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

ANSWER BRIEF ON THE MERITS

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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: March 19, 2018

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INTRODUCTION

This case involves the application of long-settled principles of California employment law to a set of undisputed facts. The only question before the Court is whether time spent undergoing checks of "bags *voluntarily* brought to work *purely for personal convenience* by employees" constitutes "hours worked." (*Frlekin v. Apple, Inc*. (9th Cir. 2017) 870 F.3d 867, 869 (*Frlekin*), italics added.) This Court's prior interpretations of the Wage Orders' "hours worked" definition, as well as the text and history of Wage Order No. 7 (hereinafter, "Wage Order"), both show that the district court correctly held that the answer to that narrow question is "no."

This Court's decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*) is dispositive as to the "subject to the control of an employer" prong of the "hours worked" definition. *Morillion* held that "travel time" on employer-provided buses was compensable because employees were *required* to ride the buses to their work sites from an off-site parking lot and "were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation." (*Id.* at pp. 586–587.) In reaching that decision, this Court made clear that "employers may provide *optional* free transportation to employees without having to pay them for their travel

time, as long as employers do not *require* employees to use this transportation." (*Id*. at p. 594, italics added.)

Morillion thus established that time is compensable under the "subject to the control of an employer" prong only "[w]hen an employer *requires* its employees" to engage in a restrictive activity. (*Morillion*, *supra*, 22 Cal.4th at p. 587, italics added.) But in order to obtain certification of the broadest class possible and avoid individualized questions regarding why employees brought bags to work, Plaintiffs represented to the district court that they would litigate this case based only on the stipulated fact that every class member who brought a bag to work did so "voluntarily" and "purely for personal convenience." (SER5, 25, 27–38; ER7.)

Given that strategic decision, there cannot be any dispute that Apple employees were not required to bring any bags to work, and thus were not required to subject themselves to security checks. Instead, any employee who wanted to avoid a check could have simply chosen to leave the bag at home, in a car, or in lockers provided in off-site break rooms at certain stores. Thus, under the rule established in *Morillion*, these employees were not "subject to the control" of Apple within the meaning of the Wage Order's definition of "hours worked" during the checks, as they could have avoided the checks by choosing not to bring bags to work.

Plaintiffs also contend that even if employees were not subject to Apple's "control" during the checks, they met the "suffered or permitted to work" prong of the "hours worked" definition because the checks supposedly required some amount of "exertion" and provided a benefit to Apple. This proposed definition of "work" would broaden the term beyond all recognition. Both prior decisions in related contexts and common sense show that a brief check of belongings that has no relation to the job duties an employee was hired to perform is not the kind of activity that requires compensation.

While there may be other cases that present more difficult questions—for example, where an employer's policy is to subject all employees to a search, or where an employee claims that bringing a bag to work is necessary due to the nature of the work or a life necessity—*this* case, as it comes to this Court, does not raise any of those questions. Instead, because of the stipulation that any bags were brought voluntarily and purely for personal convenience, this case falls within the heartland of *Morillion*.

The Court should accordingly hold that the time employees spent undergoing checks of bags brought voluntarily and purely for personal convenience is not "hours worked," and is thus not compensable time.

FACTUAL AND PROCEDURAL BACKGROUND

As a result of stipulations Plaintiffs made to obtain class certification, the facts relevant to this narrow certified-question appeal are undisputed. They are summarized briefly below for the Court's convenience.

I. FACTUAL BACKGROUND

Apple Inc. is one of the world's leading technology companies. As part of its business, it operates retail stores worldwide, including in California, that display and sell Apple products. "Apple employs individuals in its retail stores . . . to facilitate the sale and service of Apple products." (Apple's Mot. for Judicial Notice, Ex. A at p. 2 ¶ 4.)

Apple employees in those retail stores are permitted to bring personal bags to their workplaces. (ER5–6.)[1] Plaintiffs stipulated that Apple did not require employees to bring these bags to perform their job duties or for any other reason, and if bags were brought, it was done voluntarily and purely for the employees' personal convenience. (SER5, 36; see also pp. 25–30, *post.*) And, in fact, not all employees brought bags to work: Apple's expert, Dr. Randolph Hall, analyzed six hours of video surveillance footage at the busiest times of day on the

[1] "ER" and "SER" citations are to the Excerpts of Record and Supplemental Excerpts of Record filed in the Ninth Circuit.

busiest days of work during the class period at the San Francisco flagship Apple store, and recorded that 49% of the 399 employees observed left without carrying any observable item. (ER74.)

Those employees who chose to bring a bag to work could be subject to a visual inspection or pat-down of that bag by a manager or a security guard before they left the store (ER5–6), though that was not always the case. Managers had discretion as to whether to conduct checks (and to what extent), and a number testified they did not conduct any checks, or only did so infrequently. (ER75.) That comports with testimony from Plaintiffs that they sometimes did not go through a check even when they chose to bring a bag to their workplace. (ER75–76, SER46.) Some stores also had off-site break rooms with lockers where employees could store items without having to go through a check. (ER174.)

Several named Plaintiffs testified that these checks lasted only "a few seconds" (SER47), or "a couple of minutes" (SER47; see also ER78). Consistent with that testimony, Dr. Hall said that "a very high-end estimate for the average amount of bag/technology check time (including both inspection time and waiting time) experienced by Apple employees is 30 seconds per punch out." (SER47.)

II. PROCEDURAL HISTORY

In this lawsuit, four former Apple employees— Taylor Kalin, Aaron Gregoroff, Seth Dowling, and Debra Speicher—seek compensation for time

spent waiting for and undergoing checks of bags they voluntarily brought to their workplace, on the theory that such time constituted "hours worked" for which they should have been paid. (ER4–5.)[2] Based on that theory, Plaintiffs asserted claims under various sections of the California Labor Code on behalf of "current or former hourly-paid and non-exempt employee[s] of Apple Inc. who worked at one or more Apple California retail stores from July 25, 2009 to the present." (ER4–5.)

A. The Class Certification Decision

Following the completion of pre-certification discovery, Plaintiffs moved for class certification. At the hearing on Plaintiffs' motion, Apple argued that the district court should deny class certification because determining the reasons employees brought bags to work—whether out of necessity or purely out of convenience—could be resolved only on an individualized basis. (SER27–29.) To eliminate those individualized issues, Plaintiffs took the position that the reason for bringing the bags to work did not matter to their case, because in their view when "somebody gets into a bag check, they are under the control of the employer whether or not it's required." (SER30.)

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[2] Named plaintiff Amanda Frlekin asked to be dismissed as a representative plaintiff, and the district court granted that request. (ER550–551.)

The district court then asked Plaintiffs if they would agree to limit the scope of class proceedings to reflect the narrow theory of liability they had just articulated. As the court put it, "It would just be the bozo who wants to bring a big backpack full of playing cards to work and has no real need to do that and it's . . . *completely voluntary* on their part." (SER33, 36.) Plaintiffs agreed:

> We would say, Your Honor, if you would certify a class based upon . . . the common issue of whether or not standing in checks if you bring a bag is compensable under California law, we would be amenable to certifying the class on that basis . . . so we're not doing this on a piecemeal basis.

(SER36.) Plaintiffs confirmed their position in supplemental briefing following the class certification hearing, arguing that "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.)

Taking Plaintiffs at their word, the district court agreed to certify a class "to adjudicate whether or not Apple had to compensate its employees for time spent waiting for bag searches to be completed 'based on the most common scenario, that is, an employee *who voluntarily brought a bag to work purely for personal convenience*.'" (ER7, italics added.) The notice sent to class members made this point expressly:

> In an Order dated July 16, 2015 (the "Order"), the Court ruled that the Action may proceed as a class action on behalf of Apple Employees (the "Class"). 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 owned Apple technology to work. Thus: THE CLASS WILL 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.

