *Frlekin*, 870 F.3d at 871.

5 *See generally* ABM 44-50.

If CELC's view were correct, the IWC's deliberate choice to jettison the word "require" and replace it with "control" would become a meaningless amendment. Courts do not presume that regulatory bodies like the IWC make pointless changes to the text of their regulations. *See, e.g., Viking Pools, Inc. v. Maloney*, 48 Cal.3d 602, 609 (1989); *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805 (1952). This is particularly unlikely in the IWC's case, given that all textual changes to the Wage Orders must be preceded by extensive statutorily-mandated proceedings, including public hearings.[6]

The IWC's chosen word "control" is broad enough to capture both "required" actions and those that are "directed," "restrained" or "regulated" by an employer. OBM 23-24 (discussing dictionary definitions of "control" and "require"). CELC overlooks the fact that it is possible to "direct" a non-"required" activity. The plain-language definition of the word "direct" includes to "guide (something or someone),"[7] and to "manage," "regulate," "supervise or oversee."[8] It is not limited to "required" or "compulsory" actions. For example, a police officer may "direct" a driver who chooses, but is not required, to turn left. The noun form of the word, "direction," includes both "[a]n act of

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[6] *See, e.g.*, Lab. Code §§1173, 1178, 1181. These requirements were codified in 1937, but date back to "the uncodified 1913 act that created the IWC." *Martinez v. Combs*, 49 Cal.4th 35, 52 (2010) (citing Stats. 1913, ch. 324).

[7] *Black's Law Dictionary*, "direct," *vb.*, sense 3 (10th ed. 2014) ("to guide (something or someone); to govern"). CELC cites sense 4 of this definition. *See also American Heritage Dictionary*, "direct," *v.tr.*, sense 2 (5th ed. 2018) ("give guidance and instruction to").

[8] *American Heritage Dictionary, supra*, "direct," *v.tr.*, sense 1.

guidance" and "an instruction on how to proceed"[9]—neither of which presupposes a "required" or "compulsory" act.

In short, the words "control," "require," and "direct" are not interchangeable synonyms. The IWC selected the phrase "subject to the *control* of an employer," not "subject to the requirement" or "direction of an employer." It chose this word knowingly, in order to "broaden" the definition of compensable "hours worked."[10]

CELC contends that the final phrase of the "suffered or permitted to work" test—"whether or not required to do so"—would become "surplusage" unless the word "control" in the "control" test is construed as synonymous with "required." CELC Br. at 7-8. That contention finds no support in the Wage Order's text.

First of all, CELC asserts (incorrectly) that "the Legislature" (CELC apparently means the IWC) supposedly "*added*" the final phrase to the "suffered or permitted to work test." CELC Br. at 8 (emphasis added). Based on that incorrect assertion, CELC suggests that the IWC chose *not* to add the same phrase to the "control" test. *Id.* But the phrase was not "added" in 1947. It dates back to the Orders' earliest definition of "hours worked."[11] In 1947, the IWC *retained* the phrase as part of the "suffered or permitted to

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9 *Black's*, *supra*, "direction," *n.*, senses 3, 4; *see also American Heritage Dictionary*, *supra*, "direction," *n.*, sense 1 ("management, supervision or guidance of a group or operation").

10 *See* OBM 20-22; RBM 18-19; MJN Ex. 12 at 22-23.

11 *See* Wage Order 7NS ¶2(f) (Apr. 5, 1943, eff. Jun. 21, 1943) (MJN Ex. 4).

work" test, while at the same time omitting a list of illustrative examples from that test.[12] Simultaneously, the IWC chose to *remove* the word "require" from the first test, and *replace* it with the broader word "control." These amendments achieved the IWC's goal of "broadening" the definition of compensable "hours worked," while also making plain that "required" activity is not an element of *either* test.

CELC also overlooks the fact that the final phrase modifies the word "work," not the word "control." While it makes sense to say "suffered or permitted to work, whether or not required to do so," it would have made no sense to say "subject to the control of an employer, whether or not required to do so." Instead of appending a syntactically incorrect phrase to the first test, the IWC accomplished the same thing by substituting a broader word, "control," in place of the prior word, "require."

