No. S243805

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Amanda Frlekin, *et al.*,
Plaintiffs and Appellants,

v.

Apple, Inc.,
Defendant and Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states, including many in California. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF has appeared often before this Court, as an *amicus curiae*, to urge a consistent judicial interpretation of the law that respects parties' reasonable and settled expectations. (See, e.g., *T.H. v. Novartis Pharm. Corp.* (2017) 4 Cal.5th 145; *In re Cipro Cases I & II* (2015) 61 Cal.4th 116; *City of Hope Nat'l Med. Ctr. v. Genentech Inc.* (2008) 43 Cal.4th 375.)

WLF believes that the Appellants' interpretation of California's wage-and-hour regulations will, if adopted, expose Apple—and California's other employers—to massive and unpredictable liability. The Appellants propose a reading of the regulations "so vague" that a reasonable person "must necessarily guess" at what employee time they render compensable. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 763.) What's worse, the Appellants seek to impose this liability retroactively,

notwithstanding Apple's reliance on a commonsense construction of the regulations and on this Court's precedent.

INTRODUCTION

An employer subject to California Industrial Welfare Commission Wage Order No. 7—or to almost any of the commission's other wage orders—must pay each employee for all time (1) that she spends subject to the employer's control or (2) that the employer suffers or permits her to work. (Cal. Code Regs. Tit. 8, § 11070, subds. 2(G), 4(B).) The Respondent, Apple, Inc., allows employees to bring bags to work, but it reserves the right to check them. It does not pay an employee for this brief and intermittent bag-check time. During a bag check, it reasons, an employee (1) is not subject to Apple's "control," because she can avoid a check simply by not bringing a bag to work, and (2) is not being "suffered or permitted to work" by Apple, because she is not "working" at all—she is not doing anything connected to her job duties.

The Appellants, a group of former Apple employees, seek pay and penalties—dating back to 2009—for the time a class of Apple employees spent waiting for and undergoing checks of bags they voluntarily brought to work. The Appellants cannot prevail

if "control" means "control over mandatory job conduct" and if "suffer or permit to work" means "suffer or permit to fulfill job duties." They therefore argue that in this context "control" means "to restrain an employee's free action" and "suffer or permit to work" means "to allow an employee to exert herself to the employer's benefit."

But these definitions are over-inclusive to the point of unintelligibility. Under the Appellants' construction, ridiculous examples of "work" reside on a par with reasonable ones. If, for instance, an employer commands an employee not to come to work with a crippling hangover, it "restrains" the employee's conduct the night before a workday. And sometimes an employee will have to "exert" himself to act responsibly—to the "benefit" of his employer. Yet the employee is not entitled to pay for the time he spends resisting the urge to frolic. Such examples abound. Nothing in logic enables an employer to differentiate any one of the examples from another.

Under the Appellants' definitions of "control" and "suffer or permit to work," in other words, an employer cannot tell what conduct is compensable and what conduct is not. The Appellants can bring Apple's bag-check policy within the scope of Wage

Order No. 7 only by rendering the order void for vagueness. The canon of constitutional avoidance requires, therefore, that the Appellants' interpretation of the wage order be rejected.

Apple reasonably relied not only on the wage order itself, but also on *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, which says that an employer may offer an optional benefit without paying employees for the time they spend using it. That is this case. Apple offered its employees the option of bringing a bag to work, subject, occasionally, to a bag check. Apple offered a choice—something, that is, better than a no-bags policy. To hold Apple liable retroactively for not paying wages for bag-check time would, in effect, punish Apple for reasonably relying on Wage Order No. 7 and *Morillion*. It would punish Apple for playing by the rules and for respecting the law. That makes no sense. The Court should uphold the settled understanding of Wage Order No. 7, under which Apple need not pay wages for bag-check time. But if the Court alters the meaning of the wage order and declares bag-check time compensable, it should apply its decision only prospectively.

