S275431

Case No. 21-16201

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE HUERTA,
Plaintiff-Appellant,

v.

CSI ELECTRICAL CONTRACTORS, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE BETH LABSON FREEMAN
D.C. No. 5:18-CV-06761-BLF

ANSWERING BRIEF OF APPELLEE CSI ELECTRICAL CONTRACTORS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee CSI Electrical Contractors, Inc., states that MYR Group, Inc. is its parent company and is the only publicly held corporation that owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

CSI Electrical Contractors, Inc. ("CSI") agrees with the jurisdictional statement of Plaintiff George Huerta.

STATEMENT OF THE CASE

CSI was retained to perform procurement, installation, construction, and testing services on a construction project at the California Flats Solar Facility ("Project"). (5-ER-1009.) The Project was located on Jack Ranch, which is private property in San Luis Obispo County. (*Id.*) CSI started its work on the Project on May 7, 2018, and it employed about 528 workers through June 19, 2019. (*Id.*) Huerta worked on the Project, and was assigned to assist CSI in its work. (6-ER-1248, 6-ER-1261.)

A. Huerta Drove A Vehicle From The Entrance Of The Project Directly To A Parking Lot

In order to access the Project, Huerta passed a guard shack, which was at the perimeter of the Project ("Project Entrance"). (5-ER-1009.) The Project Entrance opened each morning after a biologist cleared the road at sunrise. "[A]t the beginning of the day before the sun would come up, [the biologist] would come and clear the road for animal activity [to] [m]ake sure it's safe access for [workers] to enter the project." (3-ER-490.) After the biologist cleared the road, Huerta passed the Project Entrance **without stopping** and travel down the road ("Access

Road"), where the speed limit was generally 20 miles per hour after sunrise, but only 10 miles per hour if it was before sunrise. (3-ER-490-491.)

After traveling 5.9 miles on the Access Road, Plaintiff stopped at a guard shack and presented a badge for an attendant to scan ("Badging Gate"). (5-ER-1009.) Plaintiff never left his vehicle and never even gave his badge to the attendant. (*Id*.) Instead, Huerta always kept his badge on his person, only presenting it to be scanned. (*Id*.) At the Badging Gate, two lanes of cars were processed simultaneously by several attendants. (*Id*.) After passing the Badging Gate, Huerta continued traveling down the Access Road until he reached a parking lot ("Parking Lot"). (*Id*.)

B. The Rules Of The Project

The California Department of Fish and Wildlife ("CDFW") required a permit before work on the Project began. (5-ER-1010, 5-ER-1016-1047.) The CDFW imposed rules on the Project because of the presence of two endangered species: the San Joaquin Kit Fox and the California Tiger Salamander. (5-ER-1010, 5-ER-1020-1022.) Under the California Endangered Species Act, an Incidental Take Permit ("ITP") was required because the Project was expected to have an effect on these endangered species. (5-ER-1010, 5-ER-1016-1047.)

The ITP required a biologist to monitor the Project to "help minimize and fully mitigate or avoid the incidental take of Covered Species, minimizing

disturbance of Covered Species' habitat." (5-ER-1010, 5-ER-1023-1024.) The ITP required "an education program for all persons employed or otherwise working in the Project Area before performing any work," which "consist[ed] of a presentation from the Designated Biologist that includes a discussion of the biology and general behavior of the Covered Species, information about the distribution and habitat needs of the Covered Species, [and] sensitivity of the Covered Species to human activities." (5-ER-1010, 5-ER-1024.)

The ITP required the Project to "clearly delineate habitat of the Covered Species within the [Project] with posted signs, posting stakes, flags, and/or rope or cord, and place fencing as necessary to minimize the disturbance of Covered Species' habitat." (5-ER-1010, 5-ER-1026.) The ITP also strictly set out the boundaries of the Project and the visitors' access to the Project: "Project-related personnel shall access the [Project] using existing routes, or new routes identified in the Project Description and shall not cross Covered Species' habitat outside of or en route to the Project." (*Id*.) The ITP also required the restriction of "Project-related vehicle traffic to established roads, staging, and parking areas," and "**that vehicle speeds do not exceed 20 miles per hour to avoid Covered Species on or traversing the roads.**" (*Id.* [emphasis added].) At times, small portions of the Drive posted speed limits of 5 miles per hour because of the presence of "kit fox" zones. (5-ER-1010.)

In CSI's contract with the General Contractor, it was required to observe all of these rules and ensure its employees did as well. (5-ER-1010-1011.) CSI agreed that it will "ensure that the wildlife and the burrows/dens/nests of such are not touched by anyone other than the biological Compliance Monitor." (5-ER-1011, 5-ER-1097.)

C. Huerta Was Provided A 30-Minute Lunch Each Day In Accordance With Two Collective Bargaining Agreements That Governed His Employment

Huerta was "a member of the Operating Engineers Local 3" and was "dispatched" to the Project by that union. (5-ER-1009, 5-ER-1011, 5-ER-1104-1105, 6-ER-1246.) Huerta's employment on the Project was governed by two collective bargaining agreements: the Operating Engineers Local Union No. 3 ("Operating Engineers Master Agreement") and the Project Labor Agreement specific to the Project ("Cal Flats PLA"). (5-ER-1011.) Huerta received one 30-minute unpaid meal break during his shift. (3-ER-498, 4-ER-632, 4-ER-708, 6-ER-1250-1254.)

SUMMARY OF ARGUMENT

Plaintiff claims that he is entitled to compensation for all time that he spent driving to and from a parking lot on a construction project before and after work. This Court, however, has already rejected the exact same driving time claim on the exact same Project. Justin Griffin, represented by the same counsel, filed a

putative class action on April 27, 2017 seeking unpaid wages for the same drive on the Project. The district court held that this drive was not compensable as a matter of law, and, this Court, on December 11, 2020, affirmed the lower court's order in its entirety. *Griffin v. Sachs Elec. Co.*, 831 F. App'x 270, Case No. 19-17457 (9th Cir. 2020) ("*Griffin* Appeal"). This Court rejected Griffin's claim that he was entitled to compensation because his employer "controlled" him on his drive to and from the parking lot. This action cannot survive this Court's prior holding.

The reason that the alleged "control" over employees on this drive is non-compensable is that an employer is not required to compensate employees for entering or exiting its premises and navigating to and from its time clocks or work stations. Plaintiff thinks he should be paid for the long stretch of road he must drive down in his vehicle to and from the parking lot. Although the drive takes 40-45 minutes, Plaintiff never leaves his vehicle and is not required to do anything except drive. Plaintiff points to the speed limit and the various road signs as evidence that he was controlled during the drive.

But employees are never free from rules when traveling on an employer's premises. An employee can certainly be terminated for speeding or driving unsafely in an employer's parking lot before or after work, and an employer can impose safety rules that employees must follow at all times while on the premises,

whether or not they are being paid. Despite these "rules," no one would argue that employees reporting to work get paid as soon as their vehicles turn on to their employer's driveway.

Similarly, employees are often told that they have to follow a certain pathway to get to their work stations, are not permitted to run, may not loiter, may not socialize, solicit, litter, or use their cell phones while navigating through the employer's premises to clock in. And, again, despite these "rules," it would be frivolous to argue that employees on the way to their time clock get paid waiting for an elevator to take them to the 15th floor before walking down a long hallway. Just as these every day, ordinary rules do not "control" an employee from the moment he or she crosses the threshold of an employer's property before beginning work, the rules that Plaintiff points to also do not "control" him or require compensation while he travels on the Project before beginning and after ending work.

Plaintiff, moreover, is seeking compensation for rolling down his window in his vehicle, and reaching his badge out for the attendant to scan it. As this Court recognized in the *Griffin* Appeal, this time is not compensable. Plaintiff compares this minor interaction to a bag check at work, where an employer rifles through an employee's bag to check for stolen merchandise. This comparison, however, is deeply flawed. A bag check takes much more time, is much more invasive,

actually detains an employee, and is more controlling. The analogies to the Badging Gate scan here that are undeniable are (1) swiping an electronic card at a door to gain access, (2) reaching out of a vehicle to scan a card to raise a gate to exit a parking garage, or (3) flashing identification to security to bypass a line that members of the public must go through. Plaintiff's time at the Badging Gate after a non-verbal interaction that lasts a few seconds does not rise to the level of control that warrants compensation.

