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, Case 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

AMENDED APPLICATION OF CONSTRUCTION EMPLOYERS' ASSOCIATION, SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION AND SOUTHERN CALIFORNIA ASSOCIATION OF SCAFFOLD CONTRACTORS TO FILE AMICUS CURIAE BRIEF
and
AMICUS CURIAE BRIEF IN SUPPORT OF CSI ELECTRICAL CONTRACTORS, INC.

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AMENDED APPLICATION AND STATEMENT OF INTEREST OF AMICI CURIAE

The CONSTRUCTION EMPLOYERS' ASSOCIATION ("CEA"), SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION ("SCCA"), and SOUTHERN CALIFORNIA ASSOCIATION OF SCAFFOLD CONTRACTORS ("SCAC") (together, the "Amici") respectfully request leave to file the attached brief of Amicus Curiae in support of Defendant/Respondent CSI Electrical Contractors, Inc. This application is timely made within thirty (30) days after the filing of the reply brief on the merits pursuant to Rule of Court 8.520(b)(2). Pursuant to Rule 8.520(f)(4)(A) and (B), only the attorneys listed on the caption page of this Application drafted the accompanying brief, and only the two Associations listed above made a monetary contribution to fund the preparation and submission of the brief.

CONSTRUCTION EMPLOYERS' ASSOCIATION

Established in 1986, the CEA is comprised of over 120 premier unionized contractors (primarily commercial and multi-family housing general contractors) who perform building construction work in Northern California. CEA members collectively perform an annual volume in excess of $25 billion in public and private building construction. Over 20,000 union construction tradesmen annually work on projects where CEA members are the general contractor.

CEA represents its members in collective bargaining, labor relations, and legislative advocacy. CEA's sole purpose is to protect and promote the interests of the unionized building construction industry in Northern California. CEA negotiates the collective bargaining agreements affecting building contractors performing work in Northern California, including the Carpenters Master Agreement, the Laborers Master Builders Agreement,

the Cement Masons Agreement, the Operating Engineers Agreement, and many specialty agreements.

SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION

Established in 1974, the SCCA is comprised of union-affiliated contractor businesses and affiliate construction industry service providers. SCCA negotiates Master Labor Agreements with the six basic trades – Operating Engineers, Laborers, Carpenters, Cement Masons, Iron Workers and Construction Teamsters. SCCA's Labor Committee paired with its Labor Department provides strong representation when negotiating all collective bargaining agreements. It has in excess of 200 contractor members employing over 20,000 construction employees.

SOUTHERN CALIFORNIA ASSOCIATION OF SCAFFOLD CONTRACTORS

The SCAC was established in 2018 for the purpose of promoting the business interests and improving business conditions for union signatory scaffold contractors located in Southern California. The SCAC negotiates collective bargaining agreements on behalf of its members. It also promotes legislation and education within the scaffolding industry. The SCAC is comprised of over twenty employers, which collectively employ in excess of 1,800 employees annually in California.

INTEREST OF THE AMICI ASSOCIATIONS IN THE OUTCOME OF THIS CASE

The Amici are vitally interested in this proceeding because their members routinely deal with and address issues of what is considered compensable time for their construction industry members. Whether time spent exiting a security gate at a construction site is considered compensable time under California law is an issue that substantially affects the Amici Associations' members. The same is true with respect to whether time spent at a remote jobsite during a meal period considered

"hours worked" under the collective bargaining agreement exemptions to the Labor Code and Wage Order 16; and to whether time spent traveling between a security gate and a jobsite are compensable work times.

A negative answer to any of the three certified questions in this case would transmute substantial periods of time into previously non-compensable "hours worked," resulting in an enormous increase in their cost of doing business and subjecting them to otherwise unnecessary class action and PAGA litigation.

THE AMICI ASSOCIATIONS' BRIEF WILL AID THE COURT IN REACHING ITS DECISION

The Amici are in a position to provide this Court with a broad spectrum view on the legal and practical consequences to the construction industry as a result of this Court's decision with respect to the three certified questions. For these reasons, the Amici's brief will aid the Court in its determination of this matter.