(SER5.) The notice also explained the limits of what Plaintiffs would contend:

> PLAINTIFFS, ON BEHALF OF THE CLASS, WILL NOT CONTEND THAT ANY CLASS MEMBERS WERE REQUIRED TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK FOR ANY REASON WHATSOEVER. FOR EXAMPLE, PLAINTIFFS WILL NOT CONTEND THAT: APPLE REQUIRED CLASS MEMBERS TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK; THAT THE NATURE OF THE WORK REQUIRED CLASS MEMBERS TO BRING BAGS OR PERSONAL APPLE TECHNOLOGY TO WORK; OR THAT A NECESSITY OF LIFE REQUIRED CLASS MEMBERS TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK.

(SER5.)

To protect absent class members still further, the district court informed them that they could file a complaint in intervention if they wished to litigate a claim that they were "required" to bring a bag or personal Apple device to work. (SER6–7, 23.) The notice further

explained that unless a class member intervened or opted out, he or she would be bound to litigate based on the above facts:

> IF YOU DO NOT INTERVENE IN THIS ACTION OR EXCLUDE YOURSELF FROM IT, YOU WILL BE FOREVER BARRED FROM SUING APPLE FOR COMPENSATION FOR TIME SPENT IN CHECKS BASED ON A THEORY THAT YOU WERE REQUIRED, FOR ANY REASON WHATSOEVER, TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK.

(SER5.) No class member filed a complaint in intervention. (ER7, 10, 14, 18.)

B. The Summary Judgment Order

Following class certification, both parties moved for summary judgment on the question of whether time spent waiting for or undergoing checks of bags brought to work purely for personal convenience should be counted as "hours worked" under California law. After restating the rule that "hours worked" may consist of time in which an employee is "subject to the control of an employer" or time in which the employee is "suffered or permitted to work, whether or not required to do so" (ER8), the district court concluded that time spent waiting for or undergoing checks was not compensable under either prong. (ER8.)

With respect to the "subject to the control of an employer" prong, the district court, relying on this Court's decision in *Morillion* and the Court of Appeal's decision in *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 (*Overton*), concluded that although an employee might be

physically restricted while awaiting or undergoing a bag check, she was not "subject to the control of an employer" for purposes of the Wage Order because she could "choose not to bring to work any bag or other items subject to the search rule." (ER8.) The court also explained that this choice was not "illusory," because class members were given the explicit option to intervene and litigate whether the choice to bring a bag was truly voluntary, and none did so. (ER10; see also ER14 ["[T]here is no dispute as to the genuine nature of our plaintiffs' freedom to choose to avoid searches."].)

With respect to the "suffered or permitted to work" prong, the district court concluded that the checks were not compensable because they were not "work." It noted that the checks "had no relationship to plaintiffs' job responsibilities" but instead were "peripheral activities relating to Apple's theft policies." (ER20.) The court also noted that the "plaintiffs themselves did not conduct the searches," but instead "passively awaited as their managers or security guards conducted the searches." (ER20.) The court also rejected Plaintiffs' argument that the activity could be deemed "work" because it provided some benefit to Apple, noting that such an interpretation "would render the 'control' prong meaningless," and would make compensable a range of activities—such as a personal commute in one's own vehicle—that plainly should not be. (ER21.) The court entered judgment for Apple. (ER22.)

C. The Ninth Circuit's Order

Plaintiffs appealed the judgment to the Ninth Circuit. Following the conclusion of briefing and oral argument, the Ninth Circuit certified the following question to this Court on the ground that it would be "dispositive" to the appeal before it, but that "no clear controlling California precedent exists":

> 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?

(*Frlekin*, *supra*, 870 F.3d at p. 869.)

The Ninth Circuit acknowledged that Apple's argument regarding control found "strong support in the California Supreme Court's decision in *Morillion*," which had turned on the "mandatory nature" of the activity at issue. (*Frlekin*, *supra*, 870 F.3d at pp. 871–872.) Moreover, the court recognized that "[t]he case at issue involves only those employees who voluntarily brought bags to work purely for personal convenience." (*Id.* at p. 873.)

In a September 1, 2017 letter, Plaintiffs asked this Court to restate the certified question to include checks of "technology devices." (See Letter from K. Kralowec to Hon. Chief Justice and Associate Justices of the California Supreme Court (Sept. 1, 2017) p. 10.) But when the Court

decided on September 20, 2017 to grant review, it stated the question presented exactly as formulated by the Ninth Circuit (and thus without any reference to "technology devices").

ARGUMENT

Wage Order No. 7 defines "hours worked" as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11070, subd. 2(G).) This Court has interpreted the test as encompassing two prongs or "independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'" (*Morillion*, *supra*, 22 Cal.4th at p. 582.)

The "subject to the control of an employer" prong may include time when an employee is doing *something* required by the employer, even if that "something" is not part of the set of tasks the employee was hired to perform. By contrast, the "suffered or permitted to work" prong includes time in which the employee is "working, but is not subject to the employer's control," such as voluntarily performing a duty the employee was hired to perform following the end of a shift, where the employer knows or has reason to believe the work is occurring. (*Morillion*, *supra*, 22 Cal.4th at p. 585). This Court has also explained that the "suffered or permitted to work" prong "does not limit the 'control' clause under the

definition of 'hours worked.'" (*Id.* at p. 582.) Each prong has a distinct, independent meaning and may "be independently satisfied." (*Id*. at p. 584.)

Under either prong of the "hours worked" definition, time spent waiting for and undergoing bag checks is not compensable because employees can avoid the checks entirely by choosing not to bring a bag to work. To the extent employees choose to bring a bag, they are not "working"—meaning, performing any duties they were hired to perform—during the brief period of time in which the checks are occurring.

I. Employees Undergoing Checks Are Not "Subject to the Control" of Apple

The district court correctly determined that Apple employees were not "subject to the control" of Apple during bag checks because they could choose to avoid those checks by leaving bags at home, in their cars, or (at certain stores) in lockers in off-site break rooms. That decision necessarily followed from this Court's holding in *Morillion* that activities an employee is not required to perform do not qualify as employer-controlled within the meaning of the Wage Orders. Other courts, including the Court of Appeal in *Overton v. Walt Disney Co.*, as well as California employers, have followed and relied on this holding for more than seventeen years.

Plaintiffs attempt to distinguish *Morillion* and *Overton* by dwelling on an issue that is irrelevant to this case: whether an employer exercises control under the Wage Order when employees engage in restrictive

activities that are nominally avoidable, but, in Plaintiffs' view, practically unavoidable. That issue is not before the Court. The question certified by the Ninth Circuit asks whether time undergoing checks of "bags *voluntarily* brought to work *purely for personal convenience* by employees" constitutes "hours worked." (*Frlekin*, *supra*, 870 F.3d at p. 869.) Indeed, the district court excluded from the class definition instances where an employee had a life necessity that required bringing a bag to work, and instructed class members that, if they had such a necessity, they could file a motion to intervene. No such motions were filed. Given Plaintiffs' strategic decision to frame the issue narrowly, "this is not a case with an 'illusory' choice" (ER10), and the certified class, by definition, does not contain even a single employee who brought a bag to work for reasons she could not control, "such as the need for medication, feminine hygiene products, or disability accommodations" (SER40).[3]

The narrow question presented here is thus whether the "subject to the control of an employer" prong is satisfied, and whether Apple is therefore under an obligation to pay when it checks the bag of an employee

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[3] This case is therefore factually distinct from *Alcantar v. Hobart Service* (9th Cir. 2015) 800 F.3d 1047 (*Alcantar*), in which there was "a dispute of material fact as to whether th[e] choice" of employees was "genuine or illusory." (*Id.* at p. 1055.)

who freely chose to bring it to work for his own convenience. As explained below, this Court conclusively answered this question in *Morillion*.