The only claim in this case that was not fully considered and disposed of in the *Griffin* Appeal is Huerta's claim that he should be compensated for his lunch break because he was not allowed to leave his work area. Wage Order 16, however, governing the construction industry, specifically states that a meal period is **not counted as time worked** where employees who are subject to a qualifying CBA are not relieved of all duty during the meal period. Huerta did, in fact, work under a qualifying CBA, and his meal periods therefore did not "count as time worked" even if he was not relieved of all duty during lunch. This specific and express language declaring that certain time is not "counted as time worked" is so broad that it plainly bars minimum wage claims based on employees alleging that they could not leave their work area during lunch.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing an order granting summary judgment, "[t]he mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy v. Square D*, 68 F.3d 1216, 1221 (9th Cir 1995). "Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment." *Arpin v. Santa Clara Valley*, 261 F.3d 912, 919 (9th Cir. 2001). "[S]ummary judgment may be affirmed on any ground supported in the record, including reasons not relied upon by the district court." *Id.*, 919.

Where "the case turns on a mixed question of fact and law and the only disputes relate to the **legal significance of undisputed facts**, the controversy collapses into a question of law suitable to disposition on summary judgment." *Thrifty Oil v. Bank of America*, 322 F.3d 1039, 1046 (9th Cir. 2003) (emphasis added). "[W]here the palpable facts are substantially undisputed, such issues can become questions of law which may be properly decided by summary judgment." *FTC v. Network Servs. Depot*, 617 F.3d 1127, 1139 (9th Cir. 2010). *See also Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999) (noting if "a motion for summary judgment is merely the conduit to bring the legal question before the district court ... the usual tests of summary judgment, such as whether a

genuine dispute of material fact exists, do not apply.").

II. THE DRIVE TIME BETWEEN THE BADGING GATE AND THE PARKING LOT IS NOT COMPENSABLE BECAUSE PLAINTIFF WAS NOT "CONTROLLED" DURING THIS TIME

Huerta argues that his time driving to and from the parking lots on the Access Road should be compensated because he was under CSI's control. This claim is barred as a matter of law.

A. This Court Has Already Rejected The Same Claim On The Same Project Made By The Same Attorneys

This Court already rejected the exact same claim that employees on this Project should be paid for the drive between the Badging Gate and the parking lot. In the *Griffin* Appeal, this Court held that "[n]or was Griffin under Sachs's control while he drove the access road to the parking lots. His argument to the contrary rests on the various rules he had to follow while on the property where he worked." *Griffin v. Sachs Elec.*, 831 F. App'x 270, 271–72 (9th Cir. 2020). This Court rejected this argument, holding that "Griffin's drive on the access road more closely resembles a continuation of his commute, however, which is not typically compensable under California labor law." *Id.* (citation omitted). This Court reasoned that "[t]he rules governing the drive were not particularly burdensome and reflected the nature of the property—a remote, private ranch containing cattle, as well as endangered species and their habitat." *Id.* This Court distinguished

Morillion v. Royal Packing, 22 Cal. 4th 575 (2000) "because Sachs did not require its employees to ride employer-mandated transportation, and instead allowed them to drive themselves, carpool, or take Sachs-provided buses." *Id.*

This Court's holding is obviously dispositive of Huerta's claim for the exact same drive time. Huerta does not attempt to distinguish his drive from the drive in *Griffin*, nor does he even acknowledge that this Court already held that the same drive was non-compensable as a matter of law. For the same reasons as articulated by this Court in the *Griffin* Appeal, this Court should also affirm the district court's rulings that Huerta's drive between the Badging Gate and the parking lot is noncompensable.

B. Employees Are Always Controlled In The Path Of Travel They Take To And From Their Work Station And While On Company Property

The reason that Plaintiff's "drive time" claim is baseless is that the alleged "control" exerted by CSI is merely a part of regulating the path of travel of employees to and from their work station. Under Plaintiff's theory of liability, unless employees are permitted to race their cars through an employer's parking lot, then an employer must pay them from the moment that they drive on to the employer's premises. According to Plaintiff, speed limits "control" him, as do other signs on the roads regulating the path of travel to his work station. Plaintiff is essentially challenging an employer's right to enforce rules on its property

against employees during the time that they navigate those premises before and after work unless it pays employees during that time. This theory of liability is absurd and would wreak havoc on all workplaces in California.

Plaintiff argues that "CSI determined **when**, **where** and **how** employees were to travel between the Security Gate and the parking lots. Workers could only travel on the Site from sunrise to sunset and after the Access Road was cleared by biologists. Workers could only travel on the Access Road. CSI controlled 'how' the workers must travel — they are limited in how fast they could go, whether they could stop, whether they could pass other vehicles." (AOB 29 (emphasis in original).) These rules, however, do no more than establish and regulate an employee's path of travel to and from a work station ("Path of Travel Rules"), and do not exert a level of control over an employee sufficient to warrant compensation.

1. The level of control, and not the mere presence of control, determines if time is compensable

In *Morillion*, the California Supreme Court held that an employer is not required to compensate employees whenever it exerts some "control" over them. The touchstone for the inquiry is whether an employer exercises a sufficient "level of control" over an employee. The Court rejected the employer's argument that its holding was so "broad that it encompasses all activity the employer 'requires,'

including…all grooming time, because employees might not, for example, shave unless the employer's grooming policy required them to do so." *Morillion*, 22 Cal. 4th at 586. The court acknowledged that it is "**[t]he level of the employer's control** over its employees, rather than the mere fact that the employer requires the employees' activity, [that] is determinative." *Id.*, 587 (emphasis added). *See also Frlekin v. Apple,* 8 Cal. 5th 1038, 1051 (2020) ("the level of Apple's control over its employees [is] the 'determinative' factor in analyzing whether time is compensable under the control standard").

2. Path of Travel Rules do not constitute compensable control while employees travel on the employer's premises before and after work

Traveling on an employer's premises before or after starting work **always** entails **some level of control**—employees cannot do whatever they want, employees can do only one thing (report to or exit from work), and there are certain rules of conduct that do not follow employees outside those premises. However, employees' mere presence at the work site does not automatically entitle them to compensation, even though they must obey many rules while on those premises.

Once employees enter an employer's premises for work, an employer is permitted to insist that they proceed directly and safely to their work station along a particular path. Otherwise, on the way to their work stations, while on the

employer's premises, employees could speed their cars through parking lots, slide down stair bannisters, access restricted areas, run through dangerous areas, loiter, and jump in front of oncoming traffic.

Employees, therefore, can be compelled to follow rules regarding the pace they can travel (no running), and the mode they can travel (no bikes or roller skates). Employees certainly can be restricted in their movement on an employer's premises, including rules about areas they can and cannot enter, as well as rules regarding the pathways they must follow.

In this case, none of the Path of Travel Rules complained about by Plaintiff required him to do anything other than report directly to and depart directly from his work station safely, and they were all reasonably related to an employer regulating traffic on its property. Stop signs and speed bumps, for example, slow an employee down while traveling on an employer's premises before and after work. An employer in the midst of inclement weather, moreover, may take preemptive safety measures, such as drastically reducing automobile speeds, closing lanes, and directing traffic. These rules are analogous to logistics that prevent employees from reaching a time clock as quickly as they otherwise could, such as a "no running" rule, or delays while waiting for an elevator, or a line that may form at a turnstile on work premises, all of which impede employees' progress while making their way to or from a time clock. The reason that Path of

Travel Rules do not reach the level of control to warrant compensation is that such rules directly and reasonably relate to the non-compensable task of the employee navigating the workplace to report to or depart from work.

3. Whether or not Plaintiff could use the time effectively for his own purposes is not the test for compensable control in the context of employees traveling to and from their work stations before and after their shifts

Plaintiff argues that he should have been paid for the drive because he could not use the time effectively for his own purposes. To be clear, CSI certainly is not arguing that rules regulating an employee's path of travel ordinarily do not warrant compensation or that such rules cannot constitute compensable control. Context, however, is everything, and the "level of control" that such rules impose on an employee traveling on the employer's premises before or after work is significantly less than the same rules at a different time and different place.

In *Morillion*, for example, the Court held that a bus ride—not on the employer's premises—was compensable because it was required and therefore "prohibit[ed] [the employees] from effectively using their travel time for their own purposes." *Morillion*, 22 Cal. 4th at 586. The Court noted that "during the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car. Plaintiffs were foreclosed from numerous activities **in which they might otherwise engage if they were**

permitted to travel to the fields by their own transportation." *Id.* (emphasis added).

Similarly, the Ninth Circuit has held that an employer's regulation of the plaintiff's path of travel on the way to work (not while at work) rose to the level of compensable control under California law. In that case, the court noted that the plaintiff "was required to drive the vehicle **directly** from home to his job and back," without making personal stops. *Rutti v. LoJack*, 596 F.3d 1046, 1061-62 (9th Cir. 2010) (emphasis in original).

Therefore, in both cases, the courts held that employers' Path of Travel Rules exerted a sufficient level of control over employees during commutes to warrant compensation. The central reasoning behind these decisions is that employees were unable to use their commute time effectively for their own purposes.

