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

Reply Brief on the Merits

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I. INTRODUCTION

To protect its "valuable goods" from theft, Apple requires all retail sales staff carrying bags or personal technology to participate in on-site security Checks. *Frlekin v. Apple, Inc.*, 870 F.3d 867, 870-73 (9th Cir. 2017). During the Checks, the employees are confined to store premises and "compelled" to participate in employer-directed actions. *Id.* at 872-73. Apple enforces its Check policy through threat of discipline; anyone who refuses to participate can be fired. *Id.* at 870-72 (citing ER 115).

Apple contends that the Check time is not compensable under either of the Wage Orders' two "independent" tests for "hours worked,"[1] but in 61 pages of briefing, Apple does not address, or even mention, the *discipline* Apple imposes. The discipline is the elephant in Apple's living room. Of the three "controls" Apple exerts, the discipline is the enforcement mechanism. Without it, the employees could not be forced to participate in the Checks, and Apple's Check policy would mean nothing.

Yet, according to Apple, the discipline should be disregarded—as should *both* of Apple's other "controls" over the Check time: confining employees to store premises and requiring them to engage in employer-directed actions—simply because the employees "chose" to bring their bags or personal technology to work.

Apple is wrong.

Apple's position contravenes the Wage Orders' text. The Check time is compensable because it is time "*during which* employees are subject to the *control* of an employer." 8 Cal. Code Regs. §11070, ¶2(G). The IWC purposely abandoned a less

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[1] *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 582 (2000).

protective prior test—covering only "required" time—in favor of the broader "control" test. Under plain-language definitions, the Checks are not just "controlled," but also "required." Apple's proposed standard—"*unavoidably* required"—is weaker than the abandoned prior test and finds no support in the Orders' text or adoption history.

Apple's position also contradicts *Morillion*. There, as here, the employees were "controlled" through an employer's threat of *discipline*. Contrary to Apple's view, *Morillion* did not hold that *only* "unavoidably required" time can meet the "control" test. Instead, *Morillion* favorably cited *Bono*, in which the employees could have avoided the employer's "control" (mandatory on-site lunches) by "choosing" to make "prior arrangements" to lunch offsite. 22 Cal.4th at 582-83 (citing *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal.App.4th 968, 972, 974-75 (1995)).

In this case, Apple's threefold controls exceed those exerted in *Morillion*. Apple's controls include not only discipline, as in *Morillion*; but *also* confining employees to store premises, as in *Bono*; *and* requiring them to perform employer-directed tasks. These "controls" are greater than what *Morillion* found sufficient.

The Checks are also compensable "work" that Apple knowingly "suffered or permitted" to occur on its property. Seeking to engraft an element unstated in the Wage Orders, Apple argues that the Orders embrace only "work" "related" to the employees' "regular job duties." But the Wage Orders do not say this, and inferring such an element would make California law no more protective than federal law—the opposite of the IWC's intent when it broadened the definition of "hours worked." Moreover, the Checks

are plainly job-related duties, or Apple could not have enforced them through job-related discipline.

Hoping to prevent this Court from fully considering the issues presented by the Ninth Circuit's question, Apple relies at length on a non-existent "stipulation" and certain district court rulings concerning class members with "special needs" to bring their bags to work. As will be seen, these rulings were far narrower than Apple would have the Court believe. This Court is no more precluded than was the Ninth Circuit from considering the ordinary, everyday reasons why employees carry their bags and iPhones to work. *See Frlekin*, 870 F.3d at 873. Finally, no prejudice would result from restating the certified question to cover personal technology.

As this Court recently reconfirmed, the Wage Orders exist "primarily for the benefit of the workers themselves," and are intended to "accord them a modicum of dignity and self-respect." *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 952 (2018). Apple would have the Court disregard the Orders' "remedial purposes" (*id.* at 953) and strip California workers of the "dignity" of carrying their belongings to work without being confined to their employer's premises and searched for no pay.

Apple's arguments should be rejected, and the Ninth Circuit's question answered "yes."

II. ARGUMENT

A. Apple's Procedural Arguments Lack Merit

Attempting to block this Court's full consideration of the case, Apple makes two procedural arguments, both of which fail.

1. Apple Misunderstands the District Court's Orders Regarding Class Members With a "Special Need" to Bring Bags to Work

The purported "stipulation" repeatedly mentioned by Apple[2] is nothing more than the district court's recognition that some class members may have had a "special need," rather than an ordinary, everyday need, to bring their bags to work.