A. *Morillion* Held that Employees Are Not "Subject to the Control of an Employer" During Voluntary Activities

Morillion defeats Plaintiffs' argument that they were "subject to the control" of Apple during checks. In *Morillion*, an agricultural employer required all of its field workers to report to a designated location at a specified time each day to board a bus that would take them to their work site. (*Morillion*, *supra*, 22 Cal.4th at p. 579.) The employer's buses picked up all of the workers in the morning, dropped them off at the work site for the day, and picked them up at the end of the work day to return them to the designated reporting location. (*Ibid*.) That meant that employees could not "drop off their children at school, stop for breakfast before work, or run other errands" while on the employer's bus. (*Id*. at p. 586.) In addition, the employer prohibited workers from using their own transportation to get to and from the work site; in fact, employees who attempted to use their own transportation were subject to discipline. (*Id*. at p. 579, fn.1.) On those facts, this Court held that the workers' "*compulsory* travel time" was compensable because their employer had "controlled" them within the meaning of the Wage Order by requiring them to engage in a restrictive activity—riding its buses. (*Id.* at p. 587, italics added.)

The dispositive fact in *Morillion* was that employees had no choice but to take the employer-provided transportation: "by *requiring* employees to take certain transportation to a work site, employers thereby subject those employees to [their] control by determining when, where, and how they are to travel." (*Morillion*, *supra*, 22 Cal.4th at p. 588, italics added.) The Court acknowledged 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. Instead, this Court expressly held that, in other situations, "employers may provide *optional* free transportation to employees without having to pay them for their travel time, as long as employers do not *require* employees to use this transportation." (*Id.* at p. 594, italics added.) It is only "[w]hen an employer *requires* its employees to meet at designated places to take its buses to work *and prohibits them from taking their own transportation*, [that] employees [are] . . . 'subject to the control of an employer.'" (*Id.* at p. 587, italics added.)

Morillion thus made clear that even a restrictive activity—such as riding on a bus—does not place an employee under an employer's "control" if the employee may freely choose to avoid the activity in the first

place. An activity must be both restrictive *and* required to constitute "hours worked" under the "subject to the control of an employer" prong. That holding disposes of Plaintiffs' theory here. (*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"].)

Although Plaintiffs focus their attention on the restrictive activity (going through a bag check), they are looking at the incorrect point in the process. This case does not involve a mandatory airport-style screening where every person must be checked, whether or not they have bags with them. To the contrary, "there is no dispute" that all class members were "free[] to choose to avoid searches" simply by leaving their bags at home, in their cars, or (in certain stores) in lockers in off-site break rooms. (ER14, 174.) Therefore, because employees could have made a decision that would have eliminated the potential for a bag check, employees subjected to checks were not under the "control" of Apple within the meaning of the definition of "hours worked" as construed in *Morillion*.[4]

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[4] This case is thus quite different from a number of other cases in which employers subjected employees to searches regardless of whether they had bags. (See, e.g., *Greer v. Dick's Sporting Goods, Inc*. (E.D.Cal. Apr. 13, 2017, No. 15-cv-01063-KJM) 2017 WL 1354568, p. *5 [check policy applied to jackets as well as bags, and employees could be subject to visual inspection at any time]; *Moore v. Ulta Salon,*

[Footnote continued on next page]

The *Morillion* rule is well-settled California law, which courts have followed for nearly two decades. In *Overton*, for example, Disneyland employees argued that time spent commuting on an employer-provided shuttle from an off-site parking lot to their workplace was compensable as "hours worked." (*Overton*, *supra*, 136 Cal.App.4th at pp. 265–268.) The Court of Appeal applied the *Morillion* rule to hold that employees were not subject to their employer's control under the Wage Order during that time. (*Id.* at p. 271.) Discussing *Morillion*, the court emphasized that "[t]he key factor is whether [the employer] *required* its employees who were assigned parking in the [off-site] lot to park there and take the shuttle." (*Ibid*., original italics.) Noting that ten percent of the employees did not even drive their cars to work, and therefore did not ride the employer's parking shuttles, the court concluded that the shuttles were not required. (*Ibid*.) Because the employer did not dictate how its employees got to work, but simply stated that if employees chose to drive, they needed to park in a remote lot and could take employer-provided shuttles to the work site, the shuttle rides did not establish employer control within the meaning of the Wage Order. (*Id*. at p. 274.)

[Footnote continued from previous page]

Cosmetics & Fragrance, Inc. (C.D.Cal. 2015) 311 F.R.D. 590, 595–596 [mandatory checks of bags, coats, and pockets].)

The Ninth Circuit has likewise applied the *Morillion* rule on multiple occasions. In *Rutti v. Lojack Corp.* (9th Cir. 2010) 596 F.3d 1046, for example, the court applied *Morillion* to hold that a technician who installed and repaired vehicle recovery systems should be paid for the time he was required to drive a company vehicle to and from the workplace. The court reasoned that, under a "straightforward application of *Morillion*," the fact that the employee "was *required* to drive the company vehicle" was dispositive. (*Id.* at pp. 1061–1062, original italics.) If the employee had been given the choice between driving the company vehicle and his own personal vehicle, a different conclusion—that the time was not compensable—would have been reached.

The Ninth Circuit again applied *Morillion* in *Alcantar v. Hobart Service*, which also involved service technicians who sought compensation for time they spent commuting to work in company vehicles, and focused on whether the technicians had been required to use the employer's vehicles. As the court explained, "to prevail [the employee] must prove [that] . . . employees are, as a practical matter, *required* to commute in [the employer's] vehicles." (*Alcantar*, *supra*, 800 F.3d at pp. 1044–1045, italics added.) The court thus reversed summary judgment because there was a genuine factual dispute regarding whether the technicians had been required to use their employer's vehicles. (*Id*. at pp. 1055–1057.)

In short, "*Morillion* made clear that the mandatory nature" of a restrictive activity is "dispositive" in determining whether it establishes employer control within the meaning of the Wage Order. (*Frlekin*, *supra*, 870 F.3d at p. 872.)

B. The Court Should Reject Plaintiffs' Attempts to Change the Certified Question, Which Is Easily Answered Under *Morillion*

The certified question in this case is whether "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" is compensable as "hours worked." (*Frlekin*, *supra*, 870 F.3d at p. 869.) The Court should reject Plaintiffs' attempts to broaden that question to cover issues that are either beyond the scope of the certified question or were forfeited by Plaintiffs' agreement to litigate this case based on the stipulated fact that employees did not need to bring bags to work. (See, e.g., *Sullivan v. Oracle Corp*. (2011) 51 Cal.4th 1191, 1207–1208 [limiting inquiry in a certified-question case to "the same stipulated facts" on which the federal courts had based their decisions].)

First, although Plaintiffs repeatedly reference technology checks (see, e.g., Pls.' Opening Br. on the Merits ("OBM") 2, 5–10, 14, 41), the Ninth Circuit's certified question makes no mention of such checks, and this Court did not accept Plaintiffs' request to expand the question presented to cover technology checks. Thus, the question of whether the

few seconds required to confirm that an employee's Apple device belongs to the employee is not before the Court. Even if technology checks were at issue, the result would be the same as for bag checks because Plaintiffs stipulated that if employees brought "personal Apple technology" to work, they did so "voluntarily" and "purely for personal convenience." (SER6.)

