No. S243805

IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN, ET AL.,

Plaintiffs and Appellants,

v.

APPLE, INC.,

Defendant and Respondent.

SUPREME COURT
FILED

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

CONSOLIDATED RESPONSE TO BRIEFS OF AMICI CURIAE SUPPORTING PLAINTIFFS AND APPELLANTS

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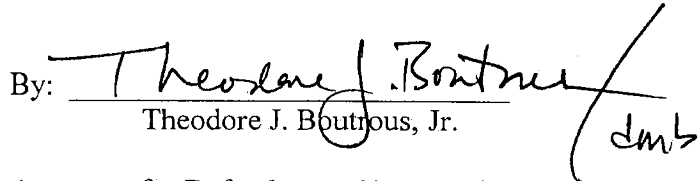
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Apple Inc. states that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: October 9, 2018

GIBSON, DUNN & CRUTCHER LLP



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INTRODUCTION

Plaintiffs' amici seek to defend the proposition that employees are "working" during brief bag checks and therefore entitled to compensation, even though those checks—by stipulation—only happened because of the employees' purely voluntary choice to bring bags to work. As such, these checks were completely avoidable, and under the holding in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*), activities like the bag checks at issue here do not constitute "work" under the Wage Order, and they cannot be characterized as "work" under any other theory.

Plaintiffs' amici—the California Correctional Peace Officers' Association, the Consumer Attorneys of California, Bet Tzedek Legal Services, and the California Employment Lawyers Association—offer various distorted readings of *Morillion* to justify their position that whether bag checks are avoidable is not dispositive of whether they constitute "work" under the "control" prong of the "hours worked" definition in Wage Order No. 7. None of those readings are supported by the reasoning or holding of *Morillion*, and the policy concerns amici raise either are not implicated by this case or are too far-fetched to be credible.

Amici also invite the Court to analyze the reasons employees bring bags to work to decide whether bringing a bag was truly avoidable and voluntary. Those considerations are both beyond the certified question in this case, and irrelevant because Plaintiffs conceded, in order to obtain class

certification, that any bags that class members brought to work were brought "voluntarily and purely for personal convenience." (SER5, 25, 27–38; ER7.) Amici offer no valid reason to revisit that binding concession—which formed the basis of the certified question—and that concession forecloses their arguments relating to the reasons why employees brought bags to work.

Amici's remaining arguments seek to rebut Apple's contentions that bag checks are not "work" under the "suffered or permitted" prong of the "hours worked" definition, and that any ruling adverse to Apple in this matter should not be given retroactive effect because it would amount to an overruling of *Morillion* and its longstanding interpretation of the Wage Order. Amici's arguments either mischaracterize Apple's positions or turn on facts not presented by this case.

The Court should reject the arguments of Plaintiffs and their amici, and hold that time spent in checks of bags brought to work voluntarily and purely for personal convenience is not compensable under either the "control" or "suffered or permitted" prongs of the "hours worked" definition in Wage Order No. 7.

ARGUMENT

I. Plaintiffs' Amici Misread *Morillion*

In *Morillion*, this Court held that agricultural workers who were required to engage in a restrictive activity—riding their employer's buses to

and from work each day—were "subject to the control" of their employer because they were "required," rather than given the choice, to participate in that restrictive activity. (*Morillion, supra*, 22 Cal.4th at pp. 587, 594.) This Court expressly acknowledged in *Morillion* that any time spent on an employer's bus entails a degree of control because, once on the bus, the employees are "foreclosed from numerous activities in which they might otherwise engage," such as "drop[ping] off their children at school," or "run[ning] other errands requiring the use of a car." (*Id.* at p. 586.) Yet the Court did not hold that time spent on *any* employer-provided bus is necessarily compensable; to the contrary, it instructed that if employees have a choice about whether to take the bus, time spent traveling on that bus need not be paid. (See *id.* at p. 594.)

