CASE NO. S275431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

George Huerta, *Plaintiff and Petitioner,*

vs.

CSI Electrical Contractors, Inc., *Defendant and Respondent.*

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

PETITIONER GEORGE HUERTA'S REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

CSI's Brief is replete with *ipse dixit* assertions and *argumentum in terrorem* unsupported by any controlling California authority that are contrary to the express terms of Wage Order 16 and this Court's decisions. CSI's Brief also contains numerous slippery slope arguments and incomplete hypotheticals that ignore the specific facts of this action and the specific provisions of Wage Order 16, which only apply to the construction industry. Under this Court's decision in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038 [258 Cal.Rptr.3d 392, 406–407, 457 P.3d 526, 538] ("*Frlekin*"), the time CSI confined its workers to the secured Site while they waited for and underwent the mandatory exit security processes is time that they were "controlled" and is therefore compensable "hours worked." The time of the mandatory activities CSI required them to perform on the Site in this regard is also time the workers were "suffered or permitted to work" and is compensable for that reason as well. At a minimum, issues of fact exist which preclude summary judgment.

The time workers spent traveling between the Security Gate on the Site and the daily work areas on the Site is compensable under Paragraph 5(A) of Wage Order 16 because it is undisputed that CSI told the workers that the Security Gate was the first location where the workers' presence was required and CSI required its workers to travel between the Security Gate and the designated work areas on the Site to work.

Such travel time is also compensable "hours worked" because the workers were under CSI's control while confined to the Site and could not leave the Site without

completing the mandatory exit security process. Such employer-mandated travel time is also time the workers were "suffered or permitted to work." At a minimum, issues of fact existed which precluded summary judgment.

The time CSI confined the workers to the daily work areas during their unpaid meal periods is compensable as "hours worked" under California law because CSI controlled the workers by confining them to their daily work locations during their meal periods. The fact that CSI's workers worked under a collective bargaining agreement does not eviscerate their non-waivable statutory right under California law to be paid for all hours worked.

II. THE TIME AN EMPLOYER CONFINES ITS EMPLOYEES TO THE WORK SITE, REQUIRES THE EMPLOYEES TO WAIT IN LINE FOR UP TO 30 MINUTES OR MORE, STOP AT A SECURITY GATE, LOCATE AND PRESENT THEIR IDENTIFICATION BADGES FOR SCANNING AND ALLOWS SECURITY GUARDS TO PEER INSIDE THE VEHICLES AND THE BACK OF PICK-UP TRUCKS BEFORE ALLOWING THE EMPLOYEES TO EXIT THE WORK SITE CONSTITUTES "HOURS WORKED" WITHIN THE MEANING OF WAGE ORDER NO. 16.

A. The time Huerta and CSI's workers spent confined to the Site while waiting for and undergoing the mandatory exit security process constitutes "hours worked" under the "control" prong of the "hours worked" definition in Wage Order 16 and this Court's decision in *Frlekin.*

CSI completely ignores the rationale underlying this Court's decision in *Frlekin*. In *Frlekin*, this Court held that where an employer confines its employees to the work premises and requires them to undergo a mandatory exit security process to leave the work premises, the time the employees spend waiting for and undergoing the exit security process constitutes "hours worked" under the "control" prong of the Wage Order "hours worked" definition. (*Id*. at 1057.)

CSI focuses only on the time of the actual badge-scanning step of the exit security process in an attempt to assert what is essentially a legally untenable *de minimis* argument that this Court rejected in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 [235 Cal.Rptr.3d 820, 421 P.3d 1114], *as modified on denial of reh'g (Aug. 29, 2018*). In doing so, however, CSI ignores the undisputed fact that by requiring its employees to undergo this exit security process, it ***confined*** its employees to the secured Site and prevented them from leaving the Site without making them first wait for up to 30 minutes or more before undergoing the mandatory exit security process. (4-ER-889-890; ¶ 62.)

If there were no mandatory exit security process, then employees would not have to spend their time to undergo such process. Just as in *Frlekin*, CSI's mandated exit security process caused the employees' waiting time. Just as in *Frlekin*, the wait time of CSI's employees is compensable. (*See also Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 [94 Cal.Rptr.2d 3, 11, 995 P.2d 139, 147], *as modified (May 10, 2000)* (time spent waiting caused by the employer's policy was compensable: "we find that plaintiffs' compulsory travel time, which includes the time they spent waiting for Royal's buses to begin transporting them, was compensable." (*Id*. at 587.))

Here, after Huerta and CSI's workers entered the Site through the Security Gate, they were confined to the Site, just as Apple's workers in *Frlekin* were confined to the Apple stores and the farm workers in *Morillion* were confined to the employer's buses. Just as the Apple employees in *Frlekin* were required to wait to undergo the exit security process and exit the stores and the farm workers in *Morillion* were required to wait to ride

on the employer's buses, CSI's workers were required to wait for and undergo the mandatory security exit process that could last up to 30 minutes or more (which CSI does not dispute) before they were allowed to leave the Site. Just as Apple's workers in *Frlekin* and the farm workers in *Morillion* were entitled to be paid for the time they were under their employer's control, CSI's workers are entitled to be paid for the time they were confined to the Site while waiting for and undergoing the mandatory security exit process.