In the district court's words, "[some] employees may need to bring a bag to work" because of "special needs" "they cannot control, such as a need for **[1]** medication, **[2]** feminine hygiene products or **[3]** disability accommodation." SER 40:23-25; *see* ER 549:3-5, 553:17-21. The court's concern from such "special needs" employees dated back to its earliest orders and proceedings. *See id.*[3]

Plaintiffs' theory of liability, in contrast, has always been that the Wage Orders required Apple to compensate *all* class members for the Check time—not merely those with "special needs." SER 14:1-27, 35:8-19, 38:9-10; MAR 43:21-47:18; 67:12-70:2. The case does not seek relief for Apple's failure to make disability accommodations for "special needs" class members and/or for gender discrimination. ER 594-601.

Accordingly, when the district court proposed that the class notice should inform the class that "special needs" would not be litigated, plaintiffs had no objection, because it was irrelevant to Apple's liability. *See* SER 36:12-13 ("we would be amenable to" the court's proposal). Apple must compensate *all* employees for all "hours worked," not just those with "special needs." MAR 54:9-12, 55:8-19, 56:8-20, 57:13-19, 60:20-61:2. The

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2 ABM 10, 14-15, 22, 29-32, *passim*.

3 *Accord* Motion to Augment the Record ("MAR"), filed herewith, at 38:17-39:1; 50:10-13, 51:3-4, 52:25-53:2.

court decided that the class notice should also invite class members to intervene if they wished to pursue a "special needs" theory. ER 553:18-28, 557:9-14; SER 38:20-25.

Importantly, plaintiffs did not "stipulate" to this procedure, as Apple claims. ABM 10, 28, 32. Rather, the district court thought of it, then ordered it. *See* ER 552:27 ("the Court raised [this] concern"), 553:18-28, 557:9-14; SER 38:20-25; MAR 59:25-60:16, 62:20-63:7 ("I'm making [the notice procedure] up as I go").

The district court approved class notice language—unquoted in Apple's brief—expressly tied to the "special needs" the court had identified:

> Plaintiffs will NOT assert that Apple must compensate Apple Employees for Checks when Apple Employees were required to bring bags and/or personal Apple technology ***due to any "special needs," such as the need to carry prescription medication or feminine hygiene products.*** The Class will litigate this case EXCLUSIVELY on the theory that Class Members voluntarily chose to bring bags and/or personal Apple technology to work purely ***for personal convenience.***

SER 6 (third paragraph under heading 2) (emphasis added).[4]

Consistent with these directives, plaintiffs have not argued that class members were "required" to bring bags or iPhones to work because of a "special need" for medication, disability accommodation, or to carry feminine hygiene products.[5] But nothing bars this Court from considering people's ordinary, everyday need to bring their

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[4] The last sentence was included over plaintiffs' objection. MAR 73:12-74:7.

[5] Apple's obligation to pay for all "hours worked" should not depend on whether the employees were women with a "special need" to carry feminine hygiene products. In 1947, when the Orders covered *only* "women and minors" (*see* Order 7R, ¶1 (MJN Ex. 5)), the IWC probably understood that employees covered by the Orders routinely carried purses or bags containing such products. In 1976, when the IWC expanded the Orders to cover men, it retained the broad definition of "hours worked." Men and women alike should be able to carry bags without adverse, and disparate, pay consequences.

bags and iPhones to work, or the flip side of the "convenience" coin—that leaving these items at home would be extremely inconvenient.

The Ninth Circuit recognized this:

> The case ... involves only those employees who voluntarily brought bags to work purely for personal convenience. ***It is thus certainly feasible for a person to avoid the search by leaving bags at home. But, as a practical matter, many persons routinely carry bags, purses, and satchels to work, for all sorts of reasons.*** Although not 'required' in a strict, formal sense, many employees may feel that they have little true choice when it comes to the search policy, especially given that the policy applies day in and day out.

Frlekin, 870 F.3d at 873 (emphasis added).[6] In other words, bags are brought "voluntarily" precisely *because* people need them, "for all sorts of reasons." *Id.*

In plaintiffs' opening brief, one alternative three-page argument rested on the Ninth Circuit's reasoning just quoted. OBM 40-42. Seizing on this, Apple contends that almost every other argument in plaintiffs' brief is somehow "precluded." *E.g.*, ABM 10, 22, 29, 32. In fact, all of plaintiffs' arguments are consistent with the Ninth Circuit's understanding of the record. For this Court to consider all of them would neither "broaden" nor "expand" the certified question, as Apple incorrectly claims. ABM 28-32.