Far from "surplusage," the final phrase ensures that the "suffered or permitted to work" test encompasses both "required" and non-"required" "work"—so long as the "work" was "suffered or permitted" by an employer, which means the employer knew or should have known it was occurring. *Morillion*, 22 Cal.4th at 584-85. The "control" test, in contrast, is not limited to "work," but instead embraces all "*time* during which an employee is subject to the control of the employer."

Each word and phrase of the "control" test plays a role. The word "time" makes plain that non-"work" that the employer decides to "control" is compensable, such as the bus-ride time in *Morillion*. *Id.* at 582. The phrase "during which" directs the focus onto

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[12] *Compare id. with* Wage Order 7 R ¶2(h) (Feb. 1, 1947, eff. Jun. 1, 1947) (MJN Ex. 5); *see* OBM at 20-21 (discussing wording changes between 1943 and 1947 Orders); RBM 15-17 (same).

the "controlled" time itself, not what may have preceded it. The phrase "subject to" ensures that on-call time, for example, is compensable.[13] And the word "control," which the IWC selected to replace the narrower word "require," ensures that all "controlled" time, whether "required" or not, is treated as compensable.

The two "independent" tests (*Morillion*, 22 Cal.4th at 582) thus function together to protect employees broadly and ensure they are compensated for all "hours worked."

In a footnote, CELC contests plaintiffs' reliance on the DLSE's conclusions in a brief it filed with the Office of Administrative Law ("OAL").[14] This brief explained that the 1947 wording changes "clearly indicated that the [IWC] intended to *broaden* the definition" of compensable "hours worked." MJN Ex. 12 at 22-23 (emphasis added). This explanation is consistent with what this Court has already recognized—that the IWC intended to ensure that California law would be *more* protective than federal law, including not only the Portal-to-Portal Act, but also other aspects of pre-1947 wage law.

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[13] *See, e.g.*, *Mendiola*, 60 Cal.4th at 840-41 ("on call" *time*, performed by an employee engaged to wait, can meet the Wage Order's "control" test and be compensable although no "work" is occurring); *Black's*, *supra*, "subject," senses 2, 3 ("exposed, liable, or prone" to something; "dependent on or exposed to (some contingency)"); *Merriam-Webster's Collegiate Dictionary*, "subject to" (11th ed. 2003) ("affected or *possibly* affected by (something)" (emphasis added)), *cited in Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 265 (2016).

[14] CELC Br. at 9 n.4. No other employer-side amicus disputes the DLSE's statements. CELC claims the statements are not "contemporaneous" with the 1947 amendments, but in appropriate cases, this Court relies on DLSE statements post-dating the relevant IWC action by decades. *See, e.g.*, *Mendoza v. Nordstrom, Inc.*, 2 Cal.5th 1075, 1090 (2017) (citing 1986 DLSE opinion letter as "a useful source of guidance" on the meaning of Wage Order language adopted more than 30 years earlier); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 15 (2016) (citing 2012 DLSE brief for guidance on meaning of Wage Order language dating back to 1911).

Troester v. Starbucks Corp., 5 Cal.5th 829, 839-41, 845 (2018); *see also Mendiola*, 60 Cal.4th at 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592. The IWC "gave little weight" to concerns that animated federal law in the 1940s, and "placed more importance on the policy of ensuring that employees are fully compensated for all time spent in the employer's control." *Id.* at 845. CELC cannot identify any "statutory or regulatory history" to support a contrary view. *See id.* at 841.

Far from "vague observation[s]," the DLSE's brief carefully reviewed the 1947 wording changes and provided background information on what led the IWC to adopt those amendments. RBM at 18-19 (discussing DLSE's brief, MJN Ex. 12 at 18, 22-24, 27). As the DLSE's brief explains, and as an independent review of the wording changes confirms, the IWC's purpose was to broaden the scope of "hours worked" in order to more robustly protect California employees.

2. Amici's Reliance on *Morillion* and Other Decisional Law is Misplaced

(a)

The employer-side amici rely heavily on decisional law, primarily *Morillion*, to argue that "control" is not enough to satisfy the plain language of the "control" test.[15] However, they misconstrue *Morillion* in the same manner Apple did,[16] and offer nothing new on how it should be read. A careful reading of *Morillion* reveals that the Court did

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[15] CELC Br. 3, 8-10; Chamber Br. 11-12, 13-14; RLC Br. 9-10; WLF Br. 4, 13-14.

