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

Opening Brief on the Merits

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I. QUESTION PRESENTED

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?

II. INTRODUCTION

In stores across California, Apple runs a highly profitable retail business selling small—and valuable—electronic devices. Instead of adequately securing these devices from theft, Apple requires its retail store employees to participate in mandatory—but unpaid—security searches, or "Checks," of their bags, purses, packages, and iPhones. On the busiest days, the Checks can take 20 to 40 minutes to complete.

The question referred to this Court by the Ninth Circuit is whether the Check time is compensable under California law. It is.

It meets either, or both, of the two "independently define[d]" tests for compensable "hours worked" in Wage Order 7. *See* 8 Cal. Code Regs. §11070, ¶2(G); *Frlekin*, 870 F.3d at 871 (citing *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 582 (2000)).

As defined in Order 7, "hours worked" includes:

(1) "the time during which an employee is subject to the ***control*** of an employer" (the "'control' test"); and/or

(2) "all the time the employee is ***suffered or permitted to work***, whether or not required to do so" (the "'suffered or permitted to work' test").

8 Cal. Code Regs. §11070, ¶2(G) (emphasis added).

(1)

The Check time meets the "control" test.

As the Ninth Circuit explained, the Checks take place "on site," and employees may not leave the store until they submit to the Check procedure. *Frlekin v. Apple, Inc.*, 870 F.3d 867, 872 (9th Cir. 2017). The employees are placed under the physical direction of a store manager or a guard, who "compel[s]" the employees to take specific "actions and movements." *Id.* at 873. Among other actions, employees must open up their bags, unzip internal compartments, pull out their iPhones and technology cards, and display the contents. Employees who refuse to comply with these directions, or who refuse to be Checked, are subject to discipline, including termination. *Id.* at 870.

In the Ninth Circuit's words, "employees who bring a bag or package to work and therefore must follow the [employer's] search procedures are clearly under the 'control' of the employer." *Id.* at 871. In fact, Apple "***concede*[*d*]" that it "controlled" its employees "while awaiting, and during," the Checks. *Id.* (emphasis added).

Hence, under a "textual analysis," the Check time easily meets the "control" test. *Id.*

Nevertheless, the district court granted summary judgment in Apple's favor. It disregarded the employer's conceded "control" over the Check time, reasoning that the time was not "required" because employees could supposedly "avoid" the Checks by "choosing" to leave their purses and iPhones at home.

This was error for several reasons.

First, the Wage Order's plain text provides no support for this view. Under the plain text, time is compensable "during which" employees are "control[led]." The test is not limited to "unavoidable" or "required" activities.

In fact, the adoption history of the "control" test shows that the district court's interpretation of the test is even narrower than a weaker prior compensability standard that the IWC purposely abandoned in 1947, and replaced with the "control" test. The Wage Order should not be construed to reinstate an older, abandoned standard. Instead, the "control" test should be applied in accordance with its plain language.

Second, the district court misread *Morillion*, in which this Court held that mandatory bus-ride time from a meeting place to the fields was compensable under the "control" test. 22 Cal.4th at 582-87. The employer exercised no other "control" in *Morillion*, so it was "dispositive" that the employees could not "choose" to "avoid" the compulsory bus rides. *Id.* at 587, 589 n.5.

This case, however, involves other employer "controls" not present in *Morillion*. As the Ninth Circuit recognized, employers have a "greater" interest in theft prevention than in how employees travel, so they tend to exercise "greater" levels of control over security search time than over travel time. *Frlekin*, 870 F.3d at 872-73.

The *Morillion* employees were free to sleep and read during the bus rides. 22 Cal.4th at 586. In this case, by contrast, the employees were required to physically perform employer-directed tasks during the Check time. 870 F.3d at 873. They were "restrained from leaving the work place" until the Checks were completed, prevented

from using the Check time "effectively for [their] own purposes," and subjected to discipline if they refused to submit to the Check procedure. 22 Cal.4th at 583, 586, 587.

The employees in this case were under a ***greater*** level of control than in *Morillion*, not a lesser one. As this Court later confirmed in *Mendiola*, it is the "'level of the employer's control'" that is "'determinative'" under the Wage Orders.[1]

Morillion did not hold that even the highest levels of employer "control" must be disregarded whenever an activity can theoretically be "avoided" thorough a pre-activity "choice." Such a holding does not appear in *Morillion* because the case did not present those facts, and because it would have contravened the Wage Order's text.

As the Ninth Circuit understood, practically speaking, employees have no meaningful "choice" to leave their purses and iPhones at home. *Frlekin*, 870 F.3d at 872. For this reason, the Checks are no more "optional" than the bus rides in *Morillion*.

In short, the Check time is "compensable" under the "control" test.

(2)

The Check time is also compensable under the "suffered or permitted to work" test. 8 Cal. Code Regs. §11070, ¶2(G).

The district court held that the Checks were not "work," but by its plain meaning, "work" means physical or mental effort to accomplish an end. The Checks easily meet that description, and they were also "suffered or permitted" by an employer, Apple.

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[1] *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833, 840 (2014) (quoting *Morillion*, 22 Cal.4th at 587).

While not an essential element of this test, the Checks also benefited Apple by "advanc[ing] [Apple's] interest in loss prevention." *Frlekin*, 870 F.3d at 873.

Apple ***should*** pay for "work" that it "suffered and permitted" (and also "controlled") in order to protect its own "valuable goods" from theft. *See id.* The district court erred by importing a less-protective federal standard into California law.

In sum, the Check time meets either, or both, of the two tests for compensable "hours worked." Accordingly, the answer to the Ninth Circuit's question is "yes."

III. STATEMENT OF FACTS

A. The Operative Complaint

This certified class action, commenced in 2013, challenges Apple's practice of failing to compensate its employees for time spent undergoing onsite security searches of their bags and technology—searches done while the employees are under Apple's control, on Apple's premises, and for Apple's benefit as a theft-prevention measure. Excerpts of Record ("ER") 583-84, ¶¶1-4, 589-91, ¶¶28-31. On behalf of themselves and the certified class, plaintiffs seek relief for Apple's failure to pay minimum and overtime wages for all "hours worked," as defined in the applicable Wage Order. [2] ER 584, ¶4, 594-95 ¶¶42-50; *see also* ER 596-99 ¶¶51-68.

B. Order Granting Class Certification

In 2015, the district court granted class certification of the California claims. ER 544-58; *see Frlekin*, 870 F.3d at 870. In its order, the court directed the parties to file

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[2] The complaint asserts violations of Wage Order 4, the relevant provisions of which are identical to Wage Order 7, cited in the Ninth Circuit's question. *Compare* 8 Cal. Code Regs. §11040, ¶2(K) *with id.* §11070, ¶2(G).

summary judgment motions on "the main issue of compensability under California law" (ER 557:17-18), and ruled that "bag searches will be adjudicated as compensable or not based on the most common [factual] scenario, that is, an employee who brought a bag to work purely for personal convenience" (ER 553:23-25).

C. Cross-Motions for Summary Judgment

As directed, after class notice, the parties filed cross-motions for summary judgment in October 2015. ER 605-06; *see* ER 80-86, 379-84.

1. Plaintiffs' Motion

Plaintiffs' motion, and their opposition to Apple's motion, relied on the following facts (*see* ER 82:4-84:2; *see also* ER 4:23-6:28 (district court's statement)):

Apple's Check Policy: Since at least 2009, Apple's hourly paid retail store employees have been subject to a written policy requiring that their bags and Apple devices—including their iPhones, iPads and Apple-branded laptops—be checked every time they exit a store (the "Check Policy"). ER 107-108 [at 32:24-33:20, 33:25-34:6, 34:24-35:4], 115, 386:11-387:2, 392, 394, 396, 398, 400, 402, 404, 406. The Check Policy, which "appl[ies] to all employees of Apple Inc.," provides as follows:

> **Employee Package and Bag Searches**
>
> All personal packages and bags must be checked by a manager or security before leaving the store.
>
> **General Overview**
>
> All employees, including managers and Market Support employees, are subject to personal package and bag searches. Personal technology must be verified against your Personal Technology Card (see section in this document) during all bag searches.

> Failure to comply with this policy may lead to disciplinary action, up to and including termination.
>
> **Do**
>
> • Find a manager or a member of the security team (where applicable) to search your bags and packages before leaving the store.
>
> **Do Not**
>
> • Do not leave the store prior to having your personal package or back [sic] searched by a member of management or the security team (where applicable).
>
> • Do not have personal packages shipped to the store. In the event that a personal package is in the store, for any reason, a member of management or security (where applicable) must search that package prior to it leaving the store premises.

ER 115; *see also* ER 5:5-28 (quoting policy), 394-406; *Frlekin*, 870 F.3d at 870.

The technology card policy requires Apple Employees to record all their Apple-branded devices on a "Personal Technology Card," including the descriptions and serial numbers of the products. ER 115, 117-18, 170 [at 18:22-19:3], 241-42. Every time an Apple Employee leaves a store "for any reason," he or she "must ensure the sales leader verifies the serial numbers on [the] card against the product [the employee is] carrying." ER 117; *see* ER 201 (checks "must be conducted" "***every time*** an employee leaves the store" (emph. added)), 230 ("check out with a manager any time you leave the store").[3]

Apple does not compensate employees for time spent on the Checks. ER 110 [at 85:10-12], 239, 307 ¶8, 322, 326; *see* ER 6:25-28; *Frlekin*, 870 F.3d at 870 ("Employees

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[3] Checks are conducted not only at the end of the day, but also at lunch. ER 117, 118, 197 ¶4, 303, 307 ¶6, 346 ¶14, 352 ¶14, 392 ("before you leave the store for any reason (such as lunch, end of day)").

receive no compensation for the time spent waiting for and undergoing exit searches, because they must clock out before undergoing a search.").

Checks were conducted in every Apple store during the class period. ER 244-53, 94:25-95:2, 255-89; *see* ER 6:18-19 (district court's fact summary).