2. No Prejudice Would Result From Restating the Certified Question to Cover Personal Technology

In a further attempt to prevent the Court from considering all issues, Apple opposes plaintiffs' request to restate the certified question to expressly cover personal technology devices. ABM 28-29. Checks were mandatory for employees carrying bags

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6 *See* ER 549:5-7 (employees carry "food, clothing, keys" and other everyday belongings in their bags).

and/or Apple-branded devices.[7] Apple references these devices repeatedly (ABM 13, 29-30, 37, 53), and concedes "the result would be the same" if the question were restated. ABM 29.

The Court may restate the question "[a]t any time." Cal. Rule of Ct. 8.548(f)(5). The Court's order accepting the question stated that "the issue is rephrased as follows," but, perhaps inadvertently, the wording was not rephrased. *Compare* Order dated Sept. 20, 2017 *with Frlekin*, 870 F.3d at 869. To avoid confusion on remand, the Court is respectfully asked to grant the pending request to restate the question.

B. The Check Time is Compensable Under the "Control" Test

1. Apple May Not Retract its Concession That it "Controlled" its Employees During and While Awaiting the Checks

As the Ninth Circuit determined, Apple "concede[d]" that its employees were "clearly" under its "control" "while awaiting, and during, the search." *Frlekin*, 870 F.3d at 971; *see* ER 8:18-20. Apple tries to backtrack (ABM 42-43), but the record is clear:

> THE COURT: .... So what I think you're saying is: Okay, ***we concede control.*** Once you're standing in the line waiting to go home ... because they don't have enough people there to get you through the line in a hurry—I know you say that never happens, but probably it does happen every now and then. So when you're waiting for your turn in a long line on a cold winter day trying to get home, all of those factors are true. ***You are under of the control of Apple. Right?***
>
> But you're [sic] point is: Well, you didn't have to be in that line to begin with. It wasn't a requirement that you get in the line. ... [I]t was only a requirement that you stand in line if you elected to bring any of those things for your personal convenience. ***So, therefore, you say the requirement part is not met. That's your argument.***

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[7] Letters filed Sept. 1, 2017 (at 9-10) and Sept. 29, 2017; OBM 41 & n.51 (citing record).

> [APPLE'S COUNSEL]: ***That is correct, your Honor, as to the control theory.***

ER 47:20-48:13 (emphasis added).

2. Apple's Position that "Control" is Not Enough to Meet the "Control" Test Conflicts With the Wage Orders' Plain Text and Adoption History

Apple's concession is consistent with the plain-language definition of the word "control"—a definition Apple does not contest. During the Checks, Apple "controlled" its employees by "exercis[ing] restraint or direction" upon their "free action," by "regulat[ing]" their conduct, and by "hold[ing]" them "in restraint." ABM 23 (citing four dictionaries plus *Bono*, 32 Cal.App.4th at 975).

Apple's "controls" were threefold. First, Apple imposed the Check procedure under "threat of sanctions and loss of employment"—the ***discipline*** Apple's brief ignores. *Frlekin*, 870 F.3d at 871. Second, the employees "may not leave the premises" until the on-site Checks are conducted. *Id.* Third, during the Checks, employees are "compelled" to perform employer-directed "actions and movements." *Id.* at 873. Whether "a few seconds" (ABM 13) or up to 45 minutes (OBM 11), the time is "controlled."

Given the high degree of "control" Apple imposed during the Check process, Apple's only hope is to argue that "control" is not enough to meet the "control" test. ABM 43. This argument, however, ignores the Wage Orders' text, which is the first source of meaning and the "best indicator" of the IWC's intent.[8]

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[8] *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 264 (2017); *see Martinez v. Combs*, 49 Cal.4th 35, 63 (2010).

a. Apple's Text-Based Arguments Assume that the IWC Adopted a Meaningless Amendment in 1947

As a preliminary matter, Apple does not—because it cannot—dispute that the Wage Order's "control" test does not use the word "required" (let alone "unavoidably required"). Nor can Apple dispute that in 1947, the IWC amended the definition of "hours worked" to remove the word "required" and substitute the word "control." Apple does not disagree that "require" and "control" have different plain-language meanings, and that the latter word is broader—in fact, broad enough to encompass both "required" and non-"required" tasks. *See generally* ABM 44-50.