[16] For example, like Apple, the RLC brief (at 9) assumes that by definition, employees are under "the 'control' of [the] employer" whenever they set foot on a company bus. *See also* Chamber Br. at 15. As explained in plaintiffs' reply brief, that assumption is a false one, based on an incorrect reading of *Morillion*. RBM 27-28.

not contravene the Wage Orders' plan language by holding that only "unavoidably required" time can meet the "control" test. *Morillion* did not present those facts, and also involved a lesser degree of employer control than the present case—as already thoroughly explained in plaintiffs' main briefs. OBM 30-38; RBM 21-28.

Courts applying *Morillion* have had no difficulty holding that all time "during which" an employer exercises "control" is compensable—notwithstanding the employees' supposed ability to "choose" to "avoid" it.[17] This Court, in *Mendiola*, recognized that time during which security guards were required to remain on site was "controlled" under *Morillion*, even though the guards could have avoided this "control" by requesting permission "to leave the worksite." *Mendiola*, 60 Cal.4th at 837, 841.[18]

The Court reached this conclusion because, under the Wage Orders, "the *extent*" or "*level*" "of the employer's control" during the time in question is what is

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17 *See, e.g., Bono Enters., Inc. v. Bradshaw*, 32 Cal.App.4th 968, 972, 974-75 (1995) (time "controlled" under *Morillion* although employees could have avoided the restraint (on-site meal periods) by choosing to make "prior arrangements"); *Ridgeway v. Wal-Mart Stores, Inc.*, 107 F.Supp.3d 1044, 1054-55 (N.D. Cal. 2015) (time "controlled" under *Morillion* although employees could have avoided the restraint (on-site layover time) by requesting and obtaining "prior" permission to leave); *Cervantez v. Celestica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009) (employer's rule prohibiting employees from leaving the facility once they entered, without passing again through security, meant that all pre-shift time was "controlled"—even though the employees were not required to "arrive early" and thus could have avoided the "controlled" pre-shift time).

18 The only defense amici brief discussing *Mendiola* overlooks this fact. CELC Br. 11 & n.6. CELC's reliance on an unpublished order, *Osman*, is misplaced because there, the restraint was imposed not by the employer, but by the U.S. government. *Osman v. Tatilek Support Servs., Inc.*, 2017 WL 945024, *5 (C.D. Cal. Mar. 1, 2017).

The Chamber's brief (at 17-18) cites two other orders, but those merely followed the district court's erroneous order in this case, so they are unhelpful. *In re Amazon.com, Inc. etc. Litig.*, 2017 WL 2662607, *2-*3 (W.D. Ky. Jun. 20, 2017); *Scott-George v. PVH Corp.*, 2016 WL 3959999, *7-*9 (E.D. Cal. Jul. 22, 2016).

"'determinative.'" *Id.* at 840 (quoting *Morillion*, 22 Cal.4th at 587 (emphasis added); citing *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1535 (2008) ("the *amount* of 'control' exercised by the employer" (emphasis added)); *Bono*, 32 Cal.App.4th at 974-75 (same)).

One employer-side brief attempts to distinguish *Bono*, a case favorably cited in *Morillion*, by claiming that "the restrictions placed on employees" in *Bono* were "mandatory" rather than optional. CELC Br. 11 n.6. Not so. The employees in *Bono* could have avoided the restraint of otherwise mandatory on-site meal periods by making "prior arrangements to reenter the plant after leaving for lunch." 32 Cal.App.4th at 972. This distinction was "extremely significant," because those employees who *did* make such "prior arrangements" were not "subject to the employer's control." *Id.* at 978 n.4.[19] Consistent with the rule that the Wage Orders "must be liberally construed to accomplish" the "primary objective of protecting workers," the time was compensable in *Bono*. *Id.* at 974-75.

The *commuting* cases on which the employer-side amici rely, starting with *Overton* and *Alcantar*, are distinguishable from this case.[20] Once again, the amici offer

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[19] CELC appears to believe this footnote means something it does not. The footnote is not part of *Bono*'s analysis of compensability under the "control" test. *See* 32 Cal.App.4th at 974-75. It appears three pages later, in a separate section of the opinion discussing the DLSE and Labor Commissioner's authority to make "factual determinations" when assessing a particular employer's compliance with the Wage Orders. *Id.* at 978 & n.4.