The Checks Are Mandatory: Apple's bag and technology Check Policy is a mandatory policy. ER 69-70 [at 48:23-50:6], 112 [at 100:20-101:2], 115, 193-94, 200-01, 203, 206, 208, 220-21, 228, 230, 242. Employees do not have the right to choose whether they want to comply. ER 112 [at 100:20-01:2], 239, 241-42 (identifying Personal Technology Card policy as one of several "important Apple policies" and "as an Apple employee, you are obligated to follow ALL Apple policies").

Apple refused to relax the policy, even after employees complained to senior management about its unfairness. *E.g.*, ER 123:26-124:2, 314-15, 317-19, 322, 324, 326. One employee who complained about Checks was told: "you don't get to pick and choose what policies to follow." ER 239.

Apple Employees Are Subject to Discipline for Not Submitting to Checks: Apple alerts employees that "[f]ailure to comply with [the Check] policy may lead to disciplinary action, up to and including termination." ER 115, 392-406; *see Frlekin*, 870 F.3d at 870. Employees who failed to comply with the Check Policy have been forced to attend "Warning Meeting[s]" (ER 232); been cited for "Behavior to be Corrected" (ER 234-35); and been subject to a "Coaching Tracker" (ER 237).

Apple Dictates All Aspects of How Checks Are Conducted: The procedures for conducting Checks are determined by Apple and described during leadership training and

in corporate documents published on Apple communication platforms. *E.g.*, ER 109 [at 63:8-14], 206, 300.

First of all, employees must track down a manager (or security guaurd) to perform the Check. ER 392 ("It is your responsibility to find a manager or member of the security team … to search your bags and packages before leaving the store."), 115 ("Find a manager … to search your bags …."), 394-406 (same).

The managers are then instructed to, among other things: (i) "[a]sk the employee to open every bag, brief case, back pack, purse, etc."; (ii) "[a]sk the employee to remove any type of item that Apple may sell"; (iii) "verify the serial number of the employee's personal technology against the personal technology log"; (iv) "[v]isually inspect the inside of the bag and view its contents"; (v) "ask the employee to unzip zippers and compartments so you can inspect the entire contents of the bag"; (vi) "[i]f there are bags within a bag, such as a cosmetics case, be sure to ask the employee to open these bags as well"; and (vii) "ask the employee to remove" any "questionable item" from the bag. ER 300; *see also* ER 6:1-17 (district court's fact summary).

The Checks require active employee participation. *E.g.*, ER 303 (during Checks, "the guard may ask you to see in all the pockets, etc. in your bag" and "ask you to move things around in your bag so they can see effectively"); 314 ("we are asked by a manager to pull the [technology] card out of our wallet, show him the serial numbers listed on the card, then pull our devices out, find the serial number in the settings, and show the manager that the serial number[s] on the devices match the serial numbers on the card. Then we are subjected to a bag search, and finally, we are allowed to leave the store.");

345 ¶8 (Checks involve inspection of "each compartment of each employee's bag"); 351 ¶6 (managers would "physically search through the compartments" of employees' bags).[4]

In addition, Apple: (i) instructs Store Managers to implement the mandatory Checks (ER 200-01, 203, 205-06, 208, 210, 212, 214-15, 217-18, 220-21, 223, 225, 300); (ii) decides whether Apple Employees should be disciplined for not complying with the Check Policy (ER 115, 232, 234-35, 237, 239); (iii) issues Personal Technology Cards for Apple Employees to identify their Apple products (ER 115, 117-18, 170 [at 18:22-19:3], 241-42); and (iv) prepares written instructions describing the Check Policy and other Apple policies (ER 115, 200-01, 206, 300, 392-406).

Apple Employees Are Confined to Store Premises During and While Waiting for Checks: Until the Checks are completed, Apple Employees are confined to their stores and are not allowed to leave the premises, which means they may not run personal errands, get meals or engage in other personal activities outside the store until a Check is done. ER 66 [at 129:16-25], 147 ¶6, 151 ¶5, 155 ¶3, 166 ¶6, 175 ¶5, 179-80 ¶6, 183 ¶3, 184 ¶5, 190 ¶6, 197 ¶4, 198 ¶8, 230, 232, 293 ¶4, 306 ¶3, 307 ¶8, 311 ¶3, 314, 345 ¶5, 346 ¶11, 329 ¶4, 350-51 ¶5, 356 ¶5, 371 ¶5; *see Frlekin*, 870 F.3d at 870.

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[4] *See also* ER 411:9 ("I open up my bag and lift up my Apple shirt so they can see in the bag"); 460:15-17 ("I open the bag for the manager" and "move [things] around" "so that the manager can see under them"); 477:24-25 ("the manager asks me to move [items in my bag] so he or she can see in the bag"); 488:20-21 ("I normally have my backpack or purse open and prepared for the bag check"): 508:27 ("[t]he employee opens his or her bag"); 529:20-23 ("The employee approached a manager and opened his or her bag .... Occasionally, the manager asked the employee to move a large item in the bag (such as a sweatshirt) out of the way so that the manager could see within the bag ....").

The employees are confined to the premises not just during the actual performance of the Check, but also while searching for a store manager to conduct it, which sometimes means waiting for the manager to finish assisting a customer, and while lining up behind other employees for everyone to be Checked. *E.g.*, ER 122 ¶7, 127-28 ¶5, 131 ¶4, 135-36 ¶5, 140 ¶6, 143-44 ¶¶5-7, 147 ¶7, 152 ¶6, 156-57 ¶6, 162 ¶6, 167 ¶7, 171 [at 31:1-3, 31:21-23] 175 ¶7, 179 ¶6, 184 ¶5, 190 ¶6, 198 ¶7, 293-94 ¶5, 297 ¶5, 298 ¶8, 302, 307 ¶¶6-8, 312 ¶6, 330 ¶¶5-7, 334 ¶6, 338-41 ¶¶67-74 & ¶¶92-93, 345-46 ¶¶8-9, 351 ¶8, 357-58 ¶9, 371-72 ¶6, ¶10.[5]

On the busiest days, the Checks can take as long as 45 minutes including wait time, none of which was compensated. *See, e.g.*, ER 298 ¶8,339 ¶67, 341 ¶92. Estimates of the average time required for the Checks (including wait time) ranged from 5 to 20 minutes or more. *E.g.*, ER 144 ¶7, 293-94 ¶5, 307 ¶6, 345-46 ¶¶8-9, 351 ¶8, 357-58 ¶9, 371-72 ¶¶6, 9. Employees are often Checked more than once per day, because Checks are required both at the end of the day and when the employees leave for lunch. *See id.*

Checks Are Conducted by Apple Store Managers or Security Personnel: Checks are carried out on the premises by "a manager" or, in stores with security guards, a "member of the security team." ER 115; *see* ER 5:18-20 (quoting policy), 206, 210, 292, 392-406; *see also* ER cites two paragraphs above.

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[5] *See also* ER 140 ¶ 6 ("The security checks were time consuming because after I clocked out, I would have to search around the store for a manager (who was often busy helping customers or performing other tasks) and then wait in line for other employees to go through security checks and then go through the actual security check myself"); 175 ¶ 7 ("The time spent looking for or waiting for a manger and then waiting in line for other employees to finish their security checks took up the bulk of the time.").

Apple Knows or Should Know That Apple Employees Go Through Checks: Apple: (i) created the Check Policy (*see* ER 114-15); (ii) has received complaints about Checks (*see* ER 314-15, 317-19, 322, 324, 326); and (iii) acknowledged in discovery that every Apple Store has conducted Checks on its premises (*see* ER 244-53). Apple management is also aware of the waiting times caused by the mandatory Checks.[6]

The Checks Benefit Apple By Preventing and Deterring Theft: Apple implemented the Check Policy, and conducts the Checks, in order to prevent and deter theft. ER 170 [at 20:7-10], 200-01, 206, 208, 217-18, 227-28, 232, 234, 363 [at 54:21-55:14], 377. The Checks are part of both Apple's "Shrink Analysis and Action Plan" and Apple's "Internal Theft" policy. ER 200-01, 206. Managers are to "be very thorough with bag checks and tech cards, as these are key components to the impression of [merchandise] control in the store." ER 212.

Apple's Retail Sales Jobs Include Responsibility for Theft-Prevention: Apple's "Loss Prevention" policy states that it is part of all employees' "responsibility" to take action "if [they] become aware of an internal theft issue or a possible internal theft issue." ER 201; *see also* ER 200 ("Internal Theft" policy; same), 205 ("Shrink Analysis and Action Plan"; "entire staff" is "accountab[le]" for internal theft).

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[6] *See, e.g.*, ER 302 ("We know sometimes there is not a guard present at the front door [to perform Checks] because they are opening the side door for shipment, a vendor, etc. and you have to wait until the guard returns to check out."); 194, 221 ("I know it can be a challenge to find a leader at times [to conduct Checks]....").

2. Apple's Motion

Apple's motion rested entirely on three basic facts that it asserted were determinative of the compensability question, namely:

(1) Employees who did not bring a bag to work, and who left their "personal Apple technology," including their iPhones, at home, would not be checked. ER 382:20-384:2 (citing ER 392-406, 419, 423-24, 440, 446, 450, 468, 478, 481, 493, 496-97, 508, 512, 516, 520, 524, 528-29, 532-33, 536, 539-40).

(2) Some employees never, or rarely, brought a bag to work and some employees rarely brought their iPhones to work. ER 384:5-26 (citing ER 411, 414, 419, 423, 433-34, 455, 459, 464, 468, 472, 476-78, 485, 488, 496-97, 500-01, 543).

(3) The district court granted class certification based on the assumption that employees brought bags, iPhones, and other personal Apple technology to work for "personal convenience." ER 380:11-15 (citing ER 553:23-25).

Based on these facts, Apple argued that time spent waiting for and undergoing Checks was not compensable under California law. ER 380.[7]

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[7] Apple's opposition to plaintiffs' motion rested on the same three facts. ER 72:15-74:28. Apple also mentioned some other facts, but characterized these as either "not relevant" or "irrelevant" to compensability. ER 75:3, 76:5, 77:6, 77:23.

3. The District Court's Order

The district court conducted a lengthy hearing on the cross-motions (*see generally* ER 23-52), during which Apple conceded that its employees were under its "control" while awaiting and during the Checks. ER 47:20-48:13; *see Frlekin*, 870 F.3d at 871.