CONCLUSION

For these reasons, this Application should be granted and the accompanying Amicus Curiae Brief be deemed filed.

Dated: November 28, 2022

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By_____

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT CSI ELECTRICAL CONTRACTORS, INC.

Amici Curiae CONSTRUCTION EMPLOYERS' ASSOCIATION ("CEA") and SOUTHERN CALIFORNIA ASSOCIATION OF SCAFFOLD CONTRACTORS ("SCAC") (together, the "Amici") hereby file this brief in support of Defendant/Respondent CSI Electrical Contractors, Inc.

I.

ISSUES ADDRESSED

Given the extensive legal briefing already available to the Court on the issues certified by the Ninth Circuit Court of Appeals, the Amici will focus the Brief on the following issues:

1. The Security Gate Exit Procedures Derive From Contested and Highly Variable Facts, Which Are Not Appropriate For Establishing a Generally Applicable "Hours Worked" Rule—or Such Rule Should Be Narrowly Tailored To Avoid Unintended and Disastrous Consequences in the Construction Industry;
2. Time Spent Driving To Or From A Jobsite Is Not Rendered "Employer-Mandated Travel" or "Hours Worked" Just Because It Is Interposed By An Access Checkpoint Requiring Minimal Activity Or Constrained By Prohibitory Rules That Must Be Followed By the General Public; and
3. An Overbroad Rule Regarding the Compensability of Meal Periods On Remote Worksites Would Have Severe Consequences In the Construction Industry.

II.

SUMMARY OF ARGUMENT

A security check on exit is not compensable hours worked. Time spent by employees traveling to and from a security gate on a remote

construction worksite has not been recognized as "hours worked" by any judicial authority, and is not the kind of activity that has traditionally been held compensable by the courts. Nor is time spent waiting to exit an employer's premises within the definition of compensable work time. In addition, the assertion that employees who may not practically leave such a remote worksite must be paid for their meal periods is at odds with Industrial Relations Commission (I.W.C.) Wage Order 16. The Court should accordingly proceed to answer each of the Ninth Circuit's certified questions in the negative, and hold that none of the three scenarios posed therein constitute hours worked under California law.

III.

THE SECURITY GATE PROCEDURES ON EXIT OF A WORKSITE DO NOT CONSTITUTE HOURS WORKED

In its first certified question to this Court, the Ninth Circuit asked:

> Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16?

(*Huerta v. CSI Electrical Contractors, Inc.* (2022) 39 F.4th 1176, 1177 [Order Certifying Questions To the Supreme Court of California].) As described by the Ninth Circuit, the first certified question focuses solely on the security check procedure upon the employees' *exit* from the site and the discrete amount of time spent waiting in line for such process. (*Id.* at 1179.)

As the Ninth Circuit frames the issue, this time included time spent by employees on the employer's premises in a personal vehicle, waiting to scan an identification badge, permit security guards to peer into the vehicle, and exit the security gate. (*Id.*)

The Petitioner's Opening Brief on the Merits ("POB") demonstrates just how minimal the security check process truly was. To wit, Petitioner states that "workers were required to roll down their windows and present their security identification badges for review and scanning by a security guard" and "security guards looked inside the workers' vehicles through the windows [and] inspected the bed of any pickup trucks." (POB at pp. 17-18.) However, the record is not clear whether the guards always looked into the vehicles' windows and inspected the truck beds, or whether the employees were required to do anything to facilitate the guards' physical inspection. (*Huerta, supra,* 37 F.4th at 1180.) The record is also not clear on how long the security check process—the badge scan and visual inspection—took. Best estimates peg the entire process between a few seconds and a minute. (Compare POB at p. 19 ["it could take up to a minute or more"] with Respondent's Answer Brief on the Merits ("RAB") at p. 31 ["the encounter takes only seconds"].)

The palpable lack of real duties, effort, control, and time expenditure associated with the exit process itself requires Petitioner to focus most of his attention on the time spent by employees merely *waiting* in line for their turn in the otherwise minimal exit process. The record is far from clear on how long workers waited in line, with the Ninth Circuit noting that the lines were "often"—but not always—five to twenty minutes long. (*Id.* at 1178.)