Instead, Apple makes two text-based arguments, both of which boil down to the assertion that the IWC's amendment from "required" to "control" was meaningless.

First, Apple cites the phrase "whether or not required to do so" from the "suffered or permitted to work" test; points out its *absence* from the "control" test; and argues that the *absent* phrase "suggests" the "control" test covers *only* "required" conduct. ABM 44-45. Second, Apple claims that by deleting from the "control" test both the word "require" and the list of "things an employee is 'required' to do," the IWC intended to "*simplify* the Wage Order's language," with no attendant change in meaning. *Id.* 45-46.

These arguments cannot be squared with the Wage Order's text. Simply put, the IWC kept the word "require" in the "suffered or permitted to work" test, and removed it from the "control" test. When "different word[s]" are used in the same regulation, "it must be presumed" that a "different meaning" was "intended." *Rashidi v. Moser*,

60 Cal.4th 718, 725 (2014); *see Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1117 (1999).

The final phrase of the "suffered or permitted to work" test dates back to 1943. OBM 19-20. When the IWC amended the definition in 1947, it chose to leave the wording of the second test untouched—except to omit a sentence with illustrative examples. *Compare* Wage Order 7NS, ¶2(f) *with* Order 7 R, ¶2(h).

But the IWC materially *changed* the wording of the first test.

Instead of either retaining the word "require" or appending "whether or not required" to the first test—both of which would have been easy edits—the IWC chose a substantive change. It modified the *operative word* of the first test, changing it to "control," while at the same time deleting the prior list of specified compensable activities entirely. Together, these changes show that the IWC intended that more time would become compensable under the new test than the prior test would have captured.

"Control" and "require" are not synonyms. If the IWC meant "require," it easily could have kept the word "require," which was already in the 1943 language. Notably, it did not. If the IWC had intended to capture only a broader range of "required" activities, as Apple claims, the fix would have been easy: "subject to a *requirement* of an employer." Instead, the IWC chose a materially different fix: "subject to the *control* of an employer."

Under well-established rules of statutory interpretation, when the words of a statute are changed, a change in meaning is presumed.[9] Moreover, Courts do not presume that regulatory bodies like the IWC enact purposeless amendments.[10]

In arguing that the wording change means nothing and should be ignored, Apple cites three inapposite cases. ABM 47. Apple's quoted language from *Perine* was not a court holding; it was a statement by the author of an amendment to a federal statute regarding "its purpose."[11] From *Flesher*, Apple quotes the special rules, inapplicable here, governing "general revision or codification" of an entire act.[12]

Culbertson held, unremarkably, that because the Legislature had *retained* a criminal statute's core language signifying two individuals, the amendment "simplifie[d] and clarifie[d]" the statute, which continued to require, for purposes of a sentencing enhancement, evidence of the two *participants'* ages, not the aider and abettor's age.[13]

In contrast to *Culbertson*, the core language here was *altered*, not retained—"require" was changed to a materially different word, "control." No such amendment was considered in *Culbertson*, and nothing indicates that the IWC intended merely to

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9 *People v. Mendoza*, 23 Cal.4th 896, 916 (2000); *Estate of Simpson*, 43 Cal.2d 594, 600 (1954).

10 *Viking Pools, Inc. v. Maloney*, 48 Cal.3d 602, 609 (1989) ("We cannot presume [the amendment] was a meaningless and idle gesture."); *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805 (1952) (amendments are not construed as "idle acts").

11 *Perine v. William Norton & Co.*, 509 F.2d 114, 120 (2d Cir. 1974).

12 *Ex parte Flesher*, 81 Cal.App. 128, 136-37 (1927).

13 *People v. Culbertson*, 171 Cal.App.3d 508, 515 (1985). Also, there was no wording change "from 'coparticipant' to 'participant,'" as Apple claims. ABM 47. The change was from "Any person participating" to "Any person who participates ...." 171 Cal.App.4th at 511, 515 n.4.

"simplify and clarify" the definition of "hours worked." Apple's construction, which would strip the amendment of any meaning, should be rejected.

b. Apple's Text-Based Arguments Assume That the IWC Narrowed the Test for Compensable Time in 1947, Instead of Broadening It

As the DLSE explained in a formal brief filed with the Office of Administrative Law, "[t]he IWC's 1947 change in the language of the Orders which defined 'hours worked' clearly indicated that the Commission intended to *broaden* the definition." MJN Ex. 12 at 22-23 (emphasis added).