Like trying to fit a square peg into a round hole, Plaintiff attempts to force this reasoning to apply to his travel on the Project by using the language used by the courts in *Morillion* and *Rutti*. (*See* AOB 13 ["while driving on the Access Road at the end of the day, workers were confined to the Site and to the vehicle in which they rode and could not use the time effectively for their own purposes, such as running errands or getting something to eat or doing other things that they could normally do outside the Site"]); *id.* 28 ["while driving to and from the

parking lots on the Access Road, [workers] were under CSI's control and could not effectively use such time effectively for their own purposes such as running personal errands outside of the Site"].) This argument strains logic.

The reasoning of *Morillion* and *Rutti* is inapt here because an ordinary commute is an **opportunity** for employees to drive passengers, run errands, take detours, drop their children off at school, and stop for coffee. These opportunities were taken from employees by the employer in *Morillion* by requiring them to report to a bus stop and be driven to the agricultural fields where they worked. *Morillion*, 22 Cal. 4th at 586-87. Likewise, in *Rutti*, the employees lost these opportunities because they were not allowed to make personal stops on the way to work or to ride with passengers during their commute. *Rutti*, 596 F.3d at 1061-62.

By contrast, when employees are travelling on the employer's premises before and after work, they obviously cannot drop off children at school. As soon as employees turn their vehicles onto the employer's property, they can no longer stop at the grocery store or run personal errands. The plain disconnect between the reasoning of the *Morillion*/*Rutti* commute cases and this case is that neither case considered the salient issue here: an employee traveling on the employer's premises before starting work and after ending work.

Therefore, Path of Travel Rules imposed during an ordinary commute may exercise a level of control over an employee that is substantial and that requires an

employer to compensate him for that time. Just like in *Morillion* and *Rutti*, such rules deprive the employees of opportunities to use the time in question effectively for their own purposes. *See, e.g.*, *Rutti*, 596 F.3d at 1062 ("Here, **the level is total control**. To repeat, Rutti was required to use the company truck and was permitted no personal stops or any other personal use.") (Emphasis added.)

Accordingly, Plaintiff is incorrect when he makes the bald assertion that "[t]he control exercised by CSI over its workers is essentially the same as that exercised by the employer in *Morillion*." (AOB 29.) To the contrary, the rules in *Morillion* are completely different than the rules in this case, as the Path of Travel Rules in this case did not affect or deprive Plaintiff of any opportunities he would otherwise have had.

The California Supreme Court warned about using the reasoning of the commute cases like *Morillion* to resolve the question of control over employees while at work. In *Frlekin*, the court rejected the employer's argument that "unlike the employees in *Morillion*, plaintiffs may theoretically avoid a search by choosing not to bring a bag or iPhone to work." *Frlekin*, 8 Cal. 5th at 1050-51. The court reasoned that "there are inherent differences between cases involving time spent traveling to and from work, and time spent **at** work." *Id.* (emphasis in original). Unlike the control in *Morillion*, the court reasoned, "Apple controls its employees **at the workplace**." *Id.*, 1051 (emphasis in original).

The court held that "[b]ecause Apple's business interests and level of control are greater in the context of an onsite search, the mandatory/voluntary distinction applied in *Morillion* is not dispositive in this context." *Id.* Just as the "mandatory/ voluntary distinction" in *Morillion* could not be imported in to the context of the onsite search in *Frlekin*, the "using the time effectively for his or her own purposes" test in the commute cases is not helpful in the context of an employee traveling on the employer's premises before and after work. Simply put, Path of Travel Rules at work are much less controlling than the same rules away from work.

Accordingly, all of the Path of Travel Rules cited by Plaintiff that "controlled" him on the Drive did not deprive him of any opportunities as he made his way across the Project either on his way to or from the Parking Lot. The fact that he could not use the time on the drive effectively for his own purposes was due to the fact that he was reporting to work on the employer's premises, and not because of any employer rules.

III. PLAINTIFF'S SECTION 5(A) CLAIM IS BARRED AS A MATTER OF LAW

Plaintiff argues that his claim under Paragraph 5(A) of Wage Order 16 is valid because "the Security Gate where the mandatory entrance security process occurred was the first location where the employees' presence was required by

CSI for them to enter and work at the Site." (AOB at 31.) According to Plaintiff, employees "were specifically instructed by CSI that the first place they were required to be at the beginning of the day to work was the Security Gate to line up and go through the mandatory entrance security process and drive on the Access Road to the parking lots of the Site." *Id.* Plaintiff, again, has raised a claim which this Court has already squarely rejected.

In the *Griffin* Appeal, this Court held that "the security gate was not the first location where employees' presence is required under the meaning of paragraph 5(a) of Wage Order 16-2001. Rather, the record establishes that Griffin was first required to arrive at the parking lot, not the security gate." *Griffin v. Sachs Elec.*, 831 F. App'x 270, 272 (9th Cir. 2020). This Court reasoned that "Griffin had to report to the parking lot by 8:00 a.m. for the buggy to pick him up and take him to his assigned jobsites. There was no designated time by which he had to be at or pass through the gate. Griffin's Drive Time is therefore not compensable under this theory either." *Id.*

Huerta worked on the same Project as Griffin. Just as in *Griffin*, the Badging Gate was not the location where Huerta's presence was first required. Like Griffin, Huerta did no more than flash a badge to a security attendant for scanning before driving past the Badging Gate without ever leaving his vehicle. *See* 5-ER-1009 ("After traveling for 5.9 miles on the Access Road, Plaintiff was

required to stop at a guard shack and present a badge for an attendant to scan ('Badging Gate'). Plaintiff did not have to leave his vehicle and never even turned his badge over to the attendant. Instead, Huerta at all times kept his badge on his person, only presenting it to be scanned. At the Badging Gate, two lanes formed so that two lines of cars could be processed simultaneously by several attendants. After passing the Badging Gate, Huerta continued traveling down the Access Road until he reached a parking lot."). Therefore, the claim in this case under Paragraph 5(A) to compensate Huerta based on the allegation that the security gate where he badged in was the first location where his presence was required is barred as a matter of law.

IV. PLAINTIFF'S STOP AT THE BADGING GATE AT THE END OF THE DAY DID NOT CONSTITUTE "HOURS WORKED"

An employer does not control an employee by requiring its employees to present some form of badge or access card to enter or exit its premises. Plaintiff merely stopped in his vehicle at the Badging Gate, rolled down his window, and extended his badge to be scanned. This procedure to exit the premises does not warrant compensation.

A. The Time Exiting The Project Through The Badging Gate Is Not Compensable Under The Control Test

Plaintiff argues that being "confined in the Site as they were waiting in the exit security line and going through the exit security process…[a]s the Supreme

Court recognized in *Frlekin*, [is] a clear element of control that makes time waiting for and going through a mandatory exit security process compensable." (AOB at 21.) This Court already rejected this exact argument in the *Griffin* Appeal.

Griffin made the same argument before this Court with respect to the same exit process on the same solar project. In *Griffin*, the plaintiff argued that:

> Sachs' mandatory security that required Sachs' employees to wait in line and to go through the mandatory security check-in process at the Security Gate Entrance and to wait in line to go through the mandatory security check-out process to exit at the Security Gate Entrance is fundamentally the same as Apple's security exit bag search process, which required Apple employees to wait in line to go through a security process to have their bags checked. Just as Apple's security exit bag search process was compensable, the time waiting for and passing through the mandatory security check-in and check-out process at the Security Gate Entrance is compensable "hours worked" under California law. (*Griffin* Appeal, ECF No. 13 at 34.)

This Court rejected this argument completely, holding that "Griffin was not under Sachs's control while waiting in line for guards to badge him in or out at the security gate." *Griffin*, 831 F. App'x at 271. This Court held that "Griffin relies on [*Frlekin*], in arguing that employees must be compensated any time they wait for and undergo 'mandatory security processes.' *Frlekin* made clear that an employer's level of control over its employees is the 'determinative factor' in assessing whether compensation is required, but that case involved mandatory searches of employees' bags and other belongings." *Id.* This Court reasoned that

"[h]ere, although the line of vehicles waiting to pass through the security gate could be long, all Sachs's employees had to do was flash their badges to a guard, which is significantly less invasive than the exit searches at issue in *Frlekin*. Griffin's Security Time is thus not compensable." *Id.*

Undaunted, Plaintiff makes the same argument to this Court again, effectively asking it to overrule itself and hold that the same time waiting to exit the same project during the same exit procedure is, in fact, compensable, without having any new facts or any new cases. Just like the plaintiff in *Griffin*, Huerta testified that, in order to exit the Project, he was merely required to present his badge at a gate for security to scan. (*See* 6-ER-1255-1256) ("Q. So you -- you held it up and they scanned it; correct? A. That's correct. Q. They didn't take it from you; they just scanned it while you're holding it? A. That's correct."); 6-ER-1257 (testifying that the exit procedure was identical to the procedure on the way in to the Project).