Nevertheless, the district court granted Apple's motion and denied plaintiffs' motion. ER 8-21; *see Frlekin*, 870 F.3d at 870. The court held that the Check time was not compensable under the "control" test because employees could "choose" not to bring a bag or personal technology to work in the first place. ER 8:14-21. It further held that the Check time did not meet the "suffered or permitted to work" test because the Checks were not "work." ER 19:1-21:15.

D. Ninth Circuit Proceedings

Plaintiffs filed a timely appeal. ER 53-59; *Frlekin*, 870 F.3d at 871. After full briefing and oral argument, the Ninth Circuit granted plaintiffs' request to certify the legal questions presented by their appeal to this Court. *See* Cal. Rules of Ct., rule 8.548.

As the Ninth Circuit recognized, and as Apple "concede[d]," "employees who bring a bag or package to work and therefore must follow the [employer's] search procedures are clearly under the 'control' of the employer while awaiting, and during, the search." *Frlekin*, 870 F.3d at 871. "Under a strictly textual analysis," therefore, the Check time is compensable. *Id.* (citing Wage Order 7, ¶2(G)). However:

> Although the search is voluntary in that the employee could have avoided it by leaving his or her belongings at home, the employer nevertheless exercises control over the employee who does bring a bag or package to work. It is unclear under *Morillion* whether, in the context of on-site time

during which an employee's actions and movements are compelled, the antecedent choice of the employee obviates the compensation requirement.

Id. at 873.

On September 20, 2017, this Court agreed to decide the questions.

IV. ARGUMENT

Under a plain-language interpretation of the Wage Orders, the Check time meets both of the "independent"[8] tests for compensability: (A) the "control" test; and (B) the "suffered or permitted to work" test. Because the Check time is compensable under either or both tests, the answer to the Ninth Circuit's question is "yes."

A. The Wage Orders' Plain Text Must Be Liberally Construed to Protect and Benefit Employees and to Effectuate the IWC's Intent

In construing the Wage Orders, this Court "adopt[s] the construction that best gives effect to the purpose of ... the IWC." *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 262 (2016) (citing *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-27 (2012); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1103 (2007)). "Time and again," the Court has "characterized that purpose as the protection of employees ...." *Id.* (citing *Mendiola*, 60 Cal.4th at 840; *Martinez v. Combs*, 49 Cal.4th 35, 53-54 (2010); *Industrial Welfare Com. v. Superior Court*, 27 Cal.3d 690, 702 (1980)).

Hence, the IWC's Wage Orders "are liberally construed to protect and benefit employees." *Kilby v. CVS Pharmacy, Inc.*, 63 Cal.4th 1, 11 (2016) (citing *Brinker*, 53 Cal.4th at 1026-27; *Industrial Welfare Com.*, 27 Cal.3d at 702). In fact, this Court considers itself "bound" to "liberally construe" the Wage Orders "to favor the protection

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[8] *Mendiola*, 60 Cal.4th at 839; *Morillion*, 22 Cal.4th at 582.

of employees." *Augustus*, 2 Cal.5th at 262, 269 (citing *Brinker*, 53 Cal.4th at 1026-27; *Murphy*, 40 Cal.4th at 1103)).

The Court's analysis of the IWC's intent "begins with" the Wage Orders' text, which is "'[t]he best indicator" of that intent. *Id.* at 264 (quoting *Reynolds v. Bement*, 36 Cal.4th 1075, 1086 (2005)). *Accord Kilby*, 63 Cal.4th at 16; *Martinez*, 49 Cal.4th at 63. The Court construes the words in accordance with their "most common understanding" and "ordinary meaning," often relying on plain-language dictionary definitions. *Augustus*, 2 Cal.5th at 265 (citing *Murphy*, 40 Cal.4th at 1103 (words are generally given their "plain and commonsense meaning")).

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

In the Wage Orders, the operative word of the first test for compensable "hours worked" is "***control***." The Check time is compensable under the ordinary meaning of this word. Indeed, Apple conceded "control." *Frlekin*, 870 F.3d at 871.

Nothing in the Wage Order's plain text supports the district court's conclusion that an employer's "control" over its employees should be ignored because of a pre-activity occurrence—such as a pre-activity "choice." Rather, the Wage Order focuses on, and makes compensable, the time "***during which***" the employees are "controlled." Here, the time "during which" the employees are "controlled" is the Check time.

The district court's narrow interpretation of the "control" test contradicts the IWC's intent in crafting the definition of "hours worked," as shown by an examination of the historical origin of that definition. The regulatory history shows that in 1947, the IWC purposely substituted the word "control" in place of the word "require"—which was

part of a weaker prior compliance standard—in order to broaden the definition of "hours worked." The district court's narrow reading is even ***less*** protective than the abandoned prior standard, because it would mean that to satisfy the "control" test, time must be not only "controlled," but also "required," and "unavoidably" so.

To adopt this less-protective compliance standard—one even weaker than a standard the IWC knowingly discarded 70 years ago—would not only contradict the Wage Orders' plain text, but also derogate the Court's "duty" to "liberally construe" the Orders "to promote worker protection." *Mendoza v. Nordstrom, Inc.*, 2 Cal.5th 1074, 1091 (2017) (citing *Brinker*, 53 Cal.4th at 1027).

The district court's main cited authority was *Morillion*. However, Apple exercised greater "control" than the employer in *Morillion*, because it required its employees to perform employer-directed tasks during the "controlled" time. Also, *Morillion* involved an undisputedly "required" and "unavoidable" activity. Thus, as discussed below, the Court had no occasion to conclusively rule on the impact of a pre-activity "choice."

Ultimately, the district court erred by construing *Morillion* in a manner contrary to the Wage Order's plain text—as the following discussion of the history of that text demonstrates.

1. Both the Enactment History and the Plain Text Show That the IWC Intended to Make All "Controlled" Time Compensable

The Wage Orders' current definition of "hours worked" has not been changed since the IWC adopted it seventy years ago, in 1947. Both the "legislative and historical

context"[9] of its adoption—and the ordinary meanings of the words the IWC chose to use in the current and historical definitions—demonstrate that the IWC intended to adopt a broad definition of compensable time for the greater protection of employees. The Check time easily meets that broad definition.

a. In 1947, the IWC Purposely Abandoned the Word "Required" and Replaced it With the Word "Control," Thereby Broadening This Test for Compensability

As used in Wage Order 7, the term "hours worked" dates back to 1919, when the IWC first required mercantile industry employers to maintain records of "the ***hours worked***" by all employees.[10] The IWC imposed the same requirement in amended Orders issued in 1920 and 1922, which made an employer's non-compliance a misdemeanor.[11]

By 1931, the Legislature had added a similar provision, requiring employees to maintain records of "the ***hours worked*** daily" by each employee, to the uncodified act through which it had created the IWC.[12]

While the early Orders did not define "hours worked," the recordkeeping requirement was an important enforcement mechanism. It enabled regulatory

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9 *Martinez*, 49 Cal.4th at 52; *see Kilby*, 63 Cal.4th at 11-13 (examining regulatory history of relevant Wage Order provision).

10 Wage Order 5 Amended (Mercantile Industry) (April 22, 1919, eff. Jun. 21, 1919), ¶7 (Motion for Judicial Notice ("MJN"), filed herewith, Ex. 1) (emphasis added).

11 Wage Order 5 Amended (Mercantile Industry) (Jun. 1, 1920, eff. Jul. 31, 1920), ¶11(a)-(b); Wage Order 5a (Mercantile Industry) (Dec. 29, 1922, eff. Apr. 8, 1923), ¶10 (MJN, Exs. 2, 3).

12 Stats. 1913, ch. 324, §3(a) (as amended), *cited in Martinez*, 49 Cal.4th at 54. That requirement was codified in 1937 as Labor Code section 1174, and remains in force today. Lab. Code §1174(d). Failure to comply with the recordkeeping requirement is a misdemeanor. *Id.* §1175(d).

enforcement of—and employer compliance with—both the minimum wages and the maximum hours limitations imposed by the Orders. The 1919 Order, for example, established an hourly minimum wage for part-time employees and limited the number of hours an employee may work per day.[13]

Notably, in these Orders, the IWC "did not follow a federal model, as Congress would not enact the FLSA until 1938." *Martinez*, 49 Cal.4th at 53 (footnote and citation omitted). That year, a few months after the FLSA was enacted, the U.S. Department of Labor ("DOL") issued a regulation, comparable to California's, requiring employers to record the "[***h***]***ours worked*** each workday and each workweek" by all employees.[14]

Nine months later, the DOL's Wage and Hour Division issued an Interpretive Bulletin defining "hours worked" as follows:

> As a general rule, ***hours worked*** will include [1] all time during which an employee is ***required*** to be on duty or to be on the employer's premises or to be at a prescribed work place, and [2] all time during which an employee is ***suffered or permitted to work*** whether or not he is required to do so.

U.S. Department of Labor, Wage and Hour Division, Office of the Administrator, Interpretative Bulletin No. 13 (July 1939) (emphasis added).[15]

In 1943, the IWC issued a "New Series" of Wage Orders (the "NS" series), each of which included a two-part definition of "[h]ours employed" resembling the 1939

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13 Wage Order 5 Amended, *supra*, ¶¶3, 8.

14 3 Fed. Reg. 2533 (Oct. 22, 1938) (emphasis added).

15 *Quoted in Bowers v. Remington Rand*, 64 F.Supp. 620, 625 (S.D. Ill. 1946); *Mortenson v. Western Light & Tel. Co.*, 42 F.Supp. 319, 321 (S.D. Iowa 1941).

federal Interpretive Bulletin. *E.g.*, Wage Order 7NS (Apr. 5, 1943, eff. Jun. 21, 1943), ¶2(f) (MJN, Ex. 4).

Under Wage Order 7NS:

> "Hours employed" includes all time during which:
>
> 1. 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.
>
> 2. A [person] is ***suffered or permitted to work***, whether or not ***required*** to do so. Such time includes, but shall not be limited to, time when the 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.