Second, while Plaintiffs devote pages of their brief to making arguments about circumstances where bringing a bag was not voluntary (see, e.g., OBM 40–42), Plaintiffs agreed to limit their theory of liability to the proposition that "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." (SER25.) Given this stipulated limitation, the district court certified a class on the condition that Plaintiffs would "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." (SER6, original emphasis; see also ER7.) In fact, the court-ordered notice sent to class members cautioned that "PLAINTIFFS . . . WILL NOT CONTEND THAT ANY CLASS MEMBERS WERE REQUIRED TO BRING A BAG OR PERSONAL APPLE TECHNOLOGY TO WORK FOR ANY REASON WHATSOEVER." (SER5.)

Having persuaded the district court to certify a class based on the agreement that they would litigate this case based on the assumption that

employees were not required to bring bags or personal Apple technology to work, Plaintiffs cannot now reverse course and argue that the checks were, "practically speaking, 'unavoidable.'" (OBM 40, citing *Frlekin*, *supra*, 870 F.3d at p. 873.) Plaintiffs are bound by the district court's class certification order, which they have not appealed, as well as the concession they made in order to obtain that order. Accordingly, the scope of the issues to be litigated on a classwide basis in this case is a settled matter and not a question presented in this appeal. And even if Plaintiffs could at this late stage seek to redefine the certified class to include employees for whom bringing bags to work was practically unavoidable, doing so would require the trial court to engage in myriad individualized inquiries that would necessitate decertification of the class. (SER33, 36, 38.)

In addition, while this Court has some liberty to restate a question certified by another court, its decision must "determine the outcome of a matter pending in the requesting court." (Cal. Rules of Court, rule 8.548, subd. (a)(1).) Here, the Ninth Circuit acknowledged that "[t]he case at issue involves only those employees who voluntarily brought bags to work purely for personal convenience" and that it was "certainly feasible for a person to avoid the search by leaving bags at home." (*Frlekin*, *supra*, 870 F.3d at p. 873.) In other words, the bag checks here were entirely avoidable because employees could have left their bags at home, in their cars, or (at certain stores) in lockers in off-site break rooms. Accordingly, deciding

Plaintiffs' proposed question concerning "practically unavoidable" checks could not be dispositive of any issue pending before the Ninth Circuit in this case.[5]

Plaintiffs' effort to expand the certified question is also barred under the doctrine of judicial estoppel, which "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The doctrine applies when (1) "a party's later position" is "clearly inconsistent" with its earlier position; (2) the party "succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 750–751; see also *Miller v. Bank of Am., N.A.* (2013) 213 Cal.App.4th 1, 9–10 [listing similar factors under California law].)

Here, Plaintiffs' attempt to backtrack on the position they took to obtain class certification is the paradigmatic scenario in which judicial estoppel applies. Their current position that Apple's checks constituted

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[5] Of course, as a factual matter, the checks here were not "practically unavoidable," because employees could avoid them by making the decision to not bring a bag to work. In fact, an observational study of one of Apple's busiest stores showed that 49% of the employees left the store without any observable bags. (ER74.)

"hours worked" because they were practically unavoidable is antithetical to their earlier position that the checks violated the "control test for all class members, *regardless of the reasons why they brought a bag to work*." (SER25, italics added.) And there is no question that the district court accepted Plaintiffs' prior position when it certified the class below. Indeed, the court made clear that Plaintiffs' stipulation was a precondition to certification, explaining that it would not adjudicate on a class-wide basis intermediate cases, such as "necessities of life" situations. (SER33, 36, 38, 40.) And, given that Plaintiffs' stipulation was a precondition to class certification, they would derive a clear unfair advantage if not estopped from asserting a contrary position here. (See, e.g., SER33, 36, 38.) Therefore, Plaintiffs are judicially estopped from asserting that this case involves any scenario other than employees who voluntarily chose to bring bags to work purely for personal convenience, and not out of practical necessity.

In sum, if, like the employer in *Morillion* that required employees to ride its buses to work, Apple had required employees to bring bags to work and then searched those bags, under *Morillion*, the time spent undergoing bag checks would constitute compensable time under the "subject to the control of an employer" prong of the "hours worked" definition. But those are not the facts here, because Apple employees did not need to bring bags to work (and Plaintiffs are precluded from arguing otherwise). As a result,

all that is left is a straightforward application of *Morillion*, which held that activities not *required* by an employer do not constitute compensable time under the "subject to the control of an employer" prong of the Wage Orders' definition of "hours worked." Because Apple did not require the very thing that set a bag check in motion—bringing a bag to work in the first place—the time employees spent in checks, which all employees could have avoided, was not compensable under the "subject to the control of an employer" prong under the rule established in *Morillion*.

C. Plaintiffs' Efforts to Avoid *Morillion* Fail

Plaintiffs have raised various arguments in an attempt to avoid *Morillion*, but their arguments are unpersuasive.

1. Whether Checks Involved "Employer-Directed Tasks" Is Irrelevant

Plaintiffs first attempt to distinguish *Morillion* by arguing that the field workers there were "not required to perform employer-directed tasks" during bus rides, whereas Apple employees supposedly had their "actions and movements" directed during checks. (OBM 29, 35.) Plaintiffs' argument ignores this Court's reasoning in *Morillion*.[6]

In *Morillion*, the Court explained that its decision was consistent with *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417 (*Vega*), abrogated in part

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[6] Plaintiffs' argument also fails as a matter of fact. As explained below (see pp. 53–54, *post*), Apple did not require employees to perform employer-directed tasks during checks.

Integrity Staffing Solutions v. Busk (2014) 135 S.Ct. 513, which held that the 4.5-hour block that employees spent commuting to work on their employer's buses was not compensable time because the employees could have used their own transportation. Plaintiffs attempt to distinguish *Vega* by arguing that the employees there "performed no employer-directed tasks during the rides." (OBM 37.) But that is not what *this* Court found to be dispositive under California law. Indeed, in discussing *Vega*, this Court made clear that it was the voluntary nature of the travel time, rather than the absence of employer-directed duties, that is dispositive under the "subject to the control of an employer" prong of the California Wage Orders: "Although the *Vega* court identified other factors, *such as the fact that the workers did not load tools or prepare for work while on the buses*," it was "the fact that the *Vega* employees were free to choose—rather than required—to ride their employer's buses to and from work" that was and still is "dispositive" under California law. (*Morillion*, *supra*, 22 Cal.4th at p. 589, fn.5.)

Moreover, even if the *Vega* discussion were omitted from this Court's opinion, *Morillion* itself holds that employers are not exercising control within the meaning of the Wage Orders over activities which employees may freely chose to avoid. (*Morillion*, *supra*, 22 Cal.4th at pp. 587–588; see also pp. 23–28, *ante*.)

2. The Fact that the Checks Took Place at the Workplace Is Also Irrelevant

Plaintiffs also attempt to distinguish *Morillion* by emphasizing that employer-provided bus rides take place outside the workplace, while Apple's checks occur at the workplace, where Apple has an "interest in preventing theft." (OBM 38.) But the location of an activity does not change whether employees could have avoided the activity, which is what matters under *Morillion*.

In support of their argument that activities taking place at the workplace are necessarily more "controlled" than activities outside the workplace, Plaintiffs cite *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 (*Mendiola*), which posed the question of whether time a security guard spent on call at a construction site was compensable (OBM 25, fn. 37.) But Plaintiffs ignore the dispositive distinction between *Mendiola* and this case: unlike Apple's employees, the guards in *Mendiola* "were required to be on call" and thus could not choose to avoid on-call time and the restrictions it entailed, including the restriction that they remain at the work site. (*Mendiola*, *supra*, 60 Cal.4th at pp. 836, 841.) Thus, as in *Morillion*, the relevant issue in *Mendiola* was employee choice, not the mere fact that the employees were at the work site.

Plaintiffs also suggest that employer control exists here because, at the workplace, "employers have a 'significant interest in preventing theft.'"

