S243805

In The Supreme Court

of the

State of California

AMANDA FRLEKIN, ET AL.
Plaintiffs, Appellants, and Petitioners,

v.

APPLE, INC.
Defendant and Respondent.

On Grant of Request by the United States Court of Appeals for the Ninth Circuit (Case No. 15-17382) to Decide Issue Pursuant to California Rules of Court, Rule 8.548

After An Appeal From the United States District Court, Northern District of California
Honorable William H. Alsup, Judge
Case No. 13-cv-03451-WHA

APPLICATION OF RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPLE, INC.

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APPLICATION OF RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPLE, INC.

To the Chief Justice and Associate Justices:

The Retail Litigation Center, Inc. and the National Retail Federation, through their attorneys, respectfully request leave to file the accompanying brief as amicus curiae in support of Apple, Inc.

The Retail Litigation Center

The Retail Litigation Center, Inc. (RLC) is a unique public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States and in California, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. Since its founding in 2010, the RLC has filed well over 100 amicus briefs in a variety of courts, including the U.S. Supreme Court and the Supreme Court of the State of California, in order to provide the retail industry's perspectives on important legal issues and to highlight the potential industry-wide consequences of significant pending cases.

The National Retail Federation

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF, and the employers it represents, therefore have a compelling interest

in the issue certified to this Court for decision. As the industry umbrella group, the NRF periodically submits amicus curiae briefs in cases raising significant legal issues, including employment law issues, which are important to the retail industry at large, and particularly to NRF's members.

Interest of RLC and NRF in the Outcome of the Case

RLC and NRF have a substantial interest in the outcome of this case because of their members' abiding interest in a workplace that is fair and balanced for all employees. Because amici's members are employers in the U.S. and California, their members have been and will continue to be the subject of class actions and other lawsuits brought by employees claiming that they were not paid for time spent on an employer's premises waiting for, and undergoing, exit searches of packages or bags voluntarily brought to work purely for their personal convenience, and that such time is compensable as "hours worked" within the meaning of Industrial Welfare Commission's (IWC) Wage Order No. 7. Accordingly, RLC's and NRF's members have a strong interest in how the IWC Wage Orders are to be interpreted and enforced, and particularly Wage Order No. 7 at issue here.

Assisting with the development of a regulatory environment that is both clear and in conformance with the law is a central component of RLC's and NRF's missions. To that end, RLC and NRF advocate for the interpretation of laws in a way that fosters a fair and equitable workplace. RLC and NRF therefore respectfully request the opportunity to file the enclosed Amicus Brief for the Court's consideration. Rather than simply repeat the arguments made by the respondent Apple, Inc. (with which RLC and NRF agree), this amicus brief is intended to provide an added dimension to selected matters discussed by the parties, to enhance the Court's understanding of the issue certified for review and how it impacts the retail industry.

CONCLUSION

For these reasons, the application should be granted and the accompanying amicus curiae brief filed.

DATED: July 9, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
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By: Karin Dougan Vogel

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AMICUS CURIAE BRIEF

Participation in a Bag Check Is Not "Hours Worked" for Which an Employee Is Entitled to Compensation

A. The Court's reasoning in *Morillion v. Royal Packing Co.* shows employees are not entitled to compensation for bag checks

In California's Wage Order No. 7, " '[h]ours 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." (Cal. Code Regs., Tit. 8, § 11070, subd. 2(G).) The wage order does not expressly define "work," but rather assumes presumes an employee is working if the employee is subject to the employer's control. Or, if the employee is not clearly under the employer's control, "hours worked" still includes time during which the employee is "suffered or permitted to work." In one sense, then, the wage order is circular: the time during which an employee is *working* and must be compensated includes the time an employee *works*.

But what is work? It should come as no surprise that employers interpret the word in its ordinary sense. They hire employees to perform certain duties that advance the goals of the enterprise or operation. Employers understand their responsibility to pay employees for the time employees expend performing those duties. For retail employees, an obvious example of "hours worked" is time during which employees are at their place of employment and either engaged with a customer or available for that purpose.

Less obvious are those activities of everyday life that are in some sense necessary to the job but not necessarily unique to it. For example, most employees don't live at their place of employment. So, to do their job, those employees must travel from their home to their workplace. Depending on where employees choose to live and the vagaries of traffic or

other forms of transportation, the travel time can be short or long. Regardless, unless the employer requires that an employee use a mode of transportation provided by the employer, the time spent commuting is not compensable "hours worked."