A. The Exit Process Does Not Constitute "Hours Worked" Under Either the Control or Suffer and Permit Prongs

The record does not suggest that the exit security check—in and of itself, without considering the time waiting in line—constitutes "hours worked" under current California law. Nor should it.

1. The "Control" Prong

In *Frlekin v. Apple* (2020) 8 Cal.5th 1038, this Court affirmed that for the "control" prong to meet the definition of "hours worked," the

determinative factor is the *level* of the employer's control over the employees—not just any measure of control. (*Frlekin,* 8 Cal.5th at 1051.) This Court further held that instructive factors include (without limitation) the location of the activity, the degree of the employer's control, whether the activity benefits the employee or employer, and whether the activity is enforced through disciplinary measures. (*Id.* at 1056.) This Court also made clear that whether the activity was "required" is not determinative of whether the employer exercised the requisite level of control for onsite activities. (*Id.*)

This Court applied these factors against the employer's exit policy and concluded that the exit procedure *itself* met the threshold level of control. (*Id.* at 1056-57.)[1] Notably, the search procedure required the employee to *find* a manager or security guard and to take specific actions and make specific movements in order to present and prove ownership of their personal belongings from their physical person. (*Id.* at 1051.)

Here, the exit security procedure evidenced in the record lacks the indicia of control present in the *Apple* litigation. Workers apparently did no more than stop, roll down their windows, and hold up a badge to be scanned for several seconds. The badge is presumably not the workers' personal property. Evidence indicates that the guards did not even hold the badge during the scan. Meanwhile, it is not clear that employees even needed to engage in any movement or activity for the security guards to perform a cursory, no-contact physical inspection of the vehicles. It appears likely that not every employee was subjected to this process. Employees did not need to find or hail down a security guard, as the guards were present

[1] The Court separately found that the time *waiting* for and time actually *undergoing* the search process both reached the requisite level of control to render the time compensable. (*Frlekin, supra,* 8 Cal.5th at 1056.) In other words, one, the other, both, or none may be under requisite control and therefore compensable or non-compensable.

and ready to scan the badges at the checkpoint. It also appears that the process rarely, if *ever*, took more than a few brief seconds, which is less time than it would take for a commuter to pay a toll at a toll bridge they took to get to work.

Because the exit procedure itself is analytically distinct from the time *waiting* for the process, it should be analyzed on its own terms. (*See Frlekin*, *supra*, 8 Cal.5th at 1056.) On its own terms, the security check process does not rise to a sufficient level of control to constitute "hours worked." But to the extent any of the combined factors constitute "control," this case is a poor vehicle for expanding the *Frlekin* rule to security check processes that occur at the perimeters of remote worksites. The record in this matter is rife with uncertainties and different experiences by the workers—including amounts of time spent in the process and whether a vehicle search even occurred—which could spell the difference between whether the process is compensable or not *as applied*.

An overbroad rule regarding control would have disastrous consequences for construction industry employers that operate on worksites with a controlled perimeter, especially where the rule would threaten to create compensable time over exit procedures that are quicker and even more passive than the procedure presented in this action.

For instance, many of the Amici's members work at locations that have one or more of the following exit features:

- Scanning a badge at a kiosk without stopping at all,
- Holding up a badge or orally identifying a name for a guard, no visual security inspection by the guard and little to no impediment of movement,
- Lines that form before a simple badge scan that take no more than 1-2 minutes to clear,
- No lines at all,

- A single path of egress from the worksite taking no more than five minutes to traverse, and
- A single path of egress *after* a badge scan.

The above scenarios present even lower levels of control than in the litigation before this Court and constitute time that has not been considered compensable time. Amici's employer members rely on this non-compensability when setting budgets, preparing bids for construction projects, and negotiating wages and work schedules during collective bargaining.

