Case No. S245805

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

AMANDA FRLEKIN, ET AL.,

Plaintiffs, Appellants, and Petitioners

vs.

APPLE, INC.,

Defendant and Respondent.

On a Certified Question from the United States Court of Appeals
for the Ninth Circuit
Case No. 15-17382

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS AMANDA FRLEKIN, ET AL.

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rules of Court, rule 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests leave to file the attached *amicus curiae* brief in support of plaintiffs and respondents Amanda Frlekin, et al.

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before this Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.*, (2007) 40 Cal.4th 1094, *Gentry v. Superior Court*, (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court*, (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522 (2014).

CELA's proposed amicus brief will assist the Court by offering additional analysis on why the question posed by the Ninth Circuit here calls for an answer that necessitates retroactive application.

CELA agrees with and supports the positions of plaintiffs and respondents Amanda Frlekin, *et al*. Recognizing that the Court's forthcoming opinion may offer further guidance as to what constitutes compensable work time under the California Industrial Welfare Commission wage orders, CELA's brief focuses on why this Court's

interpretation of an existing administrative enactment must be applied retroactively.

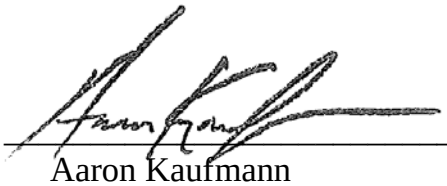
Pursuant to California Rules of Court, rule 8.520(f)(4), CELA affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA respectfully submits that its accompanying brief will assist the Court in deciding the matter, and therefore requests the Court's leave to file it.

Dated: July 3, 2018

Respectfully submitted,

LEONARD CARDER, LLC

By: 

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I. INTRODUCTION

Defendant/Respondent Apple, Inc. argues that should this Court rule that Apple must pay its employees for going through company-imposed security checks in its stores that such ruling would be "new" and thus must only be applied prospectively. Apple's position is premised on the assertion that such a ruling would necessitate overturning the Court's prior ruling in *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000) and result in an unprecedented expansion of the wage orders promulgated by the Industrial Welfare Commission ("IWC"). Neither premise is true, for reasons explained in plaintiffs' opening and reply briefs and which will not be repeated here.[1] Nonetheless, Apple's argument to limit the Court's decision to prospective application *also* fails under this Court's long standing principles regarding retroactivity, because: (1) the ruling it anticipates from this Court would *not* be a clear break from well-established law; and (2) Apple does not present circumstances that warrant a rare exception to the principle that this Court's decisions apply retroactively.

II. ARGUMENT

A. Retroactive Application of Judicial Decisions is the Rule; Exceptions Are Rare

This Court has made clear: "The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (1989); *see also Brennan* v. *Tremco Inc.*, 25 Cal.4th 310, 318 (2001). The general rule of retroactivity

[1] The argument against retroactivity offered by *amicus curiae* Washington Legal Foundation fails for the same reason, as it too is premised on the assertion that any ruling in favor of compensability here would necessarily "reverse[] or contradict" this Court's precedents. *Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondent*, p. 14.

may apply even when this Court overturns a prior decision. *Casas v. Thompson*, 42 Cal.3d 131, 141 (1986). Exceptions to the rule are rare, even when a new decision "represent[s] a clear change in the law" and even when the change "could not have [been] anticipated prior to [the new] decision." *Newman*, 48 Cal.3d at 978, 982. Only the most "compelling and unusual circumstances" justify "departure from the general rule." *Id.* at 983; *see also Laird v. Blacker*, 2 Cal.4th 606, 620 (1992).

B. A Ruling that Time Spent in Mandatory Security Checks is Compensable Must Be Applied Retroactively Because It Would Not Establish a New Rule of Law

The first step in determining whether a decision should be given retroactive effect assesses whether the decision establishes a new rule of law. *People v. Guerra*, 37 Cal.3d 385, 399 (1984). If it does not, then retroactivity is certain as there is no material change in the law. *Id.* Similarly, there is no "issue of retroactivity" when this Court addresses "an issue not previously presented to the courts." *People v. Garcia*, 36 Cal.3d 539, 548 (1984).