Id. ¶2(f) (emph. added); *see Morillion*, 22 Cal.4th at 592 n.7 (quoting Wage Order 1NS).

In 1944 and 1946, the U.S. Supreme Court handed down two opinions construing the FLSA, both of which expansively construed the "workweek" for purposes of overtime pay under federal law. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In 1947, Congress "swift[ly]" responded to these decisions by enacting the Portal-to-Portal Act, which severely contracted the definition of "hours worked."[16] The Act now excludes various categories of time from the definition, which otherwise would have been compensable under *Tennessee Coal* and *Anderson*.[17]

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16 *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 516-17 (2014).

17 *See, e.g.*, 29 U.S.C. §§203(o) (curtailing definition of "hours worked" for purposes of minimum and overtime wages), 251(a) (expressing intent to limit employer liability

The IWC was swift to take action "[i]n response."[18] The IWC issued a "Revised" (or "R") series of Orders in 1947, in which it changed its definition of "hours worked." *E.g.*, Wage Order 7 R (Feb. 8, 1947, eff. Jun. 1, 1947) (MJN, Ex. 5). Instead of contracting the definition, however, the IWC expanded it by adopting the "control" test in place of the first part of the prior definition.

Under Wage Order 7 R's new two-part definition:

> "Hours Worked" means [1] the time during which an employee is subject to the ***control*** of an employer, and includes [2] all the time the employee is ***suffered or permitted to work***, whether or not required to do so.

Id. ¶2(h) (emphasis added).

In 1952, the IWC adopted its next series of Orders. *E.g.*, Wage Order 1-52 (May 15, 1952, eff. Aug. 1952) (MJN Ex. 6). Although the Department of Labor had just codified the less expansive federal definition of "hours worked,"[19] the IWC declined to follow the federal lead, choosing instead to readopt, unchanged, the broader and more protective definition from Wage Order 7NS. *Id.* ¶2(h).

Since 1952, the IWC has issued nine more amended Wage Orders for the mercantile industry, but it has never changed the definition of "hours worked."[20] The

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for payment of wages to employees), 254(a) (list of "activities not compensable" under federal law).

18 *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 591.

19 15 Fed. Reg. 631 (Feb. 4, 1950).

20 Wage Order 7-57 (May 30, 1957, eff. Nov. 15, 1957); Wage Order 7-63 (Apr. 18, 1963, eff. Aug. 30, 1963); Wage Order 7-68 (Sept. 26, 1967, eff. Feb. 1, 1968); Wage Order 7-76 (Jul. 27, 1976, eff. Oct. 18, 1976); Wage Order 7-80 (Sept. 7, 1979, eff. Jan. 1, 1980); Wage Order 7-80 (Revised) (Sept. 7, 1979, as amended eff. Jan. 1, 1984 and

current definition has been in effect, unaltered, for more than 70 years. 8 Cal. Code Regs. §11070, ¶2(G).

Not since 1947 and Wage Order 7 R, therefore, has "hours worked" depended on whether an employee was "***required***" to engage in any activity (including "to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed work place").[21]

Instead, the IWC struck the word "***required***" from the first part of the definition, and replaced it with a broader, more protective test, that of employer "***control.***" At the same time, the IWC retained the "***suffered or permitted to work***" portion of the definition as a second, "independent" test for compensability.[22]

Through these wording changes, the IWC "clearly indicated" that it "intended to ***broaden*** the definition" of "hours worked" beyond that of the 1942 Orders.[23] In particular, the IWC adopted the "control" test because "even the … disjunctive language contained in the 1942 Orders was not as restrictive as the [IWC] felt necessary."[24] Under

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Jul. 1, 1988); Wage Order 7-98 (eff. Jan. 1, 1998); Wage Order 7-2000 (eff. Oct. 1, 2000); Wage Order 7-2001 (eff. Jan. 1, 2001).

21 Wage Order 7NS, *supra*, ¶2(f)(1) (emphasis added).

22 *Mendiola*, 60 Cal.4th at 839; *Morillion*, 22 Cal.4th at 582. The second test is addressed in Part IV.C, below.

23 DLSE, Response to Request for Determination Pursuant to Government Code Section 11347.5, *quoted in* Cal. Office of Administrative Law, Response to Request for Reconsideration, 1990 OAL Determination No. 11, at 4 (emph. added) (MJN Ex. 7, 8).

24 *Id.*

the new definition, "required" time encompassed by the prior definition may be compensable,[25] ***along with*** all other time subject to employer "control."[26]

b. The Ordinary Meaning of "Control" is Broader than the Ordinary Meaning of "Required"

This reading is borne out by the plain-language definitions of the two words.

"***Require***" means "to claim or ask for by right and authority." *Merriam-Webster's Collegiate Dictionary*, "require," *vt.*, sense 1a (11th ed. 2003), *cited in Augustus*, 2 Cal.5th at 265. It also means "to impose a compulsion or command on: compel." *Id.*, sense 3.[27] "***Control***" means to "exercise restraint or direction upon the free action of." *Bono Enterprises, Inc. v. Bradshaw*, 32 Cal.App.4th 968, 975 (1995) (citing *Oxford English Dictionary*).[28] It also means to "regulate" or "hold in restraint."[29]

The word "***control***," therefore, is expansive enough to encompass "compelled" or "commanded" activities, including those claimed "by right and authority" of an employer, while also embracing actions that are "regulated" or "directed" by an employer—even those not strictly "compelled" or claimed "by right and authority." The

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[25] *See Morillion*, 22 Cal.4th at 592 ("'Control' may encompass activities described by the eliminated language ....").

[26] *See Rashidi v. Moser*, 60 Cal.4th 718, 725 (2014) (if a statute or regulation uses two different words, two different meanings "must be presumed"); *Singh v. Superior Court*, 140 Cal.App.4th 387, 399 (2006) (applying this rule to IWC Wage Orders).

[27] *Accord American Heritage Dictionary*, "require," *tr.v.*, sense 3 (4th ed. 2000) ("to impose an obligation on; compel"), *cited in Augustus*, 2 Cal.5th at 265.

[28] *Accord id.*, "control," *tr.v.*, sense 1 ("to exercise authority or dominating influence over; direct"); *Black's Law Dictionary*, "control," *vb.*, sense 1 (10th ed. 2014) ("to exercise power or influence over"); *Merriam-Webster's Collegiate Dictionary*, *supra*, "control," *vb.*, sense 2a ("exercise restraining or directing influence over").

[29] *American Heritage Dictionary*, *supra*, "control," *tr.v.*, senses 2, 3.

word amply serves the IWC's purpose to "broaden" the definition of compensable "hours worked" and expand it beyond the narrower definition of the NS series of Orders.[30]

Notably, the IWC retained the word "required" in the second clause, describing the "suffered or permitted to work" test, while abandoning that word for the "control" test in the first clause. The IWC's decision to use two distinct words in the two independent tests was deliberate.[31] The IWC could have revised the Order to encompass all "time during which an employee is subject to ***a requirement*** of an employer." It did not.

c. During and While Awaiting the Checks, the Employees Are Under Apple's "Control," as Apple Conceded, so the Time is Compensable Under the "Control" Test

(i)

As the Ninth Circuit recognized, under a "textual analysis," the employees in this case are "clearly under the ***control*** of the employer" (870 F.3d at 872 (emphasis added)) both during, and while awaiting, the Checks:

- The Checks are "regulated" by the employer: they are imposed pursuant to a written, mandatory employer policy, and employees are subject to discipline, including termination, if they refuse to participate.[32] *Frlekin*, 870 F.3d at 870 ("Employees who

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30 It also serves the IWC's purpose to ensure that California's definition of "hours worked" would be broader than federal law after the Portal-to-Portal Act. *See Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 591.

31 *People v. Mendoza*, 23 Cal.4th 896, 916 (2000) (in general, when a statute or regulation is amended to change the wording, a change in meaning is presumed); *Estate of Simpson*, 43 Cal.2d 594, 600 (1954) ("Changes in wording and phraseology are presumed to have been deliberately made ....").

32 ER cites at pp. 6-8, *supra*.

fail to comply with the Policy are subject to disciplinary action, up to and including termination.").[33]

- The Checks are "directed" by the employer: they take place on the employer's premises, under a manager's immediate supervision, and employees are required to comply with the manager's directions, including opening up their bags, unzipping internal compartments, and displaying the contents.[34] *Id.* at 873 (during the Checks, employees' "actions and movements are compelled").[35]

- The Checks "hold" employees "in restraint": the employees are not permitted to leave the employer's premises until they have participated in the Checks.[36] *Id.* at 872 (Check are "***on-site*** search[es] during which the employee must remain on the employer's premises" (emphasis in original)).[37]

In this case, as Apple conceded, its employees were "clearly" under its "control" "while awaiting, and during," the Checks. *Frlekin*, 870 F.3d at 871. Hence, the time is compensable.

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[33] *See Morillion*, 22 Cal.4th at 587 (employees subject to "verbal warnings and lost wages" were "controlled").

[34] ER cites at pp. 8-10, *supra* Employees must also find and display their iPhones (or other Apple-branded devices), open up the settings page showing the serial number, and find and display their tech cards to compare the numbers. *Id.*

[35] *See Morillion*, 22 Cal.4th at 583, 586 (employees "foreclosed from [other] activities" and "prevented from using the time for their own purposes" were "controlled"); *Mendiola*, 60 Cal.4th at 840 (same).

[36] ER cites at pp. 10-11, *supra.*

[37] *See Mendiola*, 60 Cal.4th at 840 (employees "restrain[ed] ... from leaving the work place" are "controlled"); *Morillion*, 22 Cal.4th at 583 (same) (citing *Bono*, 32 Cal.App.4th at 975).

(ii)

This "textual analysis" does not change merely because the employees may have "voluntarily" brought their purses, bags or iPhones to work. *See Frlekin*, 870 F.3d at 869. Either way, the Check time meets the "control" test.[38]

Under the Orders' plain text, compensability does not depend on what happened ***before*** "the time ***during which***" the employee exercised "control"—such as an employee's pre-activity "choice" to bring a bag or iPhone. Instead, the text has focusing language. That language places the focus of the analysis squarely on "the time ***during which***" the employer "control" occurred.

