No. S234969

Supreme Court

OF THE

State of California

DOUGLAS TROESTER,

Plaintiff, Appellant and Petitioner,

v.

STARBUCKS CORPORATION,

Defendant and Respondent.

On a Certified Question from The United States
Court of Appeals for the Ninth Circuit
Case No. 14-55530

Application for Leave to File and Brief of Amici Curiae Consumer Attorneys of California and California Employment Lawyers Association in Support of Plaintiff and Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Secondary Authorities

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rule of Court 8.520(f), Consumer Attorneys of California ("CAOC") and California Employment Lawyers Association ("CELA") respectfully request leave to file the attached amici curiae brief in support of plaintiff, appellant and petitioner Douglas Troester.

CELA is a statewide organization of over 1,100 California attorneys who devote the major portion of their practices to representing employees in a wide range of employment cases, including wage and hour class action lawsuits similar to Troester. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting employee rights in wage and hour cases.

CELA has appeared as *amicus curiae* in many cases before this Court, including *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; and *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 3,000 associated consumer attorneys practicing in California. Its members predominantly represent individuals subjected to a variety of illegal business practices, including wage and hour violations. CAOC's members have taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the civil justice system and the Legislature. CAOC has participated as amicus curiae in precedent-setting decisions involving employee rights under California law, including both *Duran* and *Brinker*.

CAOC and CELA's members, and their clients, have an abiding interest in the correct development and interpretation of California's worker-protection laws,

including the requirement that employers pay for "any" and "all" time worked. The proposed joint amici curiae brief of CELA and CAOC will assist the Court in three ways. First, it will discuss authorities not cited in the briefing to date, all of which recognize that express statutory provisions, such as those in the Labor Code and Wage Orders, take precedence over the "maxim of jurisprudence" regarding "trifles," on which Starbucks and its amici rely. Second, the proposed brief will provide a detailed discussion of the adoption history of California's Wage Order and Labor Code provisions requiring employers to record and pay for "***any***" and "***all***" employee time worked. Finally, the proposed brief will add new analysis of California authorities demonstrating that a "de minimis" rule does not comport with the employee-protective purpose of the California Labor Code and Wage Orders.

Pursuant to Rule of Court 8.520(f)(4), CAOC and CELA affirm that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amici curiae, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CAOC and CELA respectfully submit that their proposed brief may be of assistance to the Court in deciding the matter, and therefore request the Court's leave to file it.

Dated: May 30, 2017 Respectfully submitted,

By: _____

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I. INTRODUCTION

Under California law, employers are required to track, record, and pay for "***any***" and "***all***" "hours worked" by their employees.[1] This includes "***all the time***" during which the employees are "suffered or permitted" to work or are under employer "control."[2] Federal law has a less protective definition of "hours worked," as well as a weaker timekeeping requirement, under which time considered "de minimis" need not be recorded or paid.[3] But California has never adopted these weaker standards for recording time or compensating employees, and California's Labor Code and Wage Orders contain no analog to the federal "de minimis" defense. Such a defense simply does not exist under California's more protective provisions.

Starbucks and its supporting amici cite a "maxim of jurisprudence" from the Civil Code concerning "trifles."[4] According to Starbucks and its amici, this "maxim" supports a judicial modification of the "***any***" and "***all***" requirement. However, California's "maxims of jurisprudence" cannot be applied to impair express statutory rights. Any reliance on the "trifles" maxim is therefore misplaced.

Adopting a "de minimis" defense in California would contravene not only the text of the Labor Code and Wage Orders, but also their adoption history, which dates back more than a century. The adoption history demonstrates that neither the IWC nor the Legislature ever contemplated that the requirement to track, record and pay for "***any***" and "***all***" time worked would be relaxed through a "de minimis"

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1 Lab. Code §§510(a), 1174(d); Industrial Welfare Commission ("IWC") Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (emphasis added). Undesignated statutory references are to the Labor Code.

2 Wage Order 5-2001, *supra*, ¶2(K) (emphasis added). This brief focuses on Wage Order 5-2001, and its predecessors, because that is the Order applicable to the restaurant employees in this case. The other industry Orders are in accord.

3 29 C.F.R. §§778.223, 785.47; *see* 29 U.S.C. §203(o) (Portal-to-Portal Act).

4 Civ. Code §3533.

defense. To the contrary, over the past seventy years, both the IWC and the Legislature have had numerous opportunities to relax the requirement by conforming it to federal law, yet they consistently refused to do so.

In short, when the IWC and Legislature decreed that "***any***" and "***all***" time worked must be tracked, recorded and paid, they meant what they said.

Finally, even if the Labor Code and Wage Orders leave room for judicial adoption of a "de minimis" defense (they do not), such a defense would contravene other essential principles of California employee-protection law. California courts have consistently declined to elevate employer convenience, burden or "practicality"—the rationales behind the federal "de minimis" defense—over employees' statutory rights, including the right to full payment for time worked. Our courts have also broadly interpreted California's "control" test as capturing small increments of time, which the federal "de minimis" defense would disregard. All of this further confirms that a "de minimis" defense is incompatible with California's more expansive worker-protection laws.

As will be seen, California has long provided employees with stronger protections than federal law, and the requirements to track, record and pay for "***any***" and "***all***" time worked are no exception. The Court should not weaken these protections by adopting the federal "de minimis" defense. The answer to the Ninth Circuit's certified question should be an unequivocal ***no***.

II. DISCUSSION

A. The "Maxims of Jurisprudence" Cannot Vitiate the Protective Minimum Standards of the Labor Code and Wage Orders

One of Starbucks' primary contentions is that Civil Code section 3533, concerning "trifles," takes precedence over every statutory enactment in the Labor Code and Wage Orders. *E.g.*, Respondent's Answer Brief on the Merits ("ABM")

at 17-19.[5] According to Starbucks' view, section 3533 effectively modifies each such provision, regardless of the provision's plain language or the employee-protection purposes undergirding the provision. *See id.*

That is not how the maxims of jurisprudence operate under California law.

As this Court held long ago, the maxims of jurisprudence cannot vitiate other express statutory rights. *See, e.g.*, *People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 476 (1950) (a statute's "express terms may not be nullified or defeated by a maxim" (citing *Lass v. Eliassen*, 94 Cal.App. 175, 179 (1928); *Moore Grocery Co. v. Los Angeles Nut House*, 90 Cal.App. 792, 795 (1928)); *Roe v. Superior Court*, 243 Cal.App.4th 138, 148 (2015) (the maxims "are not immutable principles that dictate how a statute is to be interpreted"); *Davcon, Inc. v. Roberts & Morgan*, 110 Cal.App.4th 1355, 1365 (2003) (refusing to apply a maxim in a manner inconsistent with "a statutory right"); *Lass*, 94 Cal.App. at 179 ("no maxim … can be applied to defeat the express terms of a statute").

As the introductory "maxim" acknowledges, the maxims "do not qualify" other statutory enactments, but serve only as "an aid in their just application." Civ. Code §3509. As a result, this Court has recognized that the maxims are not "inflexible legal principle[s]" by which every other "statutory law" is necessarily modified. *Bickel v. City of Piedmont*, 16 Cal.4th 1040, 1048 n.4 (1997).[6]

Regardless of the maxims, where statutory construction is concerned, the Court's central "objective" "is to ascertain and effectuate the underlying legislative

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[5] *See also* Amicus Curiae Brief of Chamber of Commerce of the United States at 10 (hereafter "Chamber Amicus Brief"); Amicus Curiae Brief of Association of Southern California Defense Counsel at 21 (hereafter "Defense Counsel Amicus Brief").