Nothing about Huerta's brief interaction qualifies as control that warrants compensation. In *Frlekin*, the policy imposed significant burdens on employees who brought bags: "locating a manager or security guard and waiting for that person to become available, unzipping and opening all bags and packages, moving around items within a bag or package, removing any personal Apple technology devices for inspection, and providing a personal technology card for device

verification." *Frlekin*, 8 Cal. 5th at 1047. The Court held "that plaintiffs' time spent on Apple's premises waiting for, and undergoing, mandatory exit searches of bags, packages, or personal Apple technology devices, such as iPhones, voluntarily brought to work purely for personal convenience is compensable as 'hours worked.'" *Id.*, at 1058.

The drive through the Badging Gate, however, is nothing like the bag check procedure in *Frlekin* for two reasons. First, a bag check involves a substantial interaction with an employer and a level of control that is wholly absent in this case. The requirement in *Frlekin* that employees must locate a supervisor to inspect their belongings before leaving entails significant control, both in the time it takes, the invasiveness of the encounter, and the face-to-face nature of the contact. Here, by contrast, Plaintiff never leaves his vehicle, merely holds his badge to be scanned, and the encounter takes only seconds.

Second, unlike a bag check, the Badging Gate scan is strictly for the purposes of ingress and egress. Like scanning a card, this interaction at the Badging Gate is for the purpose of exiting the workplace. The most obvious analogy to this process is stopping at a gate at a parking garage to exit, which also requires the mere rolling down of the window, reaching out an arm, and scanning a card in order to cause the gate to rise.

The badging process can even be compared to an employee swiping a card

or using a key to unlock a door to exit the employer's building after clocking out. Another apt analogy is an employee in a courthouse flashing an identification card to bypass a security line that members of the public must go through. Such an employee, on the way from a time clock, does not continue to be paid from the time clock to the security location at the exit. In each of these cases, employees must present something to their employer—either a badge, security card, or key—that allows the employee to leave the premises but is not a continuation of the work day and is uncompensated.[1]

Huerta attempts to dramatize the time spent going through the Badging Gate by complaining that he was forced to wait in line. While he does not dispute that his interaction with the Badging Gate was very brief, Plaintiff extends this time by claiming that Plaintiff claims that he was "required to wait in line for and undergo the mandatory security exit process that lasted up to 30 minutes before being allowed to leave." (AOB at 5.) Waiting in line to exit the employer's premises, however, does not warrant compensation.

Plaintiff is essentially complaining about traffic. Plaintiff, however, fails to

[1] Huerta's reliance on and citation to *Pelz v. Abercrombie and Fitch*, 2015 WL 12712298, at *1–2 (C.D. Cal. June 4, 2015) and *Cervantez v. Celestica*, 618 F. Supp. 2d 1208, 1216 (C.D. Cal. 2009) is also misplaced. Both of these cases predate *Frelkin* by several years, also involve time spent by employees undergoing security checks when leaving a facility, and are therefore distinguishable for the same reasons.

cite any authority that an employee is "controlled" by an employer and must be compensated because his exit from a facility is delayed by a throng of other workers simultaneously attempting to access the same exit point. Congestion at a door to enter and exit the workplace before and after a shift is a part of the non-compensable time spent navigating to and from an employee's work station discussed in detail above. Just as delays from a stop sign, red light, speed bump, or elevator on the employer's premises do not control an employee to warrant compensation, neither do delays from hundreds of cars trying to leave or enter the workplace at the same time. As this Court recognized, the time waiting to badge out is not compensable even though "the line of vehicles waiting to pass through the security gate could be long." *Griffin*, 831 F. App'x at 271.

Huerta also argues that because the exit process occurs on the Project, the level of control is greater and the time is compensable. Plaintiff cites to *Frlekin*'s distinction "between employer-mandated activities that occurred on the employer's premises and those that did not" (AOB at 25), namely that "there are inherent differences between cases involving time spent traveling to and from work, and time spent **at** work" (*Frlekin*, 8 Cal. 5th at 1051) (emphasis in original). But as explained above, the difference between travel to and from work, on the one hand, and time traveling at work, on the other hand, allows for some control over Huerta's travel on the Project that would not be permissible if he were outside the

Project. Requiring Huerta to travel through a guard shack at the end of each day and swipe a card to leave the Project need not be compensated precisely because such travel occurs on the Project. Imposing similar restrictions on Plaintiff's commute, by contrast, likely must be compensated because of the opportunity costs that such restrictions entail.

B. The Time Exiting The Project Through The Badging Gate Is Not Compensable Under The Suffer of Permit Test

Plaintiff cites the dictionary for the definition of work, and concludes that "[t]he activities CSI required of its workers for the mandatory exit security process they were required to undergo before being allowed to leave the Site meet this plain-language definition of 'work'" because "[t]hey involve 'exertion' or 'effort,'" such as "rolling down windows" and "locating and displaying identification cards." (AOB at 27.) But "the phrase 'suffered or permitted to work, whether or not required to do so' [citation] encompasses a meaning distinct from merely 'working.'" *Morillion*, 22 Cal. 4th at 584. The purpose, rather, of the "suffer or permit" language is to capture time that an employer knows an employee is working, even though the employer is not controlling the employee. *See Hernandez v. Pac. Bell*, 29 Cal. App. 5th 131, 142 (2018) ("Our high court explained an employee is 'suffered or permitted to work' when the employee is working, but not subject to the employer's control, such as unauthorized overtime

when an employee voluntarily continues to work at the end of a shift with the employer's knowledge.").

The "suffer or permit" test, therefore, requires more than just "exertion" or "effort"; the standard must involve an employer observing "work" and allowing it to continue. The *Hernandez* case endorsed a definition of "suffered or permitted to work" that clearly captures this meaning and excludes from its definition the scanning of a card upon exit from work premises. In *Hernandez*, the court held that "the standard of 'suffered or permitted to work' is met when an employee is engaged in certain tasks or exertion **that a manager would recognize as work**." *Id.* (emphasis added). *See also Taylor v. Cox*, 283 F. Supp. 3d 881, 890 (C.D. Cal. 2017), aff'd, 776 F. App'x 544 (9th Cir. 2019) (under California law, "the standard of 'suffered or permitted to work' is met when an employee is engaged in certain tasks or exertion that a manager would recognize as work"); *Nicolas v. Uber*, 2021 WL 2016161, at *7 (N.D. Cal. May 20, 2021) ("California state appellate courts have endorsed the *Taylor* court's construction of the suffered or permitted to work clause…Given that endorsement, the court will treat the *Taylor* court's interpretation of the suffered or permitted to work clause as authoritative."); *Moreno v. UtiliQuest*, 2021 WL 1250515, at *3 (C.D. Cal. Feb. 11, 2021) (under California law, "[a]n employee is 'suffered or permitted to work' when they engage in certain tasks or exertion that a manager would recognize as work").

The reason for this limitation on the "suffer or permit" test is that, if an employer is not controlling an employee, compensation is due only if an employer knows that an employee is performing a task that it would "recognize as work," does not stop it, and, in fact, tolerates it. Under this definition, scanning a card at the Badging Gate to exit the premises is obviously not something anyone at CSI would recognize as "work." Again, the "suffer or permit" test is designed to capture work (1) that is performed while an employer is not controlling an employee, but (2) is allowed to continue by the employer to its benefit. Scanning a key card every day after work does not fit into this category of "work."

• • • •

Accordingly, Plaintiff's claim based on scanning his card while exiting the Project is not compensable as a matter of law under either the "suffer or permit" or "control" prong of "hours worked" definition in Wage Order 16.

V. PLAINTIFF'S MEAL PERIOD WAS NON-COMPENSABLE AS A MATTER OF LAW

Plaintiff contends that "because class members were restricted from leaving their daily work areas during the meal periods, they were under CSI's control during the meal periods and [the] time of their meal periods constituted 'hours worked.'" (AOB at 35.) Plaintiff is wrong.

A. Plaintiff's Claim For Unpaid Wages During His Meal Periods Fails Under The Express Terms Of Wage Order 16

"The IWC's wage orders are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations of the employment relationship [citation], regulations that must be given 'independent effect' separate and apart from any statutory enactments…To the extent a wage order and a statute overlap, we will seek to **harmonize** them, as we would with any two statutes." *Brinker v. Superior Court*, 53 Cal. 4th 1004, 1027 (2012) (emphasis added).