Here the Ninth Circuit has asked the Court to address an issue that has not been addressed by past precedent--from this or any intermediate appellate court. California Rule of Court, rule 8.548, provides that "no controlling precedent" is a pre-condition for this Court to take up a question from another court. Accordingly, the Ninth Circuit certified in the present matter that "no clear controlling California precedent exists." *Frlekin v. Apple, Inc.*, 870 F.3d 867, 868 (9th Cir. 2017). As no prior, controlling authority exists for the Court to overrule, there can be no issue of retroactivity. *See Garcia*, 36 Cal.3d at 548.

The fact that the Ninth Circuit's question calls for an interpretation of the wage order also mandates retroactive application. This Court has stated that when it resolves a dispute over substantive statutory rights, that ruling is always retroactive because it merely elucidates what the law was when the

disputed provision was enacted or adopted. *Woosley v. State of Cal.*, 3 Cal.4th 758, 794 (1992). The Court explained: "'Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim.'" *Id., quoting Garcia*, 36 Cal.3d at 549.

As the question posed by the Ninth Circuit here explicitly calls for this Court to interpret the IWC's wage order,[2] this Court's anticipated decision will undoubtedly elucidate what the IWC intended to include as compensable time when it promulgated the regulation. Given the Court will be interpreting an existing enactment and the statutory wage and hour rights that flow therefrom, its decision must be given retroactive effect in light of the principles stated above. *Cf. Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal.4th 833, 848 n. 18 (2015) (holding interpretation of California's wage orders applies retroactively).

Apple's argument against retroactivity fails to address these fundamental principles. While Apple casts plaintiffs' position as calling for a "new interpretation of the Wage Order" -- which it is not, as explained in plaintiffs' briefings submitted to this Court -- that is not sufficient to circumvent the principles that retroactivity applies to this Court's decisions when the Court addresses a novel issue, *see Garcia*, 36 Cal.3d at 548, or resolves the meaning of a statutory provision, *see Woosley*, 3 Cal.4th at 794. That is so even if the Court was to overturn *Morillion* -- which plaintiff's liability theory does not call for, either directly or indirectly -- as that would mean that this Court was merely recognizing that it had previously misinterpreted the wage orders. *Cf. Newman*, 48 Cal.3d at 978, 982 (noting

[2] The wage orders are regulatory provisions, authorized by the state legislature. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 581 (2000).

"this court's previous groundbreaking tort decisions have been applied retroactively"). Indeed, even if the Court's decision here was seen as expanding employer's liability for hours worked in ways that employers could not have anticipated, retroactivity is in order. *See Newman*, 48 Cal.3d at 981-82 (with rare exceptions, "California courts have consistently applied tort decisions retroactively even when those decisions declared new causes of action or expanded the scope of existing torts in ways defendants could not have anticipated prior to our decision."). Because this Court's interpretation of the wage order by definition cannot establish "a new rule of law," retroactivity must apply to the Court's anticipated decision here.

C. Apple Has Not Shown the Rare Circumstances that Warrant Limiting this Court's Anticipated Ruling to Prospective Application

If somehow the Court issues a decision that is *not* based on its construction of the wage order, and instead created a "new rule of law" resting on some other set of governing principles, then, only then must the Court undertake the next step in the retroactivity analysis and consider the balancing of the equities. The strong presumption of retroactivity still governs, even when the Court has announced a new rule, unless the proponents of prospective application can demonstrate that retroactive application would impose "unique burdens" that present "compelling and unusual circumstances justifying departure from the general rule." *Newman*, 48 Cal.3d at 983. This inquiry requires an equitable balancing of fairness and hardship to the litigants and to the general public, and generally focuses on two factors: (1) whether the prior rule was clearly well-established through decisions of *this* Court or a uniform and longstanding line of appellate authority upon which there was substantial and reasonable public reliance; and (2) whether the interests of fairness or public policy requires an exception to the usual principle of retroactive application. *See Grafton Partners L.P. v.*

Superior Court, 36 Cal.4th 944, 967 (2005); *Newman*, 48 Cal.3d at 985- 986; *Peterson v. Superior Court*, 31 Cal.3d 147, 152 (1982).