Morillion thus made clear that an activity must be required *and* restrictive to constitute "hours worked" under the "subject to the control of an employer" prong. (*Morillion*, *supra*, 22 Cal.4th at p. 586 [employer exercised control "by requiring [employees] to travel on its buses *and* by prohibiting them from effectively using their travel time for their own purposes"], italics added.) That holding is dispositive of the question whether time spent engaged in avoidable bag checks is compensable under the facts of this case.

Plaintiffs' amici seek to turn this ruling on its head, arguing that whether an activity is "required" cannot be "dispositive" under *Morillion*

because (a) an activity that is the result of an employee's own choice, yet leads to certain restrictions on the employee, is also compensable under their view of *Morillion*, and (b) it would permit employers to exercise limitless control over their employees for non-required activities. These arguments cannot be squared with the Court's actual holding in *Morillion*, nor are any of the adverse consequences Plaintiffs' amici fear implicated by this case.

A. Under *Morillion*, Employees Are Not "Subject to the Control" of Their Employer During Activities that Result from Decisions They Made Voluntarily

Amicus Consumer Attorneys of California ("Consumer Attorneys") argue at length that whether an employer "require[s]" searches is not "dispositive or determinative of whether the searches constitute compensable control" under *Morillion*, on the theory that the "level of control employers exert over the employees during [an] activity" is what matters under *Morillion*. (Br. of Consumer Attys. at pp. 9–14.)

This Court held the opposite in *Morillion*. The "dispositive" fact in *Morillion* was that the employees "were [not] free to choose," but were instead "*required* to ride their employer's buses to and from work." (*Morillion*, *supra*, 22 Cal.4th at p. 589 fn. 5, italics added.) The Court thus agreed with the reasoning in *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417 (*Vega*), abrogated in part by *Integrity Staffing Solutions v. Busk* (2014) 135 S.Ct. 513, which held that a 4.5-hour block of time that employees spent

commuting to work on their employer's buses was non-compensable because the "employees were free to choose—rather than required—to ride their employer's buses to and from work." (*Morillion*, *supra*, 22 Cal.4th at p. 589, fn. 5; see also *ibid.* [describing the required nature of the transportation as "dispositive"]; *id.* at p. 587 [rejecting employer's argument "that the compelled nature of plaintiffs' travel [was] not dispositive"].)

Most of the Consumer Attorneys' arguments hinge on the Court's statement in *Morillion* that "[t]he level of the employer's control, rather than the mere fact that the employer requires the activity is determinative." (Br. of Consumer Attys. at pp. 9, 11, 12, 14, citing *Morillion*, *supra*, 22 Cal.4th at p. 587.) But the Consumer Attorneys' arguments ignore the context in which this statement was made, and that context provides no support for the proposition that time spent on activities that are purely voluntary may be considered "hours worked."

The Court made the above statement in *Morillion* in the course of rejecting the employer's argument that "commute time" and "grooming time" would fall within the Court's definition of "hours worked" because such time is, in some sense, required by the job. (*Morillion*, *supra*, 22 Cal.4th at pp. 586–587; see also Br. of Consumer Attys. at pp. 11–12.) The Court explained that while employers may set various conditions of employment, such as maintaining a clean appearance or commuting to and

arriving at work in a timely fashion, only those required conditions that are *also* restrictive—like a long mandatory bus ride to work in the morning during which an employee cannot stop at her favorite coffee shop or take her children to school—subject the employee to her employer's control and thereby meet the "hours worked" requirement. (*Morillion*, *supra*, 22 Cal.4th at pp. 586–587.) The Court did not hold, as the Consumer Attorneys incorrectly suggest, that the level of control exercised *after* an employee chooses to engage in an *optional* activity, like taking a non-required shuttle to work, was in any respect relevant to the "hours worked" inquiry. (*Ibid.*; see also Br. of Consumer Attys. at pp. 11–12.) Instead, *Morillion*'s consistent focus was on whether the activity was "required." (*Morillion, supra*, 22 Cal.4th at pp. 586–587, 594.) Even the Ninth Circuit in this case recognized that "*Morillion* made clear that the mandatory nature of the bus ride was a *dispositive* fact and that, had the bus ride not been mandatory, the time would not have been compensable." (*Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, 872 (*Frlekin*), italics added.)