Wage Order 16 applies to the construction industry. Cal. Code Regs., tit. 8, § 11160. Section 10(A) of Wage Order 16 provides that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes..." *Id.*, subd. 10(A). Section 10(D) of the wage order provides that **"[u]nless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked."** *Id.*, subd. 10(D) (emphasis added).

Subdivision (E) of the same wage order provides that "[s]ubsections (A), (B), and **(D)** of Section 10, Meal Periods, **shall not apply** to any employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked

and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage." *Id.*, subd. 10(E) (emphasis added). In other words, the requirement that an employee's lunch must be **counted as time worked** unless he or she is relieved of all duty **does not apply** to construction workers covered by a qualifying collective bargaining agreement.

The labor agreements Huerta worked under qualify under Wage Order 16 as CBAs that (1) expressly provide for the wages, hours of work, and working conditions of employees (3-ER-592-630, 4-ER-632-725), (2) provide for premium pay for all overtime hours worked (3-ER-627-628, 4-ER-632), and (3) provide a regular hourly rate of pay for employees of at least 30 percent more than the state minimum wage rate (4-ER-693) (all wage rates more than $22.97 per hour).

Plaintiff is therefore advancing a claim that is expressly barred by the wage order. Plaintiff demands that his meal break should be compensated because he was controlled and not relieved of all duty, but Wage Order 16 expressly states that the ordinary rule that meal periods are "counted as time worked" if employees are not "relieved of all duty during [their] 30 minute meal period[s]" does "not apply to any employee covered by a [qualifying] collective bargaining agreement." Accordingly, under Wage Order 16, Plaintiff's claim that his meal period be

"counted as time worked" because he was not relieved of all duty is barred.[2]

In response to this straightforward language in the Wage Order, Plaintiff argues that subdivisions 10(D) and 10(E) of Wage Order 16 do not apply to his claim because he is not alleging "that the time of his meal break should be compensated 'because he was not relieved of all duty.'" (AOB at 43.) Plaintiff claims that he is instead "contend[ing] that the time of his meal periods constitutes 'hours worked' because of the control CSI exercised over him during the meal periods," and therefore that the specific wage order provision governing hours worked during a meal period is inapplicable to him. (*Id.*)

In making this argument, Plaintiff attempts to distinguish his allegation that employees were "restricted during meal periods from leaving their daily work Sites" (AOB at 34-35) from an allegation that CSI did not relieve Plaintiff of all duty during his meal periods. Plaintiff cites *Bono v. Bradshaw,* 32 Cal. App. 4th 968 (1995), as authority for him to make this distinction, contending that in *Bono* the court held that, under "a policy where workers had to remain on the work-Site

[2] Although *Bearden v. U.S. Borax,* 138 Cal. App. 4th 429, 436 (2006), held that the CBA exemption in Wage Order 16 was invalid on the grounds that the state agency "exceeded its authority in creating a meal period exemption not codified in section 512," *Bearden's* holding was several years before section 512 was amended to expressly add a nearly identical exemption for workers in the construction industry. As a result, the CBA Meal Period Exemption in Wage Order 16 is consistent with section 512 and is valid, and *Bearden's* holding has been superseded by the 2011 amendments to section 512. (*See* SER-141-147.)

premises during their 30–minute lunch period…the lunch time was compensable" (AOB at 36) because "(w)hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, the employee remains subject to the employer's control" (*Bono*, 32 Cal. App. 4th at 975). In furtherance of this distinction, Plaintiff even states that, in *Bono*, the "workers were relieved of all work duties during the lunch period and an on-site cafeteria and relaxation area was available for them to use during the lunch period." (AOB at 36.) Plaintiff completely misreads *Bono*.

Central to the *Bono* holding was that making employees stay on the premises did not relieve them of all duty. The court, in fact, relied on and endorsed the policy of the Division of Labor Standards Enforcement ("DLSE") that "an employee remains subject to the control of his or her employer **and is not relieved of all duty** if he or she is precluded from leaving the workplace during the meal period." *Bono*, 32 Cal. App. 4th at 971 (emphasis added). The *Bono* court, in fact, held that "an employee who has a duty or obligation to remain on the premises during meal periods is not '**free of all duty**.'" *Id.*, at 975 (emphasis added). The court expressly upheld the DLSE's policy. *Id.*, at 979.

Indeed, the very definition of an "off-duty meal period is an uninterrupted 30-minute period during which the employee is relieved of all duty **or employer**

control." *Jernagin v. City of L.A.*, 2013 Cal. App. Unpub. LEXIS 3780, *24 (Cal. Ct. Appl. May 29, 2013) (emphasis added). "[T]he test" to determine if a meal period can "be designated 'off-duty'" is "whether the control exercised by the employer permitted the employees to use 'the time effectively for [their] own purposes.'" *Id.*, *33 (quoting *Morillion*, 22 Cal. 4th at 586). The only way that Plaintiff's argument would make any sense is if it were even possible for an employer to "control" an employee while relieving him or her of all duty. Because the concept of control necessarily entails the failure to relieve an employee of all duty, Plaintiff cannot escape the straightforward language of the CBA exemption in Wage Order 16 and maintain that the meal period should be "counted as time worked."

Plaintiff also argues that "there is nothing in Wage Order 16 that contains an express exemption from the minimum wage requirements in Labor Code section 1194(a) and Wage Order 16 section 4 for all hours worked." (AOB at 41.) Plaintiff essentially asks this Court to award him compensation based solely on subdivision 4(A) of Wage Order 16, which requires the payment of minimum wage for all "hours worked," and subdivision (2)(J), which defines "hours worked" as all "time during which an employee is subject to the control of an employer."

But in order to do that, this Court must bypass and ignore subdivisions 10(D) and 10(E) of the very same wage order that address precisely the situation

Plaintiff is complaining about: receiving a meal break, but not being relieved of all duty during the break. "[A] fundamental canon of statutory interpretation holds that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs, regardless of the priority of the provisions' enactment." *U.S. v. Soberanes*, 318 F.3d 959, 963 (9th Cir. 2003). *See also* Cal. Civ. Proc. § 1859 ("when a general and [a] particular provision are inconsistent, the latter is paramount to the former"); *Turner v. AAMC*, 193 Cal. App. 4th 1047, 1065 (2011) (the "most straightforward… principle [of legislative intent is] that where there is a conflict between a general statute and a more specific one, the specific statute controls and will be treated as an exception to the general statute").

Here, Plaintiff violates this most fundamental canon of statutory interpretation. Plaintiff improperly urges this Court to assess his claim that he was "controlled" during a meal period under the general definition of "hours worked." (AOB at 35.) But this definition of "hours worked" is contained in Wage Order 16, subdivision (2)(J)—the very same Wage Order that expressly states that where a union member is working under a qualifying CBA and is not relieved of all duty during a meal period, the employees' time during a meal period is not counted as time worked (*id.*, subdivision (10)(D), (E)). **Plaintiff therefore asks this Court to use the definition of "hours worked" in Wage Order 16 to conclude that the**

time he spent on a meal break should be counted as time worked without referring to a provision in the same wage order that states that such time should not be "counted as time worked."

In this way, Plaintiff's theory goes much beyond the ordinarily improper request that a court use a general statute instead of a different, more specific statute. Here, Plaintiff is asking this Court to evaluate his claim under a general provision rather than a more specific provision in **the same wage order**. The general definition of "hours worked" that is in one subdivision of Wage Order 16 was obviously meant to be modified by a subsequent subdivision that provides what is not "counted as time worked."

Plaintiff relies heavily on the case of *Gutierrez v. Brand*, 50 Cal. App. 5th 786 (2020), where the court held that an employer still owes the minimum wage despite a CBA exemption for certain travel time. The basis for *Gutierrez*'s holding is that "Wage Order 16 section 5(D) contains no express exemption from the minimum wage requirements in Labor Code section 1194, subdivision (a) and Wage Order 16 section 4 for the employer-mandated travel time of CBA-covered employees." *Id.*, at 801.

But *Gutierrez* is inapplicable here because it dealt with wage order provisions of a completely different nature than the provisions here. In *Gutierrez*, the court considered a general provision stating that "[a]ll employer-mandated

travel that occurs after the first location where the employee's presence is required by the employer shall be compensated **at the employee's regular rate** of pay or, if applicable, the **premium rate** that may be required by the provisions of Labor Code Section 510 and Section 3, Hours and Days of Work." (Wage Order 16, § 5(A) (emphasis added).) This provision contains a rule of what activity must be compensated **and** the specific wage rate that employees must be compensated at—an employer must compensate for certain travel at either the regular rate of pay or the overtime rate. The court next considered a specific exemption provision, which stated that the general rule provision "applies" to even union employees "unless the collective bargaining agreement expressly provides otherwise." *Id.*, at 798-99.