(OBM 38, quoting *Frlekin*, *supra*, 870 F.3d at p. 873.) Whether a voluntary activity promotes an employer's interest—at the workplace or elsewhere—is irrelevant under *Morillion*. Indeed, this Court acknowledged in *Morillion* that employer-provided transportation benefits employers by "ensur[ing] enough employees are available and ready to work." (*Morillion*, *supra*, 22 Cal.4th at p. 594.) That was certainly the case in *Vega*, where the employer's buses enabled it to employ workers who lived more than two hours from the work site. (*Vega*, *supra*, 36 F.3d at pp. 423–424.)

Likewise, as the district court in this case correctly recognized, the free shuttle in *Overton* "benefitted the employer" by allowing it to assign certain employees to park in a distant off-site lot, thereby "reserving spots in the on-site lot for customers." (ER18.) Nevertheless, the employee time spent on shuttle rides in *Overton* did not constitute "hours worked" under the "subject to the control of an employer" prong because Disney did not require employees to drive to work in the first place. (*Overton*, *supra*, 136 Cal.App.4th at p. 271.) The employer's interest in preserving customer parking had no bearing on the court's decision.

In any event, while Apple's checks did promote its interest in loss prevention, the checks were part of a broader policy that benefitted Apple's *employees*. As the district court recognized, the simplest and most cost-effective means of preventing theft would have been to prohibit employees

from bringing bags into the store, but Apple chose a less draconian approach:

> Rather than prohibiting employees from bringing bags and personal Apple devices into the store altogether, Apple took a milder approach to theft prevention and offered its employees the option to bring bags and personal Apple devices into a store subject to the condition that such items must be searched when the[y] leave the store.

(ER10.)

In short, *Morillion* did not hold that a voluntary program establishes employer control under the Wage Order if it promotes an employer's interest. Here, Apple's checks did not constitute employer control under the Wage Order because Apple employees could choose to avoid the checks by leaving their bags at home, in their cars, or (at certain stores) in lockers in an off-site break room. (ER174.) A contrary holding would penalize Apple for giving its employees the freedom to make that choice.

3. Plaintiffs Misread *Morillion*'s Discussion of "Control"

Plaintiffs erroneously read *Morillion* as holding that purely voluntary activities, such as the checks at issue here, can result in employer "control" within the meaning of the Wage Order if they "involve an even greater level of 'control' than in *Morillion*." (OBM 31.) And because the bag checks here are supposedly more restrictive than the time spent on buses in *Morillion*, Plaintiffs contend the time spent undergoing checks

should be compensable. There is no basis in either law or fact for this view.

As an initial matter, Plaintiffs are mistaken about the nature of the control present in *Morillion*. They assert that "the only 'control' the employer exercised in *Morillion*" was the employer's written policy that "'required' agricultural employees to ride the company bus from specified meetings points to the fields" and prohibited them from commuting in their own personal vehicles. (OBM 30.) Plaintiffs claim that there was no other basis to find control "because the record showed that [the agricultural employees] were free to, and regularly did, engage in personal activities, such as reading and sleeping, during the bus rides." (OBM 30–31.) But this Court made clear that the bus rides themselves resulted in significant employer control because employees could not "use the time effectively for [their] own purposes" and were "foreclosed from numerous activities," such as eating breakfast or running errands. (*Morillion*, *supra*, 22 Cal.4th at p. 586, citations omitted; see also *ibid*. ["Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control Royal exercises by requiring them to travel on its buses *and by prohibiting them from effectively using their travel time for their own purposes*."], italics added.)

Given that *Morillion* deemed bus rides to be highly restrictive, its holding that the time employees spend using optional employer-provided

transportation is not compensable could not have turned on the assumption that employees are "free of any form of employer 'control'" while using that transportation. (OBM 34.) Indeed, the same general restrictions—being unable to use travel time for one's own purposes, and being foreclosed from doing activities such as eating breakfast and running errands—exist for both required and optional bus rides. Moreover, if Plaintiffs' reading of *Morillion* were correct, its discussion of *Vega* would have made no sense. The optional bus rides there were an average of 4.5 hours long (*Vega*, *supra*, 36 F.3d at p. 423)—and thus presumably even more restrictive than those in *Morillion*—but the Court still deemed the result in *Vega* to be "consistent with [its] opinion" (*Morillion*, *supra*, 22 Cal.4th at p. 589, fn. 5).

While Plaintiffs' argument fails as a matter of law, it also hinges on a misstatement of fact: Apple's checks were no more restrictive than the bus rides discussed in *Morillion*. For example, nothing would stop an Apple employee from reading, sending text messages, or using her phone to shop online while waiting for a check. Moreover, unlike the bus rides in *Morillion* or *Vega*, checks often lasted no more than "a few seconds." (SER47; ER77–78.) If, as this Court has acknowledged, a 4.5-hour optional bus ride is not compensable, a seconds or minutes-long avoidable bag check is not compensable as hours worked either, even under Plaintiffs' view of *Morillion*.

4. The Checks Were Not Equivalent to Cleaning "Farming Implements"

Plaintiffs also assert that their "pre-activity 'choice'" cannot insulate Apple from liability after the choice has been made to undergo the checks. (OBM 36.) Attempting to illustrate their point, Plaintiffs pose a hypothetical in which workers who take an optional employer-provided bus to work are directed to "manually clean farming implements during the ride." (*Ibid*.) If the hypothetical workers' "pre-activity choice" to take their employer's bus negates "control," Plaintiffs say, then the workers would not be paid for their time cleaning tools. (*Ibid.*) That is not true, and Plaintiffs' argument reveals a fundamental misunderstanding of the "hours worked" definition.

Time agriculture employees spent cleaning farm tools during an optional bus ride would be compensable—but under the "suffered or permitted to work" prong, not the "subject to the control of an employer" prong. The same would be true, if, for example, Apple directed retail employees to respond to customer questions while waiting in line for the checks. But the reason that time would be compensable is not, as Plaintiffs contend, because the bus ride or waiting time is "controlled," as opposed to "optional." (OBM 36.) In both scenarios, the hypothetical employees could choose to avoid the cleaning or bag check altogether by taking a different form of transportation or not bringing a bag to work, and thus the

time would not be compensable under the "subject to the control of an employer" prong. Instead, cleaning tools, or answering customer questions, is part of the employee's job duties and would be "work" that is compensable under the Wage Orders' "suffered or permitted to work" prong, which, unlike the "subject to the control of an employer" prong, applies "whether or not" the work in question is "required." (Cal. Code Regs., tit. 8, § 11070, subd. 2(G); see also pp. 55–56, *post*.)

As this Court recognized in *Morillion*, the "time the employee is 'suffered or permitted to work, whether or not required to do so' . . . can be interpreted as 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 *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040, fn. 19 [recognizing potential circumstances where an employer "relinquishes control but nonetheless knows . . . that the employee is performing work"].) Time spent cleaning tools during an optional bus ride, just like time spent answering customer questions at an Apple store, falls into this category.

Indeed, the district court reached this same conclusion in rejecting a similar hypothetical:

> [C]ounsel for plaintiffs suggested that Apple could establish a policy requiring any employee who wore a red hat to clean the bathrooms without compensation. . . . [E]mployees would not be entitled to compensation under the "control" prong under that circumstance because they could avoid that assignment by electing not to wear red hats. Rather, that janitorial assignment would be "work" that Apple "suffered

> or permitted," because it constituted an active job responsibility, so it would be compensable.

(ER20.) Plaintiffs' hypothetical therefore provides no cause to jettison the rule established in *Morillion*. Moreover, the work that is suffered or permitted in these hypotheticals bears no resemblance to the passive checks at issue here, which typically took only "a few seconds" (SER47; see also ER78), and during which employees were not required to answer questions, straighten store displays, or perform any other job duties. And, for the reasons discussed in Part II below, Apple's checks did not constitute "work" that Apple "suffered or permitted." (See pp. 52–57, *post*.)