That was this Court's holding almost 20 years ago in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (interpreting Wage Order No. 14-80).[1] In *Morillion*, the Court held that where an employer *required* its employees to use company-provided transportation to get to work, the time was compensable as "hours worked" under the "control" prong of the wage order, regardless of whether the employees had been "suffered or permitted to work" during the travel time. (*Id.* at p. 578.) The Court "emphasize[d] that employers do not risk paying employees for their travel time merely by providing them transportation." (*Id.* at p. 588.) That is, riding to one's place of employment on the company bus is not itself work for which an employer must provide compensation, unless the bus ride is required. The Court held that "employers may provide optional free transportation to employees without having to pay them for their travel time, as long as employers do not require employees to use this transportation." (*Id.* at p. 594.) In other words, an employee who chooses to avail herself of a work-related facility or benefit is not working simply because her choice puts her within the "control" of her employer while she is availing herself of the benefit.

At its most basic level, the issue now before the Court in *Frlekin v. Apple* was already decided by *Morillion*. The convenience of choosing to

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[1] There are 17 wage orders promulgated by the Industrial Welfare Commission (IWC), all of which contain the same definition of "hours worked" as Wage Order No. 7, except for two healthcare wage orders (Wage Order Nos. 4 and 5), which contain additional language not relevant here. (See *Morillion*, 22 Cal.4th at p. 581.)

bring a bag to work to carry one's personal belongings is like the convenience of choosing to ride the company bus to work, where the employee is not required to do so. In either instance, the action by the employee is voluntary. But in either instance, if employees choose to take advantage of the convenience, they are subject to the restrictions of the convenience they have chosen.

With a company bus commute, employees don't have any flexibility about where they catch the bus, when they catch the bus, or the route taken. They must meet the bus's schedule. However, as long as employees are not required to take the company bus, they do not need to be compensated for the wait time or the travel time. Similarly, if Apple employees choose the convenience of bringing a bag to work, they are voluntarily agreeing to have the bag checked when they leave. It may prove inconvenient for the employee to wait for the bag to be checked, in which case the employee can choose to forego the convenience of bringing a bag to work, and many employees make that choice. But as the Court reasoned in *Morillion*, so long as the retail employer does not *require* that employees bring a bag to work, then it does not need to pay employees for any waiting time that results from a bag check when they leave.

Applying *Morillion* to the facts here, a retail employer does not need to pay employees, who for their own convenience choose to bring bags to work, to have those bags checked as they leave work for the day. On these facts, the employee—not the retail employer—is in "control" as it is the employee who alone decides to bring his or her bag to work, not the employer.

B. A bag check does not require "work" by the employee, as that term was intended by the IWC

Since the bag checks do not come within the "control" prong of the "hours worked" definition in Wage Order No. 7, to be compensable the

employees must show the bag checks constitute "work" that the employee was suffered or permitted to perform. Toward this end, after exploring various dictionary definitions of "work," the Plaintiff argues that having a bag she voluntarily chose to bring to work checked required physical exertion by her, and that the benefit of that activity was for the employer, not her.

Plaintiff's analysis is awkward and contrived, and ignores her concession that she voluntarily brings a bag to work only for her own convenience, a concession made by all of the employees in the class as well. Her analysis also conflicts with general principles of statutory construction and her admission that the "suffered or permitted to work" term of the "hours worked" definition has been "retained" by the IWC since 1943, when it first followed the lead of federal law by incorporating the term into its wage orders. (See AOB at pp. 18-22 [stating that in 1947, "the IWC retained the '***suffered or permitted to work***' portion of the definition as a second, 'independent' test for compensability"] [emphasis in AOB].)

In interpreting a statute, the Court's "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Courts must follow general principles of statutory construction when interpreting wage orders. (See *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027 ["When a wage order's validity and application are conceded and the question is only one of interpretation, the usual rules of statutory interpretation apply."]; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 435 ["We construe wage orders, as quasi-legislative regulations, in accordance with the standard rules of statutory interpretation."].) "[T]he most relevant time for determining a statutory term's meaning" is when it first became law. (*MCI Telecomms. Corp. v. AT&T Co.* (1994) 512 U.S. 218, 228.)

As plaintiff Frlekin points out, the IWC first included the "suffered or permitted to work" language in the wage orders in 1943, picking up the term from a 1939 Interpretive Bulletin issued by the Wage and Hour Division of the United States Department of Labor. (See AOB at p. 19-20.) Although thereafter the IWC diverged from federal law in reworking the first prong of the wage order (see *Morillion, supra*, 22 Cal.4th at pp. 588-594), it never reworked the second, "suffered or permitted to work" prong.

Black's Law Dictionary (3d ed. 1933) at the time defined "work" as: "Any form of physical or mental exertions or both combined, for the attainment of some object other than recreation or amusement." Federal case law construing the term "suffered or permitted to work" found those words as "commonly used" meant "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [*Tennessee Coal*] [Court held the miners' underground travel to the "working face" of the mine fell within the definition of "suffered or permitted to work" and was compensable].)[2] The same year, in *Armour & Co. v. Wantock* (1944) 323 U.S. 126 [*Armour*], the United States Supreme Court expanded its holding in *Tennessee Coal* to find "readiness to serve" can also be "work" under the FLSA. (*Armour*, 323 U.S at p. 133 [holding "[r]eadiness to serve may be hired, quite as much as service itself"].)