To accomplish this, the IWC "replaced" the disjunctive list of specified compensable activities from the 1942 Orders, and "simply provided that the employer must pay for all hours the employee is '*subject to the control*' of the employer," a definition "unknown in federal law." *Id.* at 23-24 (emphasis in original). These changes "clearly indicate" that the "disjunctive language contained in the 1942 Orders was not as restrictive as the Commission felt necessary." *Id.* at 24.[14]

The new definition, still in the Orders today, "is broad in and of itself," and "there is little doubt" that it was "designed to encompass *much more* than 'all the time during which an employee is necessarily *required* to be on the employer's premises, on duty or at a prescribed work place.'" *Id.* at 27 (citation omitted) (emphasis added). While "control" certainly "*may* encompass activities described by the eliminated language,"[15] the IWC's "broadened" definition also covers "much more." *Id.*

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14 *Accord* MJN Ex. 7 at 4 (quoting same language).

15 *Morillion*, 22 Cal.4th at 592 (emphasis added).

Under the "broadened" definition, any time "the employee is not allowed to leave the premises" is compensable time. *Id.* at 18. That includes "during the meal period, before the shift begins *or after the shift ends.*" *Id.* at 24 (emphasis added). "So long as the employer controls the activities of the employee," the time is compensable. *Id.*

Like the DLSE, this Court has repeatedly recognized that the 1947 amendments were adopted "in response" to the federal Portal-to-Portal Act, and that the IWC intended to make California law more protective than federal law. *Mendiola*, 60 Cal.4th at 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592. Given that the pre-1947 language mirrored that of the 1939 federal Interpretive Bulletin, the changes must be construed to make *more* time compensable than before, not *less* and not the *same*.

Apple has almost nothing to say about this adoption history, except to claim that the DLSE supposedly "did not discuss" exactly what the DLSE did discuss, namely, that the IWC intended to "broaden" the definition of "hours worked." ABM 47-49.[16] Apple identifies nothing from the regulatory history in support of any other view.

Apple claims the issue is whether the employees were "required" "to bring bags to work." ABM 32. That is a red herring. Under any plain-language definition, the Checks themselves were "required," or the employees would not have participated in them. Indeed, Apple enforced the Check policy through threatened—and actual—

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[16] Apple confusingly refers to the DLSE's brief as a "letter" (ABM 47-49), when it was actually a formal brief filed with the OAL in a contested matter challenging the DLSE's authority to issue opinion letters. MJN Ex. 12. Nor are there both a "letter" and "another related opinion," as Apple misleadingly claims. ABM 49. There is a single DLSE brief, quoted in a letter and opinion of the OAL, in which the OAL adopted the DLSE's arguments. *See* MJN Exs. 7, 8, 12.

discipline. OBM 8 (citing record). Moreover, the policy "compelled" the employees to perform employer-directed tasks (870 F.3d at 873) and "required" them to "remain on the premises" until the tasks were completed. MJN Ex. 12 at 24.

These "controls" are more than sufficient to meet the "control" test. Apple cannot deny that the Wage Order makes compensable all time "*during which*" employees are "controlled." This language focuses the compensability analysis on the controlled activity, not what occurred before it.

Apple responds to this plain text by citing decisional law (ABM 50-51), but as discussed below, the decisions do not help Apple. The Wage Orders' plain text does, in fact, mean that employees "must be compensated '*during*' any time [they are] subject to any kind of restraint by the employer." ABM 50 (emphasis added). To construe the test as Apple urges—to disregard what happened "during" the "controlled" time, and consider only "*unavoidably* required" tasks—would *narrow* the pre-1947 test, not "broaden" it.

3. Apple's Reliance on Decisional Law, Including *Morillion*, is Misplaced

To engraft an unstated element onto the Wage Orders, Apple relies heavily on *Morillion* and a series of other commute-time cases. ABM 21-28, 33-42. However, Apple's discussion of *Morillion* elides the facts, which show that Apple exerted a higher level of control than the employer in *Morillion*. Moreover, *Morillion* did not hold, as a matter of law, that no activity can ever be considered "controlled" unless the activity is "unavoidably required." *Morillion* simply did not present those facts, and such a holding would have been contrary to the Wage Orders' plain text.