1. CSI does not dispute that, as with Apple's employees, CSI confined its workers to the Site and thereby prevented them from conducting any personal activities outside of the Site while they waited for and underwent the mandatory exit security process.

CSI does not dispute that it confined its workers to the Site after they entered the Site through the Security Gate as they waited for and underwent the mandatory security exit process and that it prevented them from leaving the Site unless and until they underwent such exit security process. Moreover, CSI does not dispute that while the workers were confined in the Site as they were waiting for and undergoing the mandatory 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.

This Court in *Frlekin* specifically cited *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 972 [38 Cal.Rptr.2d 549] *disapproved on other grounds by Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 [59 Cal.Rptr.2d 186, 927 P.2d 296] (*Bono*) as "instructive" to its conclusion that Apple controlled its employees by confining them to the Apple stores. (*Frlekin,* at 1047.) There was no bag check, technology

check, or any type of exit security process in *Bono*, but this Court nonetheless found that Apple's confinement of its employees to the stores was like the employer's confinement of its employees to the plant in *Bono* and was sufficient to support a finding of "control" to make the time compensable "hours worked" under the "control" prong of the "hours worked" definition.

2. CSI does not dispute that, as with Apple's employees, CSI required its workers to perform specific tasks with respect to the exit security process.

CSI does not dispute that, as was the case with Apple's employees in *Frlekin*, CSI required its workers to perform specific tasks, including waiting in line, driving their vehicles through the security line and up to the Security Gate, locating their badges, and showing them to the security personnel. CSI also does not dispute that it required its workers to leave the line if they did not have their security badges and were required to allow their vehicles to be searched, some of which were.

In *Frlekin*, this Court recognized that Apple's personal technology device exit security process, which required an employee to locate and show the employee's personal technology device and have it verified by security personnel against a technology log, was an element of control that made the time compensable. Apple's technology verification security process is not meaningfully different than CSI's requirement that its workers wait in line, stop at the security process checkpoint, roll down their windows, locate and show their badges, and have them verified by security personnel.

CSI claims that the actual scanning of the security badges in this case was a matter of mere seconds, but this is irrelevant to whether the time workers spent waiting for and undergoing the exit security process is compensable. As this Court held in *Troester*, there is no *de minimis* test in California law. Moreover, by focusing solely on the small fragment of the security process made up of the badge scanning, CSI entirely ignores the fact that employees could wait in line for up to 30 minutes or more just to arrive at the Security Gate where the exit security process occurred. In *Frlekin*, for example, some employees testified that the actual bag search took mere seconds. (4-ER-811-24; Declarations filed in *Frlekin*.) This Court nonetheless held that the time waiting for and undergoing such search was compensable. This Court should hold the same here.

There is no meaningful distinction between Apple confining its employees to an Apple store and requiring them to wait in line to have a bag inspected or their personal technology checked for a few seconds before being allowed to leave as in *Frlekin* and CSI confining its workers to the Site while they waited in line for up to 30 minutes or more and then having their badges scanned and be subjected to a visual vehicle check before being allowed to leave. Under *Frlekin*, CSI's employees, just as Apple's employees, were under CSI's control while waiting for and undergoing the mandatory exit security process. Such time therefore constituted "hours worked" under the "control" prong of the Wage Order definition.

3. CSI does not dispute that, as in *Frlekin*, the mandatory exit security process occurred on the Site and that CSI's workers were confined to the Site as they waited for and underwent the exit security process.

This case is not a "commuting" case because the mandatory exit security process occurred on the Site. In *Frlekin*, this Court distinguished between employer-mandated activities that occurred on the employer's premises and those that did not, noting that "there are inherent differences between cases involving time spent traveling to and from work, and time spent *at* work." (*Frlekin*, at 1051.) CSI does not dispute that the mandatory exit security process occurred while the employees were confined on the secured Site. CSI also does not dispute that its employees could not leave the secured Site without undergoing the mandatory exit security process.

CSI cannot dispute that the record reflects that the exit security process was for purposes of ***its*** security. (*See* 4-ER-882; ¶¶ 26-29; 4-ER-888-90; ¶¶ 59-61, 64-65; 4-ER-902-04; ¶¶ 51-53, 56; 5-ER-926; ¶¶ 26, 27; 5-ER-931-33; ¶¶ 52-54, 57-58; 4-ER-917-18; ¶¶ 57-59, 62-63; 4-ER-864.)[1] As this Court noted in *Frlekin*, onsite security procedures do not benefit the employee, but only the employer, which distinguishes such procedures from

[1] While CSI claims that the exit security process was "strictly for the purposes of ingress and egress" (RB32), not only is this contention contradicted by the record, CSI offers no citation to the record to support this claim. Moreover, CSI does not explain what the "purpose" of "ingress and egress" was or why that purpose is relevant to the control issue. Whatever the "purpose" was, CSI does not dispute that the purpose of the mandatory security process was for ***its*** benefit, not for the benefit of its employees.

the employer's offering of optional transportation services to employees that benefit the employee. (*Id*. at 1052-1053.)