[6] *Superseded by statute on other grounds as stated in DeBerard Properties, Ltd. v. Lim*, 20 Cal.4th 659, 668 (1999). *See also* Civ. Code §4 (a statute is "to be liberally construed with a view to effect its objects and to promote justice").

intent." *Moore v. California State Bd. of Accountancy*, 2 Cal.4th 999, 1012 (1992). That "fundamental rule" "overrides … any maxim of jurisprudence, if application of the … maxim would frustrate the intent underlying the statute." *Id.* (citing Civ. Code §3509 and numerous decisions) (emphasis added); *see also In re Joseph B.*, 34 Cal.3d 952, 957 (1984) (the maxims "shall always 'be subordinated to the primary rule that the intent shall prevail …'" (quoting *Estate of Banerjee*, 21 Cal.3d 527, 539 (1978)); *Irwin v. City of Manhattan Beach*, 65 Cal.2d 13, 21 (1966) (the maxims are not "inflexible rule[s]," and the Court's "quest after legislative purpose" "remains paramount"); *J. Paul Getty Museum v. County of Los Angeles*, 148 Cal.App.3d 600, 605 (1983) (maxims inapplicable to plain statutory language or "where application of the maxim would frustrate legislative intent" (citing *Williams v. Los Angeles Metropolitan Transit Auth.*, 68 Cal.2d 599, 603 (1968)).

The "trifles" maxim of section 3533 is no exception to these rules. Courts have routinely declined to apply it when its application would be inconsistent with a statute (or other vested legal rights), or would frustrate the Legislature's purpose in enacting the statute. *E.g.*, *In re Garcia*, 58 Cal.4th 440, 458 (2014) (rejecting "de minimis" argument where express statutory language resolved question); *Knoke v. Swan*, 2 Cal.2d 630, 631 (1935) (refusing to apply "trifles" maxim to vitiate requirements of Revenue and Taxation Code; invalidating tax sale because of 2-cent discrepancy); *Walker v. Emerson*, 89 Cal. 456, 458-59 (1891) (maxim does not apply to trespass to land claimed to be "de minimis"); *Costerisan v. Tejon Ranch Co.*, 255 Cal.App.2d 57, 61 (1967) (refusing to apply maxim to questions of "permanent right[s]"); *see also* Petitioner's Reply Brief on the Merits at 9-11 (citing additional cases).

Here, as explained below, the applicable statutes and Wage Orders expressly require employers to pay for "***any***" and "***all***" time worked. "The case is not one, therefore, for the application of equitable doctrines, but rather one for the construction of an act of the Legislature." *Lass*, 94 Cal.App. at 179; *see J. Paul*

Getty Museum, 148 Cal.App.3d at 606 (given evidence of "legislative intent" and statute's "express language," "there is no need to resort to any maxim of statutory construction to discern the intent and scope of the [statute]").

As also explained below, the Wage Orders and Labor Code are highly specific enactments that post-date the maxims (adopted in 1872) by several decades. The maxims therefore must yield to the long-established rule that "later enactments supersede earlier ones, and more specific provisions take precedence over more general ones." *State Dept. of Public Health v. Superior Court*, 60 Cal.4th 940, 960 (2015) (citations omitted).

Notably, neither Starbucks nor its supporting amici have cited any California appellate decision applying the "trifles" maxim to relax an employer's obligation to pay for "all" time worked. The latter requirement is a fundamental employee-protection rule that has been part of the Wage Orders for many years. If the "trifles" maxim modified it, the maxim would have been addressed in a case by this time. It has never been used in that context, and should not be now.

Instead, this Court's interpretation of the Wage Orders and Labor Code should be guided—as it has always been—by the underlying employee-protection purpose of those enactments. *Augustus v. ABM Security Servs., Inc.*, 2 Cal.5th 257, 262 (2016); *Peabody v. Time Warner Cable, Inc.*, 59 Cal.4th 662, 667 (2014) ("[s]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees"); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026-27 (2012) (same); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1103 (2007) (same).

B. As the Regulatory and Legislative History Shows, California Workers Must Be Paid for "*Any*" and "*All Hours Worked*," Not Some Lesser Subset of Hours Worked

The current Wage Orders and Labor Code require employers to record and pay for "***any***" and "***all***" employee time worked. Labor Code §510; Wage Order 5-

2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (emphasis added). The enactment history of these provisions demonstrates that neither the IWC nor the Legislature ever contemplated that any "trifles" maxim would weaken that unambiguous requirement. To the contrary, the Wage Orders and Labor Code are explicit that California employers may not record—or pay for—anything less than "***any***" and "***all***" "hours worked."

In California, the requirement to track and pay for "***all***" time worked dates back to the earliest Wage Orders. Once, in the early 1940s, the California and federal definitions of "hours worked" were the same. But when Congress and the federal courts began to curtail employee protections in the mid-1940s, California did not. Every time the IWC had an opportunity to follow federal regulators' lead in narrowing employee protections, the IWC conspicuously chose a different path.

In particular, when federal regulators codified a "de minimis" defense by relaxing the federal recording requirement in 1955, the IWC did not follow suit. Instead, less than two years later, it issued new Wage Orders that continued to require employers to both record and pay for "***all***" time worked. The IWC reconfirmed these rules in every subsequent set of Wage Orders, including the 1998 Orders, which purported to eliminate daily overtime. In 1999, when the California Legislature stepped in, that body reconfirmed that in this state, "***any*** work" over eight hours per day must be recorded and paid. Lab. Code §510.

Since the earliest Wage Orders, a central purpose of California's overtime laws has been to ensure employer compliance with maximum hours limits, which exist for the health and safety of workers as well as the public. For that reason, among others, the Wage Orders require that "***all***" time comprising the initial eight hours be recorded (and paid). This plain language, illuminated by the enactment history, leaves no room for employers to choose to disregard working time that they may consider "trifles." Recording and paying for "***all***" time worked is not only a fundamental employee-protection principle, but is also essential to ensure that

California's overtime regulations actually function to limit maximum working hours.

1. Regulatory History Leading to Current Wage Order Language

In the first Wage Order ever adopted, the IWC imposed maximum daily and weekly working hours, applicable to all employees, whether paid on a weekly, hourly, or piece-rate basis. Wage Order 1, ¶¶1, 3 (Fruit and Vegetable Canning Industry) (Feb. 14, 1916, eff. Apr. 14, 1916). Work in excess of the daily or weekly maximum was allowed in cases of "emergency," but only at a higher rate of pay than the minimums established in the Order. *Id.* ¶4.

To enable enforcement and proper payment of all earned wages, including "emergency" overtime, employers were required to "keep a record of the work done and ***the time worked***." *Id.* ¶6 (emphasis added).

