CASE NO. S275431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GEORGE HUERTA,
Plaintiff and Petitioner,

v.

CSI ELECTRICAL CONTRACTORS, INC.,
Defendant and Respondent

On Certified Questions from the United States Court of Appeals for the Ninth Circuit
No. 21-16201

After an Appeal from the United States District Court
for the Northern District of California
Honorable Beth Labson Freeman, District Court Judge
Case Number 5:18-CV-06761-BLF

ANSWER BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Employees are not entitled to compensation for all time that they are required to spend on an employer's premises. For more than 75 years, it has been well settled that employees who are required to report to work at a certain time do not start getting paid as soon as they enter the worksite. In the case of *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946), the U.S. Supreme Court held that "walking time" on an employer's premises that was necessary for employees to arrive at their work stations before the start of their shifts and to leave their work stations after the end of their shifts was, in fact, compensable under the Fair Labor Standards Act ("FLSA").

Six months after the decision, unions and employees filed more than 1,500 lawsuits seeking nearly $6 billion in unpaid wages. Congress quickly amended the FLSA to make clear that "traveling" on the employer's premises before and after work was not compensable, and California, almost as quickly, followed suit. California, in fact, before the *Anderson* decision, defined "hours employed" as all time "an employee is required to be on the employer's premises." Just after *Anderson*, however, California deleted this language from its current definition of "hours worked," which now focuses on the element of control.

Following the post-*Anderson* amendments to both federal and state law, it is beyond dispute that employers are not required to compensate employees for entering their employers' premises and navigating to their time clocks or work stations. No one would argue that an employee reporting to work gets paid as soon as his vehicle turns on to his employer's driveway. It would be frivolous to argue that an employee on the way to her time clock gets paid waiting for an elevator to take her to the 15th floor and walking down a long hallway.

Plaintiff George Huerta filed a class action lawsuit that effectively seeks to revive the *Anderson* rationale and demands unpaid wages because of how long it took him before and after work to make his way across the property

where he worked for a subcontractor of CSI. Plaintiff was employed to work at the California Flats Solar Project ("Project"), which was located on 2,900 acres of Jack Ranch, a cattle ranch in Central California that is approximately 72,000 acres itself. Plaintiff's primary claim is that he should be compensated for the time it took him to drive from the entrance of the Project to the spot where he met his crew and began working.

In this case, Plaintiff demands compensation for engaging in two types of activities that almost all California employees regularly do without pay: (1) entering or exiting their places of employment with some sort of key, card, badge, or identification, and (2) traveling between that secured entrance and their work stations at the start and end of their work day.

First, Plaintiff is seeking compensation for lowering his window in his vehicle, and reaching his badge out for the attendant to scan it. 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 guard shack scan here that are undeniable are (1) swiping an electronic card at a door to gain access, (2) reaching out of a vehicle to insert a ticket to leave a parking garage, or (3) flashing identification to security to bypass a line that members of the public must go through. Plaintiff's travel past the guard shack after a non-verbal interaction that lasts a few seconds does not rise to the level of control that warrants compensation.

Plaintiff thinks he should also be paid for the long stretch of road he must drive down in his vehicle before he reaches a parking lot ("Drive"). Although Plaintiff alleges 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, the various road signs, and the general rules he always needed to obey on

the premises (*e.g.*, no smoking, no horseplay) 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, for example, 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. 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. Just as these everyday, ordinary rules do not "control" an employee 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 and require compensation while he travels on the Project before beginning and after ending work.

Plaintiff also claims 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. Plaintiff 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.

II. STATEMENT OF FACTS

CSI was retained to perform procurement, installation, construction, and testing services on the Project, which was located on Jack Ranch—private

property in Monterey County (5-ER-1009.) Plaintiff worked on the Project, and was assigned to assist CSI in its work. (6-ER-1247-1248, 6-ER-1261.)

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

In order to access the Project, Plaintiff passed a guard shack at the perimeter of the Project ("Project Entrance"). (5-ER-1009.) The Project Entrance opened each morning when a biologist cleared the road at sunrise, after which Plaintiff passed the Project Entrance without stopping and traveled down the road ("Access Road"), where the speed limit was 20 miles per hour after sunrise and 10 miles per hour 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 gave his badge to the attendant. (*Id.*) Instead, Plaintiff kept his badge on his person, only presenting it to be scanned. (*Id.*) At the Badging Gate, several attendants simultaneously processed two lanes of cars. (*Id.*) After passing the Badging Gate, Plaintiff 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 two endangered species: San Joaquin Kit Fox and California Tiger Salamander. (5-ER-1010, 5-ER-1020.) Under the California Endangered Species Act, an Incidental Take Permit ("ITP") was required because of the Project's expected effect on these endangered species. (5-ER-1010, 5-ER-1020-1022.)