Moreover, while workers in *Frlekin* could avoid a bag check or technology check by not bringing a bag or their own technology, Huerta and CSI's other workers were not offered the option of choosing whether to undergo the exit security process. CSI always required them to undergo the exit security process to leave the Site.

4. Contrary to CSI's contention, an employer's conduct does not have to consist of a "physically intrusive search" to constitute "control"

CSI argues that the exit security process at the Security Gate was different than Apple's exit security process in *Frlekin* because there were no bag checks. (RB 31.) CSI does not dispute, however, that during the mandatory exit security process, security guards looked inside the workers' vehicles through the windows and inspected truck beds, could search trunks, and workers were subject to being searched whenever they were on the Site. Despite these indisputable facts showing control, CSI contends that "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." (RB 33.) Of course, CSI's obtuse contention intentionally avoids the undisputed fact that CSI's employees ***were*** delayed from exiting and were required to also wait in line up to 30 minutes or more to arrive at the Security Gate and exit the Site ***because*** of the mandatory exit security process, just as the Apple employees were delayed

from exiting the store to which they were confined by Apple's exit security process in *Frlekin*.

Moreover, in *Frlekin*, even if employees had no bags at all to be checked, they were still required to show any personal technology they were carrying and have this verified against a personal technology log to leave the store. (*Frlekin,* at 1044.) While this was not a "physically intrusive search," this Court nonetheless held that the time waiting for and undergoing this exit security process was compensable under the "control" prong of the "hours worked" Wage Order definition.

CSI unsuccessfully attempts to distinguish the myriad cases in which this Court and other courts have found "control" with no "physically intrusive" requirement. (*See Morillion*, *supra; Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 841 [182 Cal.Rptr.3d 124, 130, 340 P.3d 355, 360]; *Bono, supra; Ridgeway v. Walmart Inc* (9th Cir. 2020) 946 F.3d 1066, 1078; *Boone v. Amazon.com Services, LLC* (E.D. Cal. 2022) 562 F.Supp.3d 1103, 1113–1115 (employees required to undergo COVID-19 screenings are subject to employer's control while waiting for and undergoing such screenings and such time constitutes "hours worked" under California law).)

CSI claims, without citing any authority, that 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." (RB32.) There is nothing in this Court's decision in *Frlekin*, however, that requires a finding of "intrusiveness" for the time spent in a mandatory exit security process

to constitute "control." Rather, this Court found that Apple's ***confinement*** of the workers to the stores without undergoing the exit security process was sufficient control to make the time compensable.

More importantly, the Wage Order "control" definition does not include a "physically intrusiveness" element. As this Court has held, substituting other words for the express language contained in a statute or regulation "amounts to improper judicial legislation." (*Morillion*, *supra*, 22 Cal.4th at 585.) Thus, an employer's control over an employee does not have to be "physically intrusive" to be sufficiently controlling. CSI's *ipse dixit* contention that "Waiting in line to exit the employer's premises . . . does not warrant compensation" (RB33) simply is unsupported by any controlling authority and is directly contrary to this Court's holding in *Frlekin*.

As this Court stated in *Frlekin*:

> . . . it is clear that plaintiffs are subject to Apple's control while awaiting, and during, Apple's exit searches. Apple's exit searches are required as a practical matter, occur at the workplace, involve a significant degree of control, are imposed primarily for Apple's benefit, and are enforced through threat of discipline. Thus, according to the "hours worked" control clause, plaintiffs "must be paid." (*Bono*, *supra*, 32 Cal.App.4th at p. 975, 38 Cal.Rptr.2d 549.) (*Id*. at 1056-1057.)

The factors this Court recognized in *Frlekin* that required compensating Apple's employees are present here: CSI's mandatory exit process was required, occurred at the workplace, involved a significant degree of control through the confinement of the workers to the Site, was imposed for CSI's benefit, and was enforced through threats of discipline.

B. The Exit Security Time constitutes "hours worked" under the "suffered or permitted to work" prong of the "hours worked" definition in Wage Order 16.

As Huerta discusses in his Opening Brief, Wage Order 16 does not define the term "work." In interpreting this term, as in interpreting any other statutory term, this Court has recognized the following principles of construction:

> . . . the aim of such construction should be the ascertainment of legislative intent so that the purpose of the law may be effectuated . . . a statute should be construed with reference to the entire statutory system of which it forms a part in such and that courts should give effect to statutes 'according to the usual, ordinary import of the language employed in framing them.' (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 918 [80 Cal.Rptr. 89, 95–96, 458 P.2d 33, 39–40] (citations omitted).

In reading statutes, words are to be given their plain and commonsense meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) Moreover, statutes governing conditions of employment are to be construed broadly in favor of protecting employees. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 [56 Cal.Rptr.3d 880, 886, 155 P.3d 284, 289].)