An overbroad rule — one that holds that *any* type of required badge scan and any of the time preceding it is "controlled," compensable time — would disastrously transform traditionally non-compensable time into potential unpaid wage claims. An overbroad rule would also encourage non-meritorious claims, both *during* the process and *time leading* to the process, based on negligible badging procedures with no indicia of control. The defense of these claims, and further appeals in an attempt to procure more guidance from the courts, will unnecessarily harm construction industry employers.

The Amici accordingly suggest that this case does not present the correct vehicle to promulgate a generally applicable definition of hours worked when badging out. Alternatively, if this Court is inclined to issue a rule, the Amici respectfully suggest that the rule carefully distinguish between whether the procedure itself versus *waiting in line* for the procedure constitutes sufficient control and time worked. The Amici also respectfully recommend that the rule be factually intensive and specify what scenarios are *not* covered.

2. The "Suffer or Permit" Prong

In addition to the "control" prong, "hours worked" includes all the time the employee is "suffered or permitted to ***work***" if the employer has or

should have knowledge of the employee's work. (*Frlekin*, *supra*, 8 Cal.5th at 1046 [emphasis added].) As the Ninth Circuit aptly noted, this Court has not yet precisely defined what kind of activity constitutes "work." (*Huerta*, *supra*, 39 F.4th at 1181.)

In *Frlekin*, this Court declined to express a view on whether the exit security procedure in that case constituted work that was suffered or permitted. This Court should decline to do so here.

Regardless, the definition of "work" under the suffer or permit prong must be carefully delimited to avoid catastrophic consequences, both for the construction industry and other industries generally.

The Court of Appeal's opinion in *Hernandez v. Pacific Bell Telephone Company* (2018) 29 Cal.App.5th 131 offers a functional and compelling definition: "tasks or exertion that a manager would recognize as work." (*Hernandez*, 29 Cal.App.5th at 142.) Employing this test, the *Hernandez* court ruled that requiring the plaintiff to transport company equipment and tools in a company vehicle, which did not add any time or exertion to the plaintiff's otherwise non-compensable commute, did not constitute work. (*Id.* at 145.)

Here, the activity that Petitioner and other similarly situated workers were asked to incur—rolling down their personal windows, presenting a badge, and allowing a security guard to *look* at their vehicles for a moment—is clearly not "work" in the traditional sense. Under the *Hernandez* test, it should be sufficiently clear that no manager, or any objectively reasonable person, would consider this to be work—and the record certainly does not support this finding.[2] Should this Court be

[2] In this respect, the Ninth Circuit expressly noted that there is no record evidence that Petitioner's manager "would recognize driving his personal vehicle, rolling down his window, or scanning his identification badge as 'work." (*Huerta, supra,* at 1181.)

inclined to rule on the basis of the "suffer and permit" prong, the Amici respectfully suggest that the functional and compelling *Hernandez* test be adopted for a number of reasons.

First, the *Hernandez* test vests the definition of work as what a manager would consider work, which imposes rigorous and objective limiting principles to the "suffer and permit" test. The alternative is a test with a limitless definition, where there is no end to what is considered "work." Without limiting principles, "work" can be extended to absurd lengths. For instance, many construction worksites have employees walk through a turnstile, which barely impedes the employee's free movement of egress. In almost every work environment after employees clock out, they must walk to a front door and manipulate a door knob in order to leave. Without a limiting principle, employers are susceptible to such absurd *de minimis* claims under the "suffer and permit" prong. The *Hernandez* test would impose a much-needed limiting principle to prevent absurd results.

Second, without limitations, the "suffer and permit" prong could become so broad and all-encompassing that it will subsume and render the "control" prong mere surplusage. If "work" that can be suffered and permitted could constitute any active effort that is technically necessary to work, the "suffer and permit" clause would cover many activities that have customarily been viewed as non-compensable because they are outside of the employer's control, such as home grooming and regular commuting. (See *Morillion v. Royal Packing Company* (2000) 22 Cal.4th 575, 586-87 [discussing commuting and grooming].)