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…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 strictly set out the boundaries of 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 restricted "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*.)

In CSI's contract with the General Contractor, it needed to observe all of these rules and ensure its employees did too. (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. Plaintiff Was Provided A 30-Minute Lunch Each Day In Accordance With Two Collective Bargaining Agreements

Plaintiff 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.) Plaintiff's employment on the Project was governed by two CBAs: 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.) Plaintiff received one 30-minute unpaid meal break each shift. (3-ER-498, 4-ER-632, 4-ER-708, 6-ER-1250-1254.)

III. PROCEDURAL HISTORY

On March 4, 2021, CSI moved for partial summary judgment on certain of Plaintiff's **individual claims**, which the district court granted on April 28, 2021. (1-ER-10-30.) On June 8, 2021, CSI moved again for partial summary judgment on Plaintiff's other **individual claims**, which the district court granted on June 25, 2021. (1-ER-5-9.) Both motions disposed of all of Huerta's individual claims that are before this Court.

IV. PLAINTIFF'S TIME SPENT TRAVELING ON THE PROJECT BEFORE WORK AND AFTER WORK IS NOT COMPENSABLE BECAUSE HE WAS REQUIRED TO FOLLOW ONLY PATH OF TRAVEL RULES AND GENERAL RULES PROHIBITING CERTAIN CONDUCT ON THE PREMISES

Under Plaintiff's theory of liability, unless they are permitted to race their cars through an employer's parking lot, then employees must be paid from the moment that they drive onto the employer's premises. Plaintiff's theory of liability also requires employees to be paid for all time on the employer's premises unless they are permitted to loiter, litter, or smoke. 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.

A. Travelling On An Employer's Premises Before And After Work Is Generally Not Compensable

Time clocks are often located in remote areas of an employer's property. Merely because an employee crosses the threshold of an employer's premises does not entitle him to be paid for every minute spent on those premises. This is true even though he may spend dozens of minutes finding a parking space, walking to an elevator, navigating his way through other departments, and

finding the time clock for his work area. No matter how much time this process takes, none of it is compensable.

1. Federal law expressly excludes as wages time employees spend traveling on the employer's premises before the start of work and after the end of work

In *Anderson*, 328 U.S. 680, the Supreme Court issued a decision that immediately spurred Congress to amend the FLSA to repeal the ruling. In *Anderson*, employees worked on a "plant [that] covers more than eight acres of ground and is about a quarter of a mile in length." *Id.*, at 682. The employer did not compensate employees for dozens of minutes per day that constituted "walking time." The Court interpreted the FLSA to require compensation for these employees because "it was necessary for them to be on the premises for some time prior and subsequent to the scheduled working hours." *Id.*, at 690. The Court reasoned that "[s]ince the statutory workweek includes all time during which an employee is **necessarily required to be on the employer's premises**…the time spent in these activities must be accorded appropriate compensation." *Id.*, at 690-91 (emphasis added).

As the Supreme Court reflected in retrospect, the *Anderson* decision "provoked a flood of litigation. In the six months following [*Anderson*], unions and employees filed more than 1,500 lawsuits under the FLSA." *Integrity Staffing Solutions, Inc.*, 574 U.S. 27, 31-32 (2014). "These suits sought nearly $6 billion in back pay and liquidated damages for various preshift and postshift activities." *Id.* "Congress responded swiftly." *Id.* "Congress met this emergency with the Portal-to-Portal Act," which "exempted employers from liability for future claims based on…walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." *Id.*, 516-17 (quoting 29 U.S.C. § 254)(a)).

This amendment declared time spent traveling on an employer's premises before and after work is non-compensable. *See IBP v. Alvarez*, 546

U.S. 21, 41 (2005) (time walking from "the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate *Anderson*'s holding that such walking time was compensable under the FLSA").

2. California responded just as swiftly to similarly amend its laws in response to *Anderson*

Before *Anderson*, California law compensated employees for "hours employed," which included "all times during which…an employee is **required to be on the employer's premises."** Wage Orders, § 2 (emphasis added). (2-ER-151, 2-ER-165, 2-ER-233-236, 2-ER-251-252.) The decision in *Anderson* was issued on June 10, 1946, and the Portal-to-Portal Act was enacted on May 14, 1947. *Glenn v. Southern Cal. Edison*, 187 F.2d 318, 319 (9th Cir. 1951).