CSI does not dispute that the activities it required of its workers of driving from the location on the Site where the employees worked to the Security Gate, waiting in line for up to 30 minutes or more and, moving in the line to the Security Gate, stopping, and undergoing the mandatory exit security process meet the plain definition of "work" because such activities are activities "in which one exerts strength or faculties to do or perform something." (*Merriam-Webster's Collegiate Dictionary* (11th ed.) and encompass

"exertion to attain an end, especially as controlled by and for the benefit of an employer; labor." (*Black's Law Dictionary* (10th ed. 2014).) (RB 35.)

CSI also does not and cannot dispute that, while the FLSA does not define "work," under federal law, the general rule is that an employee must be "paid for all time spent in 'physical or mental exertion, whether burdensome or not, controlled and required by the employer, and pursued necessarily and primarily for the benefit of the employer or his business.' " (29 C.F.R. § 785.7 (2005) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949]). Thus, under federal law, an employee's travel on the employer's premises is "work." (*Id*., *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (1945) 325 U.S. 161, 165 [65 S.Ct. 1063, 1066, 89 L.Ed. 1534] (same); *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 690–691 [66 S.Ct. 1187, 1194, 90 L.Ed. 1515].)[2]

The activities CSI required of its workers while confined to the Site and before CSI allowed them to leave the Site meet this plain-language definition and Supreme Court's definition of "work." Such activities involve "exertion" or "effort" required by CSI, including traveling from the location where the employees worked on the Site to the Security Gate, waiting in lines for up to 30 minutes or more, stopping, and undergoing the mandatory exit security process. These activities "attain an end," including confirming that

[2] The fact that the subsequently enacted federal Portal-to-Portal Act classifies certain activities occurring both prior to and after the regular workday as noncompensable under federal law does not mean that such activities do not constitute compensable "work" under California law. (*Frlekin* at 1051.)

workers have left the Site and have not taken any items, equipment, or supplies. This clearly benefits CSI by deterring and preventing theft. These activities are therefore compensable "work" of which CSI was indisputably aware, and Huerta and the class members were therefore entitled to be paid for this time of such employer-mandated work activities.

Facing these indisputable facts, CSI improperly attempts to graft an additional element onto the "suffer or permit to work" wage order test by claiming that, for an activity to constitute "work," the employer must "recognize" the activity as work. (RB 35.) CSI's attempt necessarily fails. First, there is no language in the Wage Order "suffer or permit" test that provides for an activity to constitute work, such activity must be "recognized by the employer to be work." Had this been the IWC's intention, it easily could have drafted the definition to include such condition. It did not, however, define or qualify "work" in such way.

Moreover, adding words to the express language contained in a statute or regulation "amounts to improper judicial legislation." (*See*, *e.g.*, *Morillion*, *supra*, 22 Cal.4th at 585.)[3]

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[3] While CSI refers to *Hernandez v. Pacific Bell Telephone Co.* (2018) 29 Cal.App.5th 131, 142 [239 Cal.Rptr.3d 852, 860, 29 Cal.App.5th 131, 142], that case involved a claim by employees who participated in an optional and voluntary Home Dispatch Program who alleged that their commute drive time between their home and the customer was "work." Addressing plaintiffs' "suffer or permit to work" theory, the court, relied solely on the non-binding opinion of a federal district court in *Taylor v. Cox Communications California, LLC* (C.D. Cal. 2017) 283 F.Supp.3d 881, *aff'd* (9th Cir. 2019) 776 Fed.Appx. 544. (*Id*. at 142.) In *Taylor*, however, the district court had created out of whole cloth the "employer recognition as work" element to the "suffer or permit to work" test. While the district court in *Taylor* purported to rely on *Morillion*, nowhere in *Morillion* did this Court hold that, to constitute "work" under the "suffer or permit to work"

Grafting an "employer recognition as work" element onto the "suffer or permit to work" test is not only unsupported by the Wage Order's text, but if an objective test were adopted, application of such test would create an issue of fact here. Using the dictionary definition of "work" and the United States Supreme Court's recognition that travel on an employer's premises constitutes "work," a jury in this case could easily find that CSI's requirement that its workers drive from their daily work site, wait in line for up to 30 minutes or more, stop, and submit to a mandatory exit security process before being allowed to leave the Site was "work." For example, if a CSI foreman instructed a worker to drive an injured worker from his daily work site to the Security Gate "off the clock," such time would clearly be considered "work" time. (*See also Troester* at 835-836 (walking coworkers to their cars or waiting for their rides to arrive in compliance with employer's policy assumed to be work).) There is no difference here.

In its Brief, CSI ***concedes*** that employer-mandated activities must be compensated, stating:

> **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. (RB 22.)

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test, the activity must be "recognized" by the employer as "work." In fact, in *Morillion*, this Court did not even address whether the time at issue was compensable under the "suffer or permit to work" test.

Here, CSI compelled its workers to travel to, wait for, and undergo the mandatory exit security process just as Apple compelled its employees to undergo the exit security process in *Frlekin*. These employer-mandated activities are "work" and CSI must compensate its employees for such work.

At a minimum, there was at least a triable issue of fact whether the workers were "suffered or permitted to work" when CSI required them to travel to, wait for, and undergo the mandatory exit security process, and the district court therefore erred in granting CSI's summary judgment motion.