As a result, the court in *Gutierrez* followed the Wage Order provisions literally—if a CBA provides that the employer mandated travel is not compensable, then the particular wage order section is not applicable to the employees covered by the CBA; *i.e.*, the particular forms of compensation laid out in section 5(A) (regular rate of pay and overtime pay) are not available to an employee. This still leaves the minimum wage for such travel time available to an employee. Here, by contrast, the CBA exemption in Wage Order 16 **broadly** provides that a meal period in which an employee is not relieved of all duty shall not be "counted as time worked." The phrase "time worked" is the broadest possible language. Obviously, an employee does not get paid even minimum

wage where the time is not counted at time worked.

The court in *Gutierrez*, moreover, expressly distinguished the Wage Order 16 section 5(D) CBA exemption from the CBA meal period exemption. *Gutierrez*, 50 Cal. App. 5th at 801. The court, in fact, distinguished the case of *Araquistain v. PG&E*, 229 Cal. 4th 227, 233 (2014), discussed more fully below, holding that in *Araquistain* "the reviewing court relied on Labor Code section 512, subdivision (e)(2), which provides 'an exception to the ordinary rule that an employer must provide meal periods of a specified time after a specified amount of work; that is, it provides that where a collective bargaining agreement meets certain requirements, subdivision (a) 'do[es] not apply…There is no equivalent statutory language in our case." *Id.* This case, therefore, is much more like *Araquistain*, which actually is about and applied the section 512 meal period exemption to the plaintiff's claim, than it is like *Gutierriez.*

Another reason *Gutierrez* supports CSI here is that it held that CBA exceptions must be interpreted in light of "the statutory scheme of which the statute is a part." *Id.*, at 796. In that case, the court held that the defendant had not "presented a valid basis for inferring [a minimum wage] exemption based on the legal scheme as a whole." *Id.*, at 801. Here, by contrast, as explained below, there is a legislative scheme in Section 512 in which the Legislature intended to provide unions the power to negotiate what it means to be relieved of duty during an

unpaid meal period in certain industries.

Accordingly, the exemption for qualifying CBAs from Wage Order 16, subdivision 10(D) does not exclude only certain remedies, like the exemption in *Gutierrez*. Therefore, *Gutierrez*'s refusal to allow the employer to evade the minimum wage obligation in a provision that specifically identified the type of pay an employer did not owe is not relevant to the blanket exemption from any type of compensation in the wage order provision at issue here.

Wage Order 16, therefore, expressly provides that Plaintiff's meal period is not "counted as time worked." Plaintiff is thus unable to recover the minimum wage for such time.

B. Section 512 Permits Unions And Employers To Define What An Off-Duty Meal Period Is Irrespective Of California Law

Another independent reason that Plaintiff's minimum wage meal period claim fails is section 512 of the Labor Code. Critical to Plaintiff's argument that he should be able to recover for unpaid wages while he was on a lunch break is that this Court should use California law in order to determine whether he was on-duty or off-duty during his meal periods. According to Plaintiff, unless he was relieved of all duty during a meal period under California law, his meal period was on-duty and he must be paid for the time he was on break. Labor Code section 512, however, cedes to unions in the construction industry the right to bargain

with employers over whether they are on or off duty based, not on California law, but on the terms of the CBA. A union employee working under a qualifying CBA cannot bring a claim that he was not relieved of all duty during a meal period under California law and is owed wages for that time.

Like Wage Order 16, section 512 of the Labor Code exempts employers in the construction industry from having to pay an employee for time worked because he is not relieved of all duty during a meal period. Section 512(a) provides that "[a]n employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes." Labor Code §512(a). Subdivision (a), however, does not apply to an "employee employed in a construction occupation" who is "covered by a valid collective bargaining agreement [that] expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning application of its meal period provisions, premium wage rates for all overtime hours worked, and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate." *Id.*, § 512(e), (f).

Section 512(a), therefore, does not apply to Plaintiff because he was covered by a collective bargaining agreement that (1) expressly provides for the wages, hours of work, and working conditions of employees (3-ER-592-630, 4-

ER-632-725), (2) expressly provides for meal periods for those employees (4-ER-632, 4-ER-708), (3) expressly provides for final and binding arbitration of disputes concerning application of its meal period provisions (4-ER-632-633, 4-ER-708-711), (4) expressly provides for premium wage rates for all overtime hours worked (3-ER-627-628, 4-ER-632), and (5) expressly provides for a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate (4-ER-693) (all wage rates more than $22.97 per hour).

Because section 512(a) does not apply to his employment, Plaintiff cannot seek remedies for not being relieved of all duty during a meal period. The CBA meal period exemption leaves it to unions to negotiate what an off-duty meal period means and whether an employee gets paid for that meal period. In *Vranish v. Exxon*, 223 Cal. App. 4th 103 (2014), the court considered an almost identical CBA exemption from overtime laws. Under section 510(a) of the Labor Code, the court noted, "[e]ight hours of labor constitutes a day's work." *Id.*, at 109. Section 514, however, provides that "'Section[] 510...do[es] not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates **for all overtime hours worked** and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.'" *Id.* (quoting Cal. Labor Code § 514)

(emphasis added).

In *Vranish,* the CBA provided overtime "for hours worked over 40 hours in a workweek or over 12 hours in a workday. The CBA provides that overtime is not paid for hours worked between eight and 12 in a workday." *Id.,* at 107. As the court framed the problem, the "issue in this appeal is whether the phrase 'all overtime hours worked' in section 514 means 'overtime' as defined in section 510, subdivision (a); said otherwise, was Exxon required to pay plaintiffs 'overtime,' as that word is defined in section 510, subdivision (a), or was it only required to pay a premium for 'overtime' worked as that word is defined in the CBA?" *Id.*

The court held that "the CBA provides for premium wages," and "[n]othing in section 514 requires Exxon to look to the definition of 'overtime' as that word is defined in section 510, subdivision (a)." *Id.,* at 110. The court reasoned that "[w]hen there is a valid collective bargaining agreement, [e]mployees and employers are free to bargain over not only the **rate** of overtime pay, but also **when** overtime pay will begin. Moreover, employees and employers are free to bargain over not only the timing of when overtime pay begins **within a particular day,** but also the timing **within a given week.** The Legislature did not pick and choose which pieces of subparagraph (a) will apply or not apply. Instead, the Legislature made a categorical statement that 'the requirements of this section,' meaning this section **as a whole,** do not apply to employees with valid collective

bargaining agreements." *Id.* (emphasis in original).

The reasoning of *Vranish* has been applied by a California state court to the CBA meal period exemption. In *Araquistain*, 229 Cal. App. 4th at 233, the plaintiff argued that the CBA's "provision that [certain] employees 'shall be permitted to eat their meals during work hours and shall not be allowed additional time therefore at Company expense' does not "expressly provide[] for meal periods." "According to plaintiffs, the Agreement provides for 'meals' but not 'meal periods'; a 'meal period,' they argue, is 'a period of time—i.e., with a beginning and an end[] — when an employee is not required to work.'" *Id.*

"The question before [the court], then, is whether we must construe the term 'meal periods' in section 512, subdivision (e)(2) in the same way as the term is used in section 512, subdivision (a); that is, whether the meal periods included in a collective bargaining agreement that meets the requirements of subdivision (e)(2)—and that thereby establishes an exception to subdivision (a)—must have the same characteristics as the meal periods required by subdivision (a)." *Id.*, at 234. The court held initially that "a collectively bargained meal period that complies with subdivision (e)(2) need not necessarily be a full 30 minutes, begin before the end of the fifth hour of work, or **even be completely free of all employer control."** *Id.* (emphasis added). The plaintiffs argued however, that "the 'irreducible core meaning' of a meal period is the same in both contexts—'a

discrete amount of time when an employee is relieved of work duties.'" *Id.*

The court rejected the plaintiffs' argument. The court held that the statute "provides an exception to the ordinary rule that an employer must provide meal periods of a specified time after a specified amount of work; that is, it provides that where a collective bargaining agreement meets certain requirements, subdivision (a) 'do[es] not apply.'" *Id.*, at 236. "It would make no sense to conclude that subdivision (a)'s requirements apply to an employee who is explicitly exempted from them. Rather, Assembly Bill 569 authorizes collectively bargained agreements that provide alternate meal period arrangements." *Id.*

The court cited "[the] legislative history [as proof] that the bill was intended to **increase meal period flexibility** in certain industries, and that the bill would also address, to some degree, the **problem of forced monitoring** of employee meal periods." *Id.*, at 237 (emphasis added). "The history also indicates that the Legislature was aware of the distinction between on-duty and off-duty meal periods, and chose not to specify that the 'meal periods' mentioned in section 512, subdivision (e) must be off-duty meal periods." *Id.* The court concluded that "[t]o the limited extent this history illuminates the issue before us, it provides some support for our conclusion that alternate meal period arrangements, including meal periods that might take place while an employee is on duty, are permissible where the other requirements of section 512, subdivision (e) are met." *Id.*

The court therefore held that "a collective bargaining agreement providing that employees 'shall be permitted to eat their meals during work hours' expressly provide[s] for meal periods for those employees." *Id.* (§ 512, subd. (e)(2).) "The parties to the Agreement expressly made alternate arrangements to allow covered employees time to eat their meals. This conclusion comports with the clear intent of the Legislature to afford additional flexibility with regard to the terms of employment of employees in certain occupations, so long as their interests are protected through a collective bargaining agreement." *Id.,* at 237-38. The court concluded that "when employees, 'represented by a labor union, 'have sought and received alternative wage protections through the collective bargaining process," [citing *Vranish*], they are free to bargain over the terms of their meal period, including whether the meal period will be of a specified length and whether employees will be relieved of all duty during that time." *Id.,* at 238.