D. Apple Did Not Concede Liability Under the "Subject to the Control of an Employer" Prong

Plaintiffs erroneously assert that Apple "conceded" that employees undergoing checks were under its "control" within the meaning of the Wage Order. (OBM 25.) This argument misstates the facts. At the summary judgment hearing, the district court—not Apple—used the words "concede control" to describe Apple's acknowledgement of the obvious: once an employee has opted to bring a bag to work and is engaged in the check process, she is—like the employees riding buses in *Overton* and *Vega*—subject to some degree of "control" within the lay meaning of the word. (ER47–48.) But—critically—the court went on to describe Apple's position that the hypothetical employee is not under Apple's control within

the meaning of the Wage Order because she "didn't have to be in the line to begin with" and thus could avoid the check. (ER48.)

Apple thus did not concede that the "subject to the control of an employer" prong is satisfied under such circumstances. To the contrary, Apple's counsel clearly stated that an activity must be required by the employer in the first place to establish "control" under the Wage Order:

> With respect to the issue of control, it's not enough to simply say . . . that an employer imposed some sort of control on an activity in order to make it work. They must also, under this control theory, prove that it was required.

(ER42; see also *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 962 ["fragmentary and equivocal concession[s]" cannot establish liability]; *American Title Ins. Co. v. Lacelaw Corp.* (9th Cir. 1988) 861 F.2d 224, 226 [affirming district court's refusal to treat "a statement made by counsel" as a "judicial admission"].)

Moreover, as discussed above, if the "subject to the control of an employer" prong were satisfied here simply because class members were subject to some degree of control at the time of a check, regardless of their pre-activity choice to be in that position, and regardless of whether the employer required the activity, then the "subject to the control of an employer" test would also have been satisfied in *Vega* and *Overton*. It was not, because the employees there, like the employees here, had a choice

about whether or not to do something that would result in the ultimate activity that is alleged to be compensable.

E. Neither the Text Nor the Regulatory History of the Wage Orders Supports Plaintiffs' Interpretation of "Control"

Plaintiffs also appeal to the text of the Wage Order and the historical changes to that order over time. But these textual and legislative history arguments fail.

Plaintiffs' first argument is that the text of Wage Order No. 7 and its regulatory history reveal the Industrial Welfare Commission's ("IWC") intention for the "subject to the control of an employer" prong to cover activities that are not required by the employer. (OBM 23.) But the statute cannot be read in a vacuum. This Court already interpreted the current definition of "hours worked" in *Morillion*, holding that activities not required by an employer do not constitute compensable time under the "subject to the control of an employer" prong. (*Morillion*, *supra*, 22 Cal.4th at p. 587.)

Moreover, Plaintiffs' reading of the statute ignores important textual differences between the two prongs of the Wage Order. As this Court explained in *Morillion*, each prong has a distinct, independent meaning and may "be independently satisfied." (*Morillion*, *supra*, 22 Cal.4th at p. 584.) The *second* prong expressly requires payment for time during which an employee is "suffered or permitted to work, *whether or not required to do*

so." (Cal. Code Regs., tit. 8, § 11070, subd. 2(G), italics added.) The first prong contains no such language, strongly suggesting that the "subject to the control of an employer" prong applies *only* if the activities are required. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 725 [if a statute or regulation uses two different words, two "different meaning[s]" "must be presumed"]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 [presuming, where Legislature included a certain phrase in two prongs of a statute, but not in the third and fourth prongs, that the Legislature "intended [for] different . . . requirements to apply" in each set of prongs]; *Morales v. 22nd Dist. Agricultural Ass'n* (2016) 1 Cal.App.5th 504, 539 ["Wage orders are quasi-legislative regulations and are construed in the same manner as statutes under the ordinary rules of statutory construction."], quotation marks and citation omitted.) As Plaintiffs concede, the elements of one prong should not be imported into the other. (OBM 45–46, citing *Morillion*, *supra*, 22 Cal.4th at pp. 582–583; *Mendiola*, *supra*, 60 Cal.4th at p. 839.)

The idea that an employee must be "required" to do something—if it is not "work"—to be entitled to compensation under the "subject to the control of an employer" prong is also supported by the Wage Order's regulatory history. As Plaintiffs note in their brief, the 1943 definition of "hours worked" included "all time during which" "[a] [person] is required to be on the employer's premises ready to work, or to be on duty, or to be at

a prescribed work place." It also included time in which an employee "is required to wait on the premises while no work is provided by the employer and time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day." (OBM 20, citing Wage Order No. 7NS.) All of these elements have one trait in common: they are all things an employee is "required" to do.

In 1947, the IWC decided to replace the language stating that hours worked may include time a "person is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed workplace" with the language that "hours worked" includes time during which an employee is "subject to the control of an employer." (OBM 21, citing Wage Order No. 7R.) It also chose to eliminate the rest of the "required" activities in the 1943 definition.

Based on that modification, Plaintiffs now ask this Court to go beyond its statement in *Morillion* that "'[c]ontrol' may encompass activities described by the eliminated language" in the 1943 Wage Order (*Morillion*, *supra*, 22 Cal.4th at p. 592), and hold that "control" may encompass a *broader* range of activities than what the Wage Order previously covered. But it is more plausible that the IWC wanted to *simplify* the Wage Order's language to include the required activities and any others that were similar in kind—which is to say, also required.

In *People v. Culbertson* (1985) 171 Cal.App.3d 508, for example, the court rejected an argument that a change in a criminal statute from "coparticipant" to "participant" broadened the scope of potentially liable persons, reasoning that "[n]othing in the legislative history suggests that the . . . change in statutory language was intended to broaden the class encompassed within the term 'participates'; the amendment merely simplifies and clarifies the language of the statute." (*Id*. at p. 515; see also *Ex parte Flesher* (1927) 81 Cal.App. 128, 137 [amendment to statute was intended to "arrange it logically and dispense with unnecessary verbiage," not to effect a substantive change]; *Perine v. William Norton & Co.* (2d Cir. 1974) 509 F.2d 114, 120 [amended statute "was not intended to have the substantive effect of changing the scope of the clause" but instead "was intended to simplify the rather cumbersome language of the previous formulation"].)

The only document Plaintiffs cite in support of their contrary argument that the insertion of "control" in lieu of the list of required activities represented a conscious decision to expand the "hours worked" definition to cover non-work activities that were not required by the employer is a 1990 letter from the Division of Labor Standards Enforcement ("DLSE") stating: "The IWC's 1947 change in the language of the orders which define 'hours worked' clearly intended to *broaden* the definition." (OBM 22, original italics, citing Pls.' Mot. for Judicial Notice

("MJN"), Exs. 7–8; see also MJN, Ex. 12.) The DLSE letter was drafted in response to an inquiry about whether an employer was required to compensate employees that had to remain on the employer's premises during a meal break. The employer tried to argue that the federal definition of "hours worked" ought to control, and that under that definition, which allowed employees to be confined to the work site during meal breaks so long as the employees were free of duty, no compensation was owed. (MJN, Ex. 7 at pp. 15–16.) The DLSE rejected that argument, noting that the "subject to the control of an employer" language was added in response to the narrowing of the federal definition that followed the U.S. Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co*. (1946) 328 U.S. 680. (See MJN, Ex. 7 at p. 17; see also *Martinez v. Combs* (2010) 49 Cal.4th 35, 59–60 (*Martinez*) [explaining that the IWC changed its wage orders in response to the exclusion of travel time and preliminary/postliminary activity time from the federal definition of hours worked].)