[20] *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263 (2006); *Alcantar v. Hobart Service*, 800 F.3d 1047 (9th Cir. 2015).

no new or different analysis of either decision.[21] As already explained in plaintiffs' prior briefs, the *Overton* employer imposed no "control" of any kind on employees who took the free shuttle, and in *Alcantar*, the governing legal standard was neither contested nor briefed. OBM 35, 38-39; RBM 26-27.

In addition to *Alcantar* and *Overton*, CELC cites a third commuting case, *Stevens v. GCS Service, Inc.*, 281 Fed.Appx. 670 (9th Cir. 2008)[22] *Stevens* is best read together with one of Apple's cited commuting cases, *Rutti v. Lojack Corp.*, 596 F.3d 1046 (9th Cir. 2010). In both cases, employers "required" their employees to drive the company car to work, but in *Rutti*, the time was compensable because the employer exercised "control" during the drive, while in *Stevens*, the employer did not. *Rutti*, 596 F.3d at 1061-62; *Stevens*, 281 Fed.Appx. at 672; *see* 9th Cir. AOB 33-35. If *only* "required" activities can meet the "control" test, as CELC claims, then *Stevens* would have had no occasion to consider the degree of "control" exercised by the employer *during* the drives. As *Rutti* and *Stevens* illustrate, conduct can be "required" without being "controlled," and vice versa. What matters is the "*extent*," "*level*," or "*amount*" of "control." *Mendiola*, 60 Cal.4th at 840; *Ghazaryan*, 169 Cal.App.4th at 1535 (emphasis added).

CELC cites the DLSE Enforcement Manual in support of the argument that if employees "voluntarily come in before their regular starting time or after remain after

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21 CELC Br. 16-17; Chamber Br. 14-15; RLC Br. 15.

22 CELC cites a fourth commuting case, *Novoa v. Charter Comm'ns, LLC*, 100 F.Supp.3d 1013 (E.D. Cal. 2015), but *Novoa* is distinguishable for reasons explained in plaintiffs' Ninth Circuit opening brief (9th Cir. Dkt. 12 at pp. 41 n.23, 42-45), and the Ninth Circuit agreed it merited no discussion (870 F.3d at 871-73).

their closing time," the time is not compensable. CELC Br. 19 (citing DLSE Manual §47.2.2). But CELC ignores the next section, which states that such time *is* compensable if "the employee ... has been directed by the employer to be on the premises," which is true of the Checks. DLSE Manual, §47.2.2.1.[23]

(b)

The employer-side amici strain mightily, as Apple did, to try to equate the Checks with optional employee benefits like health insurance or the "optional free transportation" discussed in *Morillion* (22 Cal.4th at 594). Apple has claimed that the Check policy is supposedly meant to "benefit" employees by allowing them to bring their purses, bags and iPhones to work.[24] The employer-side amici repeat that artifice,[25] but the Ninth Circuit saw through it. *Frlekin*, 870 F.3d at 872-73. Apple has no policy stating that these jobs come with the following "benefits": two weeks' paid vacation; health and dental; and getting to bring an iPhone X to work instead of a Samsung Galaxy Note 9.

To the contrary, the Check policy is a requirement imposed by Apple in the "Employee Conduct" manual. ER 114-115. It comprises a key part of Apple's theft

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[23] CELC's reliance on *Alonzo v. Maximus, Inc.*, 832 F.Supp.2d 1122, 1129 (C.D. Cal. 2011), is misplaced. There, unlike here, the employer did not direct the employees to be onsite or perform employer-directed tasks. *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010), involved federal law, not California law, and is inapposite.

[24] ABM 36-37, 57, *passim*; Defendant-Appellee's Brief (9th Cir. Dkt. 28-1) at 33, 50, 55.