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[2] The fourth edition of Black's Law Dictionary, published in 1951, defined work similarly to the third edition published in 1933, but this time cited to *Tennessee Coal* for support. The definition reads: "Work. To exert one's self for a purpose, to put forth effort for the attainment of an object, to be engaged in the performance of a task, duty, or the like. The term covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement. . . . *Tennessee Coal*, [*supra*, 321 U.S. 590]."

From these cases addressing the "suffered or permitted to work" language that was also found in the Fair Labor Standards Act, it is clear that, at the time the IWC included the language in the wage orders, "work" required three things: (1) physical or mental exertion (or, as in *Armour*, readiness to engage in physical or mental exertion); (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business. Within just a few years, the IWC reacted by separating "control" and "suffered or permitted to work" into separate parts of the definition of "hours worked." (Wage Order 7 R (Feb. 8, 1947, eff. June 1, 1947); see Frlekin's Motion for Judicial Notice, Ex. 5.)[3] By doing so, it appears that the IWC intended for "work" that is not

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[3] Congress reacted to *Tennessee Coal* and its progeny (see also *Jewell Ridge Coal Corp. v. United Mine Workers* (1945) 325 U.S. 161, 163 and *Anderson v. Mt. Clemens Potter Co.* (1946) 328 U.S. 680, 693) by amending the FLSA with the Portal-to-Portal Act (29 U.S.C. § 251 et seq.), that excludes from compensation the time traveling to and from work and also activities preliminary or subsequent to the employee's principal work activity. The Portal-to-Portal Act does not affect the general test for "work" expressed in *Tennessee Coal*. (See *IBP, Inc. v. Alvarez* (2005) 546 U.S. 21, 28 [Court held the Portal-to-Portal Act makes certain "work" time non-compensable, but "does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.' "].) California has not enacted a similar law, and in *Morillion, supra*, the Court distinguished the Portal-to-Portal Act from California law. (*Morillion, supra*, 22 Cal.4th at pp. 589-592 [describing the Portal-to-Portal Act as "preclud[ing] paying employees for their time spent traveling on employers' buses from designated meeting points to the actual place of work when employees do not work during the travel period"].) In its discussion, the Court found the Fifth Circuit's decision in *Vega v. Gasper* (5th Cir. 1994) 36 F.3d 417, applying the Portal-to-Portal Act to deny compensation for employees riding a company bus hours to work each day, "to be consistent with our opinion." (*Morillion*, 22 Cal.4th at p. 589, fn. 5.) The Court stated, "[i]n contrast to plaintiffs, the employees in *Vega* 'were *not* required to use [the employer's] buses to get to work in the morning.

time spent by an employee under the "control" of the employer to still require "physical or mental exertion" that primarily benefits the employer.[4]

Courts in other jurisdictions have interpreted the term "suffer or permit to work" similarly. For example, the Ninth Circuit, applying California law, has held that activities related to an employer's voluntary wellness program are not "hours worked" under California law; the employee was not "suffered or permitted to work" because the requirements to complete the wellness program were not work and were not part of her job duties. (*Watterson v. Garfield Beach CVS, LLC* (9th Cir. 2017) 694 F.App'x 596, 597.) Like California, Oregon's wage act also uses the term "suffer or permit to work," and Oregon courts rely on the definition of "work" used in *Tennessee Coal*. (See *Leonard v. Arrow-Tualatin, Inc.* (1985) 76 Or.App. 120, 124, 708 P.2d 630, 632 [Oregon Court of Appeal adopted the definition of "work" from *Tennessee Coal* as controlling under the Oregon wage act, which also uses the term "suffer or permit to work"]; see also *Kitchen v. WSCO Petroleum Corp.* (D. Or. 2007) 481 F.Supp.2d 1136, 1152 [same].) The Arkansas Code Annotated section 11-4-203(2) defines "employ" as "to suffer or to permit to work," but does not expressly define "work." The Arkansas Supreme Court has held "[t]he plain and ordinary meaning of the word 'work' is defined as an 'activity in which one exerts strength or faculties to do or perform.' Webster's Third New International Dictionary 2634 (1993)." (*Gerber Prods. Co. v. Hewitt*

They chose . . . how to get to and from work. Not all of [the employer's] field workers rode his buses." (*Id.*, emphasis in opinion.)