III. THE TIME IT TOOK HUERTA AND THE OTHER WORKERS TO TRAVEL BETWEEN THE SECURITY GATE AND THE DAILY WORK AREAS ON THE SITE WAS COMPENSABLE UNDER WAGE ORDER 16, PARAGRAPH 5(A). [4]

CSI does not dispute Huerta's evidence that CSI instructed Huerta and other CSI workers that the Security Gate was the first location where CSI required its workers presence to work on the Site. (4-ER-877-91; 4-ER-892-905; 4-ER-906-19; 5-ER-921-34.)[5]

CSI claims that "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.' " (RB 29.) Not so. Neither the existence of the

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[4] In its Brief, CSI does not dispute that it required its workers to travel on the Site between the Security Gate and the designated work areas to work. CSI therefore does not dispute that such travel was "employer-mandated" under Paragraph 5(A).

[5] While CSI refers to a "parking lot" in its Brief (RB 29), it fails to cite to any evidence that demonstrates, as a matter of law, that this location, rather than the Security Gate, was the "first location where the employees' presence was required" by CSI. Even if CSI had presented such evidence, whether the Security Gate or the parking lot was the first location where CSI required its employees' presence is clearly a triable issue of fact.

Security Gate nor the fact that workers entered the Site at the Security Gate is controlling. There is no language in Paragraph 5(A) that limits its effect to locations where a security gate exists, where an entry security process occurs, or where workers enter the work site. If, for example, construction workers were required to be at a specific location at the beginning of the day outside of the Site, such as a gas station or the employer's office, and then travel to the Site where they worked for the day, they would be entitled to compensation for all travel to and from that first location, regardless of whether that location was at a security gate with a security process at such location or whether the location was the entrance to the work site.

Huerta and other declarants state in their declarations (which CSI did not dispute) that they were told by CSI that the Security Gate was the first location where CSI required their presence. Therefore, Huerta and the class members were entitled to be paid for travel required by CSI occurring thereafter under Paragraph 5(A). Huerta would and does have this Paragraph 5(A) claim even if there was no security process at the Security Gate or if there were no Security Gate at the location they were told that their presence was first required.

CSI's contention that "Section 5(A) . . . 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" (RB 29) misapprehends Section 5(A)'s requirements. There is nothing in Paragraph 5(A) that limits its effect to a location that is the only entrance to a

specific property at which employees work and Huerta's claim is not dependent on the existence of only one entrance to the Site.

CSI also improperly attempts to add the requirement to Section 5(A) that the "first place where the employee's presence is required" must be where employees "report" to work. (RB 28.) There is no language in Section 5(A), however, that requires employees to "report to work" at the first location where their presence is required for Paragraph 5(A) to apply. For example, 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, they would still be entitled to compensation for all travel to and from that first location under Paragraph 5(A) regardless of whether there was any "reporting to supervisors" there.

The fact that workers' meetings or "reporting to supervisors" may not have occurred at the Security Gate is irrelevant. Paragraph 5(A) does not require that meetings occur at the "first location where the employee's presence is required by the employer" or that employees "report to work" at such location. It is silent as to what must occur at such location. There were no worker meetings in *Morillion*. There, the workers were required to meet at a designated departure point location, park their cars, and get on the bus. (*Morillion v. Royal Packing Co.* (Cal. Ct. App. 1998) 77 Cal.Rptr.2d 616, 618, *review granted and opinion superseded* (Cal. 1998) 80 Cal.Rptr.2d 752 [968 P.2d 463], *as modified (May 10, 2000)*, *rev'd* (2000) 22 Cal.4th 575 [94 Cal.Rptr.2d 3, 995 P.2d 139].)

The fact that the workers did not engage at meetings at the location where they boarded the buses did not make the bus-ride time non-compensable.

CSI also proffers the baseless *ipse dixit* conclusion that "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." (RB 30.) In fact, there is no difference. If, for example, there was a parking lot at the entrance of the Site rather than a Security Gate and the employees were instructed to park their vehicles there and to bring their own bicycles and ride them, or walk, to the daily work locations on the Site, they would clearly be entitled to be paid for such travel time under Paragraph 5(A).

CSI contends, without any statutory or case law support, that "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." (RB 30.) As discussed above, however, the fact that the "first location" was at the entrance to the Site does not and cannot prevent the applicability of Paragraph 5(A), and nothing in the text of Paragraph 5(A) supports such manufactured limitation. Similarly, there is nothing in the text of Paragraph 5(A) that conditions its applicability on the fact that there "is a break in the employee's travel" at the location where an employee's presence is first required, and, in any event, there was a "break in the employee's travel" here when they were required to stop at the Security Gate at the beginning of the day.

Based on the undisputed evidence before the trial court, a jury could certainly find that the Security Gate was the first location where CSI's employees' presence was required. Thus, this issue is at a minimum a triable issue of fact that precluded the granting of summary judgment in favor of CSI on this claim.

IV. THE TIME OF THE MANDATED TRAVEL BETWEEN THE SECURITY GATE AND THE DAILY WORK AREAS ON THE SITE CONSTITUTES "HOURS WORKED."