ARGUMENT

I. BECAUSE ADOPTING THE APPELLANTS' CONSTRUCTION OF WAGE ORDER NO. 7 WOULD RENDER IT UNCONSTITUTIONALLY VAGUE, THE COURT SHOULD REJECT IT

"Vague laws," this Court has explained, "offend several important values":

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges and juries[.]

(*Cranston*, *supra*, 40 Cal.3d at p. 763.) "Fair notice" of a law's meaning is, in short, "a crucial element of the modern rule of law." (Note, *Textualism as Fair Notice* (2009) 269 Harv. L. Rev. 542, 543.) A law "so vague" that a reasonable person "must necessarily guess" what it means "violates the first essential of due process of law." (*Cranston*, *supra*, 40 Cal.3d at p. 763.)

Although its role in criminal law is better known, the vagueness doctrine applies also to civil law. (See *Connor v. First Student, Inc.*, review granted Nov. 24, 2015, S229428

[considering vagueness challenge in civil action invoking Civil Code provision regulating consumer reports]; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484 [considering vagueness challenge in civil action invoking Labor Code provision barring an employer from trying to control its employees' political activity]; *Diaz v. Grill Concepts Servs., Inc.* (May 24, 2018, B280846) ___ Cal.App.5th ____ [2018 WL 2355295 *5-*7] [considering vagueness challenge in civil action invoking municipal wage ordinance].) "Civil as well as criminal statutes must . . . give fair warning of the conduct prohibited." (*Morrison v. State Bd. of Educ.* (1969) 1 Cal.3d 214, 231.)

The Appellants invoke Wage Order No. 7, under which an employee's "hours worked" is comprised of the time during which her employer either (1) controls her or (2) suffers or permits her to work. (Cal. Code Regs. Tit. 8, § 11070, subd. 2(G).) The Appellants contend that Apple displays the requisite control or sufferance when it inspects bags its employees voluntarily bring to work. To reach this conclusion, the Appellants must define "control" to include control arising from optional activity (see OBM 23, 26), and they must define "suffer or permit to work" to include any exertion that benefits the employer (see *id.* 44-48).

The Appellants must, in other words, stretch and churn the words "control" and "work" until they are an incoherent mush.

1. *Control*. The Appellants argue that bag-check time is "compensable under the ordinary meaning" of the word "control." (OBM 16.) This "ordinary meaning," the Appellants say, is: "to exercise restraint or direction upon the free action of." (OBM 23.) But if everything that "restrains" an employee's "free action" can trigger the compensation clock—even a "restraint" that arises directly from the employee's accepting an optional perk provided by the employer—the meaning of "control" becomes impossible for an employer to predict and plan for.

Imagine an employee who works in San Francisco. He has a free Sunday, and he wants to visit his great aunt, who lives in Eureka. He knows, however, that if he uses the day to drive north, visit his great aunt, and drive back, he will be exhausted when he starts work on Monday. So he decides to stay home. Has the employer "restrained" the employee's "free action"? Does it need to pay him for the hours he voluntarily spent at home, preserving his energy for his job?

Say an employee enjoys seeing her friends at night, but her job starts at 5 a.m. The last time she arrived at work ill-rested,

her boss ordered her to improve her performance. So she stays in and goes to sleep at 9 p.m. Did her boss "restrain" her "free action"? Is she due compensation for the time she spent "restrained" and asleep instead of "unrestrained" and outside?

What of the employee who, hoping to gain a promotion, attends the office holiday party solely to flatter his boss? How about the employee who, warned that he might be fired for incompetence, practices a work-related skill in his spare time?