Unlike the pre-1947 text, which asked if the employer had "***required***" certain specified activities, the current text depends only on whether the employee was under employer "***control***" "***during***" the "time" in question. There is no carve-out for "controlled" time of any kind, including "controlled" time spent on activities that theoretically might be "avoided." The IWC could have amended the Orders to read: "subject to the ***unavoidable*** control of an employer." It did not.

Inferring such a qualification, as the district court did, would make the "control" test even less protective than it would have been if the IWC had retained the operative word "required," instead of abandoning that word 70 years ago in favor of "control."

Under the district court's construction, only ***some*** activities "required" by an employer—those that are "unavoidable" in the strictest and least protective sense of that

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[38] While irrelevant to the "control" test, as a practical matter, the Checks cannot truly be "avoided," and therefore are not "voluntary" in any meaningful sense. *See Frlekin*, 870 F.3d at 872-73. This is addressed in Part IV.B.3, below.

word—are compensable. Here, for instance, the Checks ***are*** "required," under common understandings of the term. They occur because Apple "commands" them to occur "by [its] right and authority" as an employer,[39] which Apple enforces through threat of discipline. According to the district court, however, an activity cannot be deemed "required" unless it is also strictly "***unavoidable***"—a qualifier appearing nowhere in the plain-language definition of the word "required," ***or*** the word "control," and appearing nowhere in the Wage Orders, either before or after 1947.

The Wage Orders' plain text cannot reasonably be so construed. Such a construction would disregard even the highest levels of "***control***" exercised by an employer "***during***" workplace activities—nullifying the Wage Orders' central, operative word, "control." Such a construction would "redefin[e] 'hours worked'" by "substitut[ing] other words" in place of the Wage Order's "express language," which would be "improper judicial legislation." *Morillion*, 22 Cal.4th at 585. And it would contravene the Court's "duty" to "liberally construe" the Wage Orders "to promote worker protection." *Mendoza*, 2 Cal.5th at 1091 (citing *Brinker*, 53 Cal.4th at 1027).

Such a holding could, moreover, easily lead to employer abuse. If a "controlled" activity became non-compensable simply because of a pre-activity "choice," then an employer could identify something most employees ***want*** to do—like bring their purses to work—and attach conditions to it: "You may bring your purse to work, but if you do, you'll be required to perform tasks X, Y and Z without pay, and if you refuse, you will be

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[39] *Merriam-Webster's Collegiate Dictionary*, *supra*, "require," *vt.*, senses 1a, 3; *American Heritage Dictionary*, *supra*, "require," *tr.v.*, sense 3.

disciplined." The employer could then claim that even the most closely "directed," "regulated," and "restrained" tasks, performed purely to meet the employer's conditions, were not "controlled" because the employees could have "avoided" them.[40]

The Wage Order's plain language provides no support for this view. The IWC carefully chose to eliminate the word "***required***" from the Wage Orders and replace it with the broader word "***control***." The IWC did not intend to make the new test narrower than the abandoned, prior test. The "best interpretation"—the one "most consistent with" the Court's "practice of liberally construing" the Orders to "favor the protection of employees"[41]—recognizes all of this, and thus serves the IWC's goal, 70 years ago, to ***broaden*** the definition of compensable "hours worked."

In short, the Checks amply meet the "control" test. The answer to the certified question should be "yes."

2. This Court, in *Morillion*, Did Not Contravene the Wage Orders' Plain Text by Holding That an Employee's Pre-Activity "Choice" Eviscerates an Employer's "Control"

Contrary to the Wage Orders' plain text, the district court held that the Checks did ***not*** meet the "control" test—even though Apple conceded that the time was "controlled." The court relied entirely on the fact that the employees could "choose" not to bring a bag

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[40] If the tasks were unrelated to the employee's primary job duties, then the employer might also argue—as Apple successfully did here—that the tasks were not "work" within the meaning of the "suffered or permitted to work" test. Such an employer could get free services from its workforce by this means. That outcome, of course, would fly in the face of the Wage Order. Such hypothetical time is compensable under both tests for "hours worked," including the "suffered or permitted to work" test (*see* Part IV.C, below).

[41] *Augustus*, 2 Cal.5th at 262, 266 (citing *Brinker*, 53 Cal.4th at 1027).

(or iPhone) to work in the first place. This antecedent "choice," the court reasoned, meant that the Checks were not "required," and therefore could not be deemed "controlled"—regardless of the magnitude of the employer restraints imposed "during" the Check time itself. ER 8-18.

The district court's main authority for this holding was *Morillion*. ER 9-10. The Ninth Circuit, however, recognized that there are material factual differences between *Morillion* and this case—including "the level of control" exercised by the employer and the employer's greater "business interest" in controlling the time. *Frlekin*, 870 F.3d at 872-73. Therefore, the Ninth Circuit reasoned, while *Morillion* may provide "support" for the district court's ruling (*id.* at 871), "uncertain[ty]" remains (*id.* at 872).

The Check time is compensable under *Morillion* for two basic reasons.

First, as already discussed above, under a straightforward reading of the Wage Orders' plain text, all "controlled" time is compensable, and the Checks are concededly "controlled." The Wage Order's plain text should be the beginning and the end of the inquiry. As held in *Morillion* itself, for a Court to "redefin[e] 'hours worked'" by "substitut[ing] other words" in place of the Wage Order's "express language" is to engage in "improper judicial legislation." 22 Cal.4th at 585.

Second, as will be explained in detail below, the employees in *Morillion* were not required to perform employer-directed tasks "during" the time in question, nor did *Morillion* involve a "controlled" activity that employees could theoretically "avoid"

through a pre-activity "choice." The Court had no occasion to hold, and did not hold, that such an activity can never meet the "control" test.[42]

Rather, as this Court subsequently confirmed in *Mendiola*, *Morillion* held that the "'level of the employer's control'" during the activity is "'determinative.'" *Mendiola*, 60 Cal.4th at 840 (quoting *Morillion*, 22 Cal.4th at 587).

In short, the district court misapplied *Morillion*.

a. Under *Morillion*, the "Level of Control" Exercised by the Employer Is Determinative

A close reading of *Morillion* exposes the district court's errors in applying it.

(i)

In *Morillion*, the employer's written policy "required" agricultural employees to ride the company bus from specified meeting points to the fields, where the employees harvested produce; the policy prohibited the employees from driving their personal vehicles, on pain of disciplinary action. 22 Cal.4th at 579 & n.1.

That was the only "control" the employer exercised in *Morillion*. It was the only fact on which the employees based their argument that the bus-ride time met the "control" test. *See id.* at 579, 582.[43] The employees simply had no other "control" to

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[42] *Barry v. State Bar of California*, 2 Cal.5th 318, 325 (2017) (lower court "erred in relying on" an opinion of this Court "as authority 'for a point that was not actually raised and resolved' in that case") (quoting *Fairbanks v. Superior Court*, 46 Cal.4th 56, 64 (2009)); *People v. Alvarez*, 27 Cal.4th 1161, 1176 (2002) ("No prior decision has confronted this precise issue, and it is axiomatic that cases are not authority for propositions not considered." (footnote omitted)).

[43] *Morillion* considered Wage Order 14-80, whose definition of "hours worked" is identical to that of Wage Order 7-2001. 22 Cal.4th at 578, 581 (quoting 8 Cal. Code Regs. §11140, ¶2(G)).

assert, because the record showed that they were free to, and regularly did, engage in personal activities, such as reading and sleeping, during the bus rides. *Id.* at 586.

Based on that single "control," this Court agreed with the employees that the bus-ride time was compensable. *Id.* at 582-87.

In so holding, the Court emphasized that the employees were "subject[ed] ... to verbal warnings and lost wages" if they refused to comply with their employer's policy. *Id.* at 587. The policy, compliance with which was "compelled" through the threat of discipline, prevented the employees from "'us[ing]'" the bus-ride "'time effectively for [their] own purposes,'" and "foreclosed" "numerous activities in which they might otherwise [have] engage[d]." *Id.* at 586 (quoting *Bono*, 32 Cal.App.4th at 975). Hence, the time was "controlled," and thus compensable. *Id.* at 586-87.

Under this standard, the Check time is also compensable. As explained above, the Checks are compelled through threat of discipline. And, while awaiting and undergoing Checks, employees are confined to their employer's premises, unable to use the time effectively for their own purposes, and foreclosed from activities in which they otherwise would have engaged. The Checks are "controlled" under *Morillion.*

In fact, the Checks involve an even greater level of "control" than in *Morillion.* While the *Morillion* employees were free to read and sleep, Apple's employees have to line up and participate in an inspection in which their "actions and movements" are "compelled" by the immediate directions of a manager. *Frlekin*, 870 F.3d at 873. This fact distinguishes this case from *Morillion*, as well as other commute-time cases.

In *Morillion*, the Court repeatedly emphasized that the bus rides were "requir[ed]," "compulsory" and "compel[led]." 22 Cal.4th at 587-88. It made sense to do so, given the facts of *Morillion*. Contrary to the district court's conclusion below, however, the use of those words does not amount to a holding, as a matter of law for all future cases, that conduct can never be "controlled" unless it is also both "required" and "unavoidable," in the narrowest sense of those words.

Morillion did not present those facts. In *Morillion*, the ***only*** "control" was the employer's decision to impose compulsory bus rides, enforced through discipline, that the employees could not "choose" to avoid. Of course that was "dispositive." *Id.* at 589 n.5. Given the facts of *Morillion*, the employees had no other "controls" to assert, and no other arguments to make. That is not this case.

The *Morillion* Court had no occasion to consider the full impact of IWC's decision, in 1947, to abandon the word "require" and replace it with "control." While the Court mentioned that amendment in holding that the IWC intended to depart from federal law (*id.* at 591), the Court had no other reason to consider the wording change, because the bus rides were undisputedly "required." This case presents a reason to closely consider the wording change, which shows that the Checks are compensable, as discussed exhaustively above.

(ii)

The district court took several parts of *Morillion* out of their factual context.

One of those had to do with the employer's claim that ordinary commute time would become compensable if any "required" activity meets the "control" test, because

"employees would not commute to work unless the employer required their presence at the work site." *Id.* at 586.