Just a few weeks later, on June 1, 1947, California abandoned the term "hours employed" and adopted the federal term, "hours worked." In the 1947 amendment, the state removed the term "required to be on the employer's premises," and adopted a definition that provided that "'Hours Worked' means the time during which an employee is subject to the control of an employer and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Cal. Code Regs., tit. 8 § 11140, Subd. 2(G) (2-ER-151, 2-ER-165, 2-ER-238-249, 2-ER-251-252.)

This deletion is particularly significant because the *Anderson* Court had held that "all time during which an employee is necessarily required to be on the employer's premises…must be accorded appropriate compensation," and proceeded to award employees compensation for time they spent "walking to work on the employer's premises" at the beginning and end of their shifts. *Anderson*, 328 U.S. at 690-92. California's removal of "required to be on the employer's premises" from the definition of "hours employed" just after *Anderson* and just after Congress acted is substantial evidence that California, like Congress, also rejected *Anderson*'s holding that traveling on the

employer's premises before and after work should be compensated. *See, e.g.*, *People v. Martinez*, 132 Cal. App. 3d 119, 148, n4 (1982) ("It is hornbook law that the Legislature is presumed to know the decisions of appellate courts and to have them in mind when amending statutes which the courts have construed.").[1]

B. CSI Did Not Exert The Necessary Level Of Control Over Plaintiff During The Drive To Make It Compensable

Against this statutory backdrop and general presumption against compensating employees for traveling on the employer's premises before and after work, California will nevertheless compel compensation for such travel if the employer exerts a sufficient level of control over the employee during the travel. Plaintiff describes the different rules and conditions on the Project that subjected him to "control" and impeded his progress to his work station. (Petitioner's Opening Brief ("POB") at 13-16.) None of these rules, however, even cumulatively, establish a level of control that requires compensation.

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[1] In *Morillion v. Royal Packing*, 22 Cal. 4th 575, 591-92 (2000), the defendant argued that an employer compelled bus ride was not compensable because California law patterned itself after the Portal-to-Portal Act, which declared such commute time, even if required by the employer, noncompensable. This Court, however, disagreed, and held that, in 1947, California had added that time under an employer's "control" was compensable, meaning that employer mandated bus time must be paid for. *Morillion*'s rejection of federal law in that case, however, is not instructive here. This Court did not hold or even suggest that California law is unlike the Portal-to-Portal Act in all respects or that California law is always different. The court in *Morillion*, rather, merely held that federal law is irrelevant where, as in that case, the employer exerts the requisite "level of control" over an employee. *Morillion*, 22 Cal. 4th at 587. As explained below, Plaintiff was not "controlled" on the Drive like the employees in *Morillion*, and, therefore, California law, after *Anderson*, should be interpreted in accordance with federal law in this narrow respect: travel on an employer's premises before and after work is noncompensable.

1. The rules that Plaintiff had to follow on the Drive were either Path of Travel or Prohibitory Rules

Plaintiff contends that he was subject to two types of rules on the Drive. First, Plaintiff cites to rules establishing and regulating the path of travel to his work station: speed limits, no passing other vehicles, drive directly to work station, no stopping, and signs warning drivers about animal crossings ("Path of Travel Rules"). (POB at 13-16.) Second, Plaintiff complains about the following rules that prohibited certain conduct at all times on the Project: "discrimination rules, anti-harassment rules, environmental rules, alcohol and drug policies," "no smoking, no practical jokes, no horseplay rules, no gambling rules, no photography, [and] no loud music" ("Prohibitory Rules") (POB at 14.)

2. Prohibitory and Path of Travel Rules that an employee must respect while traveling on an employer's premises before and after work do not constitute compensable control

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

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

An employer is not required to compensate employees whenever an employer exerts some "control" over them. The touchstone for the inquiry is whether an employer exercises a sufficient "level of control" over an employee. This 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." *Morillion,* 22 Cal. 4th at 587 (emphasis added). *See also Frlekin v. Apple,* 8 Cal. 5th 1038, 1051 ("the level

of Apple's control over its employees [is] the 'determinative' factor in analyzing whether time is compensable under the control standard").

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

Once an employee enters an employer's premises for work, an employer may insist that the employee proceed directly and safely to her work station along a particular path. If the right of an employer not to pay employees navigating their way to their work stations before and after work means anything, it has to include the right to insist on Path of Travel Rules. 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 can be restricted in their movement on an employer's premises, including rules about areas they can and cannot enter, and rules regarding the pathways they must follow.