Importantly, the court held that "employees who are unable to eat their meals during work hours [still have] a remedy." *Id.,* at 238, n.7. "[T]he collective bargaining agreement provides that employees whose workdays are eight consecutive hours 'shall be permitted to eat their meals during work hours," and "[i]f these employees find they are unable to eat their meals during work hours, they may seek redress through the five-step grievance procedure set forth in the agreement." *Id.*

In *Perez v. Leprino*, 2018 U.S. Dist. LEXIS 47698, *11 (E.D. Cal. Mar. 22, 2018), the district court interpreted *Araquistain* similarly, holding that the court "expand[ed] on *Vranish* to explain that labor unions are also free to set the terms of meal periods, including the length and **whether employees are relieved of duty in a manner that provides lesser protection than the California Labor Code would in other circumstances."** (Emphasis added.) Accordingly, the law is settled that a CBA may define an off-duty meal period differently than California defines the same term under section 512.

Federal law provides an example of how parties to a CBA can agree on what it means to relieve a union member of all duty during a meal break so that it is unpaid, but still fall short of the California standard. Under the FLSA, "[w]hether a meal period must be counted as time worked is evaluated under the 'predominant benefit test' which examines whether the meal time is spent primarily for the employer's benefit." *Nelson v. Waste Mgmt. of Alameda County*, 2000 U.S. Dist. LEXIS 11286, *9-10 (N.D. Cal. Jun. 16, 2000). "The predominant benefit tests asks 'whether the [employee] is primarily engaged in work-related duties during meal periods." *Babcock v. Butler Cnty.*, 806 F.3d 153, 156 (3d Cir. 2015). *See Henson v. Pulaski County*, 6 F.3d 531, 536-37 (8th Cir. 1993) (meal period properly uncompensated under the FLSA even though some employees are "required to monitor their radios and to respond in the case of an emergency" and

other employees "must remain on the premises of the jail facility during their thirty-minute meal breaks," and "must respond to any emergency calls that are issued over the jail's intercom," which "interrupt[] approximately twenty percent of their breaks").

Clearly, the meal period in *Henson* would be compensated under California law because employees are still on call during their meal period and are required to stay on the premises. The CBA meal period exemption, however, permits a union and an employer to agree that they are not following California law during meal periods and that employees need not be relieved of all duty and completely free from control. The parties to a CBA, rather, may incorporate and follow a different body of law, such as the "predominant benefit" test under federal law for meal periods, and that is the standard used to see if an employee was "off duty" during a meal period.

Here, the Cal Flats PLA provides that "[t]he standard work day shall consist of eight (8) hours of work between 6:00 a.m. and 5:30 p.m. with one-half hour designated as an **unpaid** period for lunch." (4-ER-708 (emphasis added).) The Operating Engineers Master Agreement provides that a union member who is required "to perform any work" during "his/her scheduled meal period" is paid overtime during the meal, and then receives another "opportunity to eat on the Individual Employer's time." (4-ER-632.) The parties to the CBA negotiated this

provision, and decided on what it means to "to perform any work" during "his/her scheduled meal period." A meal period on the Project, for example, that requires employees to eat lunch at their worksite would, under Plaintiff's theory, engender liability for this lunch period, as the employees were restricted in their movement on the Project.

The CBA Meal Period Exemption would be upended under such an interpretation, as the parties' ability to vary from California's strict rules of no control during a meal period become meaningless. **All meals would have to be paid meals unless CBAs mimic state guidelines.** This interpretation deprives the parties of the statutory flexibility provided to the construction industry to shape the contours of meal periods for its employees. Plaintiff's idea here to import California law to determine what it means to work during meal periods intrudes upon the CBA's province to define what an off-duty meal period is and to relieve employees of duty during meal periods as agreed to by the parties.

Accordingly, Plaintiff's claim here for unpaid wages during his meal period is barred under section 512. The definition of a meal period is left up to the parties under subdivisions (e) and (f) of section 512, including whether it is an on duty of an off duty meal period. The definition of an "off duty" meal period under section 512(a)—that the employee must be completely free from control—does not govern the CBA here. The parties to the CBA, rather, could negotiate the features and

level of control permitted during the off duty meal period. A plaintiff is not permitted to claim that he was "controlled" under California law during that meal period and sue for unpaid wages under state law. Otherwise, the CBA meal period exemption is toothless, as CBAs are still required to follow *Brinker* and relieve employees of all duty during meal periods unless they pay for all meal periods as time worked.

C. Courts Find Derivative Claims Barred Where There Is A Statutory CBA Exemption

Courts have not allowed union employees to evade the CBA meal period exemption by raising derivative claims based on a failure to provide a duty free meal period. In *Pyara v. Sysco*, 2016 WL 3916339, at *1 (E.D. Cal. July 20, 2016), the plaintiff "was employed by Defendants as a non-exempt industrial truck driver" and was subject to a CBA. The plaintiff alleged that the defendants engaged in "wage theft/time shaving" "based on Defendants' alleged practice of clocking out Pyara for meal and rest periods even when he remained working. Pyara's second cause of action for failure to pay overtime is based on Defendants' alleged failure to provide meal and rest periods and therefore not correctly classifying certain hours as overtime work." *Id.* "Pyara's third cause of action for failure to provide meal periods is based on Defendants' alleged policy of requiring Pyara to work through meal periods." *Id.*

After finding that both of Pyara's claims for missed meal periods and unpaid overtime was subject to the relevant CBA exemption, the court turned to the "time shaving" claim, acknowledging that "California employees who do not receive their full wages owed may bring an action to recover the unpaid balance." *Id., at* *5. The court found, however, that the time shaving claim based on working through meal periods and unpaid overtime failed "to the extent this cause of action rests upon violations of overtime or meal periods" because "those claims are statutorily barred." *Id.*, at *6.

Plaintiff claims that the *Pyara* court held that the "the plaintiff could make a claim for unpaid wages for hours worked under 1194(a)" (AOB at 47), but the court preserved unpaid wage claims only to the extent that "the time shaving occurred on non-statutorily barred claims." *Id.*, at *6. In *Pyara*, the plaintiff also brought claims that defendants "engaged in time shaving by not paying him for rest break periods [or] even regular time he worked." *Id.* The time shaving claims that *Pyara* held were barred "rest[ed]" on meal period violations. *Id.*

As discussed above, the CBA meal period exemption is substantively identical to the CBA exemption for overtime. *See* Cal. Labor Code § 514. Courts interpreting section 514 have also dismissed Labor Code claims that are derivative of the overtime claims. In *Chavez v. Smurfit Kappa,* 2018 U.S. Dist. LEXIS 232653, *3 (C.D. Cal. Oct. 17, 2018), the plaintiff "allege[d] that Defendant

engaged in a pattern and practice of wage abuse against its hourly-paid employees within the State of California, which included failing to pay the employees for all regular and/or overtime wages earned." The plaintiff brought claims for "unpaid overtime" and "unpaid minimum wages." *Id.* After finding that the plaintiff's overtime claim was barred by the CBA overtime exemption under section 514, the court also dismissed "the unpaid minimum wages claim [because it] can only arise out of Defendant's failure to pay overtime wages." *Id.*, at *11. The court reasoned that "[b]ecause the unpaid overtime claim is barred, the unpaid minimum wages claim necessarily fails." *Id.*

See also Vasquez v. Packaging Corp., 2019 U.S. Dist. LEXIS 167855, *1041 (C.D. Cal. Jun. 7, 2019) (after finding overtime claim barred by CBA exemption, court holds that "[m]any of the remaining causes of action are derivative of Plaintiff's overtime claim. For example, Plaintiff asserts that Defendant failed to provide accurate wage statements…because it failed to include the correct overtime rate…Plaintiff also claims that he is entitled to waiting time penalties…because Defendant did not properly tender overtime wages...As such, the Court finds that those claims are likewise preempted by the LMRA, to the extent that they are derivative of Plaintiff's overtime claim.").