Apple has not and cannot point to any "clearly well-established" rule that governs the compensability of time spent in employer-imposed security checks. Indeed, were there such a rule, the Ninth Circuit would not have referred the subject question and this Court could not have taken the matter up under the California Rules of Court, as noted above. While both sides argue that the Court's analysis in *Morillion* support their respective positions, the Court has obviously never addressed the circumstances present here. *See Frlekin*, 870 F.3d at 871-74 (finding that neither the text of the wage order nor *Morillion* give clear guidance to the issue at hand, thus concluding that "California law provides no clear answer to the certified question"). Nor has Apple pointed to a long line of appellate authority that directly addresses the issue presented here. Thus, Apple's argument fails the first part of the equities analysis.

Apple's reliance on *Moss v. Superior Court*, 17 Cal.4th 396 (1998) and *Olszewski v. Scripps Health*, 30 Cal.4th 798 (2003) is misplaced, as in both instances the parties had reasonably relied on clear legal precedents in justifying their conduct at issue.

The Court in *Moss* disapproved of one of its prior cases and of an intermediate appellate case regarding contempt penalties for failure to comply with child support orders. 17 Cal.4th at 422, 428. Thus conduct that was lawful under the two prior precedents was no longer so. In rejecting retroactive application of this new rule, the Court observed: "The effect would be to make conduct that was not subject to criminal contempt actions at the time it was committed contemptuous. This we may not do." *Id.* at 429.

Here, unlike in *Moss*, Apple has not and cannot excuse its conduct based on clear precedent from this Court or the intermediate appellate courts.

As discussed above, there is no precedent that directly addresses whether an employer can refuse to pay its employees for mandatory security screenings. As Apple's conduct has not been clearly authorized under decisions from this or any other court, it cannot make out the reasonable reliance on clear authority as was the case in *Moss*.

In *Olszewski*, defendant justified its conduct through reliance on safe-harbor provisions found in California statutes. While this Court held those provisions to be preempted by federal law, 30 Cal.4th at 814-27, it found defendant's reliance on such provisions to be reasonable. *Id.* at 829. The Court noted, "Californians should be able to presume that statutes enacted by the Legislature are constitutional." *Id.*

Here, unlike the safe harbor provisions at issue in *Olszewski*, the wage order does not directly allow an employer to impose an unpaid security screening on its employees. Further, under no circumstances will this Court rule the wage order unconstitutional or otherwise void, as was the result of the Court's review of the state statutory provisions at issue in *Olszewski*.

Finally, should the Court rule the subject time compensable, the balance of equities weighs heavily in favor of retroactive application of such ruling. While Apple and its supporting amicus, Washington Legal Foundation, suggest public policy supports limited employer liability here, neither the wage order language nor precedent support their position. To the contrary, as this Court recently observed, the wage orders were adopted in recognition that workers generally are at a bargaining disadvantage compared to the hiring entity and therefore need protections to ensure minimum standards for wages and working conditions. *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 952 (April 30, 2018). The Court found that the fundamental purposes animating the wage laws justified the "adoption of the exceptionally broad suffer or permit to work standard in

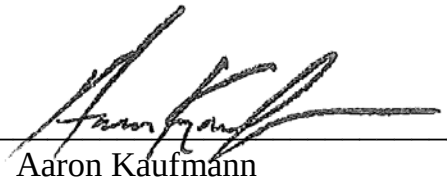
California wage orders." *Id.* These same policies manifest in the wage orders support reading those orders expansively to cover time spent in employer-imposed security screenings and to apply such interpretation retroactively. Retroactive application will advance the payment of wages for all work time suffered or permitted by employers, whether in the past or the future.

III. CONCLUSION

Ruling that time spent in employer-imposed security screenings would be a logical extension of this Court's prior precedents and well-supported by a textual analysis of the wage order. Accordingly, the rule of retroactivity must apply.

Dated: July 3, 2018

Respectfully submitted,

By: 

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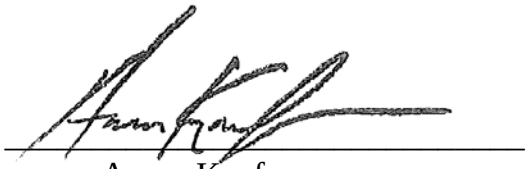
CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITS

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text does not exceed 14,000 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(c)(1).

Dated: July 3, 2018



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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 LEONARD CARDER, LLP, located at 1330 Broadway, Suite 1450, Oakland, California 94612, 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:

- **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS AMANDA FRLEKIN, ET AL.**

- **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed on the attached service list 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.

Executed this 3rd day of July, 2018 in Oakland, California.

Cate L. Coelho

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