Cases decided since *Morillion* confirm that employee choice is "dispositive" of the control inquiry under *Morillion*. In *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 (*Overton*), the Court of Appeal stated, in affirming a grant of summary judgment to the employer, that "the key factor [under *Morillion*] is whether [the employer] *required* its employees" to engage in an activity. (*Overton*, *supra*, 136 Cal.App.4th at

p. 271, original italics.) Taking optional free transportation was not a "required" activity, and thus was not compensable. (*Ibid.*)

The Ninth Circuit's recent decision in *Rodriguez v. Taco Bell Corp.* (9th Cir. 2018) 896 F.3d 952 (*Rodriguez*) provides further support for the conclusion that whether an activity is required is dispositive under *Morillion*. In *Rodriguez*, a Taco Bell employee brought a putative class action alleging she should be compensated for thirty-minute meal breaks during which she was given the option, but not required, to purchase a discounted meal on the condition that she eat the meal on the employer's premises. (*Rodriguez*, *supra*, 896 F.3d at p. 954.) The Ninth Circuit affirmed an order granting summary judgment to the employer because the employer did "not *require* the employee to purchase a discounted meal" and instead simply "offered a benefit or service that employees could choose," which meant that the time spent eating the meal on the employer's premises was not compensable under *Morillion*. (*Id.* at pp. 956–957, italics added; see also Letter from Cal. Employment Law Council to Clerk of Court (July 19, 2018).)

The other cases the Consumer Attorneys cite—*Bono Enterprises Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968 (*Bono*), and *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21 (*Aguilar*)—are not to the contrary. (Br. of Consumer Attys. at p. 22.) In *Bono*, the Court of Appeal concluded that the employees were subject to their employer's control

because they were "precluded from leaving the employer's facility"—in other words, *required* to remain on premises—during their meal breaks. (*Bono*, *supra*, 32 Cal.App.4th at p. 972.) Further reinforcing the point that employee choice is dispositive, the court in *Bono* specifically noted that employees who *were* given the choice to leave the worksite "did not remain subject to the employer's control." (*Id.* at p. 978, fn. 4.) And in *Aguilar*, the employees were deemed to be subject to their employer's control for the same reason as the employees in *Bono*: the employer "required" the employees to sleep on its premises overnight between shifts without compensation. (*Aguilar*, *supra*, 234 Cal.App.3d at pp. 24, 34.) Thus, whether a given activity was "required" was dispositive in those cases, too.

Amicus California Correctional Peace Officers' Association ("Peace Officers") attempt to muddle this otherwise straightforward analysis of *Morillion* by arguing that the Court should look instead to other factors in applying the "subject to the control of the employer" prong, such as where the bag checks take place. (Br. of Peace Officers at pp. 10–17.) But as explained in Apple's Answer Brief, the fact that the checks occurred at the workplace is irrelevant under *Morillion* because the employees could have avoided the checks by making the voluntary choice not to bring a bag to work in the first place. (Answer Brief on the Merits ("ABM") at p. 35.) While issues such as where an activity took place might be relevant in assessing whether an unavoidable activity is sufficiently restrictive such

that it must be compensated under the "subject to the control of an employer" prong, those considerations are irrelevant for activities like the checks here that could have been avoided entirely because employees could have made the voluntary choice not to bring a bag to work.