The overtime provision was included "[f]or the purpose of limiting the hours of labor." By 1918, "[w]ork after twelve hours was practically prohibited by the requirement of double time rates." Fourth Report of the Industrial Welfare Commission 10 (Cal. State Printing Office 1924); *see also* Fifth Report of the Industrial Welfare Commission 11 (Cal. State Printing Office 1927) ("A penalty was placed on long hours of work by requiring the payment of [overtime wages].").[7]

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[7] *Accord* Statement as to the Basis for Order 5-80, ¶3 (Sept. 7, 1979) ("The Commission relies on the imposition of a premium or penalty pay for overtime work to regulate maximum hours consistent with the health and welfare of employees …."); Statement as to the Basis for Amendments to Section 3 of IWC Order 5-80 Affecting the Health Care Industry at 2 (Jan. 17, 1986) ("the Commission reasserted its previous position that overtime pay is a means of limiting hours of work," and that reducing overtime hours "encourage[s] employers to schedule long hours"); *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 713 (1980) (citing Statement as to the Basis for 1980 Wage Orders, §3, "Hours and Days of Work"); *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal.App.3d 16, 37 (1990) ("The

None of these provisions could have been enforced absent the requirement for employer records of "the time worked." *See* Wage Order 1, *supra*, ¶6. In fact, the uncodified act establishing the IWC in 1913 contemplated employer recordkeeping for enforcement purposes. The 1913 act required employers to "furnish to the commission, at its request, any and all reports or information which the commission may require to carry out the purposes of this act …." Stats. 1913, ch. 324, §3(b)(1), *cited in Martinez v. Combs*, 49 Cal.4th 35, 54 (2010).

By 1931, this provision had been amended to require employers to maintain records of "the ***hours worked daily***" by each employee. *Id.* §3(a) (as amended). This requirement remains in force today. Lab. Code §1174(d).[8]

Meanwhile, in the first industry order governing hotels and restaurants (the predecessor to Wage Order 5-2001), the IWC adopted the same enforcement structure as in its earliest industry orders. In Wage Order 12 (Hotels and Restaurants) (July 19, 1919, eff. Sept. 17, 1919), the IWC established a weekly minimum wage for full-time employees; an hourly minimum wage for part-time employees; and maximum daily and weekly hours of work for all employees. *Id.* ¶¶1, 3. Work in excess of the maximums was allowed, but only if overtime wages were paid. *Id.* ¶6(f). For purposes of tracking and enforcement, the Order required employers to maintain records of "***the hours worked*** and the amounts earned" by all employees. *Id.* ¶7 (emphasis added).

These same basic requirements and structure were readopted in amended Orders issued in 1920 and 1923. *See* Wage Order 12 Amended (Hotels and

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avowed purpose of the imposition of premium wages is to discourage the employer from working the employee excessive hours.").

[8] The requirement was codified in 1937 as Labor Code section 1174, which continues to state that employers must maintain "payroll records showing the ***hours worked daily*** by" all employees. Lab. Code §1174(d). Failure to comply with the recordkeeping requirement is a misdemeanor. *Id.* §1175(d).

Restaurants) (Jun. 1, 1920, eff. Jul. 31, 1920); Wage Order 12 Amended (Hotels and Restaurants) (Jun. 8, 1923, eff. Sept. 13, 1923).

Twenty-two years after the IWC's first Wage Order, Congress enacted the federal Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (Jun. 25, 1938) ("FLSA" or "the Act"), thereby regulating hours and working conditions at the federal level for the first time. *See Martinez*, 49 Cal.4th at 53 ("[California] did not follow a federal model, as Congress would not enact the FLSA until 1938" (footnote and citation omitted)).

The FLSA limited the length of the "workweek" to a specified number of hours, and for time "in excess of" of the maximum, overtime pay was required. FLSA, §7(a). The Act compelled employers to keep records of the "wages, ***hours***, and other conditions and practices of employment maintained by [them]." *Id.* §11(c) (emphasis added). Four months later, the U.S. Department of Labor clarified that employers must record the "[***h***]***ours worked each workday*** and each workweek." 29 C.F.R. §516.1(d), 3 Fed. Reg. 2533 (Oct. 22, 1938) (emphasis added); *see* 29 C.F.R. §516.2(a)(7) (current version). The terms "workday" and "workweek" were, as of that time, undefined. *See Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 516 (2014).

In July 1939, the Wage and Hour Division of the U.S. Department of Labor issued Interpretative Bulletin No. 13, defining "hours worked" as follows:

> As a general rule, ***hours worked*** will include 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 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), *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).

For its part, the IWC was keenly aware of the federal activity in the area of wage and hour regulation, which previously had been left to the states. In 1943, the IWC issued a "New Series" of Wage Orders (known as the "NS" series), which contained definitions for the first time. *E.g.*, Wage Order 5NS ¶2 (Hotels and Restaurants) (Apr. 14, 1943, eff. Jun. 28, 1943). The definition of "[h]ours employed" mirrored that of Interpretative Bulletin No. 13:

> "***Hours employed***" includes ***all time*** during which:
>
> 1. An employee 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. An employee is suffered or permitted to work, whether or not required to do so. ….

Id. ¶2(f) (emphasis added).

Order 5NS continued to impose a weekly minimum wage for full-time employees; an hourly minimum wage for part-time employees; and maximum daily and weekly hours of work for all employees, above which overtime must be paid. *Id.* ¶¶3(a), 4. The recordkeeping requirement incorporated the newly-defined term "Hours employed," requiring employers to keep "an accurate record" of "Hours employed, which shall show the beginning and ending of hours employed by the employee each work day, which shall be recorded at the time the employee begins and ends employment." *Id.* ¶8(a)(7) (emphasis added).

In 1944 and 1946, the U.S. Supreme Court handed down two opinions construing the FLSA, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), both of which addressed the scope of the "workweek" for purposes of overtime pay. The opinions held that time preliminary and postliminary to periods of productive labor (such as "time spent walking from timeclocks to work benches") should count as part of the "workweek" under the FLSA. *See Integrity Staffing*, 135 S.Ct. at 516.

Anderson also suggested that "a de minimis rule" was not "preclude[d]" if "the minimum walking time is such as to be negligible." 328 U.S. at 692.

In 1947, Congress "swift[ly]" responded to these decisions by enacting the Portal-to-Portal Act. *Integrity Staffing*, 135 S.Ct. at 516-17. The Portal-to-Portal Act reflects Congress' intent to contract the definition of "hours worked." *Id.* The Act now excludes various categories of time from the definition, which would otherwise have been considered compensable "work" under *Tennessee Coal* and *Anderson*. *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 for payment of wages to employees), 252(c) (limiting "compensable" activities to those "engaged in during" specified "portion[s] of the day"), 254(a) (list of "activities not compensable" under federal law).

The IWC's reaction was just as swift. "In response" to the Portal-to-Portal Act, the IWC changed its definition of "hours worked" in a "Revised" (or "R") series of Orders issued in 1947. *Martinez*, 49 Cal.4th at 59-60; *see Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 591 (2000); *e.g.*, Wage Order 5R (Feb. 8, 1947, eff. Jun. 1, 1947). The object of this revision was to expand employee protections in California beyond those of federal law, and to make California law even more protective. *Martinez*, 49 Cal.4th at 59-60 (IWC's 1947 amendments were "[i]n response to" the enactment of the federal Portal-to-Portal Act, which dramatically weakened protections of federal law).

Wage Order 5R adopted a new definition of "***hours worked***," which remains in force today. Under the new definition, "hours worked" no longer depends on whether the employee was "required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed work place."[9] Instead, the IWC adopted a simpler, yet broader and more protective, definition, hinging on a single

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[9] Wage Order 5NS, *supra*, ¶2(f)(1).

factor, namely, employer "control": "'***Hours worked***' means ***the time*** during which an employee is subject to the control of an employer …." Wage Order 5R, *supra*, ¶2(h) (emphasis added). The definition continued to also state that "***hours worked***" "includes ***all the time*** the employee is suffered or permitted to work, whether or not required to do so." *Id.* (emphasis added).

