No. S243805

IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN, ET AL.,

Plaintiffs and Appellants,

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

SUPPLEMENTAL BRIEF

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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: August 28, 2019

GIBSON, DUNN & CRUTCHER LLP

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INTRODUCTION

The Court's minor modification of the question presented in this case to include not only "packages and bags" but also "personal technology devices" does not impact in any respect the core issue that the Court must resolve: whether exit searches resulting from an employee's choice to "voluntarily" bring items to work "purely for personal convenience" constitute compensable "hours worked." (Aug. 14, 2019 Order.) In fact, Plaintiffs themselves previously told the Court that the "governing legal principles" for "bag searches" as well as "searches of Apple-branded personal technology devices" "are the same." As a result, Plaintiffs took the position that including such devices in the question presented would simply "avoid any doubt about whether this Court's eventual answer covers both the 'bag check' and the 'tech check' aspects of the searches." (Sept. 1, 2017 Letter from K. Kralowec to Hon. Chief Justice and Associate Justices of the California Supreme Court at p. 10.)

Apple agrees with Plaintiffs that adding "personal technology devices" to the question presented does not alter the legal question before the Court. No matter what kind of items were brought to work, the question presented makes clear that those items were "voluntarily brought to work purely for personal convenience." That limitation on the question presented—which derives from the limitations on the class certified in this action—means that the Court need not and should not consider the reasons

why employees decided to bring any particular items to work in deciding whether they were subject to Apple's control. Nor does the inclusion of personal technology devices have any bearing on whether the checks constituted "work" under the "suffered or permitted" prong of the "hours worked" test because checks of technology devices—just like bag checks—are not part of an employee's regular job duties.

In short, Apple's position remains unchanged: time spent in checks—whether of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience—is not compensable time.

ARGUMENT

I. The Addition of Personal Technology Devices to the Question Presented Does Not Impact Apple's Arguments Regarding the Control Test

Time is compensable under the "subject to the control of an employer" prong of Wage Order No. 7 only "[w]hen an employer *requires* its employees" to engage in a restrictive activity. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587, italics added.) To avoid the individualized issues that would have doomed Plaintiffs' bid for class certification, Plaintiffs stipulated away any questions about whether personal technology devices or bags were "required" for their jobs, and instead agreed that those items were brought to work "voluntarily" and "purely for personal convenience." (SER5.) The class notice also specifically stated that "Plaintiffs have received the Court's approval to proceed with their claims

only on the theory that Apple must compensate Apple Employees whenever they go through Checks *regardless of why they bring bags or their personally owned Apple technology to work*" and that Plaintiffs would "not contend" that "any class members were required to bring a bag or personal Apple technology to work *for any reason whatsoever*." (SER5, all italics added.) The district court then offered any class member who wanted to assert that they were "required" for any reason to bring a bag or personal Apple device to work the opportunity to intervene, but none did. (SER6-7, 23; see also ABM 28-33.)

Given their strategic decision to frame the issue narrowly in order to advance their case on a class basis, Plaintiffs have relinquished the argument that the choice to bring bags or personal devices was not a "true choice." (OBM 41.) In fact, the certified class—by definition—does not contain even a single employee who brought a bag or device to work because they were "required" to do so by Apple. That it may be difficult for some to choose to leave their devices at home does not diminish the fact that it is nonetheless a choice. (See *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 315 ["A hard choice is not the same as no choice."].)

This Court's decision in *Morillion*, as well as the Court of Appeal's decision in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, teach that an activity must be required to constitute "hours worked" under the "subject to the control of an employer" test. In *Morillion* and *Overton*,

employees tried to claim that time spent on employer-provided buses was compensable. Even though being confined to a bus is necessarily restrictive and precludes the employee from doing other things—like walking or taking their own transportation—the dispositive issue in both cases was whether the employer *required* the bus ride. In *Morillion,* the employees were held to be under their employer's control because it "requir[ed] them "to travel on its buses" and thus "prohibit[ed] them from effectively using their travel time for their own purposes." (22 Cal.4th at p. 586.) By contrast, the employees in *Overton* were *not* "required" to park in an off-site lot and "take the shuttle" that the employer provided to the worksite. (136 Cal.App.4th at p. 271; see also ABM 21-44.)

The holdings of *Morillion* and *Overton* are fatal to Plaintiffs' theory that control exists even where an activity is *not* required by the employer, and nothing about those holdings turns on what kind of item—packages, bags, or personal technology devices—an employee voluntarily chose to bring to work.

II. Checks of Personal Technology Devices, Like Checks of Packages and Bags, Do Not Constitute "Work"

Checks of personal technology devices cannot be considered "work" under the "suffered or permitted" prong of the hours worked test for the same reason that checks of packages and bags are not "work." Technology checks generally consisted of a brief comparison of the serial number on an

employee's technology card with the serial number on her personal Apple device, which is located within the "settings" icon. (ER5-6, 314.) This was neither time-consuming nor onerous; bag and technology checks combined took, on average, around 30 seconds to complete and required only minimal exertion. (SER47.)

As with the bag checks, technology checks should not be considered "work" because "Apple employs individuals in its retail stores . . . to facilitate the sale and service of Apple products," and not "for the purpose of submitting to bag or technology checks." (Apple's Mot. for Judicial Notice, Ex. A at p. 2 ¶ 4.) The purpose of checking bags and personal technology devices was not to prevent theft by customers or other persons, but instead to prevent theft by the employees themselves. While a prohibition on theft is surely a condition of employment, it can hardly be considered a job duty. Defining "work" without any connection to an employee's job responsibilities would be boundless, and would render the "subject to the control of an employer" prong of the "hours worked" test superfluous. Thus, as the district court concluded, these checks have "no relationship to plaintiffs' job responsibilities" and are merely "peripheral activities relating to Apple's theft policies" (ER20), they are not properly considered "work." (See ABM 52-57.) The addition of personal technology devices to the certified question does not change that conclusion.

CERTIFICATE OF SERVICE

I, Marissa Garcia, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90026, in said County and State. On August 28, 2019, I served the within:

SUPPLEMENTAL BRIEF

to each of the persons named in the attached service list at the address(es) shown, in the manner described below.

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated on the attached service list for collection and mailing at my business location, on the date mentioned above, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the proof of service.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this certificate was executed on August 28, 2019 at Los Angeles, California.

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