B. Applying *Morillion* Will Not Eviscerate the "Control" Prong or Otherwise Adversely Affect Employees

Plaintiffs' amici next offer a series of dire predictions about what might happen to employees if this Court agrees with Apple's proposed application of *Morillion* to this case. The Consumer Attorneys, for example, assert that if Apple's reading of *Morillion* is correct, it would "eviscerate the control test altogether as an independent basis of compensable hours worked." (Br. of Consumer Attys. at pp. 21–24.) Plaintiffs' amici also contend that Apple's proposed rule would permit employers to exercise limitless control over employees once they agree to engage in an optional activity (*id.* at pp. 25–26), including subjecting employees to longer and burdensome searches (Br. of Bet Tzedek at pp. 11–15; Br. of Peace Officers at p. 8), or else stripping them of basic workplace comforts (Br. of Peace Officers at pp. 17–19). These concerns are all misplaced.

The Consumer Attorneys hypothesize that, under Apple's interpretation of *Morillion*, a restaurant server or a truck driver who arrives at work for an optional—rather than scheduled—shift and is subsequently

required to engage in a restrictive activity would not be "controlled" and thus, would not be entitled to compensation because the shift was optional, rather than required. (Br. of Consumer Attys. at pp. 23–25.) That argument finds no support in any law or case and cannot be the relevant decision point for obvious practical reasons: at-will employees are always in some sense "choosing" to go to work each day, but no one would contend that the threshold choice to go to work somehow makes all the time an employee spends at the workplace categorically non-compensable. Nor would anyone contend that the mere fact of being required to go to work means that *all* activities at the worksite are per se compensable. If compensability hinged on the decision to go to work, there would have been no need for this Court in *Morillion* or the Court of Appeal in *Overton* to analyze whether the bus rides in question were required; indeed, there would never be any reason to analyze whether an employee is subject to an employer's control with respect to a particular activity at all.

Instead, what matters is whether the employee, when presented with a particular restrictive activity *after* deciding whether to go to work, is given a choice to avoid that activity. (*Morillion*, *supra*, 22 Cal.4th at p. 594.) Thus, under *Morillion*, whether a truck driver who is "forced to wait for hours" while a truck is loaded or a restaurant server who takes an on-premises meal break after coming in for an optional shift is entitled to pay for that time (Br. of Consumer Attys. at p. 23) depends on whether the

specific restrictive activity (waiting for the load, or taking the on-premises break) is avoidable (*Morillion*, *supra*, 22 Cal.4th at p. 594). This distinction does not "eviscerate" the control prong as the Consumer Attorneys contend (Br. of Consumer Attys. at p. 22); to the contrary, it provides a workable and "straightforward" distinction that courts have had no difficulty applying (*Overton*, *supra*, 136 Cal.App.4th at p. 269).

In a similar vein, several amici claim that applying *Morillion* to hold that avoidable security checks are non-compensable would lead to a greater number of more burdensome and intrusive searches of employees (Br. of Bet Tzedek at pp. 11–15; Br. of Peace Officers at p. 8), subject employees who choose to participate in an optional activity to "limitless controls without compensation" (Br. of Consumer Attys. at pp. 25–26), or else trigger a "race to the bottom" in which employers will attempt to take away as many workplace comforts as possible (Br. of Peace Officers at pp. 17–19, 24). These speculative predictions are unfounded for several reasons.

Bet Tzedek's argument that "employers will have no incentive to shorten search time or diminish a search's scope" if that time is not compensable (Br. of Bet Tzedek at p. 14) is contrary to the evidence in this case, which showed that the checks in question lasted only "a few seconds" (SER47) or a "couple of minutes" (SER47; ER78), if they were conducted at all (ER75–76; SER46). Even if that were not the case, under the

stipulated facts here, employees always retain the option not to bring a bag to work if they do not want to go through a check.