A. The time CSI required Huerta and the workers to travel on the Site to their daily work areas while confined to the Site constituted "hours worked" under the "suffer or permit to work" test of Wage Order 16.

In Huerta's Opening Brief, Huerta demonstrated that the time CSI's employees spent following CSI's directions and traveling on the Site between the Security Gate and the designated work areas was compensable under the "suffer or permit to work" test of the Wage Order "hours worked" definition. (Opening Brief 40-41.) In its Brief, CSI does not dispute that CSI required such travel or that such travel required effort or exertion. CSI does not even attempt to explain how employer-mandated travel does not constitute "work," but merely offers the baseless conclusion that "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." (RB 9.) CSI offers no controlling California statutory or case law to support this baseless contention, but only the federal Portal-to-Portal Act, which has no application to California law. (RB 15-16.) Moreover, as discussed above, CSI ***concedes*** that employer-mandated activities must be compensated under California law. (RB 22.)

As discussed above, employer-mandated travel on the employer's premises between a work site and the location of a mandatory exit security process is clearly "work" under the generally understood definition of "work" and United States Supreme Court precedents as to what constitutes "work," which includes employer-mandated travel on an employer's premises.

Under existing law, employer-mandated travel "off premises" is clearly compensable. (*Morillion*, *supra*; DLSE Opinion Letter, 1994-02-16 ("Travel time of an employee made at the request of the employer must be compensated").) There is simply no cogent rationale to support the argument that employer-mandated travel "on premises" is not also compensable.

CSI does not dispute that it required its workers to travel between the Security Gate and their daily work areas on the Site. CSI does not dispute that this travel is an activity "in which one exerts strength or faculties to do or perform something." (*Merriam-Webster's Collegiate Dictionary* (11th ed.) and that it is also an "exertion to attain an end, especially as controlled by and for the benefit of an employer; labor." This travel time is time during which the workers are required to be on the Site and is time employees are under the complete control of CSI. This is time that is dependent solely upon the physical arrangements at the Site (the Security Gate and the designated work areas). Without such mandated travel by the employees, CSI could not have provided the work it was providing to the general contractor on the Site. Moreover, the workers' convenience and necessity bear no relation whatsoever to this travel time – they traveled on the Site between the

Security Gate and the designated work areas only because they were compelled to do so by the necessities of CSI's business. Thus, the time spent traveling on the Site involved "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590, 598 [64 S.Ct. 698, 703, 88 L.Ed. 949]; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America* (1945) 325 U.S. 161, 165 [65 S.Ct. 1063, 1066, 89 L.Ed. 1534] (travel on employer's mine is "work" and compensable).)

B. Because CSI confined its employees to the Site and did not allow them to leave the Site without traveling to, waiting in line for up to 30 minutes or more, stopping, and undergoing the mandatory exit security process, CSI controlled the employees during the travel time between the Security Gate and the daily work areas and such time is therefore compensable under the "control" test of the "hours worked" Wage Order definition.

CSI does not dispute that after its workers entered the secured Site through the Security Gate and while driving between the Security Gate and their daily work areas on the Access Road, CSI confined them to the Site and did not allow them to leave the Site unless and until they traveled to, waited in line for up to 30 minutes or more, stopped, and underwent the mandatory exit security process. CSI does not dispute that CSI required its workers to stay on the Site during the entire workday from the beginning of the workday to the end of the workday. (*See* 4-ER-891; ¶ 67; 4-ER-904; ¶ 58; 5-ER-934; ¶ 60; 4-ER-919; ¶ 65.) Finally, CSI does not dispute that while confined to the Site, its employees could not effectively use such time for their own purposes, such as running personal errands outside of the Site.

Because CSI's workers were under CSI's control while they were confined to the Site and while traveling between the Security Gate and their daily work areas, such time is compensable. (*See Frlekin*; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (94 Cal.Rptr.2d 3, 995 P.2d 139), *as modified (May 10, 2000)*.) The fact that CSI's employees were not providing services during such travel time does not mean they are not entitled to compensation. (*Id*. at 582.) Just as the workers in *Frlekin* were confined to the Apple stores and the farm workers in *Morillion* were confined to the employer's buses, CSI's workers were confined to the Site while traveling between the Security Gate and their daily work areas. They were therefore under CSI's control during this time and are entitled to be paid for this time.

C. CSI's Rules of Travel arguments are a red herring.

CSI devotes a large portion of its brief to its argument that CSI's control over the manner of its workers traveling on the Access Road is not controlling on the issue of whether CSI controlled its employees during the time it confined them to the Site. (RB 17-24.) Huerta agrees that this is not the only factor evidencing control, but CSI misses the mark by focusing only on the Rules of Travel and ignoring the ultimate control it exercised over its workers by ***confining*** them to the Site ***and not allowing them*** to leave the Site without traveling to, waiting in line for up to 30 minutes or more, stopping, and undergoing the mandatory exit security process.

For that reason, CSI's hypotheticals regarding its Rules of Travel arguments (RB 21-22) are incomplete and irrelevant because they each omit the salient facts of this case –

the employer confined the workers to a secured job site and prevented them from leaving the job site unless they traveled to, waited in line for, and underwent a mandatory exit security process.