The Court disagreed, focusing on the "level of control" exercised by the employer during an ordinary commute—which was low to non-existent. *Id.* at 587. The "level of control" prevailed over "the mere fact" that the commute time was on some level "required." *Id.* An ordinary commuter might be disciplined for arriving late, but not for "decid[ing] when to leave, which route to take to work, [or] which mode of transportation to use," nor does the employer "regulate" or "direct"[44] any of the commuter's movements during the commute. *See id.* at 586-87. In other words, ordinary commuters are not "controlled" by their employer during their travel time. *Id.*

The Ninth Circuit recognized this important distinction: "In the context of travel to a work site, an employer's interest is typically limited to the employee's timely arrival. It is irrelevant to an employer how an employee arrives, so long as the employee arrives on time. So it makes little sense to require an employer to pay for travel time unless, as discussed at length in *Morillion*, the employer ***requires*** the employee to use the employer-provided transportation." *Frlekin*, 870 F.3d at 872 (emphasis in original).

Non-travel cases, however, are quite different. This case involves "***on-site*** search[es] during which the employee must remain on the employer's premises" and "during which an employee's actions and movements are compelled." *Id.* at 872, 873 (emphasis in original). In such cases:

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[44] *American Heritage Dictionary*, *supra*, "control," *tr.v.*, senses 1, 2; *Merriam-Webster's Collegiate Dictionary*, *supra*, "control," *vb.*, sense 2a; *Bono*, 32 Cal.App.4th at 975 (citing OED definition of "control").

> both the level of control and the employer's business interest are greater. Once an employee has crossed the threshold of a work site where valuable goods are stored, an employer's significant interest in preventing theft arises. The employer's exercise of control over the bag-toting employee—albeit at the employee's option of bringing a bag—advances the employer's interest in loss prevention.

Id. at 872-73.

Therefore, "[a]lthough the search is voluntary in that the employee could have avoided it by leaving his or her belongings at home, the employer nevertheless exercises ***control*** over the employee who does bring a bag or package to work." *Id.* at 873 (emphasis added).

The Ninth Circuit's analysis is consistent with this Court's holding, first stated in *Morillion* and later confirmed in *Mendiola*, that "'[t]he level of the employer's ***control*** over its employees ... is determinative.'" *Mendiola*, 60 Cal.4th at 840 (quoting *Morillion*, 22 Cal.4th at 587) (ellipsis in original) (emphasis added).

(iii)

The employer in *Morillion* also contended that if the bus-ride time were compensable, employers would stop "providing free transportation as a service to their employees." 22 Cal.4th at 594. This Court disagreed, explaining that "employers may provide optional free transportation to employees without having to pay them for their travel time, so long as employers do not require employees to use this transportation." *Id.*

In so stating, the Court once again focused on the level of "control"—or lack thereof—exercised by the employer during the travel time. The Court's remarks on this point assume truly "optional transportation," free of any form of employer "control."

The Court was prescient in predicting that *Morillion* would not discourage employers from offering truly "optional" company buses. An example of one came up six years later, in *Overton v. Walt Disney Co.*, 136 Cal.App.4th 263 (2006). Unfortunately, the district court misconstrued *Overton*. ER 9-10, 18.

In *Overton*, the employer provided a free shuttle for employees assigned to a distant parking lot. The employees, however, were not "required" to drive to work in the first place. *Id.* at 267, 272-73. And if they did, they were not "required" to park in the distant lot (*id.* at 266 n.6); and regardless of where they parked, they were not "required" to ride the shuttle (*id.* at 267-68, 271). They could take an "early" shuttle or a later one, so long as they arrived to work on time. *See id.* at 268, 273. They were not "required" to engage in any employer-directed tasks during the shuttle rides, and no discipline of any kind resulted from the employees' decision to use or not use the shuttle. *See id.* at 265-67, 271-73, *passim*. Applying *Morillion*, the Court of Appeal held that employees who rode the shuttle were not "controlled" during the rides. *Id.* at 269-74.

The district court failed to perceive that the "optional" shuttle rides in *Overton* differ markedly from the on-site security searches in this case. On pain of discipline, the Checks are "required" for all employees who "choose" to bring a bag to work. During the Checks, a manager or a security officer physically supervises and directs the employees' "actions and movements." The employees may not leave the store premises until the Checks are completed, and the employees can be fired if they refuse to participate. *Frlekin*, 870 F.3d at 870, 872-73.

Under *Morillion*, the Checks are "controlled," not "optional." In fact, as the Ninth Circuit recognized, the "level of control" exercised by the employer during the Checks is equal to if not "greater" than the "level of control" in *Morillion*. *See* 870 F.3d at 873.

A hypothetical illustrates the point. Suppose the *Morillion* employer had provided an "optional" bus, but "required" those who took the bus—on pain of discipline—to manually clean farming implements during the ride, under the physical supervision of a foreman, who directed the employees' "actions and movements." That would be a very high "level of control"—greater than a "required" bus ride during which employees can read or sleep, and far greater than an ordinary, albeit technically "required," commute.

In such a case, the employer's mandatory policy—enforced through threat of discipline—would prevent the employees from using the bus-ride "'time effectively for [their] own purposes,'" and would "foreclose" "numerous activities in which they might otherwise [have] engage[d]." *Morillion*, 22 Cal.4th at 586 (quoting *Bono*, 32 Cal.App.4th at 975). The time would therefore meet the "control" test, notwithstanding the employee's pre-activity "choice."

The same is true of the Checks in this case, as the Ninth Circuit perceived. *Frlekin*, 870 F.3d at 872-83.

(iv)

Finally, the district court relied heavily on *Morillion*'s "*Vega* footnote." ER 9-10. In that footnote, the Court considered the facts of *Vega v. Gasper*, 36 F.3d 417 (5th Cir.

1994),[45] in which the employees "were free to choose—rather than required—to ride their employer's buses to and from work." *Morillion*, 22 Cal.4th at 589 n.5 (citing *Vega*, 36 F.3d at 425). The Court called this a "dispositive, distinguishing fact," making the outcome of *Morillion* "consistent with" *Vega*. *Id.*

This case, however, differs from both *Morillion* and *Vega*. In neither case were the employees required, on pain of discipline, to engage in employer-directed tasks during the travel time. Here, the employees were required to engage in "compelled" "actions and movements" during the Check time. *Frlekin*, 870 F.3d at 873. That is a different—and higher—"level of control" than existed in either *Morillion* or *Vega*. It is sufficient to meet the "control" test—antecedent "choice" notwithstanding.

Recently, the Fifth Circuit explained that "[t]he voluntary use of transportation in [*Vega*] was not dispositive in concluding the travel time was noncompensable." *Griffin v. S&B Engineers & Constructors, Inc.*, 507 Fed.Appx. 377, 382-83 (5th Cir. 2013). Rather, it was dispositive (under less protective federal law) that the employees performed no employer-directed tasks during the rides, and were not "restrict[ed]" from "engaging in personal activities such as sleeping and reading." *Id.* at 383.

Like *Vega* itself, this Court's *Vega* footnote does not state that the "voluntary" use of transportation is dispositive in every case, including cases with materially different facts, in which the employees ***do*** engage in employer-directed tasks and for that reason ***are*** restricted from engaging in personal activities. Rather, as explained in the body of

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[45] *Abrogated on other grounds as stated in Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 227-28 (5th Cir. 2017).

Morillion, the "'level of control'" is "'determinative.'" *Mendiola*, 60 Cal.4th at 840 (quoting *Morillion*, 22 Cal.4th at 587).

b. Security Searches Are Materially Distinguishable from the Travel Time Considered in *Morillion*

The Ninth Circuit recognized critical differences between security search cases, like this one, and travel-time cases, like *Morillion* and *Overton*. 870 F.3d at 872-73.

First, retail employers have a "significant interest in preventing theft," which arises as soon as "an employee crosse[s] the threshold of a work site where valuable goods are stored." *Id.* at 873. This interest did not exist in either *Morillion* or *Overton*.

In this case, Apple chooses to operate stores selling "valuable goods" small enough to hide in a bag or coat.[46] As a result, Apple has a "significant interest in preventing theft." *Id.* Nevertheless, Apple fails to take security measures sufficient to protect the goods from being stolen. The unpaid Checks are Apple's way of shifting part of its cost of doing business—namely, the cost of security—onto the backs of its retail workforce. This is not only unfair to the employees, but also contrary to California law, which is "designed to prevent employers from passing their operating expenses on to their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 562 (2007) (citing Lab. Code §2802).

Second, as the Ninth Circuit recognized, it is usually "irrelevant to the employer ***how*** an employee arrives [to work], so long as the employee arrives on time." *Frlekin*,

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[46] ER 208 (iPod nano, measuring from 1.5 by 1.5 in. to 3.01 by 1.56 in.); ER 219 (iPod touch, 4.86 x 2.31 in.); *see* https://support.apple.com/kb/sp656?locale=en_US (iPod nano specs); http://www.apple.com/ipod-touch/specs/ (last visited Dec. 15, 2017).

870 F.3d at 872 (emphasis added). Employers thus have a "greater" interest in imposing theft-prevention measures than in regulating employee travel time. *Id.* at 873. To "advance" this "greater" interest, employers impose a "greater" "level of control" over "on-site security searches" than they do over most travel time. *Id.*[47]

In this case, the security searches involved "on-site time during which an employee's actions and movements are compelled" and "during which the employee must remain on the employer's premises," on pain of discipline. *Id.* at 870, 872, 873. As the Ninth Circuit comprehended, such close physical "direction," "regulation," and "restraint"[48] vastly exceeds any imposed by the employers during the bus rides in either *Overton* or *Morillion*.

This also distinguishes the Checks from ordinary commute time. Every employer does, on some level, "require" employees to spend time commuting. But ordinary commuters are not "required" to take a certain route to work or leave at a particular time. *Morillion*, 22 Cal.4th at 586-87. In this case, Apple certainly "requires" the Checks, or employees would not participate in them. The difference between the Check time and ordinary commute time is that Apple ***also*** "requires" the Checks to be conducted in a

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47 *See, e.g., Moore v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 311 F.R.D. 590, 596 (C.D. Cal. 2015) ("'All employees are required to have package/purse/pocket inspections conducted by management anytime they exit the store.'" "It is the responsibility of the employee to notify a manager that he or she is in need of an exit inspection." "'All ... bags will be inspected, and employees are required to show the contents of their pockets.'").