Further, employees remain free to argue that voluntary activities are compensable under the "suffered or permitted" prong of the "hours worked" definition, which considers "time an employee is working but is not subject to an employer's control." (*Morillion*, *supra*, 22 Cal.4th at pp. 584–585; see also ABM at pp. 40–42.) The "suffered or permitted" prong thus resolves amici's concerns that employees will be required to do things like "clean out cockroaches from a microwave for no pay if they 'choose' to use the microwave to heat up their lunch" (Br. of Bet Tzedek at p. 15), or clean the break room if they choose to use it (Br. of Peace Officers at p. 18). Apple has never contended, however, that an employee's voluntary decision to bring a bag to work (or to use a microwave or a break room) would bar her from arguing that she was otherwise "suffered or permitted" to work, and amici's misunderstanding of the interplay between the two distinct elements of the "hours worked" definition does not provide any basis for abandoning *Morillion*'s holding that employee choice is "dispositive" under the separate "subject to the control of the employer" prong. (*Morillion, supra*, 22 Cal.4th at p. 587.)

Equally unfounded is the Peace Officers' concern that, if bag checks are not treated as compensable time, employers will respond by racing to "set the comfort level of [their] employees at the absolute legal minimum"

thereby requiring employees to spend unpaid time making themselves more comfortable by, for example, wearing warmer clothing to work or bringing their own lunches. (Br. of Peace Officers at pp. 17–18.) This is a substantial oversimplification of how employer incentives operate: Even under current law, employers have a range of reasons, such as promoting productivity, boosting morale, or wanting to retain employees, not to set "the comfort level of employees at the absolute legal minimum." The Peace Officers' argument also disregards the possibility that, should Plaintiffs prevail, employers could impose *more* restrictions on what can be brought to work. (See, e.g., Br. of Chamber of Commerce at pp. 22–25.)

II. Amici Seek to Raise Issues that Are Beyond the Certified Questions and Are Foreclosed by Plaintiffs' Concessions

The question certified by the Ninth Circuit, and accepted by this Court, is: "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?" That question does not ask the Court to engage in far-ranging inquiries about the reasons employees brought bags to work, and the Court should reject Plaintiffs' amici's attempts to inject those issues—which Plaintiffs themselves took off the table in order to obtain class certification—into this case.

The district court agreed to certify the class here based on Plaintiffs' concession that they would "litigate this case exclusively on the theory that all class members voluntarily chose to bring bags and/or personal Apple technology to work purely for personal convenience," without examining whether Apple "required class members to bring a bag or personal Apple technology to work"; whether "the nature of the work required class members to bring bags or personal Apple technology"; or whether "a necessity of life required class members to bring a bag or personal Apple technology to work." (SER5.) Class members were permitted to file a complaint in intervention if they wished to litigate the issue whether they were required to bring a bag or personal Apple device to work (SER 6–7, 23), but none did so (ER7, 10, 14, 18). The Ninth Circuit also expressly acknowledged that "[t]he case at issue involves *only those employees who voluntarily brought bags to work purely for personal convenience.*" (*Frlekin*, *supra*, 870 F.3d at p. 873, italics added.)

Plaintiffs' amici nonetheless raise questions about whether the checks in question are truly voluntary, and posit that employees may choose to bring bags to work for all kinds of reasons. (See, e.g., Br. of Bet Tzedek at pp. 11–15.) But in order to obtain certification of the broadest class possible and to avoid individualized questions about employees' motivations for bringing bags to work (to the extent they even brought bags at all, which many did not), Plaintiffs made the strategic decision not to

litigate whether an employee was required to bring a bag to work. (SER5, 25, 36–38; ER7, 74.) As Plaintiffs put it, "certifying the liability issue of whether Apple's bag check policy violates California's control test for all class members, *regardless of the reasons why they brought a bag to work,* will allow the Court to conclusively determine the central issue in this case." (SER25, italics added.) Thus, for strategic reasons, Plaintiffs agreed to litigate this case in a way that made irrelevant the reasons why an employee brought a bag to work. And Plaintiffs made that choice because they could not litigate claims that turned on the reasons why bags were brought to work in this classwide proceeding.