Here, none of the Path of Travel Rules Plaintiff complains about required him to do anything other than report directly to his work station safely, and they were all reasonably related to regulating traffic. Stop signs and speed bumps, for example, slow employees down while traveling on an employer's premises before work. An employer in the midst of inclement weather, moreover, may take 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 elevators, or lines that may form at a turnstile

on work premises, all of which impede an employee's progress while making his way to a time clock before his shift. 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 work. Indeed, without Path of Travel Rules, then an employer's right not to pay an employee walking from the perimeter of the employer's property to his work station means nothing, as the employee would be permitted to disrupt business, distract employees, and destroy property without consequence.

c. Prohibitory Rules do not constitute compensable control while employees travel on the employer's premises before and after work

Apparently, Plaintiff felt controlled on the Drive because he could not engage in "horseplay" or "photography," possess or use "alcohol" or "drugs," "gamble," "smoke," "discriminate" or "harass." (POB at 21-23.) But as soon as an employee steps foot onto an employer's premises there are always rules that prevent the employee from doing a variety of things. Employees may have to follow dozens of rules on an employer's premises, such as rules against smoking, littering, loitering, talking to customers, carrying weapons, eating or drinking, sleeping, and disruptive noises. Employees walking on an employer's premises must follow rules regarding clothing, solicitation of others, use of cell phones and bringing any third parties, including children.

The rule that Plaintiff could not disturb the habitat of animals in the area by, for example, playing loud music, also does not rise to the level of compensable control. Any workplace with animals, such as a zoo, aquarium, or pet store, would not allow employees while traveling on the premises before clocking in or after clocking out to antagonize the animals. The Project was in the midst of the habitats of two endangered species, and Plaintiff's need to

respect those habitats while on the premises but not being paid is both prohibitory and not controlling.

Despite the fact that employees can feel "controlled" by such rules and restrictions that their employer imposes on them, an employer does not have to pay an employee in order to prevent unsafe, harassing, disrespectful, or destructive conduct on its premises. Otherwise, employees would have an immunity from rules that generally govern the workplace unless they are also being paid.

d. The rules on the Project are akin to everyday rules in a variety of other work settings

Other work sites also impose "controlling" rules on employees that they must respect while not being paid.:

- **Construction Worker**. A construction worker enters the job site and must go to the time clock on the other side of the project. Along the way, the worker must observe many safety rules (such as no running), is told which areas he must pass through, may not touch a variety of objects and equipment, and is instructed not to disrupt other employees before arriving at the time clock.
- **Usher**. An usher at a symphony enters the arena and must travel through the arena to get to her work area, where she clocks in. The usher must observe many rules while in the arena, such as not disturbing the symphony's performance while traveling through the arena, no running, no talking, no loitering, and no use of cell phones.
- **Tour Guide**. A tour guide driving to work parks his car in the underground garage before reporting to work. While driving in the parking garage before the start of his shift, the tour guide will be terminated if he drives too fast or drives unsafely.

There is no reason that any of these common sense results should be any different in a highly regulated environment. Just because an employer's premises has unusual rules does not make this type of control any different:

- **Airport**. A gate agent enters an airport and must travel through the terminal to get to his gate, where he clocks in. The gate agent must travel through baggage claim and more than a dozen other gates to get to his time clock, all the while needing to observe the complex rules of an airport along the way.
- **Zoo**. A zookeeper enters the zoo's premises and must travel to her work area, where she clocks in. The zookeeper must travel through the park to get to her time clock, and, along the way, may not disturb, pet, play with, interact with, or feed the animals, cannot run, cannot interact with customers, and must observe all safety rules.
- **Hospital**. A nurse must go through several wings of the hospital to get to his work station and clock in. While going through the maternity department, the nurse cannot interact with the newborn babies or mothers, cannot handle sterile equipment or medication, and must observe patient safety rules along his entire trip to the time clock.
- **Court**. A court clerk must wind her way through a courthouse before getting to her department on the 10th floor. On her way to the courtroom each morning she must flash her badge to pass security, and pass by several other departments and administrative offices, with strict rules about what she cannot do, such as interrupting court, disrupting a filing window, and recording court proceedings.

In all of these cases, the same basic premise that emanated from the post-*Anderson* wage and hour laws on both the state and federal levels holds true: employees need not be paid while they are traveling on the employer's premises in order to begin the work day or leave after the work day is completed.

e. Rules that are mandatory, rather than prohibitory, in nature constitute compensable control of employees traveling on the employer's premises before and after work

Obviously, some rules that employees must follow while on the premises, even if they are traveling to a time clock, start the work day and require compensation. For example, rules (1) requiring employees to don protective gear before entering the plant or (2) requiring employees to submit to a bag check while they are entering the workplace can certainly start the work day. *See, e.g.*, *Alvarez v. Hyatt*, No. CV 09-4791 GAF (VBKx), 2010 U.S. Dist. LEXIS 152573, *10 (C.D. Cal. Jan. 5, 2010); *Frlekin*, 8 Cal. 5th at 1051.