[25] CELC Br. 17-18 (citing employee benefit cases); Chamber Br. 13 (equating the Checks with "tak[ing] advantage of an employer's proffered program"); RLC Br. 9-10 (equating the Checks to the "company bus"); WLF Br. 4 (claiming that Apple offered its employees the "optional benefit" of "bringing a bag to work").

detection and prevention policy.[26] The Check policy presupposes that everyone routinely brings their purses, bags, and iPhones to work. 870 F.3d at 870 (quoting ER 115). It applies broadly to "[a]ll employees"—with a narrow exception if an employee carries no bag or iPhone to work on a given day. *See id.* (quoting ER 115). The policy is not comparable to employee benefits like a free shuttle or health insurance. The "Employee Conduct" manual, where the Check policy appears, says nothing about any employee benefits.[27] The policy stems from Apple's own voluntary choice of business model. Apple has become a trillion-dollar company[28] by choosing to sell small "valuable goods" in a retail setting (*id.* at 873),[29] while at the same time choosing not to adequately secure those goods from theft.[30]

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26 *See Frlekin*, 870 F.3d at 873; ER 200-01 ("Shrink Analysis and Action Plan"), 206 ("Internal Theft" policy), 363 [at 54:21-55:14] (admitting Checks are for purpose of theft detection and deterrence); MAR 14 ("Loss Prevention" rules), 20-22 ("Internal Theft" and "Shrinkage" policies).

27 ER 114 (index to "Employee Conduct" manual, covering Apple's "business conduct" rules, "confidentiality" rules, "entrance and exit" policies, "harassment" policy, "insider trading" policy, and other rules that are "expected of you").

28 "Apple is the first $1 trillion company in history," *The Washington Post* (Aug. 2, 2018), *available at* https://www.washingtonpost.com/business/economy/apple-is-the-first-1-trillion-company-in-history/2018/08/02 [viewed 10/4/18].

29 "Apple makes vast margins on its products," including a "staggering 58% of the iPhone's retail price," and other products "are thought to enjoy similarly extravagant margins." "Upsetting the Apple cart," *The Economist* 83 (Sept. 15, 2018). In Q3 2018 alone, Apple's net revenue came to $11.5 billion (https://www.apple.com/newsroom/2018/07/apple-reports-third-quarter-results/ [viewed 10/4/18]), and its cash on hand exceeded $243 billion (https://www.cnbc.com/2018/07/31/apple-q3-cash-hoard-heres-how-much-money-apple-has.html [viewed 10/4/18]).

30 "Security cameras capture rash of brazen Apple Store robberies in California," *ABC7 News* (Sept. 4, 2018), available at https://abc7news.com/technology/video-rash-of-grab-and-run-thefts-plague-california-apple-stores-/4112085/ [viewed 10/4/18]; "Apple

Accordingly, the employer-side amici's heavy reliance on employee benefit cases is misplaced. The Checks are not an employee "benefit." They are an employer-imposed rule with an exception. Truly optional employee benefits do not come with the high levels of employer "control" exercised by Apple during the Checks, nor does "disciplinary action, up to and including termination," typically follow for employees who take advantage of their benefits. *Frlekin*, 870 F.3d at 870.

CELC cites a district court order, *Watterson*, involving a group medial insurance plan.[31] As the Ninth Circuit recognized, there, as in *Overton*, the employer neither "required" the employee to do anything, such as sign up for the plan, nor disciplined her for failing to do something. *Watterson v. Garfield Beach CVS, LLC*, 694 Fed.Appx. 596, 597 (9th Cir. 2017). Instead, *Watterson* concerned an offsite activity—a wellness screening—involving no employer direction or supervision whatsoever, and no threat of employer discipline of any kind. *Id.* It is therefore distinguishable from this case, which (a) does not involve employee benefits; and (b) involves a mandatory "on-site" task, a series of "compelled" "actions and movements" performed under a manager's immediate

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Store mob thefts are surging. Why can't the company make the devices worthless?" *San Francisco Chronicle* (Sept. 1, 2018), *available at* https://www.sfchronicle.com/crime/article/Apple-store-mob-thefts-are-surging-Why-can-t-13198014.php [viewed 10/4/18].

As explained in the California Correctional Peace Officers' Association's amicus brief ("Peace Officers' Br."), Apple has apparently chosen a store layout design that enhances customer experience (and thus sales) at the expense of security. Peace Officers' Br. at 18-19 & n.4. Apple is free to make that choice, but not to shift the burden and cost of the choice onto the backs of its employees by forcing them to undergo *unpaid* security searches.

[31] CELC Br. 17-18 (citing *Watterson v. Garfield Beach CVS LLC*, 120 F.Supp.3d 1003 (N.D. Cal. 2015)).