Bet Tzedek's argument that an examination of the reasons employees brought bags to work is before this Court because Apple's proposed interpretation of the Wage Order "predicat[es] compensability broadly on 'the reasons employees br[ing] bags to work'" (Br. of Bet Tzedek at p. 11) mischaracterizes Apple's position. Apple's argument is that compensability hinges on whether an employee had a *choice* to bring a bag to work. That argument in no respect turns on how employees exercised that choice, but instead is premised on the fact that employees were given a choice to begin with. There can be no dispute that that choice existed in this case, because Plaintiffs decided to litigate this case on the assumption that all bags were brought to work "voluntarily and purely for personal convenience." (SER5, 25, 27–38; ER7.) If they had not done so,

no class could have been certified. Indeed, the litany of examples on page 16 of Bet Tzedek's brief raises exactly the sort of individualized issues ill-suited to class certification and only confirms why Plaintiffs made the strategic choice they did in this case. Wading into the "real-life, everyday reasons" "low-wage workers bring bags or packages to their jobs" (Br. of Bet Tzedek at p. 15) would exceed the bounds of the certified question and effectively allow Plaintiffs to escape their strategic choice to litigate this case on the lowest common denominator scenario.

As far as personal Apple devices, the Peace Officers' argument that Apple is engaging in "doublespeak" with respect to the "centrality of phones to the lives of its employees" by defending the importance of these devices in other cases (Br. of Peace Officers at pp. 20–22) is likewise misplaced because it was *Plaintiffs*, not Apple, who decided not to litigate whether employees were actually or effectively required to bring their personal Apple devices to work.[1]

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[1] Moreover, the certified question does not ask the Court to make any rulings regarding checks of personal Apple devices: Although Plaintiffs expressly asked this Court to restate the certified question to include those checks (see Letter from K. Kralowec to Hon. Chief Justice and Associate Justices of the California Supreme Court (Sept. 1, 2017) p. 10), this Court declined to include them when it granted review on September 20, 2017, and stated the question presented exactly as formulated by the Ninth Circuit.

[Footnote continued on next page]

III. Apple's Definition of "Work" Does Not Import Extraneous Elements, Rely on Federal Law, or Undercompensate Employees

Bet Tzedek also contends that Apple's definition of "work" under the "suffered or permitted" prong of the "hours worked" test incorrectly imports an "unavoidable" element, is improper because it is supposedly based on federal law, and otherwise cannot be accepted because it would fail to compensate employees for a range of activities performed on their employer's behalf. (Br. of Bet Tzedek at pp. 19–24.) Each of these arguments fails.

On the question whether Apple's proposed definition of "work" includes an "unavoidable" element, Bet Tzedek simply misconstrues Apple's argument and takes a sentence from Apple's brief out of context. The relevant passage of Apple's Answer Brief makes clear that Apple is positing two *separate* reasons why security checks are not compensable: they are not "hours worked" under the control prong because "employees can avoid the checks entirely by choosing not to bring a bag to work," and they are not "hours worked" under the "suffered or permitted" prong

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[Footnote continued from previous page]

To the extent the Court elects to consider such checks, Plaintiffs' stipulation for purposes of class certification renders the analysis for the technology checks the same as it does for the bag checks: The question is simply whether time spent in technology checks is compensable, regardless of the reason the employee brought a personal Apple device to work.

because they do not constitute "duties [employees] were hired to perform." (ABM at p. 21.) The two prongs are distinct, and Apple did not conflate them or argue that whether something is "work" under either prong depends exclusively on whether it is avoidable.

Bet Tzedek is also mistaken that Apple's definition of "work" improperly relies on federal law. Neither of the referenced portions of Apple's brief mention the federal Portal-to-Portal Act or purports to rely on it, and the passages quoted in Bet Tzedek's brief come from the district court's summary judgment order, which also did not purport to rely on federal law. At most, the district court's order referenced federal law as "useful guidance" but did not reach its definition of "work" by importing elements of that law. (See ER20; ABM at pp. 41–42, 53.)