The new definition of "hours worked" was integral to several other provisions of Wage Order 5R. Notably, in this Order, the IWC abandoned the concept of minimum ***weekly*** pay, which dated back to its earliest Orders. Instead, Order 5R imposed a minimum ***hourly*** wage for all employees. *Id.* ¶4(a). The minimum wage provision was amended to explicitly state, for the first time, that compensation must be paid for "***all hours worked***." *Id.* (emphasis added). Maximum daily working hours continued in place, along with mandatory overtime pay if the maximum was exceeded. *Id.* ¶3(b).

The recordkeeping provision in Order 5R also hinged on the new definition of "hours worked." It required employers to "keep" an "accurate" "[t]ime record showing actual time employment begins and ends each day, and ***hours worked daily***." *Id.* ¶6(a)(3) (emphasis added).[10]

The IWC chose not to adopt any "de minimis" language similar to that mentioned in *Anderson*. Instead, the 1947 Orders required, more broadly than federal law, that "***all***" "***hours worked daily***" be recorded, tracked, and paid. Wage Order 5R, ¶¶3(b), 4(a), 6(a)(3) (emphasis added).

For this reason, Starbucks and its amici's heavy reliance on *Anderson* is misplaced.[11] *Anderson* construed a narrower definition of "hours worked," one that

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[10] The italicized language comports with Labor Code section 1174, which had been codified in 1937, and remains unchanged today.

[11] *See* ABM at 15; Defense Counsel Amicus Brief at 14; Amicus Curiae Brief of California Retailers Association at 5; Chamber Amicus Brief at 9.

the IWC purposely abandoned in 1947, and knowingly replaced with the broader, more protective definition stated in Wage Order 5R, which remains in force today. The IWC has never reverted to the pre-1947 definition at issue in *Anderson*. Rather, as will be seen, the IWC has modified "hours worked" only twice over the past sixty years, and then only for particularly defined, narrow groups of employees.

In 1950, the Department of Labor incorporated the less expansive federal definition of "hours worked" into the Code of Federal Regulations. 29 C.F.R. §778.7(f), 15 Fed. Reg. 631 (Feb. 4, 1950); *see* 29 C.F.R. §778.223 (current version). The C.F.R. definition remained curtailed by the Portal-to-Portal Act, which expressly excluded various time and tasks from the definition. *E.g.*, 29 U.S.C. §§203(o), 252(c), 254(a).

In 1952, the IWC adopted its next series of Orders. *E.g.*, Wage Order 5-52 (May 15, 1952, eff. Aug. 1952). Although the C.F.R. had just been amended to incorporate a narrower definition of "hours worked," the IWC chose to readopt, unchanged, its broader and more protective definition. *Id.* ¶2(h). The minimum wage provision of Order 5-52 continued to require payment for "***all* hours worked**." *Id.* 4(a). And the overtime language was revised so that it, too, unambiguously required payment for "***all* hours worked**" above the daily and weekly maximums. *Id.* ¶3(a)(1). Finally, the recording language required employers to "keep" "accurate" records of "***total hours worked*** each day." *Id.* ¶7(a)(3) (emphasis added).

All four of these aspects of Order 5-52 continue in force, unchanged, today. Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (imposing same definition of "***hours worked***"; requiring minimum and overtime wages for "***all* hours worked**"; and requiring employers to keep records of "***total daily hours worked***" (emphasis added)); *see also* Lab. Code §1174(d) (requiring records of "***the hours worked daily***").

The next development of note occurred in 1955. The Department of Labor modified its recording requirement by adopting a new provision entitled "Recording

working time." 29 C.F.R. §785.4, 20 Fed. Reg. 9967 (Dec. 24, 1955). That provision stated: "***In recording working time*** under the act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis." *Id.* §785.4(b) (citing *Anderson*, 328 U.S. 680) (emphasis added).[12] The provision went on to explain how this new language would be construed and applied to federal wage claims. *See id.*

In its next Wage Orders, issued less than two years later, in 1957, the IWC declined to adopt this federal "de minimis" provision, even though it just had been added to the C.F.R. *E.g.*, Wage Order 5-57 (May 30, 1957, eff. Nov. 15, 1957). Instead, the IWC readopted the same definition of "***hours worked***" from 1947; the same requirement to pay minimum and overtime wages for "***all***" hours worked (which dated back to 1947 and 1952); and the same requirement to record "***total daily hours worked***." *Id.* ¶¶2(h), 3(a)(3), 4(a), 7(a)(3) (emphasis added).

Nor did the Legislature relax Labor Code section 1174(d), requiring employers to keep records of "***the hours worked daily***."[13]

Over the next thirty-two years, the IWC amended its Wage Orders five more times, but it never modified any of these requirements, and it never added any "de minimis" language like that inserted into the C.F.R. in 1955. *See* Wage Order 5-63, ¶¶2(h), 3(a)(3)(A), 4(a), 7(a)(3) (Apr. 18, 1963, eff. Aug. 20, 1963); Wage Order 5-67, ¶¶2(h), 3(a), 4(a), 7(a)(3) (Sept. 26, 1967, eff. Feb. 1, 1968); Wage Order 5-76,

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[12] The language adopted in 1955 appears in the current regulations at 29 C.F.R. §785.47, except that the citations appearing in footnotes in 1955 were subsequently moved into the text. *See* 26 Fed. Reg. 195 (Jan. 11, 1961).

[13] *Compare Bartholomew v. Heyman Properties*, 132 Cal.App.2d Supp. 889, 894 (1955) (quoting §1174(d) in effect in 1955) *with People v. Hutchings*, 69 Cal.App.3d Supp. 33, 35 n.1 (1977) (quoting §1174(d) in effect in 1977).

¶¶2(G), 3(A), 4(A), 7(A)(3) (Jul. 27, 1976, eff. Oct. 18, 1976); Wage Order 5-80, ¶¶2(H), 3(A), 4(A), 7(A)(3) (Sept. 7, 1979, eff. Jan. 1, 1980); Wage Order 5-89, ¶¶2(H), 3(A), 4(A), 7(A)(3) (Sept. 23, 1988, eff. July 1, 1989).

One amendment to Wage Order 5-76 is notable. While retaining the basic definition of "hours worked," Order 5-76 added a new clause applicable to a small subset of employees:

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

Wage Order 5-76, *supra*, ¶2(G) (emphasis added).

As the IWC later explained, the change was intended to "amplify" and "clarify" the definition only for "employees who are required to reside at their place of employment." Statement as to the Basis for Wage Order 5-89, ¶2 (Sept. 23, 1988).[14] However, "[t]he IWC ***received no compelling evidence, and concluded there was no rationale, to warrant making any other change in the provisions of this section***." *Id.* (emphasis added). The prior, unqualified definition of "hours worked" therefore continued to apply to all employees outside the narrow, specified group. Wage Order 5-76, *supra*, ¶2(G).

If the IWC had intended to modify the definition of "hours worked" for any employees outside this limited group, it would have done so in 1976.

Meanwhile, in 1984, the Ninth Circuit handed down its opinion in *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), on which Starbucks and its amici heavily rely in this case. In *Lindow*, the Ninth Circuit applied the federal "de

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[14] *Accord* Statement as to the Basis for Wage Order 5-80, ¶2 (Sept. 7, 1979).

minimis" defense to an FLSA overtime claim brought by employees working in Oregon. *Id.* at 1062-63 (citing 29 C.F.R. §785.47; *Anderson*, 328 U.S. at 692).