The difference, however, between rules requiring donning and doffing and security checks, on the one hand, and rules forbidding employees from smoking, using cell phones, or running, on the other hand, is that one set of rules requires employees to take action, and the other set of rules prevents employees from taking action. Such a dichotomy is appropriate because mandatory rules, unlike prohibitory rules, constitute an intervention by the employer that disrupts the employee from traveling directly to the worksite to begin work. The essence of the post-*Anderson* state and federal statutes' rule that employees' entrance to an employer's premises does not necessarily begin compensating them is preserved by this test. As long as employees are proceeding, uninterrupted, directly to or from their work stations at the beginning or end of the work day, then the time is noncompensable, even though the employees are not free to do whatever they want to on the premises during the travel, and even though the employees are subject to workplace rules that exert some level of control over them.

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 "[a]fter the workers entered the Site through the Security Gate and while driving to and from the mandatory parking lots on the Access Road, they 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." (POB at 37.) To be clear, CSI certainly is not arguing that rules prohibiting certain conduct or regulating an employee's path of travel ordinarily do not warrant compensation or that such rules cannot constitute compensable control. The "level of control," however, that such rules impose on an employee traveling on the employer's premises before work is significantly less than the same rules at a different time and place.

In *Morillion*, 22 Cal. 4th at 586, for example, the Court held that a bus ride—not on the employer's premises—was compensable because it was required and "prohibit[ed] [the employees] from effectively using their travel time for their own purposes." 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). *See also Rutti v. LoJack*, 596 F.3d 1046, 1061-62 (9th Cir. 2010) (employer's regulation of plaintiff's path of travel on the way to work (not while at work) constitutes compensable control under California law, where plaintiff "was required to drive the vehicle **directly** from home to his job and back," without making personal stops) (emphasis in original).

Therefore, in *Morillion* and *Rutti*, the courts held that the employers' Path of Travel rules and Prohibitory Rules exerted a sufficient level of control over the employees during commutes to warrant compensation. The central

reasoning behind these decisions is that employees were controlled because they were unable to use their commute 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* regarding "personal errands" and using "time effectively for their own purposes." This argument strains logic. The reasoning of *Morillion* and *Rutti* is inapt here because an ordinary commute is an **opportunity** for employees to run errands and take detours. The employer took those opportunities from employees in *Morillion* by requiring them to report to a bus stop, board a bus, and be driven to the agricultural fields for work. *Morillion*, 22 Cal. 4th at 586-87. Likewise, in *Rutti*, the employees lost these opportunities because they could not make personal stops driving to work or take passengers during their commute. *Rutti*, 596 F.3d at 1061-62.

By contrast, when an employee is travelling on the employer's premises before work, he obviously cannot take his child to school. As soon as an employee turns her vehicle onto the employer's property, she cannot 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 employee travel on the employer's premises before starting work and after ending work.

Therefore, Prohibitory/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.)

Plaintiff correctly asserts that "if the workers in *Morillion* were allowed to use their own personal transportation to travel to the fields where they worked but were confined to and required to follow only one specific route on the employer's property and were subjected to numerous rules in using such designated route and could not use the time on that route effectively for their personal purposes, there is no question that they would be under their employer's control and therefore entitled to compensation for such travel time." (POB at 38.) In other words, if an employer attempts to regulate the path of travel during employees' ordinary commute by limiting their available routes, then that control requires compensation because, as in *Rutti*, requiring a particular route deprives employees of an opportunity to run personal errands and drop off children at school. This fact, however, is not relevant to the compensability of an employer's rules regulating an employee's path of travel while at work.

This Court in *Frlekin* warned about using the reasoning of the commute cases like *Morillion* to the question of control over employees while at work. In *Frlekin*, this 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. This 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 *Morllion*, this Court reasoned, "Apple controls its employees **at the workplace**, where the employer's interest—here, deterring theft—is inherently greater." *Id.*, at 1051 (emphasis in original). This 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 into 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. Accordingly, all of the prohibitory rules cited by Plaintiff that "controlled" him on the Drive did not deprive him of any opportunities as he traveled across the Project either on his way to or from his work station. The fact that he could not use the time on the Drive effectively for his own purposes was because he was reporting to work on the employer's premises, and not because of any employer rules.