Moreover, there was nothing improper in referring to that guidance. This Court referred to federal cases and statutes, such as *Vega*, and 29 U.S.C. § 203(g), when resolving issues of first impression in *Morillion* (*Morillion*, *supra*, 22 Cal.4th at pp. 585, 589), and such references are equally appropriate here, insofar as this Court has never defined what level or type of exertion constitutes "work," and so the parties are writing, to some degree, on a blank slate. As Apple pointed out in its Answer Brief, there must be *some* limit on what type of exertion constitutes compensable work; otherwise, the separate prongs of the "hours worked" definition, which cover distinct behavior and may be "independently satisfied," would

collapse entirely because every activity that would satisfy the "subject to the control of the employer" prong would surely also constitute "work." (ABM at p. 56, citing *Morillion*, *supra*, 22 Cal.4th at p. 584.) To preserve the two prongs, it must be the case that merely being required to engage in some limited physical exertion during an avoidable bag check is not, by itself, enough to show that an employee is being "suffered or permitted" to work.

Finally, Bet Tzedek's argument that "defining 'work' to include only time spent performing duties an employee is 'hired to perform' would fail to compensate employees for a broad range of activities done on their employer's behalf" (Br. of Bet Tzedek at p. 23) simply signals that there may be room for debate as to how to define an employee's job duties in a particular case; it does not undermine Apple's position that the definition of "work" ought to be tethered to those job duties in general. There is no room for debate here because there can be no reasonable dispute that the employees in this case were not hired to perform or undergo security checks of their own personal property. (ABM at pp. 52–55.) Accordingly, the time spent in those security checks should not be deemed compensable work under the "suffered or permitted" prong, either.

IV. Amici's Retroactivity Arguments Are Premised on a Misunderstanding of *Morillion*

Amicus California Employment Lawyers Association also argues that any new interpretation of the Wage Order that might be issued in this case "would not establish a new rule of law" and should be retroactively applied to Apple. (Br. of Cal. Emp't Lawyers at p. 4.) That is incorrect: *Morillion* has set forth the established interpretation of the Wage Order for nearly two decades, and overruling it now—as Plaintiffs' arguments would require—would deprive Apple and other employers of fair notice of what the law prohibits.

In *Morillion*, this Court construed Wage Order 14-80 and held that employees are not "subject to the control of an employer" under that Wage Order while engaged in non-required activities. (*Morillion*, *supra*, 22 Cal.4th at p. 587.) Apple (and other employers) have relied on that controlling and now 18-year-old construction "by a court of last resort." (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 305 (*Moradi-Shalal*).) Adopting Plaintiffs' proposed rule would effectively overrule *Morillion*, and thus, Apple could not be said to have had "fair notice" of this Court's new interpretation of the Wage Order. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574.) Under these circumstances, "considerations of fairness and public policy" preclude applying any potential new rule retroactively. (*Moradi-Shalal*, *supra*, 46

Cal.3d at p. 305 [declining to apply new rule retroactively because other parties had relied on the previous rule].)

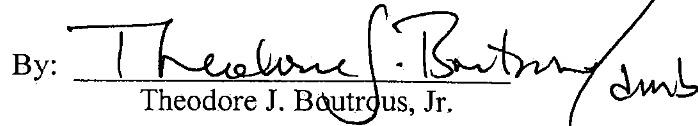
CONCLUSION

None of the arguments of Plaintiffs' amici provide any basis for holding that the time Apple employees spent in the avoidable bag checks at issue here was compensable under Wage Order No. 7.

Dated: October 9, 2018

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
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CERTIFICATE OF WORD COUNT

In accordance with rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that this Consolidated Response to Briefs of Amici Curiae Supporting Plaintiffs and Appellants contains 4,909 words, as determined by the word processing system used to prepare this brief, excluding the cover information, the tables, the signature block, the attachment, and this certificate.

Dated: October 9, 2018

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