A few years later, in 1988, an employer asked the DLSE whether the same "de minimis" defense applies to California wage claims. *See* DLSE Op. Ltr. 1988.05.16 at 1. Without considering the text of any Wage Orders, and without citing "any California cases on point," the DLSE opined that it "would adopt the test of the *Lindow* court with respect to *de minimis* time for purposes of compensation"—even though the IWC itself had never done so, nor had the Legislature ever amended section 1174(d). *Id.* at 2.

The IWC wasted no time signaling its disagreement with the DLSE's opinion, and with *Lindow*. Within months, it had adopted the 1989 series of Orders, in which it reenacted the same broad definition of "***hours worked***," the same requirement to pay minimum and overtime wages for "***all hours worked***," and the same requirement to record (and pay for) "***total daily hours worked***." Wage Order 5-89, *supra*, ¶¶2(H), 3(A), 4(A), 7(A)(3) (emphasis added).

Notably, the IWC once again declined to adopt any "de minimis" provision similar to that of the C.F.R. *See id.*

Four years later, in 1993, the IWC made its only other change to the "hours worked" provision since the 1979 amendment discussed above. A new sentence, affecting only a subset of employees—those working in "the health care industry"—stated that "hours worked" is to be "interpreted in accordance with the provisions of the Fair Labor Standards Act." 1993 Amendments to Sections 2, 3, and 11 of IWC Order 5-89, ¶2(H) (Jun. 29, 1993, eff. Aug. 31, 1993).[15]

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[15] Order 4-89 was similarly amended, but the others orders were unchanged. 1993 Amendments to Sections 2, 3, and 11 of IWC Order 4-89 (Jun. 29, 1993, eff. Aug. 31, 1993); *see* Wage Order 4-2001, 8 Cal. Code Regs. §11040, ¶2(K).

For all other employees, however, the prior definition of "***hours worked***" continued to apply. *See id.* Moreover, the provisions requiring minimum and overtime wages for "***all hours worked***" were unchanged, as was the provision requiring records of "***total daily hours worked***." *See id.* (emphasis added).

As the 1993 amendment shows, "where the IWC intended the FLSA to apply to wage orders, it has specifically so stated." *Morillion*, 22 Cal.4th at 592 (citing this amendment to Wage Order 4); *see also Martinez*, 49 Cal.4th at 67 (same).[16] This Court will not "incorporate a federal standard concerning what time is compensable" into California law "'[a]bsent ***convincing*** evidence of the IWC's intent ….'" *Mendiola*, 60 Cal.4th at 846 (quoting *Morillion*, 22 Cal.4th at 592) (emphasis in original).

The DLSE disregarded this principle, as well as the IWC's narrow 1993 amendments, when it issued two more opinion letters in the 1990s. In those letters, heavily cited by Starbucks and its amici, the DLSE said that it "has an established policy that time which is *de minimis* need not be counted toward the employer's obligation to pay" wages. DLSE Op. Ltr. 1995.02.03 at 2 (citing *Lindow*); DLSE Op. Ltr. 1994.02.03 at 4 ("the Division has adopted the de minimis rule relied upon by the federal courts" (citing *Lindow* and *Anderson*)).

But the IWC itself has never adopted an "established policy" to treat any working time as "de minimis." In Order after Order, it has said instead that nothing

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[16] *Accord Mendiola v. CPS Security Solutions, Inc.*, 60 Cal.4th 833, 847 n.17 (2015) ("Wage Order 4 itself demonstrates that the IWC knows how to expressly incorporate federal law and regulations when it desires to do so."). Another compelling example is the 1943 "NS" Orders, discussed above, in which the IWC explicitly adopted language from the Department of Labor's Interpretative Bulletin No. 13. By later revising the language, the IWC expressed its intention to depart from the previously-adopted federal standard, which it is fully empowered to do. *Morillion*, 22 Cal.4th at 592 ("state law may provide employees greater protection than the FLSA").

less than "***all* hours worked***"—including "***all time***" an employee is engaged in work or under employer "control"—must be tracked, recorded and paid.

In 1998, the DLSE went a step further, but again without any textual support from the Wage Orders. It copied the C.F.R.'s "de minimis" language dated 1955, and pasted that language, verbatim, into its *Enforcement Manual*. *See* DLSE, *Enforcement Policies and Interpretations Manual* §44.2 (Oct. 1998) (quoting 29 C.F.R. §785.4(b)).[17] The only change was the addition of a cite to *Lindow*. *Id.*[18]

This provision of the *Manual* has become the main source of authority for a purported "de minimis" rule in California, and it was the only California authority cited by the district court below. *Troester v. Starbucks Corp.*, 2014 WL 1004098, *3 (C.D. Cal. Mar. 7, 2014). However, nothing in the *Manual* or the DLSE letters changes the fact that the IWC consistently declined to adopt the federal "de minimis" defense, every time it had an opportunity to do so.

The IWC could have adopted the defense in its Orders issued in 1947, 1952, 1957, 1963, 1967, 1976, 1989, or 1993, but it did not. Instead, in 1988, it adopted a new series of orders just months after the DLSE's prior opinion letter on this topic, without including the federal "de minimis" standard. And, in 1993, when it *did* adopt the federal definition of "hours worked" (including the "de minimis" defense) for certain employees in the health care industry, it chose not to adopt that standard for anyone else. There is no evidence at all, let alone "***convincing*** evidence," that the IWC intended to modify the definition of "hours worked," or the requirement to

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[17] This Court had recently invalidated the DLSE's prior *Manual* as an improper "underground regulation." *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 577 (1996). Hence, the DLSE's *Manuals*, including the current *Manual*, are entitled to "no deference." *Martinez*, 49 Cal.4th at 50 n.15.

[18] The language is unchanged in the current *Manual*, except that it has been split into two subsections. *See* DLSE *Enforcement Policies and Interpretations Manual*, §§47.2.1, 47.2.1.1 (2002 Update).

pay for "***all*** hours worked," by adopting the federal standard for ***anyone*** other than heath care workers. *Mendiola*, 60 Cal.4th at 846.

Under *Mendiola*, "[t]he relevant issue in deciding whether [a] federal standard has been implicitly incorporated [is] whether state law or the wage order contained an express exemption similar to that found in federal law." 60 Cal.4th at 946 (citing *Morillion*, 22 Cal.4th at 590). There is no such "express exemption" in the Wage Orders' definition of "hours worked," and there never has been.

In fact, in *Mendiola*, this Court refused to hold that the IWC's Wage Orders "implicitly incorporate[d]" another provision of the same part of the C.F.R. concerning "hours worked"—namely, 29 C.F.R. §785.22(a), concerning sleep time. *Mendiola*, 60 Cal.4th at 844-46. That provision, like the "de minimis" section cited in the DLSE letters and *Manual*, also dates back to 1955. *See* former 29 C.F.R. §785.3(e)(2), 20 Fed. Reg. 9965 (Dec. 24, 1955). Yet, there is "no indication, much less convincing evidence," that the IWC ever intended to incorporate ***either*** federal standard into California law. *Mendiola*, 60 Cal.4th at 846.

For unknown reasons, the DLSE overlooked all of this in 1988, and again in the 1990s, when it issued its letters and its new *Manual* provision. Neither the DLSE's letters, nor its *Manual*, should be afforded any persuasive value on the "de minimis" question. They contradict the Wage Orders' text and contravene the IWC's clear contrary intentions, repeatedly expressed since 1947. *See California School of Culinary Arts v. Lujan*, 112 Cal.App.4th 16, 27 (2003) (affording no deference to DLSE interpretation where "no amendment has been made to the wage order" to adopt such an interpretation and where DLSE's construction of the order was "not supported by … the early records of IWC").