48 *American Heritage Dictionary*, *supra*, "control," *tr.v.*, senses 1, 3; *Merriam-Webster's Collegiate Dictionary*, *supra*, "control," *vb.*, sense 2a; *Bono*, 32 Cal.App.4th at 975 (citing OED definition of "control").

certain physical manner, under a supervisor's immediate supervision, while employees are confined to store premises, and subject to discipline if they refuse to submit. ***These*** are the markers of "control" that make the Check time compensable under *Morillion*.

3. While the Checks Need Not Be Either "Required" or "Unavoidable" In Order to Meet the "Control" Test, They Are, in Fact, Both

The district court construed the Wage Orders in a "strict, formal sense" (*Frlekin*, 870 F.3d at 873) rather than a liberal, employee-protective one, as this Court's precedents dictate.[49] It concluded that to satisfy the "control" test, an activity must be not only "controlled," but also "required," and "unavoidably" so. If this Court were to agree with that analysis—which it should not—the Checks are not only "controlled," but also "required" and, practically speaking, "unavoidable." Hence, they would meet even a highly conservative, employer-protective interpretation of the "control" test.

As discussed above, the Checks are "compelled" "by [the] "right and authority" of an employer, on pain of discipline, for all employees who present with a bag, purse or iPhone.[50] Hence, the Checks meet the plain-language definition of the word "require."

The Checks are also, practically speaking, "unavoidable." As the Ninth Circuit recognized, security searches that employees can "avoid" only by leaving their everyday personal belongings "at home" are only "nominally voluntary." *See id.* at 873. That is because, "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

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49 *E.g.*, *Kilby*, 63 Cal.4th at 11 (citing *Brinker*, 53 Cal.4th at 1026-27).

50 *See supra* footnote 39.

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." *Id.*

Notably, the policy applies "day in and day out" not only to "bags, purses, and satchels," but also to Apple-branded technology devices, including the iPhone.[51] These devices "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 134 S.Ct. 2473, 2484 (2014).[52] As with their purses and bags, therefore, employees have "little true choice" to "avoid" being Checked by leaving their iPhones at home when they go to work.

There is a rich irony in Apple's argument that anyone, let alone its own employees, should "choose" to leave their iPhones at home—as if an iPhone were a needless luxury, instead of an essential communication and payment device, fully integrated into day-to-day modern life due to Apple's persistent commercial promotion efforts. In Apple CEO Tim Cook's words, "You wouldn't think about leaving home

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[51] ER 115, 117-18, 241-42, 386:11-387:2, 392, 394, 396, 398, 400, 402, 404, 406. Petitioners have asked the Court to rephrase the certified question to expressly encompass these devices. *See* Letter filed Sept. 1, 2017 at 9-10; Letter filed Sept. 29, 2017.

[52] *See also City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (noting "ubiquity" of cell phones in modern society; "Cell phone ... communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876-77 (9th Cir. 2014) (millions of "households now rely exclusively on wireless telephone service"); *People v. Valdivia*, 16 Cal.App.5th 1130, 1143 (2017) ("[T]there is an element of pervasiveness that characterizes cell phones .... Now it is the person who is not carrying a cell phone ... who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time.'" (quoting *Riley*, 134 S.Ct. at 2490)).

without it."[53] It is equally ironic that Apple would encourage its own employees to buy a Samsung Galaxy Note instead of an iPhone. But that is what Apple's policy does. Employees who "choose" to carry a non-Apple-branded device are not Checked.[54]

As a "practical" matter, employees' so-called "choice" to leave their personal belongings at home—including their purses, bags, satchels, and iPhones—is an illusory one. *See Frlekin*, 870 F.3d at 873. These items are ubiquitous in modern society, and leaving them at home would be a significant personal inconvenience.

Moreover, as mentioned above, the employees in this case would not face this so-called "choice" but for Apple's chosen business model of selling small, "valuable goods," and the nature of Apple's retail sales jobs, which require access to those goods.

Apple told the Ninth Circuit that it would rather "prohibit" its own employees from bringing their iPhones, purses and bags to work than pay for the Check time.[55] However, no record evidence suggests that Apple ever actually considered such an extreme step. Such a rule would be highly unpopular, would impair Apple's ability to retain competent staff, and would not solve the problem because Apple sells "valuable goods" small enough to hide in coat pockets. If someone brought a steamer trunk to

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53 https://9to5mac.com/2017/05/03/tim-cook-cnbc-interview/ (video at 5:58) (viewed 12/18/17).

54 ER 118, 241-42.

55 *E.g.*, Defendant-Appellee's Brief (9th Cir. Dkt. 28-1) ("DAB") at 29, 52.

work—as in the Ninth Circuit's hypothetical (870 F.3d at 873)—Apple could hold it in the manager's office instead of searching it.[56] No compensable time would then exist.

The Wage Orders' language is "broad" for a reason. Employer-controlled workplace activities, like the Checks, ***should be*** compensated—regardless of whether they can be "avoided" by employee "choice." Any other rule would allow employers to require employees to perform extra tasks and assignments without pay, simply by imposing "optional" conditions that employees can "avoid." Here, Apple ***disciplines*** employees for not complying with its Check policy. If a task is so integral to the job, so important, and so controlled, that an employer can fire an employee for not performing it, the time should be compensable. That is the only rule that avoids employer abuse.

C. The Check Time Is Compensable Under the "Suffered or Permitted to Work" Test

After holding that the security Check time was not compensable under the "control" test, the district court turned to the separate and independent "suffered or permitted to work" test. ER 19-12. The court held that this test was not satisfied, either, because the Checks were not "work." *Id.* The court reached this conclusion even though the Checks involve physical exertion; are concededly controlled by Apple; and are done for Apple's benefit to deter and prevent theft. *See Frlekin*, 870 F.3d at 872-73.

The district court erred. The Checks easily meet a plain-language definition of "work." Therefore, regardless of whether "required," the Check time is compensable under this independent, alternative definition of "hours worked."

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[56] Some Apple locations already do this for large personal items. ER 241; *see* ER 117 (items can be left in manager's office).

1. The Check Time Meets This Test Because It Involves Physical or Mental Effort to Accomplish Something and Is "Suffered or Permitted" by an Employer

(a)

Under Wage Order 7, compensable "hours worked" includes "all the time the employee is ***suffered or permitted to work***, whether or not required to do so." 8 Cal. Code Regs. §11070, ¶2(G) (emphasis added). The Wage Order does not define the term "work." *See generally id.* Hence, the Court applies the word's "most common" and "ordinary meaning." *Augustus*, 2 Cal.5th at 265; *Murphy*, 40 Cal.4th at 1103.

In common parlance, to "work" means "[t]o exert effort; to perform, either physically or mentally." *Black's Law Dictionary*, *supra*, "work," *vb.*, sense 1. It also means "[t]o exert oneself physically or mentally in order to do, make, or accomplish something." *American Heritage Dictionary*, *supra*, "work," *v.—intr.*, sense 1.[57]

The noun form of the word means an "activity in which one exerts strength or faculties to do or perform something." *Merriam-Webster's Collegiate Dictionary*, *supra*, "work," *n.*, sense 1.[58] *Black's* defines it as "[p]hysical and mental exertion to attain an end, ***especially*** as controlled by and for the benefit of an employer; labor." *Black's Law Dictionary*, *supra*, "work," *n.*, sense 1 (emphasis added).

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[57] *Accord Merriam-Webster's Collegiate Dictionary*, *supra*, "work," *vi.*, sense 1a ("to exert oneself physically or mentally esp. in sustained effort for a purpose or under compulsion or necessity").

[58] *Accord American Heritage Dictionary*, *supra*, "work," *n.*, sense 1 ("Physical or mental effort or activity directed toward the production or accomplishment of something.").

The Checks meet these plain-language definitions of "work." Contrary to the district court's reasoning, the Checks were not "merely passively endured." ER 21:4. They involved "exertion" and "effort," including tracking down a manager or supervisor, lining up, opening and holding out bags, opening internal pockets, moving the contents around, pulling out and displaying iPhones and tech cards, and physically complying with other employer directions.[59] The Checks accomplished something, namely, Apple's stated goal of theft prevention and deterrence, by confirming that Apple's unsecured "valuable goods" are not removed from the premises. *Frlekin*, 870 F.3d at 873.

Black's definition of the noun form of "work" suggests that activities "controlled by and for the benefit of an employer" are "especially" worthy of the name. Here, the on-site Checks are concededly "controlled" by an employer, Apple, and they "benefit" Apple by preventing and deterring theft. Even under this narrower, less-protective language from *Black's*, the Checks are "work."

(b)

While security search time unquestionably meets the narrowest part of the *Black's* definition, "control" should not be made an element of the "suffered or permitted to work" test. In the Wage Orders, "controlled" time and "suffered or permitted" "work" time are two separately-stated, "independent" tests for compensability. *Mendiola*, 60 Cal.4th at 839; *Morillion*, 22 Cal.4th at 582. The elements of one should not be imported

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[59] ER cites at pp. 8-10, *supra*; *see Frlekin*, 870 F.3d at 873 ("on-site" Checks involve "compelled" "actions and movements").

into the other. *Id.* Also, none of the plain-language definitions of "work," quoted above, states that employer "control" is an essential component—including the one in *Black's*.

Certainly, "controlled" time, such as the Checks in this case, can be "work," but time that is neither "controlled" nor "required" can also be "work," under the Wage Orders' plain text. For example, unauthorized overtime is plainly "work," defined as "physical or mental exertion to accomplish something," and is compensable if the employer knew (or reasonably should have known) about it and "suffered or permitted" it to occur. *Morillion*, 22 Cal.4th at 584-85. As *Morillion* explained, the "suffered or permitted" portion of the test "encompasses a meaning distinct from merely 'working.'" *Id.* at 584. That part of the test is what ties the compensable activity to the employment relationship—not whether the employer "controlled" (or "required") it. *See id.*

In short, "control" is not an element of the "suffered or permitted to work" test.