4. Plaintiff's theory of liability has no limiting principle

If California employers must compensate employees for all time they spend traveling on the employer's premises before and after work (unless it allows them to do whatever they want during this time), then any employee who uses a time clock will have unreported time and will be owed wages. Employees always spend some amount of time navigating towards a time clock or their workspace before a shift and away from the same area after a shift, in their cars on employer property or walking across employer hallways or sidewalks. None of that time is ever, **by definition**, recorded on a time clock and if it is compensable, then the "1,500 lawsuits" seeking "$6 billion in back pay" filed in the mere 6 months after the 1946 *Anderson* decision will pale in comparison to the wave of lawsuits for unpaid overtime wages, missed meal and rest breaks, and penalties brought under California's 4-year statute of limitations. If that is considered control worthy of compensation, then it is not an exaggeration to predict that workplace norms that have persisted for almost 75 years will be challenged everywhere.

It is simply not an answer for Plaintiff to tell the Court not to worry about the clear staggering implications that a ruling that travel on the employer's premises before and after work is generally compensable will have. The lack of a limiting principle, along with the legislative history and strong reaction to the

Anderson decision, is a good reason why this Court should reject any attempt by Plaintiff to recover for travel on the premises here.

5. The length of the Drive is irrelevant to the question of control

Whether it takes employees 5 minutes, or 45 minutes to get to their work stations on the employer's premises is irrelevant. It is the nature of the time spent and not its duration that determines whether the time is compensable. The employees in *Anderson* lost up to 24 minutes per day walking around the premises without being compensated. Plaintiff claims here that the Drive took 40-45 minutes on average each way per day. Just like an ordinary commute does not become compensable once it reaches a certain duration, neither does traveling on an employer's premises before beginning work just because it surpasses a certain length.

It is not always true that employees with a long commute do so by choice because they can choose to work close to home. Zoning laws or the lack of affordable housing within a large radius of a workplace can make a long commute unavoidable, forcing employees to spend several hours commuting to and from work wherever they live. Employers without housing nearby do not have to pay for a commute because employees are "required" to commute a long distance to work there.

V. PLAINTIFF'S STOP AT THE BADGING GATE—EITHER ON THE WAY IN OR ON THE WAY OUT—IS NOT COMPENSABLE AS A MATTER OF LAW

A. Plaintiff's Stop At The Badging Gate At The Beginning Of The Drive Did Not Start The Work Day

Wage Order 16 provides 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…" 8 CCR § 11160(5)(A). Plaintiff declares that the guard shack is the first place that he was required to report to, thereby making all subsequent travel compensable. (POB at 32-37.) This is incorrect.

Plaintiff is essentially arguing that because he needed to enter through a security gate to get to work, that was the "first location where the employee's presence is required by the employer." Section 5(A), however, is not triggered just because an employer's premises can be accessed only from one point, and the employee is "required" to stop there before starting work. Employees who use a key or scan a card to open a door at the entrance to the employer's property have not "reported" to the entrance.

Under Plaintiff's theory of liability, every place of employment would have a reporting event at any gate, front door, or other entrance. There is no reason to distinguish between a site with a single entrance, like the Project, and a site with multiple entrance. If an employee's access of a gate or entrance with a key card qualifies as "reporting," triggering all travel thereafter, then it makes no difference whether there is one or a dozen entrances. This is obviously not the law.

The requirement to compensate employee travel after a first reporting applies to the very common situation where employees must gather at a certain location, and then are required to travel again to another location. A reporting point such as this can be seen in *Morillion*, 22 Cal. 4th 575 (workers were required to report to a location to be transported to fields on a bus).

There is even a reporting point in this case, where Plaintiff met his other crew and then traveled on buggies to his work site, but that point is at the Parking Lot, not the Badging Gate. The Drive, in fact, **precedes** rather than **follows** the first place that Plaintiff's presence is required. The Drive took Plaintiff to the Parking Lot where he met other employees. (3-ER-496-498, 4-ER-789-791.) The Parking Lot is the first location where Plaintiff's presence is required, and the subsequent buggy ride is therefore compensated. (ER-496-498.)

Plaintiff argues that "if construction workers were required to be at a specific location at the beginning of the day that was not at an entrance to a

specific property at which the employees worked, such as a gas station, parking lot, or the employer's office, and then travel to where they worked for the day and 'report to work' there, they would still be entitled to compensation for all travel to and from that first location under Paragraph 5(A)." (POB at 35.) Plaintiff is correct, but there is a world of difference between employees being told to go to a "gas station," "parking lot," or "office" before going to a worksite, and employees being told to go to the entrance of a property. Under Plaintiff's interpretation of Section 5(A), employees who are required to enter a worksite from a single access point must start being compensated from that point because that is the first location where their presence is required.