In fact, even when the IWC chose to relax employee protections in other ways, it did ***not*** relax the requirement to pay for "***all***" time worked.

In 1997, the IWC issued five new Wage Orders, including Wage Order 5-98 (Apr. 11, 1997, eff. Jan. 1, 1998). The definition of "***hours worked***" was unchanged, as was the requirement to pay minimum wages for "***all hours worked***," and the requirement to maintain records of "***total daily hours worked***." *Id.* ¶¶2(H), 4(A), 7(A)(3) (emphasis added). However, the new Orders eliminated daily overtime by requiring payment of premium wages only for "***all hours worked*** over 40 hours in the work week." *Id.* ¶3(A); *see Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1037 (2012).

Under the new Orders, daily overtime hours would fall within the scope of "***all hours worked***," which must be compensated at no less than minimum wage, although premium wages would not be owed for that time. Wage Order 5-98, ¶4(A). In other words, even as it limited daily overtime, the IWC nevertheless continued to reconfirm the basic definition of "***hours worked***" and the concept—essential to proper operation of any maximum hours limitation—that "***all*** hours worked" must be tracked, recorded and paid. *Id.* ¶¶2(H), 4(A), 7(A)(3).

As discussed in the next section, the California Legislature had more fundamental concerns with the IWC's amended Orders, and quickly stepped in to restore daily overtime as a fixture of California employees' legal protections. *See* Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (Assembly Bill No. 60 (1999-2000 Reg. Sess.)) ("AB 60").

Thereafter, in the 2000 and 2001 series of Wage Orders, the IWC readopted all four protective provisions, dating back to 1947 and 1952, defining "***hours worked***" to include "***all time***" during which any work is "suffered or permitted"; requiring payment of minimum wages for "***all hours worked***"; requiring payment of overtime wages for "***all hours worked***" above the stated daily and weekly maximums; and requiring employers to track, record and pay for "***total daily hours worked***." Wage Order 5-2000, ¶¶2(L), 3(A)(1), 4(A)-(B), 7(A)(3) (eff. Oct. 1,

2000); Wage Order 5-2001 (eff. Jan. 1, 2001), 8 Cal. Code Regs. §§11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3).

As this history demonstrates, the IWC has consistently declined to weaken the protective requirements, dating back to the earliest wage orders, that employers must record and pay for "***all***" "hours worked."

2. The Impact of AB 60, Leading to Current Labor Code Section 510

After the IWC adopted the 1998 series of Orders, eliminating daily overtime, the Legislature was "[t]roubled by this weakening of employee protections." *Brinker*, 53 Cal.4th at 1037. It swiftly responded. *Id.* In May 1997, even before the new Orders went into effect, the IWC's funding was cut off.[19]

Then, in 1998, AB 60 was introduced, and signed into law in 1999. AB 60 "wrote into the statute various guarantees that previously had been left to the IWC." *Brinker*, 53 Cal.4th at 1037-38. One of those was Labor Code section 510, which "restored the eight-hour workday" and prevented the IWC from ever relaxing that protection again. *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal.App.4th 729, 735 (2009).

As amended by AB 60, Labor Code section 510 states: "Eight hours of labor constitutes a day's work. ***Any work*** in excess of eight hours in one workday and ***any work*** in excess of 40 hours in any one work week … shall be compensated" at the overtime rate. Lab. Code §510(a) (emphasis added). As a result, California

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[19] State of California, Department of Industrial Relations, *Guide to the Records of the Industrial Welfare Commission Collection 1913-2004*, at 8 (Jan. 2006).

This should have been a strong signal to both the IWC and the DLSE that the Legislature disapproved such efforts to contract employee protections. Nevertheless, the DLSE issued its new *Manual*, incorporating the 1955 C.F.R.'s "de minimis" language, the very next year. *Manual*, *supra*, §44.2.

law now requires records and payment not just of "***all*** hours worked," but also "***any***" time worked. The words used, and the intention behind them, could not be plainer.

In uncodified section 2 of AB 60, the Legislature confirmed its commitment to the fundamental employee-protection principles supporting these requirements.

The Legislature declared that "[t]he eight-hour work day is the mainstay of protection for California's working people, and has been for over 80 years," "long before the federal government enacted overtime protections for workers." AB 60, *supra*, §2(a), (b). The Legislature reconfirmed what the IWC had recognized almost a century before—namely, that one of the overtime laws' core functions is to enforce the statutory limits on maximum working hours: "Numerous studies have linked long work hours to increased rates of accident and injury," and "[f]amily life suffers when either or both parents are kept away from home for an extended period of time on a daily basis." *Id.* §2(d), (e).[20] "Therefore, the Legislature affirms the importance of the eight-hour workday, declares that it should be protected, and reaffirms the state's unwavering commitment to upholding the eight-hour workday as a fundamental protection for working people." *Id*. §2(g).

To drive these points home, in another uncodified section of AB 60, the Legislature reinstated the IWC's 1989 series of Orders, including Wage Order 5-89, as amended in 1993. AB 60, *supra*, §21. Each reinstated Order required employers to pay minimum and overtime wages for "***all hours worked***"; retained the same broad definition of "***hours worked***," except for narrow groups of specified employees; and continued to require employers to track and record "***total daily hours worked***." *E.g.*, Wage Order 5-89, as amended in 1993, ¶¶2(H), 3(A), 4(A), 7(A)(3).

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[20] *See supra* footnote 7 and accompanying text.

Finally, as mentioned above, when the IWC adopted its new series of Orders in 2000 and 2001, as AB 60 directed,[21] it reinstated these provisions yet again, and they remain in force now. Wage Order 5-2001 (eff. Jan. 1, 2001), 8 Cal. Code Regs. §§11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3).

All of this regulatory and legislative history, dating back a full century to the IWC's first Wage Orders, refutes every argument Starbucks and its amici make in support of incorporating a federal "de minimis" defense into California law. Federal regulators, unlike the IWC, were operating in an environment in which Congress had signaled, in the Portal-to-Portal Act, its intention to curtail the definition of compensable "hours worked." The California Legislature, in contrast, has consistently signaled the opposite, as has the IWC itself.

One of Starbucks' amici supporters contends that California law "contemplates that compensation be measured by 'hours,'" rather than by other increments. Defense Counsel Amicus Brief, *supra*, at 28. However, the plain text of section 510 belies this by requiring compensation for "***any work***," regardless of increment, as does the definition of "hours worked," which includes "***all time***."

Another amicus makes a similar argument, asserting that "California law does not use the term 'all time,'" but instead "'speak[s] in terms of 'all hours.'" Chamber Amicus Brief at 15. This is incorrect. As discussed in detail above, since 1947, the Wage Orders have required compensation for "all hours worked," which is expressly defined to include "***all the time***" an employee is suffered or permitted to work, regardless of increment. *Compare* Wage Order 5R, ¶¶2(h), 4(a) *with* Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B).

Starbucks and its amici uniformly contend that "de minimis" is not a federal standard, but instead derives from California law, citing the maxim of jurisprudence

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[21] *See* Lab. Code §517, added by AB 60, *supra*, §11 (directing IWC to adopt new orders "consistent with this chapter" by specified dates).

concerning "trifles."[22] The detailed history discussed above, however, demonstrates that federal decisions and regulations were the first to adopt such a rule to modify "hours worked," and that California has never done so. Even the DLSE opinion letters and *Manual* acknowledge that the concept of "de minimis" time was a creature of federal law. *E.g.*, DLSE Op. Ltr. 1994.02.03 at 4 (referring to "de minimis" as a "rule relied upon by the federal courts").