The DLSE thus did not discuss whether the phrase "subject to the control of an employer" in the Wage Order was intended to cover a broader set of activities than those covered under the 1943 definition; it concluded only that, under California law, the employer's requirement that employees remain on-site during meal breaks rendered the meal breaks compensable under a "subject to the control of an employer" theory, and that it did not

matter whether federal law stated otherwise. As the DLSE stated in another related opinion, "there is little doubt that the definition of 'hours worked' contained in the IWC Orders is 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 workplace" (MJN, Ex. 12 at p. 27)—but nothing in that statement, nor in the 1990 DLSE letter regarding the required on-site meal breaks, indicates that the definition was supposed to cover non-work activities that were not required and could be avoided by employees.

Plaintiffs next claim that the "ordinary meaning" of "control" necessarily includes time spent in checks of personal bags that the employee decides to bring to the workplace for his or her own convenience. (OBM 23.) But this Court is not writing "on a blank slate" and "must consider the question presented . . . in light of [its] well-developed case law." (*Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 676.) The "subject to the control of an employer" language has been a part of Wage Order No. 7 for nearly seventy years, and has been construed by this Court on several occasions, including, most notably, in *Morillion*, where this Court said that the employer exercised "control" by "requiring [its employees] to travel on its buses." (*Morillion*, *supra*, 22 Cal.4th at p. 586; see also *Mendiola*, *supra*, 60 Cal.4th at p. 840 [analyzing on-call time through the lens of "control"]; *Augustus v. ABM Security Services, Inc.*

(2016) 2 Cal.5th 257, 269 [analyzing whether on-call rest periods were free of employer control]; see also *Watterson v. Garfield Beach CVS, LLC* (9th Cir. Aug. 2, 2017) 694 Fed.Appx. 596, 597 (*Watterson*) [time spent completing requirements for optional wellness program not under employer's control].) Plaintiffs' identification of other definitions of "control" that are more favorable to their position (see OBM 23) cannot override the established interpretations of that language by this Court. In any event, if "control" did have the broader meaning Plaintiffs seek to assign to it, then both *Morillion* and *Overton* would have been resolved differently.

Plaintiffs also argue, in essence, that the plain meaning of "control" necessarily requires an employee to be compensated "during" any time she is subject to any kind of restraint by the employer, regardless of whether she could have chosen to avoid it. (OBM 24–25.) But that interpretation would yield absurd results. (See *Baker v. Workers' Comp. Appeals Bd*. (2011) 52 Cal.4th 434, 442 [holding that statutes and regulations should be interpreted to avoid absurdity].) For one thing, *Morillion* held that whether an activity is required and unavoidable is a necessary, but not sufficient, condition for "control" to exist. (*Morillion*, *supra*, 22 Cal.4th at p. 587.) An employee may be "unavoidably" "required" to commute to work every day, but if she has choices about when to leave, what route to take, and which mode of transportation to use, then she need not be paid for that

time. (*Ibid*.) An interpretation of "hours worked" that would require compensation for activities that are neither required nor unavoidable would turn that ruling on its head. Moreover, ignoring the role of employee choice could allow employees to dictate the terms of their compensation by, for example, voluntarily subjecting themselves to longer checks by bringing large numbers of bags, or taking a long time to find a manager to complete the checks.

In sum, Plaintiffs' proposed construction of "control"—as being limited exclusively to "restraint" without regard for whether the employee could have avoided the restraint—has no support in the text or history of the Wage Order, and adopting it would disregard key language in that Order, contradict this Court's past interpretations of "control," and lead to illogical and undesirable results.

* * *

Under the undisputed facts here, employees were subjected to checks only when they voluntarily decided to bring bags to work purely for their own convenience. As such, they were not "subject to [Apple's] control," and are not entitled to compensation for time spent in those checks under the "subject to the control of an employer" prong of the "hours worked" definition. Nothing in the text of the Wage Order or its regulatory history changes that result, and any other rule would upend two

decades of settled precedent upon which California employers have reasonably relied.

II. Employees Undergoing Checks Were Not "Suffered or Permitted to Work"

Plaintiffs alternatively argue that, even if they were not subject to Apple's control during the bag checks, they should nevertheless be compensated because the checks constituted "work" under the "suffered or permitted to work" prong of the Wage Order. (OBM 43–51.) The thrust of Plaintiffs' argument on this point is that because the checks involve "physical exertion," were "controlled by Apple," and were "done for Apple's benefit," they constitute "work" within the meaning of the "suffered or permitted to work" prong of the Wage Order. (OBM 43.) But Plaintiffs cannot satisfy this prong of the "hours worked" definition because being subjected to a check is not "work" in any sense.

As *Morillion* confirmed, the "suffered or permitted to work" prong of the Wage Order is applied to situations in which there is no dispute about whether the activity at issue constitutes work, and the question is whether the employer knew or should have known about it (see, e.g., *Morillion*, *supra*, 22 Cal.4th at p. 585 [continuing to work at the end of the shift]; *Jong v. Kaiser Foundation Health Plan, Inc*. (2014) 226 Cal.App.4th 391, 399–400 [working unrecorded overtime]), or what entity, if any, should be charged with knowledge of the work (see, e.g., *Martinez*, *supra*, 49 Cal.4th

at pp. 57–59, 71–72). This case involves neither issue; instead, it turns on the threshold question of what activities constitute compensable "work."

The district court correctly held that the checks in this case did not constitute "work" because they had no relationship to the job the employees were hired to perform—i.e., selling products, assisting customers, and troubleshooting Apple products. Indeed, "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 fact that so many Apple employees reported to work without bags also confirms that participating in bag checks was not one of their job duties. (ER74.) Thus, as the district court concluded, the checks were not "work" because "Apple's searches had no relationship to plaintiffs' job responsibilities; they were peripheral activities relating to Apple's theft policies." (ER20.)

Of course, a different conclusion would have been warranted *if* Apple had required employees to bring bags to work, required employees to continue assisting customers while waiting for bag checks, or hired them for the purpose of submitting to, or conducting, the checks. But that is not what occurred here. Plaintiffs nonetheless argue that the checks were related to the employees' job duties because those duties supposedly include a general responsibility for "theft prevention." (OBM 51.) But even assuming that employees had such a duty, the purpose of checking

employees' bags as they left the store was not to prevent theft *by customers or other persons*, but instead to prevent theft *by the employees themselves*. There is no dispute that "the plaintiffs themselves did not conduct the searches"; rather, they "passively awaited as their managers or security guards conducted the searches." (ER20.) And while "do not steal" is surely a *condition* of any employment, it can hardly be considered a job duty—even for employees who were tasked with preventing the theft of products by others.

The district court's reasoning that "work" must have some relationship to an employee's job responsibilities is also consistent with the reasoning of other courts to have considered the issue. For example, in *Betancourt v. Advantage Human Resourcing, Inc*. (N.D.Cal. Sept. 3, 2014, No. 14-cv-01768-JST) 2014 WL 4365074, the court analyzed whether the time an employee of a temporary staffing agency spent interviewing for a position with the staffing agency's prospective client constituted "work" under the "suffered or permitted to work" prong. It concluded that the interview was work because it was "part of [the plaintiff's] responsibilities as an . . . employee" of the temporary staffing agency. (*Id*. at p. *7.) But the court contrasted that with an initial interview between a job candidate and a prospective employer, which it acknowledged was typically "not compensable work time." (*Ibid.*)

By comparison, in *Watterson v. Garfield Beach CVS LLC*, the Ninth Circuit concluded that the time an employee spent completing annual health screenings and wellness reviews in compliance with the terms of a medical insurance plan the employer offered, and in which the employee voluntarily enrolled, was not compensable "hours worked" under California law because, among other reasons, completing the screenings and reviews was "*not part of her job duties*." (*Watterson*, *supra*, 694 Fed.Appx. at p. 597, italics added; see also *Saini v. Motion Recruitment Partners, LLC* (C.D.Cal. Mar. 6, 2017, No. SACV-16-01534-JVS) 2017 WL 1536276, p. *11 [concluding that employment activities which are distinct from "the work to be performed" do "not qualify as work"]; *Young v. Beard* (E.D.Cal. Mar. 9, 2015, No. 11-cv-02941-KJM) 2015 WL 1021278, p. *10 [time spent bidding on vacation schedules not considered "hours worked" under the FLSA because the bidding was not necessary to what the plaintiffs were hired to do, any benefits accruing to the employer were too speculative, and there was no dispute that the employees viewed vacation as a benefit].)