In this case, and in each of CSI's hypotheticals as modified by the facts of this case, CSI and the employer controls the employee by confining the employee to the work site and preventing them from leaving unless they travel to, wait in line for, and undergo a mandatory exit security process.

More importantly, even if there were no "rules of travel" in this case, the control CSI exercised over its workers by confining them to the Site and not allowing them to leave unless and until they traveled to, waited for up to 30 minutes or more, stopped, and underwent the mandatory exit security process constitutes sufficient control to make the time compensable under this Court's reasoning in *Frlekin* and *Morillion*. As this Court explained in *Morillion*:

> " 'When an employer directs, commands or restrains an employee from leaving the work place ... and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to (the definition of hours worked), that employee must be paid.' " (*Id.* at p. 583.)

D. At a minimum, whether the Drive Time between the Security Gate and daily work areas constituted "hours worked" under either the "control" test or the "suffer or permit to work" test are issues of fact for the jury.

Whether time CSI's workers spent complying with CSI's directions and traveling between the Security Gate and the workers' daily work areas while the workers were

confined to the Site constitutes "hours worked" under the "suffer or permit to work" test is at a minimum an issue of fact.

Similarly, whether CSI sufficiently controlled its workers by confining them to the Site and not allowing them to leave during the time CSI required them to travel between the Security Gate and their daily work areas to make such time compensable under the Wage Order "control" test of "hours worked" is at a minimum an issue of fact. (*See Oliver v. Konica Minolta Business Solutions U.S.A., Inc.* (2020) 51 Cal.App.5th 1 [264 Cal.Rptr.3d 248, 51 Cal.App.5th 1].)

V. THE FACT THAT HUERTA WORKED UNDER A COLLECTIVE BARGAINING AGREEMENT DOES NOT EVISCERATE HIS NON-WAIVABLE RIGHT UNDER CALIFORNIA LAW TO BE PAID FOR ALL HOURS WORKED.

A. California law provides employees a non-waivable, non-negotiable right to compensation for all hours worked.

Labor Code Section 1197 states:

> The minimum wage for employees fixed by the commission or by any applicable state or local law, is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful. This section does not change the applicability of local minimum wage laws to any entity.

Section 1197 is enforced by Section 1194 of the Labor Code, which states:

> (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Thus, CSI does not and cannot dispute that California law provides employees a non-waivable, non-negotiable right to compensation for all hours worked, which includes any hours where the employee is under the employer's control, regardless of whether the employee is "working." (*Morillion* at 582.)

B. Huerta's state law "unpaid hours worked" claim is not preempted by federal law.

The United States Supreme Court "has repeatedly repudiated the idea that the mere ability of unionized workers to bargain collectively somehow makes it permissible to give unionized employees fewer minimum labor-standards protections under state law than other employees." (*Burnside v. Kiewit Pacific Corp.* (9th Cir. 2007) 491 F.3d 1053, 1068.)

In *Melendez v. San Francisco Baseball Associates LLC* (2019) 7 Cal.5th 1, 9–10 [246 Cal.Rptr.3d 287, 293, 439 P.3d 764, 769], this Court adopted the two-part test to determine whether a state law claim is pre-empted by Section 301: (1) whether the claim arises from independent state law or from the collective bargaining agreement; (2) if the claim arises from independent state law, whether the claim requires "interpretation or construction of a labor agreement," or whether a collective bargaining agreement will merely be "reference[d]" in the litigation. (*Id*. at 9-10.)

1. Huerta's unpaid hours worked claim is based on California law, not on any CBA.

CSI argues 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." (RB 47.) Not only does the authority CSI offers for this startlingly erroneous

proposition not stand for this proposition, but Sections 1194 and 1197 have no CBA exemptions. Moreover, Huerta's state law claim for unpaid hours worked is not based on any CBA but on state law.[6] Because Huerta's hours worked claim is based on California law, not on any CBA, CSI has not established the first prong of the pre-emption analysis.

CSI also argues that "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." (RB 48.) CSI mischaracterized Huerta's claim, however. Huerta's right to be paid for all hours worked, including for time that CSI controlled him during a meal period, is not a CBA right, but an independent non-waivable right under California law that is not "inextricably intertwined" with any meal period rights granted under either a CBA or California law.

Section 1194 requires that "irrespective of how 'the wages,' or 'hours of work,' are determined under a CBA, plaintiff is entitled to be paid a minimum wage and overtime for all hours he was under the 'control' of defendant." (*See Livadas v. Bradshaw* (1994) 512 U.S. 107, 125 [114 S.Ct. 2068, 2079, 129 L.Ed.2d 93] (no LMRA preemption because the plaintiff's wage and hour claim raised "a question of state law, entirely independent of any

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[6] CSI concedes that Huerta's hours worked claim is based on state law:

> 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." (RB 37.)

understanding embodied in the collective-bargaining agreement between the union and the employer"); *Burnside*, 491 F.3d at 1073 (finding no preemption because the employee was not "complaining about the wage rate ... but about the fact that he was not paid at all."); *Garcia v. Statewide Traffic Safety and Signs, Inc.* (C.D. Cal., Nov. 26, 2018, No. SACV1801668JVSJDEX) 2018 WL 6242866, at *3–4 (no preemption as to hours worked claim during meal period when no meal period claim asserted).)