Here, there is no dispute that the employer, Apple, "suffered or permitted" the Checks to occur. Apple knew the Checks were occurring in its stores, had the "power" to "prevent" them, yet failed to do so. *Martinez*, 49 Cal.4th at 69. As discussed above, the Checks are "work" because they involved exertion or effort to accomplish an end. Hence, the Check time is compensable under the "suffered or permitted to work" test.

(c)

The Ninth Circuit recognized that the Checks "advance [Apple's] interest in loss prevention," which plainly benefits Apple. *Frlekin*, 870 F.3d at 873. The district court flatly refused to consider those benefits, citing this Court's *Martinez v. Combs* opinion. ER 19:14-22, 21:9-10. However, the district court misread *Martinez*.

In *Martinez*, the Court was not considering the definition of the word "work." There was no dispute that by picking strawberries, the *Martinez* plaintiffs performed "work." The dispute was over who "employed" them. *See* 49 Cal.4th at 48-51.

The Wage Orders define "employ" as "to engage, suffer, or permit to work." *Id.* at 64 (quoting 8 Cal. Code Regs. §11140, ¶2(C)).[60] That definition is wholly separate from the definition of "hours worked," which appears in a different subsection of the Orders and has a materially different regulatory history. *Id.* at 57-59, 69-71 (discussing enactment history of definition of "employ").

After their primary employer went bankrupt, the *Martinez* employees sought wages from the "downstream" produce merchants who bought and resold the strawberries they had picked. *Id.* The employees argued that the merchants "employed" them because they "knew plaintiffs were working" and "because plaintiffs' work ***benefited*** [them]." *Id.* at 69, 70 (emphasis added). These factors, the employees argued, satisfied the "suffer or permit" part of the definition of "***employ***." *See id.*

This Court disagreed. *Id.* at 69-70. In order to "suffer or permit" work within the meaning of the definition of "employ," the merchants would need to have the "power" to "prevent" the work from occurring. *Id.* Even if the merchants knew about and "benefited" from the plaintiffs' work, "neither" of them "had the power to prevent" the plaintiffs "from working." *Id.* at 70. Hence, the plaintiffs' contention that the merchants "employed" them failed. *Id.* at 69-71. Absent the requisite "power" to "prevent" the work, "the concept of a benefit is neither a necessary nor a sufficient condition for

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60 *Accord* 8 Cal. Code. Regs. §11070, ¶2(D).

liability under the 'suffer or permit' standard" for determining whether a defendant "employed" someone. *Id.* at 69.

The district court misread this part of *Martinez*. *See* ER 19, 21. *Martinez* does not say that "benefit" to a conceded "employer" is irrelevant to whether an employee's activity is "***work***." Rather, *Martinez* says that "benefit" is not "necessary" or "sufficient" to determine whether a defendant "***employed***" someone. *See* 49 Cal.4th at 69-71.

In this case, the Checks obviously benefited Apple by preventing and deterring theft. *Frlekin*, 870 F.3d at 873. The district court dismissed this as irrelevant. But employers ***should*** pay for "work" that they "suffer and permit" in order to protect their "valuable goods" from theft. Here, the Checks are "work" that Apple "suffered or permitted" because doing so "advance[d]" Apple's "interest in loss prevention." *Id.*

The Checks meet all stated parts of the Wage Orders' "suffered or permitted to work" test—and they also benefit Apple. The Check time is compensable.

2. To Qualify as "Work," an Activity Need Not Be Part of an Employee's Regular Job Duties

Finally, the district court accepted Apple's argument that "work" must be a "job duty" related to the "purpose" for which the employees were hired.[61] The Checks were not "work," the court held, because they "had no relationship to plaintiffs' job responsibilities." Instead, they were "peripheral activities relating to Apple's theft policies." ER 20:8-9.

This, too, was error.

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61 DAB 50, 56; *see* ER 36:9-13 ("duty or a task" they were "hired to perform").

Nothing in the Wage Orders' plain text supports such a narrow, employer-centric reading of the word "work." Of course, while unauthorized overtime, and other activities related to an employees' primary job responsibilities, are certainly "work," those are not the only types of activity that can meet the definition. Neither the text of the Orders, nor the ordinary definition of "work" (discussed above), includes such a qualification.

To the contrary, under such a reading, California law would be no more protective than the federal Portal-to-Portal Act. The district court even cited that Act as "useful guidance," explaining that under federal law, "work" is not compensable unless the activity has an "integral or indispensable relationship to the employees' job responsibilities." ER 20:19-28 (citing *Integrity Staffing*, 135 S.Ct. at 518). Under the less-protective federal standard, activities that are "preliminary and postliminal [sic]" to an employee's regular job duties are generally not compensable. *Id.*

In 1947, however, the IWC amended the Wage Orders to "broaden" the definition of "hours worked" and ensure that California law would ***not*** be coextensive with the Portal-to-Portal Act. *Mendiola*, 60 Cal.4th at 843; *Martinez*, 49 Cal.4th at 59-60; *Morillion*, 22 Cal.4th at 592. The 1947 amendment "belongs to a set of revisions intended to distinguish state wage law from its federal analogue" and "provide employees with greater protection than federal law affords." *Martinez*, 49 Cal.4th at 59-60.

As a result, the Wage Orders "differ substantially" from the federal standard governing compensable time. *Morillion*, 22 Cal.4th at 594.

When the IWC intends to adopt a federal standard, "it has explicitly so stated." *Id.* at 590.[62] For example, for certain employees covered by Wage Orders 4 and 5, the definition of "hours worked" is expressly tied to the federal standard:

> Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, ***as interpreted in accordance with the provisions of the Fair Labor Standards Act.***

8 Cal. Code Regs. §§11040, ¶2(K) (emphasis added); *id.* §11050, ¶2(K) (same).

Similarly, for employees "required to reside on the employment premises," Wage Order 5 expressly ties the definition of "hours worked" to the employee's job duties:

> all the time the employee is suffered or permitted to work, whether or not required to do, and in the case of an employee who is required to reside on the employment premises, that ***time spent carrying out assigned duties*** shall be counted as hours worked.

8 Cal. Code Regs. §11050, ¶2(H) (emph. added), *cited in Mendiola*, 60 Cal.4th at 843.

Unlike Wage Orders 4 and 5, Wage Order 7 contains no such express language narrowing the definition of compensable "work." Order 7 neither explicitly adopts the federal standard, nor limits "hours worked" to "time spent carrying out assigned duties." Instead, under Order 7, "***all*** the time the employee is suffered or permitted to work" is compensable. 8 Cal. Code Regs. §11070, ¶2(G) (emphasis added). The Order's plain language does not exclude "preliminary," "postliminary," or "peripheral" activities.

The district court erred by adopting a standard, tantamount to the federal one, "which expressly eliminates substantial protections to employees," and doing so "by

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[62] *Accord Mendiola*, 60 Cal.4th at 843 ("the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so").

implication"—rather than based on "convincing evidence" of the IWC's intent. *Morillion*, 22 Cal.4th at 592. There is no such "convincing evidence" in Order 7. In fact, the "absence" of language "analogous" to that used in Orders 4 and 5 is "compelling evidence" of the opposite conclusion—that "the IWC did ***not*** intend" Order 7 to be construed as those Orders would be. *Augustus*, 2 Cal.5th at 272 (emphasis added).

3. While Not an Element of This Test, Theft Prevention *Does* Relate to a Retail Sales Employee's Regular Job Duties

Finally, the district court failed to perceive that theft prevention ***is*** part of a retail sales employee's regular job duties. These jobs necessarily require employees to "cross[] the threshold of a work site where valuable goods are stored." *Frlekin*, 870 F.3d at 873. Such employees must access and handle their employer's "valuable goods" in order to make sales and assist customers. Apple's own policies assign "responsibility" to these employees to take action if they "become aware" of a "theft issue." ER 201; *see* ER 200. Not just managers, but the "entire staff" bears "accountability" for theft. ER 205.

Apple's chosen business model is to sell devices small enough to conceal in bags—then fail to adequately secure the devices from theft. Absent these characteristics of the employer's business and the nature of the employees' jobs, the Checks would be unnecessary. Therefore, the Checks ***do***, in fact, relate to the duties of the jobs for which the employees were hired—even though this is not an element of compensability under the Wage Order's plain text and the ordinary meaning of the word "work."

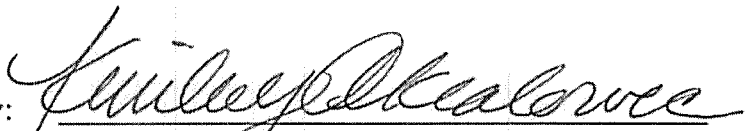
For all of these reasons, the Checks are compensable "hours worked" under the "suffered or permitted to work" test.

V. CONCLUSION

For the reasons discussed above, the Court is respectfully asked to answer the certified question "yes."

Dated: December 19, 2017

Respectfully submitted,

By: 

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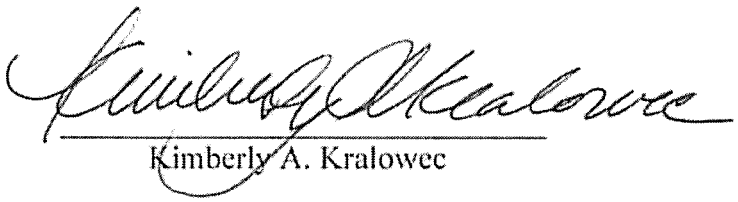

Kimberly A. Kralowec

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose members are members of the State Bar of California and at least one of whose members is a member of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. **OPENING BRIEF ON THE MERITS;**
2. **MOTION FOR JUUDICIAL NOTICE; MEMORANDUM IN SUPPORT; DECLARATION IN SUPPORT; PROPOSED ORDER; and**
3. **PROOF OF SERVICE.**

- **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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Via email

Executed this 19th day of December, 2017 in San Francisco, California.

Gary M. Gray