These decisions make sense because a definition of "work" that is detached from an employee's job responsibilities would be boundless. Under Plaintiffs' expansive and unprecedented definition of "work," virtually anything an employee does—such as walking from an employee parking lot to the office, or rummaging through a purse to find a security badge—would constitute "work." That cannot be correct, especially

because it would render the "subject to the control of an employer" prong superfluous. That is because, under Plaintiffs' interpretation, anything that would satisfy the "subject to the control of an employer" prong would surely also constitute "work." The "suffered or permitted to work" prong would thus swallow the entire definition of "hours worked," and "would render the 'control' prong meaningless," as the district court recognized. (ER21.)

Plaintiffs' definition of "work" also cannot be squared with *Morillion*. In *Morillion*, this Court rejected the proposition that "whenever an employee is 'suffered or permitted to work,' . . . that employee is subject to an employer's control." (*Morillion*, *supra*, 22 Cal.4th at p. 584.) On the contrary, the time an employee is "suffered or permitted to work" includes "time an employee is working but is not subject to an employer's control." (*Id*. at pp. 584–585.) Because each of the two prongs covers distinct behavior and may "be independently satisfied," Plaintiffs' definition of "work," which conflates these two "independent" prongs, necessarily fails. (*Id*. at p. 584.)

Plaintiffs also argue that the checks are "work" because they benefit Apple. (OBM 46–47.) This argument both sweeps too broadly and runs afoul of this Court's decision in *Martinez v. Combs*. Indeed, *Martinez* rejected the notion that "hours worked" could be used as a catch-all to seek compensation for any activity that benefits the employer, and expressly

held that "the concept of a benefit is neither a necessary nor sufficient condition for liability under the 'suffer or permit' standard." (*Martinez*, *supra*, 49 Cal.4th at p. 70.) This makes logical sense, because nearly everything an employee might do before arriving at work in the morning—from getting dressed, to eating healthy, to exercising—conceivably provides a benefit to the employer, yet this Court has made clear that these kinds of things are not compensable as "work." (*Morillion*, *supra*, 22 Cal.4th at p. 583.) Plaintiffs' "benefit to the employer" argument also inverts the relevant facts: The checks here occurred only because Apple permitted employees to make a voluntary decision to bring personal bags to work, purely for their own personal convenience, in the first place—something Apple is not obligated to permit.

This Court should thus reject Plaintiffs' sweeping definition of "work," and hold that the checks here were not "work" because they had no relationship to what the employees were hired by Apple to do.

III. A Ruling in Plaintiffs' Favor Would Create Significant Uncertainties Beyond the Context of Bag Checks

Adopting Plaintiffs' construction of "hours worked" would upset settled law, established by this Court in *Morillion* two decades ago, holding that the time employees spend engaged in optional activities that they can choose to avoid is not compensable. Indeed, if time spent in the avoidable bag checks at issue here constitutes "hours worked," that would call into

question whether time spent in a broader range of optional activities is also compensable. That, in turn, would cast significant doubt on the *Morillion* rule, as employee choice would no longer be the dispositive factor in the compensable time analysis. The resulting uncertainty would risk jeopardizing not just employer-provided transportation, but also other optional programs and benefits that employers offer to their employees.

While Plaintiffs have not expressly asked this Court to overrule *Morillion* (or to disapprove cases like *Overton* that have faithfully applied *Morillion*), to adopt Plaintiffs' view of the "hours worked" definition would effectively do just that. But this Court does "not lightly overrule . . . established precedent." (*People v. Cuevas* (1995) 12 Cal.4th 252, 269.) To the contrary, it is a "fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212–1213.) "This is so parties can 'regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.'" (*Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 273, citation omitted.)

There is no reason for this Court to depart from *Morillion*. The decision established a workable and clear rule that was easy for employers, employees, and courts to understand and apply. Yet Plaintiffs would have this Court replace *Morillion*'s clear rule with an amorphous standard under

which even completely avoidable, non-required activities can become compensable depending on where the activities occur and what the activities entail. Adopting that standard would undermine settled expectations, and lead to unnecessary litigation over whether other voluntary activities must be compensated.

IV. If the Court Adopts a New Interpretation of the "Hours Worked" Definition, It Should Not Be Applied Retroactively

Given *Morillion*'s holding that an employer does not exercise "control" under the Wage Orders over employees engaged in purely voluntary activities, Apple lacked fair notice that its checks of bags brought voluntarily to work could constitute "hours worked" under the "subject to the control of an employer" prong. Applying a new interpretation of California law retroactively would violate state and federal due process.

"Elementary notions of fairness enshrined in [the U.S. Supreme Court's] constitutional jurisprudence dictate that a person receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574; see also *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 266 ["The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation."]; *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1171.) Fair notice requires that a defendant be able to

determine—in advance, and based on objectively identifiable standards—what conduct can give rise to liability. (See, e.g., *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108 [explaining that "a basic principle of due process" requires "that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"].)

Consistent with these fundamental principles, this Court has declined to make new rules retroactive where doing so would violate the parties' due process rights: "retroactive application of a decision disapproving prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties," much "[l]ike retroactive application of an 'unforeseeable and retroactive judicial expansion of' a statute," "denies due process." (*Moss v. Superior Court* (1998) 17 Cal.4th 396, 429, quoting *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352.) This rule applies to all forms of liability, not just to cases involving civil penalties, sanctions, or punitive damages. For example, in *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 829 (*Olszewski*), this Court invalidated two state statutes as preempted by federal law, but still concluded that they provided the defendant a safe harbor from a plaintiff's claim for restitution under Business and Professions Code section 17200. This Court refused to apply its decision retroactively in *Olszewski* because the defendant could have reasonably relied on the statutes at issue, and

subjecting the defendant to civil liability would have violated due process. (See *id*. at pp. 829–830.)

Imposing significant liability on Apple under a new interpretation of the Wage Order—especially one that directly conflicts with this Court's precedent—would violate Apple's due process rights. This Court held in *Morillion* that an activity required by an employer may constitute employer control under the Wage Order, but purely voluntary activities do not. In the years since this Court decided *Morillion*, both the Court of Appeal and the Ninth Circuit have reinforced *Morillion*'s holding. Apple—like other California employers—could and did reasonably rely on these decisions. Because Apple could not have had fair notice of this Court's new interpretation of the law, imposing substantial liability on Apple would violate its state and federal right to due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

CONCLUSION

Because the checks at issue could be avoided at the employee's option—as Plaintiffs stipulated—and undergoing the checks did not constitute "work" under any reasonable reading of the term, the time employees spent in such checks is not compensable under California law.

Dated: March 19, 2018

Respectfully submitted,

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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 Answer Brief on the Merits contains 12,530 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: March 19, 2018

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CERTIFICATE OF SERVICE

I, Sam Kunz, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, Suite 3000, San Francisco, California 94105, in said County and State. On March 19, 2018, I served the within:

ANSWER BRIEF ON THE MERITS

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

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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 March 19, 2018 at San Francisco, California.

Sam Kunz