[4] Cf. *Augustus v. ABM Sec. Servs., Inc.* (2016) 2 Cal.5th 257 [in holding that rest periods under California law have to be off-duty, the Court contrasted rest with the absence of work or exertion: "The ordinary meaning of 'rest' conveys, in this context, the opposite of work. 'Rest' is defined by the American Heritage Dictionary as the '[c]essation of work, exertion, or activity.' (American Heritage Dict. (4th ed. 2000) p. 1486, col. 1 . . .)"].

(2016) 2016 Ark. 222 [court held the employees' donning and doffing of protective clothing "constitute 'work' because these activities are performed pursuant to strict procedures developed by Gerber and are performed for the benefit of Gerber"].)

Ordinary physical acts do not become "work" just because they take place at one's place of employment. For example, no one would argue that the act of stepping into a company bus and sitting down is physical exertion sufficient to constitute work. (See also *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263 [time spent voluntarily on an employee shuttle is not "hours worked"].) Similarly, making one's bag available for a bag check is now a routine matter. We do it all the time, before sporting events, concerts, lectures, political rallies, graduation ceremonies, and to enter public places like airports, museums, courthouses, and Disneyland, to name a few instances. It is the price we are often required to pay for the convenience of carrying a bag. And often we will not carry a bag because the inconvenience of a bag check outweighs the convenience of carrying a bag. The act of complying with a bag check is not inherently an act of physical exertion. There is nothing unique about the act of a bag check itself that constitutes work.

Because a bag check doesn't constitute work, it is not necessary to also refute Plaintiff's second argument in depth—that the bag check is only for the benefit of the employer/retailer because it is conducted for the purpose of making sure employees are not stealing from their employer. This argument, even if true, is a bridge too far. Plaintiff concedes bringing a bag to work in the first instance is solely for an employee's own convenience. The employee's bag provides no benefit to the employer at all. The employee has no *right* to bring a bag to work, and employers could make a rule disallowing bags. But employers typically allow the bags, just

often with a condition—that the bags are checked as employees leave work each day.

The bag check, which is not itself work, does not become work if an employee has to wait a short time on the employer's premises for it to take place. Where the act of a bag check is not "physical exertion," neither is the time spent waiting for the bag check to occur. A similar situation helps to put the issue in perspective. It is not unusual for retail employers to provide employee discounts to their employees. But to make use of the employee discount, the employee may have to wait for a manager to ring up the purchase. The act of using the employee discount (which is for the employee's benefit) is not made "work" merely because the employer requires the employee to take the time to find an available manager to complete the transaction (which is for the employer's benefit, to prevent employee fraud).[5]

The "benefit" the plaintiff would attribute to the employer from bag checks is a false benefit, since the need for the bag checks arises not from any activity that is related to an employee's job responsibilities or that would be necessary to the employer's business if not for the fact that employees carry bags to work for their own convenience. In other words, the *antecedent* to the "benefit" to the employer is unrelated to the employer's business needs. Further, in the end it shouldn't even matter whether the bag checks benefit the employer if the exercise is not inherently "work." The IWC has only determined that employees get paid for hours worked, not for every benefit that their employer receives.

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[5] Because a bag check is not "work" within the definition of "hours worked" for which an employee must be compensated, the *de minimis* rule, currently under consideration by this Court, does not come into play. If the Court were to find a bag check is "work," then the Court should consider whether the time is nonetheless not compensable because *de minimis*.

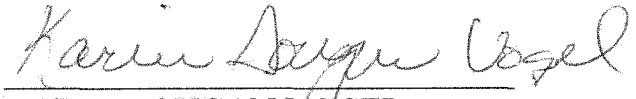
The act of an employee bringing a bag to work for her own convenience is not work. Neither is the employer's requirement that the same bag be checked when the employee leaves work for the day. California law does not anticipate that employees should be compensated for the convenience of carrying their things in a bag.

CONCLUSION

For all of the foregoing reasons, in addition to those discussed in Apple's Brief on the merits and the briefs of other amici in support thereof, this Court should hold that time spent on an employer's premises waiting for, and undergoing, required exit searches of employees' packages or bags voluntarily brought to work purely for personal convenience is not compensable as "hours worked" within the meaning of IWC Wage Order No. 7.

DATED: July 9, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations

By: 

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CERTIFICATE OF WORD COURT
(Cal. Rules of Court, Rule 8.504(1)(d))

The text of this petition consists of 3,223 words, including all footnotes, as counted by the computer program used to generate this petition.

DATED: July 9, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
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PROOF OF SERVICE

In The Supreme Court of the State of California
Amanda Frlekin, et al. v. Apple, Inc.
S243805

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On July 9, 2018, I served true copies of the following document(s) described as **APPLICATION OF RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPLE, INC.** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 9, 2018, at San Diego, California.

Pamela Parker

Pamela Parker