In *Garcia v. Statewide Traffic Safety and Signs, Inc.* (C.D. Cal., Nov. 26, 2018, No. SACV1801668JVSJDEX) 2018 WL 6242866, at *3–4, a union employee plaintiff alleged that his employer required him and other employees to work during their unpaid meal periods. He did not assert a stand-alone meal period claim. The district court held that the unpaid hours worked claim, even though the unpaid work occurred during a meal period, was not preempted.

CSI's reliance on *Marquez v. Toll Global Forwarding* (9th Cir. 2020) 804 Fed.Appx. 679 is completely misplaced. Not only is it non-precedential (*Id.* at fn. ***) but this case, unlike *Marquez*, does ***not*** involve claims for meal or rest period violations.

2. Huerta's unpaid hours worked claim does not require an "interpretation" of a CBA.

Huerta's unpaid hours worked claim does not require an "interpretation" of any CBA. (*Burnside, supra* at 1071; *Garcia v. Statewide Traffic Safety and Signs, Inc.* (C.D. Cal., Nov. 26, 2018, No. SACV1801668JVSJDEX) 2018 WL 6242866, at *5.) There are no provisions in the CBA that must be "interpreted" for Huerta to establish that he was not paid for all hours worked. The mere fact that a CBA may refer to meal periods has nothing

to do with whether Huerta and the class members are entitled to compensation for all hours worked during their meal periods because they were controlled during their meal periods by being confined to their work areas on the Site.

C. Because the meal period protections of Paragraph 10(D) of Wage Order 16 do not apply in this case, they have no relevance to Huerta's unpaid hours worked claim.

CSI concedes, as it must, that the provisions of Paragraph 10(D) of Wage Order 16 relating to meal periods[7] does not apply to workers subject to qualifying CBAs. Because the meal period protections of Paragraph 10(D) do not apply to Huerta, and because Huerta is not asserting meal period rights under the Wage Order or the Labor Code, CSI's discussion of its provisions is completely irrelevant.

D. Wage Order provisions cannot trump the statutory protections of Sections 1194 and 1197.

As discussed above, courts construing the Labor Code and wage orders must liberally construe them to favor protection of employees. (*Troester* at 839.) CSI's construction of the CBA exemption to Paragraph 10(D) of Wage Order 16 as eviscerating the rights of union employees to be paid for all hours worked during meal periods completely ignores the non-waivable rights granted to employees by Sections 1194 and

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[7] Paragraph 10(D) provides:

> Unless 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. An "on duty" meal period shall be permitted only when the nature of the work prevents employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to and complies with Labor Code Section 512.

1197 to be paid for all hours worked, including hours worked by union employees during meal periods, and violates the well-established rules of construction enunciated by this Court.

Moreover, the non-waivable rights provided by Section 1194 and 1197 prevail over Paragraph 11(D) as construed by CSI. "[B]ecause the Legislature is the source of the IWC's authority, a provision of the Labor Code will prevail over a wage order if there is a conflict." (*Gerard v. Orange Coast Memorial Medical Center* (2018) 6 Cal.5th 443, 448 [240 Cal.Rptr.3d 757, 760, 430 P.3d 1226, 1228] (emphasis added).)

Huerta is entitled to be paid a minimum wage for all "hours worked," which includes time he was under CSI's "control." (*Frlekin,* at 1056-1057.) Where an employer restricts an employee's ability to leave the daily worksite during the employee's meal period, the employer controls the employee during the meal period and the time of the meal period therefore constitutes "hours worked" for which the employee must be paid. (*See Bono*, *supra* at 972.)

The fact that Huerta may not be able to assert a meal period claim (which he is not asserting in any event) because of the CBA meal period exemption in Wage Order 16, Paragraph 10(E) (which merely provides that certain ***meal period*** protections do not apply to union employees), does not mean he cannot enforce his independent right to be paid for all "hours worked" during a meal period based on CSI's confinement of him his daily work areas on the Site during his meal period.

VI. CONCLUSION

This Court should find that the time at issue is compensable under California law.

Dated: October 26, 2022

Respectfully submitted,

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CERTIFICATE RE NUMBER OF WORDS

I certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that **PETITIONER GEORGE HUERTA'S REPLY BRIEF ON THE MERITS** contains 8,327, including footnotes. I rely on the word count of the Word computer program used to prepare this brief.

Dated: October 26, 2022

Respectfully submitted,

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I am over the age of 18 and not a party to the within action. My business address is 2945 Townsgate Road, Suite 200, Westlake Village, CA 91361. On October 26, 2022, I served the following document(s) described as:

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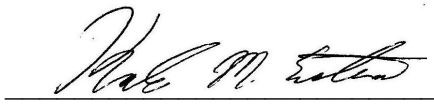

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STATE OF CALIFORNIA
Supreme Court of California

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