In each of these examples, the employee decides to do something that is, strictly speaking, optional. It could also be said in each instance that the employer "controls" the employee. The control in some of the examples, in fact, is much greater than the control that exists during the search of a bag an employee elects, as a matter of convenience, to bring to work. But if the aspect of control in these cases is emphasized over the aspect of freedom, the meaning of the wage orders breaks down. Suddenly anyone who changes her personal behavior, and who can plausibly say "My job made me do it," may sue for unpaid wages. That can't be right, and it isn't. The pertinent fact in each example, viewed through the lens of the law, is that the employee acted "voluntarily," as that word is understood by an ordinary person;

and not that she was "controlled," as that word might be understood by a philosophy professor.

No logical distinction exists between voluntarily staying home or going to bed early, voluntarily attending a holiday party, voluntarily practicing a job skill, and voluntarily bringing a bag to work. The Appellants' attempts to manufacture a workable distinction fail. Several of the employees in the above examples face a "threat of discipline" (see RBM 1, 21-22). The attendee of the holiday party is "on site" (see *id.* 22-23). And equating control with completing "employer-directed tasks" (see *id.* 24) would entitle an employee to compensation for the time she spends filling out an entry card for an employer-sponsored raffle. Nor can it be that this case turns on some *sui generis* combination of factors. Allowing such case-by-case special pleading would render Wage Order No. 7 just as vague as would removing the requirement of compulsion altogether.

If, in short, the meaning of "control" is not tempered by the commonsense meaning of "voluntary" or "optional," an employer lacks fair notice of what employee conduct it must pay for. Wherever the line would be in such a scheme—the appearance at the holiday party is compensable, but not the bag check? the skill

practice is compensable, but not the early bedtime?—it would be arbitrary and unforeseeable. To apply to Apple's bag-check policy, in other words, the wage order's use of "control" must be read in a manner that is void for vagueness.

2. *Suffer or Permit to Work*. According to the Appellants, if an employee's act of "physical or mental exertion" creates a "benefit" for the employer, it is compensable. (OBM 44-48.) This is another supposedly "ordinary meaning" that, if adopted, would render the wage-and-hour laws unconstitutionally indeterminate.

An employee's "physical or mental exertion" "benefits" her employer when she plans her commute; when she asks her spouse to walk the dog while she is at work; when she exercises or eats healthy food; and when she listens to a friend tell her why she should not quit her job to return to school or pursue her dream of becoming an artist. Under the Appellants' definition, almost anything the employee does to *stay alive* might be compensable. Followed to its quite logical conclusion, the Appellants' interpretation becomes a burlesque of Marx's theory of alienation: the employee's every breath is a commodity to be tracked, categorized, and accounted for by the employer. The problem under discussion, to be sure, is not the extremism of this

view per se. It is that the law provides the employer not the slightest *ex ante* guidance in determining when or why a judge or jury might declare wrong or inadequate the categories in its every-breath-you-take wage policy.

Whereas to create "control" at the bag check the Appellants must ignore the commonsense notion of what is "optional," to create "sufferance" they must ignore the contextual definition of "work." Both mowing a front lawn and kissing a spouse entail "physical exertion" that "benefits" a family. The first act is properly called "work"; the second—one hopes—is not. Context matters. In the context of employment, "work" means not a "physical exertion" that "benefits" the employer, but rather a "physical exertion" connected to an employee's job duties.

It is this requirement of a connection to job duties that enables an employer to understand and predict what work is compensable. Without it, an employer cannot know where the line lies between a reasonable example of compensable work, such as helping customers operate iPhones, and a ridiculous example of "work," such as brushing one's teeth. Without the connection to job duties, the dividing line on this spectrum will be arbitrary. And a law that can be applied only through arbitrary,

after-the-fact line-drawing is a law that fails to provide fair notice. The Appellants' construction of "suffer or permit to work" is void for vagueness.