Here, by contrast, after flashing his badge at the Badging Gate, Plaintiff immediately passes, does not leave his vehicle, never parks his car, and therefore did not yet reach a location where his presence is required. For the wage order provision to make any sense, the "first location" cannot be at the entrance of the employer's property, or there must at least be a **break** in the employee's travel, more than flashing a badge at a guard shack.

B. Plaintiff's Stop At The Badging Gate At The End Of The Day Did Not Constitute "Hours Worked"

Plaintiff wants to be paid for exiting the Project. An employer, however, is not required to compensate is employees for requiring them 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, lowered the window, and extended his badge to be scanned. This procedure to exit the premises does not warrant compensation.

1. The badge-out while exiting in Plaintiff's vehicle is not analogous to a bag check and 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 [this] Court recognized in *Frlekin*, [is] a clear element of control that makes time

waiting for and going through a mandatory exit security process compensable." (POB at 21.) Plaintiff is wrong.

Plaintiff analogizes the badge-out process at the end of the day to the bag check in *Frlekin*. But the two procedures are nothing alike. Plaintiff 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.").

In *Frlekin*, by contrast, the policy imposed significant burdens on employees who brought bags or even just an iPhone: "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 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.

Plaintiff argues that "an employer's control is not required to be physically 'intrusive' for it to constitute sufficient control." (POB at 28.) In support of this principle, Plaintiff cites *Morillion* (mandatory bus ride before work), *Mendiola v. CPS Security*, 60 Cal. 4th 833 (2015) (mandatory residence in trailer while on-call), *Bono v. Bradshaw* 32 Cal. App. 4th 968 (1995) (required to remain on premises during meal periods), and *Ridgeway v.*

Walmart, 946 F.3d 1066 (9th Cir. 2020) (truckers not permitted to go home without permissions during "layovers").

All of these cases, however, involved either a meal break or time away from the employer's premises, where employees must be relieved of all duty so they can use the time effectively for their own purposes. These cases are not helpful where an employee is entering or exiting the premises, where it is precisely how intrusive the interaction is that makes a bag check compensable and a scan of a badge at a door not compensable.

In addition, unlike a bag check, the Badging Gate scan is strictly for the purposes of ingress and egress. The most obvious analogy to this process is stopping at a gate at a parking garage to exit, which also requires the mere lowering 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.

Perhaps realizing that scanning card is nothing like being searched, Plaintiff suggests that searching was part of the exit procedure here. Plaintiff claims that (1) "security guards **looked** inside the workers' vehicles through the windows," (2) "security guards were required to **look in** the vehicles and truck beds during the exit process," and (3) "[w]hen the vehicles had more than one person, security guards **looked in** the vehicles to see how many people were in the vehicles." (POB at 18-19 (emphasis added).) Plaintiff is apparently

suggesting that an employer must pay an employee for the time it takes to exit a facility with a badge or a key if security guards are stationed at the exits and are looking at the employees for suspicious activity. But because there is no evidence that Plaintiff or anyone else was **delayed** by these ominous looks, a security guard even staring at an employee as he or she scans a card to exit is not even an indicia of compensable control.

Even the requirement in *Frlekin* that "employees [with] no bags to be searched were required to show any personal technology they were carrying and have this verified against a personal technology log to leave the store" cannot be compared to the badge-out procedure here. (POB at 25.) The Court noted that "Apple employees who bring an item subject to search," such as an iPhone without a bag, are still "confined to the premises until they submit to the search procedure; required to locate a manager or security guard and wait for that individual to become available; and compelled to…remov[e] their personal Apple technology devices and technology cards, and proving ownership of such items." *Frlekin*, 8 Cal. 5th at 1051. This is very similar to the bag check itself, and is nothing like scanning a badge from a vehicle on the way out.

Plaintiff 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 could last up to 30 minutes or more before being allowed to leave." (POB at 8.) Waiting in line to exit the employer's premises, however, does not warrant compensation.

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

Plaintiff also argues that because the exit process occurs on the Project, the level of control is greater and the time is compensable. Plaintiff cites *Frlekin's* distinction "between employer-mandated activities that occurred on the employer's premises and those that did not" (POB at 27), 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 Plaintiff's travel on the Project that would not be permissible if he were outside the Project. Requiring Plaintiff to travel through the Badging Gate at the end of each day and scan 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.