Because the Wage Orders and Labor Code have no analog to it, the federal standard should not be incorporated by "inference." *See Mendiola*, 60 Cal.4th at 946 (citing *Morillion*, 22 Cal.4th at 590). Instead, the Court is respectfully asked to confirm what the Wage Orders and Labor Code already say: in California, "***any***" and "***all***" time worked must be tracked, recorded, and paid.

C. The Federal "De Minimis" Defense Should Not Be Adopted Because it Cannot Be Squared With Other Fundamental Principles of California Law

Not only does the legislative history show no intent, by either the IWC or the Legislature, to incorporate a "de minimis" defense into the Wage Orders or Labor Code, but the "de minimis" defense also fails to comport with fundamental principles of California law.

First, a "de minimis" defense would shift onto the employee the employer's normal burden to record, track, and pay for hours worked. Federal courts embrace this shift in the name of "practicality," where the time to be paid is small and difficult to record. By contrast, California courts have repeatedly stated that the Labor Code's employee-protective policies abhor burdening employees for an employer's failure to comply with statutory obligations. California courts have embraced "practicality" exceptions only to the extent they cause no reduction in

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[22] *See supra* footnote 5 and accompanying text.

employee pay for all time worked, or if they are explicitly supported by statutory text. Neither is true of the "de minimis" defense.

Second, in line with California's broad definition of "hours worked," recent California opinions have required pay for short, hard-to-record working periods, such as time that farm workers spend assembling at departure points and waiting for an employer-provided shuttle to transport them to the fields. Similarly, two recent California opinions held that pay is required for no more than 10 minutes of "grace period" time at the beginning or end of a shift so long as the employees were working or under their employer's control during these short work periods. These decisions are inconsistent with a purported "de minimis" defense.

Finally, the "de minimis" defense set forth in *Lindow* does not comport with California's employee-protective policies because the rule allows employers to avoid paying for certain activities merely by construing them as separate from the rest of the day's work. Courts applying the *Lindow* test focus inordinately on the amount of time at issue, calling this the "chief concern in determining whether [time] is de minimis." *Farris v. County of Riverside,* 667 F.Supp.2d 1151, 1165 (C.D. Cal. 2009). Thus, activities subject to a "de minimis" defense under federal law include checking log books at a power plant, undergoing security checks at a clothing retailer, and accessing an employer's computer system at a call center. As the employer can easily satisfy the "time at issue" prong of the *Lindow* test by merely focusing on one activity in isolation from the rest of the day's work, the test is subject to abuse and should be rejected.

1. An Employee Should Not Bear the Burden of An Employer's Failure to Record Off-the-Clock Work, Even If the Work Is of Short Duration

The "de minimis" defense puts the burden on employees to forgo pay for small periods of compensable time that are difficult to record. While federal courts have determined that employees should shoulder this burden due to the "practical

administrative difficulty of recording the additional time," *Lindow*, 738 F.2d at 1062, in California, the burden of failing to record time typically falls on the party with the duty to record it in the first place—the employer, *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988). Indeed, in situations that would qualify for the "de minimis" exception under the federal rule, it is the employer who requires or permits off-the-clock work and the employer who fails to record it. Allowing an employer to shift to an employee its burden to record time contravenes California's rule that, "where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee." *Hernandez*, 199 Cal.App.3d at 727.

While the FLSA imposes a duty on employers to record all hours worked like under California law, *compare* 8 Cal. Code Regs., §11050, ¶7 *with* 29 U.S.C. §211(a); 29 C.F.R. §516.2(a)(7), a subversion of that duty in the name of "'just plain everyday practicality'" does not serve the employee-protective purpose of the California Labor Code. ABM at 15 (quoting *Lindow*, 738 F.2d at 1063). Federal courts have justified burdening employees because, viewed from the employer's perspective, it is not "worthwhile" to pay employees for short periods of work that are difficult to record. *Id.* at 16 (quoting *Mitchell v. JCG Industries, Inc.*, 745 F.3d 837, 841 (7th Cir. 2014)). That employ***er***-protective justification cannot stand in California, where courts have repeatedly balked at allowing an employer to reap the benefits of its failure to record working time: "Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation." *Hernandez*, 199 Cal.App.3d at 727.

Of course, California courts are not blind to concerns of "practicality," but they have never favored the employer's convenience over the employee's statutory right to full payment of earned wages. In *See's Candy I*, for example, the court determined that California employers may round employee time to the nearest tenth

of an hour for the sake of practicality, but only because the impact on employees was "neutral" (because time was rounded both up and down): "time-rounding is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees." *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889, 903 (2012). As the *See's Candy I* court acknowledged, a "practicality" exception should not apply to the detriment of employees. Thus, rounding time is only lawful in California to the extent it applies neutrally and "will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." *Id.* at 907. As neutral rounding results in "full payment" for all working time, it is consistent with "the employee-protective policies embodied in California labor law" and could be incorporated into California law despite having originated as a federal rule. *Id.* at 903.

Brinker contains another example of California courts permitting a "practicality" exception to a wage and hour requirement. In that case, this Court relied on the text of Wage Order 5-2001 to determine that employers may deviate from offering rest breaks in the middle of a work period "where practical considerations render it infeasible." *Brinker*, 53 Cal.4th at 1031. The court there, however, interpreted language from the applicable Wage Order requiring rest breaks "insofar as practicable [to] be in the middle of each work period." *Id.* at 1028; *see also Rodriguez v. E.M.E., Inc.*, 246 Cal.App.4th 1027, 1040 (2016). The fact that the IWC wrote a "practicality" exception into the rest-period requirement shows that it could have written a similar exception into the requirement to pay wages for "all hours worked," had it so intended. *See Martinez*, 49 Cal.4th at 67 (while "the IWC has on occasion deliberately incorporated federal law into its wage orders," where the IWC intends to incorporate federal standards, "it has specifically so stated"). This Court should not read a "practicality" exception into the Wage Orders where the IWC chose not to include one.

While California courts have thus imposed "practicality" exceptions where they do not harm employees and are supported by statutory text, the courts have not shied away from imposing requirements on employers that are more onerous than under federal law where doing so furthers the employee-protective purpose of the California Labor Code. For example, in *Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 323 (2005), the court held that an employer cannot comply with California minimum wage requirements by simply averaging an employee's pay over all hours worked in a work week. Instead, the employer must ensure that minimum wage is paid for "each and every separate hour worked during the payroll period." *Id.* at 320 (quoting trial court opinion). Although viewing each hour in isolation burdens employers to a greater extent than under the FLSA, the federal averaging approach violates the California Legislature's intent to "adopt[] protective laws and regulations for the benefit of employees." *Id.* at 323.