* * *

The question at hand is merely "whether [the law] is vague as applied to this [respondent's] conduct in light of the specific facts of this particular case." (*Cranston*, *supra*, 40 Cal.3d at p. 765.) If the "particular case" opens a law to a vagueness challenge, the "vagueness c[an] be resolved by a more precise judicial construction and application of the statute." (*Morrison*, *supra*, 1 Cal.3d at p. 232.) The Appellants can bring Apple's bag-check policy within the scope of Wage Order No. 7 only by reading the order in a fashion that creates intractable vagueness. This Court can resolve this vagueness problem simply by declining the Appellants' invitation to stretch the order's meaning. (See *People v. Garcia* (2017) 2 Cal.5th 792, 804 [under "the doctrine of constitutional avoidance," a law "should not be construed to violate the Constitution if any other possible construction remains available"].)

The Court should reject the Appellants' construction of Wage Order No. 7.

II. IF THE COURT ADOPTS THE APPELLANTS' CONSTRUCTION OF WAGE ORDER NO. 7, IT SHOULD DO SO ONLY GOING FORWARD

"Unforeseeable and retroactive judicial expansion of a statute . . . denies due process." (*Moss v. Superior Court* (1998) 17 Cal.4th 396, 429.) Accordingly, if retroactive application would "unfairly undermine" a party that "reasonabl[y] reli[ed]" on "the previously existing state of the law," the Court may decide to apply a decision only prospectively. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983.)

Apple and countless other California employers have set their pay policies based on a reasonable interpretation of California's wage orders. They relied on commonsense notions of "control" and "work." They reasonably believed that they need not pay an employee for conduct that is both voluntary and unrelated to the employee's job duties. They should not now be ambushed with liability for years' worth of such employee conduct.

This is all the more true given that California's employers relied not only on a reasonable reading of the wage orders, but also on *Morillion*, *supra*, 22 Cal.4th 575. As Apple explains at length (ABM 23-28), a clear implication of *Morillion* is that an employer may provide its employees with an "optional" service

"without having to pay them" for using it (*Morillion*, *supra*, 22 Cal.4th at p. 152). California employers should not be penalized for failing to predict that one of this Court's precedents will be reversed or contradicted.

In its order sending this case here, the Ninth Circuit speculated about how the case might be distinguishable from *Morillion*. The distinctions the panel raised, however, are illusory. Might it matter, the panel asked, that an employer has greater control over its employees on-site? But the panel offered no reason for creating an "on-site" exception to *Morillion*'s statement that optional activity is not "controlled." Further, Morillion's employer transported its employees in part to "reduc[e] . . . traffic congestion." (*Morillion*, *supra*, 22 Cal.4th at p. 594.) The fact that the employees in *Morillion* were owed compensation for time evidently spent *off*-site confirms that this Court does not create formalistic and arbitrary on-site-off-site distinctions.

Might it matter, the panel asked, that an employer has a strong interest in preventing theft? But an employer has an equally strong interest in getting its employees to the workplace, yet *Morillion* says that an employee need not be paid for using

the employer's optional transportation. In any event, an employer's "interests" cannot be dispositive. An employer has a strong interest in its employees' getting enough sleep, but no one would contend that the law entitles employees to pay for going to bed early.

What, the panel asked, about the fact that for some employees the bag-check requirement might be only "nominally" voluntary? For one thing, this question simply changes the definition of the certified class, which includes only those employees who brought a bag to work "voluntarily" for "personal convenience." For another thing, the question distorts *Morillion*. The Court in *Morillion* could easily have speculated about employees whose use of an employer's optional transportation is only "nominally" voluntary. Instead the Court concluded that time spent on optional transportation is not compensable.

The Ninth Circuit had it correct at the outset when, before starting to postulate distinctions, it said: "Applying *Morillion*, the searches here are voluntary . . . [and] the time spent undergoing the search is not compensable." (*Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, 872.) Apple's bag check policy is legal so long as this Court does not either (1) overturn *Morillion* or

(2) drastically narrow *Morillion* based on an arbitrary distinction—one of the sort the Ninth Circuit explored—that no employer could reasonably have predicted. If Apple can suffer retroactive liability here, it can suffer liability more or less at random.