Plaintiff argues that employees "while confined in the Site as they were waiting in the exit security line and going through the exit security process, they were not free to conduct any personal business outside of the Site or use the time effectively for their own purposes." (POB at 23.) As noted above, 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. This Court **did not apply this test** either to identify the security check in *Frlekin* or to determine that it was not compensable. This standard, therefore, is not relevant here to find that the badge-out procedure is either a security check or is compensable.

2. 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 to perform as part of the mandatory exit security process 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 badges." (POB at 31.) 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) (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").

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."

VI. A CBA CAN DESIGNATE A MEAL PERIOD AS UNPAID WITHOUT RELIEVING UNION MEMBERS OF ALL DUTY

A. The Express Terms Of Wage Order 16 Permit Unpaid Meal Periods For Union Members Even Where They Are Not Relieved Of All Duty

"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).

"When a wage order's validity and application are conceded and the question is only one of interpretation, the usual rules of statutory interpretation apply." Brinker, 53 Cal. 4th at 1027. "The statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs." *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 1190 (2006).

This Court has repeatedly relied on the plain words of a wage order when interpreting its meaning. *See Morillion*, 22 Cal. 4th at 588 ("we find plaintiffs' compulsory travel time is compensable under the plain language of Wage Order No. 14–80"); *Frlekin*, 8 Cal. 5th at 1049 (rejecting Apple's interpretation

because it does "not comport with the wage order's plain language"); *Brinker*, 53 Cal. 4th at 1031 (rejecting employee's interpretation because it is not supported by "the plain language of the operative wage order").

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 CBA 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 CBA.

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.'" (POB at 49.) 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.*)

Plaintiff 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." (POB 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." *See* 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." (POB 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 a wage order provision of a completely different nature than the provisions here. In *Gutierrez,* the court considered Section 5(A), discussed above, which states 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." (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—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 [CBA] expressly provides otherwise." *Id.*, at 798-99.

As a result, *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 [CBA]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*. *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.[2]

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

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

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[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.)

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. "An 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 [CBA] [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).

Where section 512(a) does not apply to a qualifying CBA, a 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), "[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 [CBA that] provides [*inter alia*] premium wage rates **for all overtime hours worked**.'" *Id.* (emphasis added).

In *Vranish,* the CBA provided "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 [CBA], [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 [CBAs]." *Id.* (emphasis in original).

The reasoning of *Vranish* has been applied 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 [CBA] 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, holding 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 [CBA] 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 [CBA]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 [CBA]." *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 [CBA] 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.*

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, the compensability of a meal period is determined by "[t]he predominant benefit test[, which] 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 FLSA where employees "required to monitor their radios [for] emergenc[ies]," "must remain on the premises" during meal breaks, and "must respond to any emergency calls that are issued," 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. Section 512 entrusts unions to negotiate what an off-duty meal period is on behalf of their members irrespective of California law.

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 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 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.

C. 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 bars Plaintiff's claim for unpaid wages during meal periods. "[S]tate-law claims are preempted by § 301 [if] the rights at issue exist[ ] solely as a result of the CBA." *Dent v. NFL*, 902 F.3d 1109, 1116 (9th Cir. 2018).

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*, the court held that the CBAs "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 been applied to section 512 by the Ninth Circuit. In *Marquez v. Toll Global Forwarding*, 804 F. App'x 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. 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]

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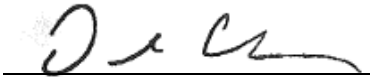
[3] Plaintiff cites *Andrade v. Rehrig Pac.*, 2020 WL 1934954, at *3 (C.D. Cal. Apr. 22, 2020), to argue that the "statutory exemption for overtime [does] not abrogate plaintiff's rights under § 1194" (POB at 53). But *Andrade* cannot be reconciled with *Curtis*. *Andrade*'s holding that a section 510 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.

VII. CONCLUSION

For the foregoing reasons, this Court should find that all of the time discussed above is not compensable under California law.

Date: October 17, 2022

FORD & HARRISON LLP

By: 

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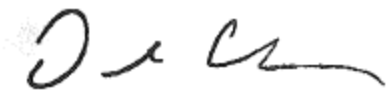
I, Daniel Chammas, counsel of record for Respondent CSI Electrical Contractors, Inc., hereby certify that pursuant to Rule 8.204(c)(l) of the California Rules of Court, this brief contains 13,965 words, not including the tables of contents and authorities, the caption page, signature blocks, or this certification page. I rely on the word count of the computer program used to prepare this brief.



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

Executed on **October 17, 2022**, at Los Angeles, California.

Lillian Marquez

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Supreme Court of California

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