B. Waiting in Line Alone Does Not Constitute "Hours Worked" Under the "Control" Test, or Any Such Rule Must Be Significantly Circumscribed

It is equally important to *separately* evaluate the time workers waited in line for their turn in the security check process — and exercise *separate* caution to prevent unintended consequences.

In *Frlekin*, this Court concluded that *both* the waiting time and the security check process itself demonstrated a sufficient level of control. Here, the security check process itself does not establish a sufficient level of control, weakening the notion that the waiting time demonstrates such control. And here, the waiting time demonstrates less control than in *Frlekin*. Here, unlike in *Frlekin*, Petitioner and the other workers were not obligated to find a security guard or a manager. Moreover, the record indicates that at least some workers waited *less* than five minutes total (the lower range present in *Frlekin*)[3] — and for those employees, the level of control is even *less* sufficient.

Finally, the line formation experienced by Petitioner and other workers is not like in *Frlekin*. In *Frlekin*, each worker was individually halted and prevented from leaving Apple's premises until they waited for and underwent the security check. Here, the line leading to the exit formed as a result of a mass exodus of employees leaving at the same time. In this sense, it is not dissimilar to a line that forms in a commercial parking garage adjacent to an office, where office workers line up at the same time to scan their office-issued pass to leave the garage at the same time. In either instance, the line is more of an incidental consequence of commuting patterns than an indicia of strong control by the employer — but in neither case is the employee under the "control" of the employer for the purpose of

[3] *Frlekin*, *supra*, 8 Cal.5th at 1045.

establishing the compensability of the waiting time. In this respect, the mere fact that the act of waiting occurs on the employer's premises is insufficient to support a conclusion that it compensable. (*Frlekin*, *supra*, 8 Cal.5th at 1051) (presence on a worksite is a factor, but not a solely dispositive factor, of control.)[4]

The construction industry takes a significant interest in the limitations of the "control" prong in the exit procedure context. Construction worksites frequently feature *minimal* exit procedures, such as waving a badge in passing, or walking through a free-moving turnstile, but foot traffic forms a natural line that slows traffic by as little as a minute or two. Or, on single egress driveways, vehicular traffic slows the free egress by several minutes. To the extent these and similar scenarios were found to constitute compensable "control," the construction industry would be adversely affected by an overbroad rule that calls these marginal situations into question. The Amici therefore respectfully urge this Court, if issuing a rule, to issue one that is narrowly construed.

IV.

INBOUND AND OUTBOUND DRIVING TIME BETWEEN A GATE AND THE WORKSITE IS NOT COMPENSABLE

The Amici address two points related to the "road travel" between the security checkpoint to the designated parking lots, but not including the time spent in the exit process or waiting for the exit process. First, the road travel does not remotely resemble the "travel time" discussed in *Morillion*

[4] Surely, therefore, an employee who works at UCLA or some other California university and parks in a campus parking lot is not entitled to compensation for entering the lot, finding a parking space, and later waiting in line to exit the lot, merely because the lot is part of her employer's premises. Nor is she entitled to even greater compensation if she parks in a remote corner of the lot from which it takes longer to access the worksite or later exit the lot.

and codified in Wage Order 14. Second, the road travel does not have requisite indicia of control to constitute hours worked.

A. ***Morillion*** **and Wage Order 16, Section 5(A)**

In *Morillion*, employees were required to meet at a specific departure point at a specific time, at which point employees could not leave. A bus would take employees to their designated worksite, where they would work their full shift, after which the bus would return the employees to their departure point. The bus was the *only* permitted means of conveyance to the worksite. (*Morillion*, *supra*, 22 Cal.4th at 579, fn. 1.) The rule in *Morillion* was codified by the Industrial Welfare Commission into Wage Order 16, Section 5(A), which tracks *Morillion's* language.