The difficulty of foreseeing liability distinguishes this case from *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 848 n.18 (cited RBM 37). The employer in *Mendiola* did not pay security guards for time spent on-site but asleep. The employer had relied on an erroneous Court of Appeal decision—the decision improperly used a federal regulation to interpret California employment law—and on an expired agreement with the labor commissioner. The employer could not reasonably expect this Court to defer to either of these authorities. Here, by contrast, Apple reasonably relied on both the plain language of a wage order and a clear statement in one of this Court's opinions.

The stakes here are high. Retroactive liability would impose on Apple—and, in follow-on actions, on many other California employers—immense unforeseeable legal fees, settlements, and damages awards and penalties. For instance, an employer found in violation of the wage-and-hour laws is

typically exposed to derivative liability for pay-stub penalties (an extra $4,000 per employee) (Lab. Code, § 226, subd. (e)), waiting-time penalties (an extra 30 days' wages per employee) (*id.*, § 203), and PAGA penalties (an extra $100 per employee per pay period) (*id.*, § 2699(f)(2)). The Appellants seek each of these penalties. They demand that Apple pay an exorbitant price for failing to predict the unpredictable.

Given that retroactive application would impose, on Apple and many others, staggering liability for unknown and unknowable infractions, this case should—if Apple loses—join the long line of authority applying a ruling only prospectively. (See, e.g., *Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379 [applying only prospectively a rule governing the interpretation of workers' compensation settlements]; *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 829 [applying only prospectively the invalidation of a law containing a safe-harbor clause on which the defendant had reasonably relied]; *Camper v. WCAB* (1992) 3 Cal.4th 679, 688-289 [applying only prospectively a new rule governing the deadline to file a petition for a writ of review]; *Woods v. Young* (1991) 53 Cal. 3d 315, 330 [applying only prospectively a new rule governing the calculation of a period of limitation]; *Moradi-*

Shalal v. Fireman's Fund Ins. Co. (1988) 46 Cal.3d 287, 305 [applying only prospectively a ruling eliminating a private right of action created in one of the Court's prior decisions].)

"After all," Justice Holmes wrote, "one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules." (O.W. Holmes, letter of Feb. 8, 1908, to Franklin Ford, published in R. Posner, ed., *The Essential Holmes* (1992) p. 201.)

CONCLUSION

Because the Appellants' construction of Wage Order No. 7 would render the order void for vagueness, the Court should reject it. If the Court instead accepts the construction and finds that Apple's bag-check policy violates Wage Order No. 7, it should apply its ruling only prospectively.

Dated: June 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Rule 8.520(c)(1) of the California Rules of Court, I certify that, according to the word-count feature in Microsoft Word, the foregoing Brief of Washington Legal Foundation as *Amicus Curie* in Support of Respondent contains 3,576 words, including footnotes, but excluding any content excepted by Rule 8.520(c)(3).

Dated: June 15, 2018

Corbin K. Barthold

PROOF OF SERVICE

I declare that I am over 18 years of age, employed in the District of Columbia, and not a party to this action. My business address is 2009 Massachusetts Ave., NW, Washington, DC 20036.

On June 15, 2018, I served a copy of the foregoing

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

on the interested parties in this action via U.S. First Class Mail, by placing a true copy of the same, enclosed in individually sealed envelopes with postage prepaid, for collection and mailing at Washington Legal Foundation (WLF), 2009 Massachusetts Ave., NW, Washington, DC 20036, in accord with WLF's ordinary business practices and addressed to each recipient below as follows:

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I am readily familiar with WLF's practice for collection and processing of mail for delivery to the U.S. Postal Service. In the ordinary course of WLF's business practice, the foregoing application will be deposited with the U.S. Postal Service on the same date that it is placed for collection and mailing at WLF, with postage fully prepaid.

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

Executed on June 15, 2018 at Washington, District of Columbia.

Corbin K. Barthold