As the Ninth Circuit recognized, there are material differences between Apple's Checks and the travel time considered in *Morillion* and other commuting cases. One of the most material is that, unlike most ordinary commuting time, the Checks took place on Apple's store premises during the regular work day. Principles drawn from commuting cases should not apply mechanically to onsite security searches like Apple's Checks.

a. Apple Exerted "Control" in Three Ways That Make the Check Time Compensable Under *Morillion*

Contrary to Apple's position, the Check time is compensable under the standard stated in *Morillion*. OBM 30-32. Although Apple exerted "control" differently than the *Morillion* employer, the time in question was nevertheless "controlled" and compensable in both cases. Indeed, Apple exercised a *greater* level of "control" during the Checks than the *Morillion* employer did during the bus rides.

Apple exerted "control" in three ways: (1) adopting a written policy enforced through threat of discipline; (2) confining employees to store premises, which prevents them from leaving for the day and going home; and (3) requiring employees to engage in employer-directed, "compelled" tasks. OBM 24-25.

Apple ignores the first "control" completely, then claims that the other two "controls" are "irrelevant." Apple is wrong.

(1) "Control" Through Threat of Discipline

Here, as in *Morillion*, the employer adopted a mandatory written policy that it enforced through threat of discipline. 22 Cal.4th at 586-87; 870 F.3d at 870-71. The

Morillion employer threatened "verbal warnings and lost wages," while Apple threatened the greater penalty of "termination." *See id.*

Here, as in *Morillion*, the written policy plus discipline was not the *only* "control" the employer exerted. In *Morillion*, the Court variously described the bus rides as "compulsory," "requir[ed]," and "compel[led]" by the employer. *Id.* at 587-89 & n.5. That "control" was dispositive in *Morillion* because the employer exerted no other "control" during the rides. *See id.* at 586 (employees free to read or sleep).

Apple, in contrast, exerted two other "controls" not present in *Morillion*: the employees were **(a)** confined to store premises and **(b)** had to line up and perform employer-directed tasks. Those "controls" had the same effect as the "controls" considered in *Morillion*. They prevented employees from using the time "effectively for [their] own purposes," and "foreclosed" "numerous activities in which they might otherwise [have] engage[d]." 22 Cal.4th at 586. Together with the threat of discipline, which Apple ignores, these "controls" are dispositive.

(2) "Control" Through Confining Employees On Site

Apple "controlled" its employees by confining them to store premises during the "on-site" Check time. 870 F.3d at 872. Apple calls this "irrelevant" (ABM 35), but under this Court's precedents, it is highly relevant. As stated in *Morillion*, "'[w]hen an employer directs, commands or restrains an employee ***from leaving the work place*** ..., that employee remains subject to the employer's ***control***.'" *Morillion*, 22 Cal.4th at 583 (quoting *Bono*, 32 Cal.App.4th at 975) (emphasis added). In *Mendiola*, the Court quoted

that very language in holding that the "level of the employer's control over its employees ... is determinative." 60 Cal.4th at 840.

Apple claims that to consider all the controls Apple exercised *during* the Checks is to "look[] at the incorrect point in the process." ABM 25. According to Apple, the focus should be on events occurring hours *before* the Checks—namely, the employees' pre-activity "decision" not to leave all their personal belongings at home. *Id.*

But this argument contradicts the Wage Orders' text. All time "*during which*" the employees were subject to employer control is compensable.

Nor does the case law aid Apple's argument. In *Morillion*, the employees had no relevant pre-activity decision to make. However, in *Bono*—which *Morillion* favorably cited—the employees were not allowed to leave the plant during lunch "*unless* they ma[d]e prior arrangements to reenter." 32 Cal.App.4th at 972 (emphasis added). Their on-site lunch time was "controlled," and thus compensable, because they were "restrain[ed]" from "leaving the workplace"—even though they could have "chosen" to "avoid" the "restraint." *Id.* at 974-75, *cited in Morillion*, 22 Cal.4th at 582-83.

Similarly, in *Cervantez*, the employees were "controlled" during pre-shift time inside the employer's facility—even though they were not required to "arrive early" and could have avoided the "controlled" pre-shift time. *Cervantez v. Celestica Corp.*, 618 F.Supp.2d 1208, 1222 (C.D. Cal. 2009).

Recently, in *Sali*, the Ninth Circuit easily perceived that under *Morillion*, employees can be "restricted ... in a manner that amount[s] to employer control" in many ways, including "being required to remain on the employer's premises *or* being restricted