A "de minimis" defense does not protect California employees' statutory right to "full payment" for "all the time [employees] have actually worked," *See's Candy I*, 210 Cal.App.4th at 903, but instead puts the burden on employees to forgo pay for short periods of time that the employer is statutorily obligated to record and pay. *See* ABM at 24 ("the *de minimis* rule is concerned with whether short periods of compensable time must be paid"). Even if the circumstances of the additional work make it difficult to record, concern for an employer's time-recording difficulties cannot override its statutory duty to record and pay for all "hours worked." In fact, it is unclear why the employer's recording difficulty justifies non-payment at all when it is often just as "practical" for the employer to pay for extra time even when it cannot be recorded to the second.[23] Under the California Labor

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[23] Employers invoking the "de minimis" defense have also been able to modify their recording practices to better capture working time, despite incurring some burden to do so. For example, until 2015, Dick's Sporting Goods placed its time clocks at the back of the store but required employees to undergo security checks at the front of the store after clocking out. The company argued that the security check

Code, an employee should not have to work for free—even for a short period of time—simply because her or his hours are difficult for the employer to record. *Cf. Lindow*, 738 F.2d at 1062.

2. California Requires Employers To Pay For Small Amounts Of Time During "Grace Periods" And When Subject To An Employer's Control—Requirements That Do Not Square With A "De Minimis" Exception

California's broad definition of "hours worked" does not allow for a "de minimis" exception. For purposes of California law, "hours worked" is defined as (1) "the time during which an employee is subject to the control of an employer," and (2) "all the time the employee is suffered or permitted to work, whether or not required to do so." *Morillion*, 22 Cal.4th at 582; *see generally* Wage Order 5-2001, *supra*, ¶2.) Federal law likewise contains the "suffered or permitted to work" category, but does not recognize all time during which an employee is subject to the employer's control as "hours worked." *Morillion*, 22 Cal.4th at 589.

California's control test provides broad coverage for compensable activities, including those that federal law might consider "de minimis." For example, in *Morillion*, this Court held that, under the control test, an employer was required to

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time was "de minimis" and impractical to record even though, "[a]s of January 2015, [it] began to install a second time clock at the front of the store in response to pending litigation in another case, and employees can now punch out after the security check is complete." *Greer v. Dick's Sporting Goods, Inc.*, 2017 WL 1354568, *5 (E.D. Cal. Apr. 13, 2017). Likewise, in the present case, "Starbucks changed its procedures so that store employees no longer had to run a store closing procedure after clocking out." Petitioner's Brief at 6; *see also Gillings v. Time Warner Cable LLC*, 583 F.Appx. 712, 715 (9th Cir. 2014) (rejecting Time Warner's argument that it was administratively difficult as a matter of law to record time employees spent logging onto their computers and opening software programs, in face of the employees' pointing out that the company could have installed a time clock by the door).

pay wages for agricultural employees' compulsory transportation time riding the employer's bus to the fields where they worked. Compensable time included "the time they spent (1) assembling at the departure points; (2) riding the bus to the fields; (3) waiting for the bus at the end of the day; and (4) riding the bus back to the departure points." *Id.* at 579. While any one of these activities could be construed as *de minimis* under federal law, this Court held that they are compensable pursuant to California's control test because the employees were "prevented from using the time effectively for [their] own purposes." *Id.* at 586.

Because the control test focuses on the time when an employee's freedom is impacted, and not simply on when the employer requires or permits the employee to work, that test requires payment for activities that the "suffered or permitted to work" test does not, even those, as in *Morillion*, that last a short duration and may be difficult to record. *Morillion*, 22 Cal.4th at 586–587; *see also Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257, 270 (2016) (requirement for security guards to "remain at the ready" during a 10-minute break was "irreconcilable with employees' retention of freedom to use rest periods for their own purposes"). This focus on the time when the employee's freedom is encumbered is incompatible with the federal "de minimis" defense, which focuses on whether it is "worthwhile" from the employer's perspective to pay for short periods of hard-to-record time. *See* ABM at 16 (quoting *Mitchell*, 745 F.3d at 841). In California, the time during which an employer prevents an employee from using time for his or her own purposes must be compensated, even if it is of a short duration and hard to record.

In another example of the broad reach of California's "hours worked" definition, the court in *See's Candy I* and *II* recently determined that employees may recover wages and penalties if they could show they were under the employer's control or working during a "grace period" of no more than 10 minutes before and after shifts. The employer in that case maintained a "grace period" policy allowing employees to "voluntarily punch into the [timekeeping] system up to 10 minutes

before their scheduled start time and 10 minutes after their scheduled end time." *Silva v. See's Candy Shops, Inc.*, 7 Cal.App.5th 235, 241 (2016). In *See's Candy I*, the court held:

> To the extent an employee claims that he or she was not properly paid under this grace period rule, this claim raises factual questions involving whether the employee was in fact working and/or whether the employee was under the employer's control during the grace period …. If the evidence later shows that the employees were working or "under the control" of See's Candy during the grace period and they were not paid for this time, they may be entitled to recover those amounts in the litigation and any applicable penalties.

See's Candy I, 210 Cal.App.4th at 909-11.

The court in *See's Candy II* upheld summary judgment for the employer by applying California's "hours worked" definition to the 10-minute grace period: Since "employees engaged only in personal activities during the grace period and were neither working nor under See's Candy's control during this time," it was safe for See's Candy to assume that no work took place in the grace period and to pay based on the scheduled shift times. *See's Candy II*, 7 Cal.App.5th at 253. Again, while the "de minimis" defense was not directly at issue, application of California's broad "hours worked" definition to a working period of 10 minutes or less suggests that employers must pay for such brief periods under California law.

3. A "De Minimis" Defense Would Improperly Allow Employers To Avoid Payment For Short Durations Of Working Time By Focusing On Each Work Activity In Isolation

Finally, the "de minimis" defense is particularly ill-suited to California's employee-protective policies because nearly any one work activity viewed in isolation could be construed as "de minimis," and it would be absurd to allow employers to avoid payment for all hours worked by separating certain activities from the rest of the day's work. For instance, in the present case, the activities at

issue included off-the-clock time that employees spent transmitting sales data to Starbucks' corporate office, activating the store's alarm, exiting and locking the store, and escorting co-workers to their cars, pursuant to Starbucks' policy. Order Certifying Question at 4.

The federal "de minimis" cases involve a range of work activities, such as power plant workers reviewing a log book and exchanging log information with other workers, *Lindow*, 738 F.2d at 1059, telecommunications workers logging onto the employer's computer system and initiating a program, *see, e.g.*, *Gillings v. Time Warner Cable LLC*, 583 F. Appx. 712, 714 (9th Cir. 2014); *Corbin v. Time Warner Entertainment-Advance/Newhouse Partnership*, 821 F.3d 1069, 1074 (9th Cir. 2016), and sales associates waiting for a required security check before leaving the store, *see, e.g.*, *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 442 (N.D. Cal. 2008); *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 604 (C.D. Cal. 2015).

Any one of these work activities viewed at the narrowest focus may seem insignificant, but the sum total of these activities, and thousands of others, make up the entirety of a day's work. Although the "de minimis" defense was designed to avoid the burden imposed on employers of paying for "split-second absurdities," the true absurdity at stake is to allow employers to avoid paying for all hours worked by simply construing certain activities in isolation, divorced from the rest of an employee's duties. Such a rule creates a perverse incentive for employers to refuse payment for certain work activities, especially those that occur at the beginning or end of a shift. Such a rule should not be adopted in California.

III. CONCLUSION

For the reasons stated above, the answer to the Ninth Circuit's certified question should be that neither the federal "de minimis" defense, nor any purported state-law "de minimis" defense, applies to claims for unpaid wages under California law.

Dated: May 30, 2017 Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 12,363 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(c)(1).

Dated: May 30, 2017

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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. **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICI CURIAE CONSUMER ATTORNEYS OF CALIFORNIA AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT; and**
2. **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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Executed this 30th day of May, 2017 in San Francisco, California.

Gary M. Gray