Here, Plaintiff's unpaid wage claim is derivative of the underlying section 512 claim. The core violation alleged is a failure to provide a duty-free meal

period. As in *Pyara* and *Chavez*, a plaintiff cannot evade the relevant CBA exemption by bringing a claim for unpaid wages based on not being relieved of all duty during a meal period or not being paid overtime. In *Pyara* specifically, the court, relying on the CBA meal period exemption, rejected a minimum wage claim to the extent it was based on wages owed during a meal period. The same result should occur here.

D. Plaintiff's Wage Claim For Not Being Relieved Of All Duty During Meal Periods Is Preempted By Section 301 Of The LMRA

Independent of the exemptions under Wage Order 16 and section 512, federal law also bars Plaintiff's claim for unpaid wages during meal periods. Courts "conduct a two-step inquiry to determine whether state-law claims are preempted by § 301." *Dent v. Nat'l Football League*, 902 F.3d 1109, 1116 (9th Cir. 2018). "First, we ask whether the cause of action involves rights conferred upon an employee by virtue of state law, not by a CBA." *Id.* "If the rights at issue exist[ ] solely as a result of the CBA, then the claim is preempted, and our analysis ends there." *Id.*

The Ninth Circuit has recently held that claims under Labor Code provisions with CBA exemptions seek to vindicate rights that exist solely because of the CBA and section 301 preempts those claims. In *Curtis v. Irwin*, 913 F.3d 1146, 1149-50 (9th Cir. 2019), the court held that plaintiff's "claim for overtime

pay is preempted under § 301…because California overtime law does not apply to an employee working under a qualifying [CBA], and Curtis worked under such an agreement." "[A]ny suit 'alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law." *Id.*, at 1151-52. "A state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." *Id.*

Citing *Vranish* (discussed above), the court held that the "CBAs in this case meet the requirements of section 514, and therefore Curtis's claim for overtime pay is controlled by his CBAs. Because Curtis's right to overtime 'exists solely as a result of the CBA,' *Kobold,* 832 F.3d at 1032, his claim that Irwin violated overtime requirements by not paying him for the 12 off-duty hours is preempted under § 301." *Id.*, at 1155.

The preemption analysis of *Curtis* has recently been applied to the CBA meal period exemption under section 512 by the Ninth Circuit. In *Marquez v. Toll Global Forwarding,* 804 Fed. Appx. 679, 680 (9th Cir. May 6, 2020), the court held that the district court "correctly found that Marquez's meal and rest break claims are preempted by § 301 of the LMRA." "Marquez's meal period claims under [section] 512(a) are statutorily barred by § 512(e)'s 'commercial driver' exception, which exempts commercial drivers covered by a CBA meeting the requirements of § 512(e) from the meal period requirements of § 512(a)." *Id.*

Citing *Curtis,* the court held that "Marquez's right to meal periods **'exist[s] solely as a result of the [CBAs].'"** *Id.* (emphasis added).

It is beyond dispute, therefore, that section 301 preempts state law claims by certain union employees for not being relieved of all duty during a meal break because the right to a duty free meal period is conferred solely by the CBA. The only question remaining is whether a claim to be paid for a meal period provided by a CBA that does not relieve Plaintiff of all duty is covered by this preemption. The weight of authority strongly suggests that it does.

Plaintiff's claim that CSI exerted control over him during meal periods is completely preempted because that claim is in the scope of the CBA right. This is a claim inextricably intertwined with the meal period provision in the CBAs. The right to a duty free meal period is conferred by the CBAs and founded directly on rights created by the CBAs.

"[I]f a federal cause of action completely preempts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 24 (1983). "When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Ben. Nat'l Bank v. Anderson,* 539 U.S. 1, 8 (2003).

Here, the right created by federal law that displaced section 512(a) is the right under the CBA to an unpaid meal period without being required to work. This right "exists solely as a result of the CBA." *Kobold v. Good Samaritan Reg'l Med. Ctr.*, 832 F.3d 1024, 1032 (9th Cir. 2016).

As explained above, Plaintiff has no right to a duty free meal period independent of the CBA. During meal periods, only the CBA, and not California law, dictates whether an employee has worked, or performed job duties, or been subject to the employer's control, and whether any of that warrants compensation under the CBA. A claim for unpaid wages under the Labor Code for not being relieved of all duties during a meal period is preempted by section 301.

This is particularly true because Plaintiff's claim does not allege that he missed meal breaks altogether, and was forced to work through them. If Plaintiff had alleged that he was not provided any meal breaks, but time for a break was automatically deducted from his time card, then his state law claim for wages would not have anything to do with the kind of break the parties agreed to provide and whether there would be a total or only partial relief from duties. Accordingly, Plaintiff's claim here goes to the heart of the CBA provision over which the parties negotiated, and it is preempted by section 301. Just like *Vranish* holds, CSI and the union were "free to bargain over not only...when [a meal break] will begin [and] not only the timing of when [a meal break] begins **within a particular day,**

but also" whether to relieve the employee of all duties during an unpaid meal break. Plaintiff's claim that he was not relieved of all duty during a meal period does not arise under state law, but rather only under the CBA. As a result, this claim is preempted.[3]

VI. THIS COURT SHOULD NOT CERTIFY ANY QUESTIONS OF STATE LAW TO THE CALIFORNIA SUPREME COURT

"There is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision. A party should not be allowed a second chance at victory through certification by the appeals court after an adverse district court ruling." *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (internal quotation marks omitted). "To overcome that presumption, [a party] must demonstrate 'particularly compelling reasons' why it should 'be allowed a second chance at victory.'" *All. for Prop. Rts. & Fiscal Resp. v. City of Idaho Falls*, 742 F.3d 1100, 1108 (9th Cir. 2013) (citing *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir.1984)).

[3] Plaintiff cites *Andrade v. Rehrig Pac.*, 2020 WL 1934954, at *3 (C.D. Cal. Apr. 22, 2020), to argue that the "statutory exemption for overtime [does] not abrogate plaintiff's rights under § 1194" (AOB at 48). But *Andrade* cannot be reconciled with *Curtis*. *Andrade*'s holding that a section 510 overtime claim is not preempted even where "the CBA meets the threshold requirements of § 514" (*Andrade*, 2020 WL 1934954, *3), is directly at odds with *Curtis*'s holding that if the "CBAs in this case meet the requirements of section 514, Curtis's right to overtime [under section 510] 'exists solely as a result of the CBA,' and therefore is preempted under § 301." *Curtis*, 913 F.3d at 1154.

A Court should "decline to exercise [its] discretion to certify [the state law] questions" where "'controlling precedent'…is available to guide [it]." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 958 (9th Cir. 2005). *See also Kremen v. Cohen*, 325 F.3d 1035, 1037–38 (9th Cir.2003) (the "certification procedure is reserved for state law questions that present significant issues ... and that have not yet been resolved by the state courts"); *Herrera v. Zumiez*, 953 F.3d 1063, 1070 (9th Cir. 2020) (declining to certify "the question of interpreting Wage Order 7's reporting time pay provision to the California Supreme Court" because "there is no sharp split of authority between the California Courts of Appeal and the Ninth Circuit regarding the proper interpretation of state law").

Here, certification is inappropriate and unnecessary. Not only is the law quite clear as explained above, but Plaintiff has not made a sufficient showing that this case involves issues of significant importance, that there is a split of authority, or that there is any other reason compelling enough to warrant certification.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's orders awarding judgment in favor of CSI.

Dated: December 23, 2021

By: */s/ Daniel B. Chammas*
Daniel B. Chammas
Attorneys for Defendant-Appellee,
CSI ELECTRICAL CONTRACTORS, INC.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 21-16201

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

CSI refers this Court to the related case of Griffin v. Sachs Elec. Co., 831 F. App'x 270, Case No. 19-17457 (9th Cir. 2020).

Signature s/ Daniel B. Chammas **Date** 12/23/2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 21-16201

This brief contains 13,809 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Daniel B. Chammas* **Date** December 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I electronically filed the foregoing **ANSWERING BRIEF OF APPELLEE CSI ELECTRICAL CONTRACTORS, INC.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 23, 2021

By: */s/ Daniel B. Chammas*
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