As this Court in *Morillion* noted, there is a material difference between the travel procedure mandated by Morillion's employer and an ordinary commute. The travel procedure mandated in *Morillion* required employee presence at a specific time in a specific place and was thereafter committed to the employer's control thereafter, whereas in a normal commute, an employee always enjoys considerable discretion on *when* to leave, how to travel, and what to do *en route*. (*Morillion*, *supra*, 22 Cal.5th at 586-87.) This Court warned that its opinion should not be construed to render all travel time to and from work compensable. (*Id.* at 587.) The Ninth Circuit cautiously noted that in Petitioner's case, there may have been a *de facto* need for employees to show up at the front entrance at a certain time based on how long it would take to travel to the parking lots, but this did not necessarily signify that the travel time was mandated by Respondent. (*Huerta*, *supra*, 39 F.4th at 1184.)

The record does not remotely establish a similar fact pattern to the *Morillion* mandated travel time. Functionally, the security gates did not operate as a place that Petitioner and other workers needed to "report to" at a specific time to take the next step of mandated, exclusive travel. Instead,

the security gates were little more than an access checkpoint in the course of travel that otherwise functionally resembles a normal commute similar to the commutes excluded in *Morillion*. The fact that there was a *de facto* time in which employees showed up is not dissimilar to normal commutes where, for instance, an employee will show up to a garage at a certain time to ensure that he or she makes it to the adjacent office on time. These facts of life do not strip employees of their agency to control the timing, manner, and conveyance of their commute as they see fit, generally constrained by the principle of reporting to work on time. Nor do minor impediments to conveyance, preconditional access points during commutes, or single road ingresses transform commutes into places of first reporting and subsequent "mandatory travel."

Because there is no first place of reporting and no mandatory travel, neither Wage Order Section 5(A) nor the "employer-mandated travel" rule in *Morillion* is applicable.

B. The Ingress and Egress After the Access Checkpoint Is Not Hours Worked

For the same reasons, and because of the lack of control, the road travel time does not constitute hours worked under general principles of the "control" prong. Five additional points bear emphasis.

First, when setting aside and excluding the exit procedure and waiting time for the exit procedure, the road travel for *egress* is analytically indistinguishable from the road travel for *ingress*. Neither should be compensable.

Second, the ingress and egress are not rendered "controlled" merely because travel is limited to a single roadway. Such a rule would significantly conflict with federal labor law authorizing employers to constrain ingress to controlled lines, which is a common practice in the construction industry. On "common situs" worksites, where multiple

companies provide services at the same site, all companies will usually use the same entrance and exits. However, during a labor dispute, if one company is picketed by organized labor, the National Labor Relations Board will generally approve the use of separate gates to isolate the ingress and egress of the employees of the picketed company from those of the neutral companies—and to restrain organized labor from affecting the neutral employers. (*Ironworkers Local 433 v. NLRB* (9th Cir. 1979) 598 F.2d 1154, 1156.) Creating a new obligation for compensable time, merely because ingress or egress is constrained to a single pathway, would create an entirely new legal obligation in the construction industry for a practice that has been endorsed for decades under the National Labor Relations Act.

Third, ingress travel should not be rendered automatically compensable just because it is interposed by an access checkpoint. Rather, "hours worked" consists of either controlled time or suffered and permitted *work*. These are ongoing inquiries, and compensable time can be interrupted even while on site and after commencing a first act for the employer.

This was recently demonstrated by the Court of Appeal in *See's Candy Shops, Inc. v. Sup. Ct.* (2012) 210 Cal.App.4th 889. There, employees were permitted to clock in during a grace period of up to ten minutes earlier than their scheduled shifts, but were not paid during this short grace period. (*Id.* at 909.) The Court of Appeal found that in the absence of actual control or work performed during this interim grace period, the employees would not have a claim for compensable time. (*Id.* at 910-911.) Similarly, because the ingress is not controlled and not "work," it is non-compensable time.

Fourth, in this case, the rules on the access road do not constitute compensable control under the *Frlekin* standards. In addition to the points exhaustively detailed by Respondent, the Amici simply point out that the

rules of the road and the general rules of conduct imposed at the site are no greater than would be required of a member of the general public. In order to prevent the "control" test from metamorphosing into a worksite proximity test, where all employee presence on site is automatically compensable, the "control" prong needs a backstop that still allows employers to maintain basic, safe, and civilized standards. At the minimum, employers should be permitted to ask that employees conduct themselves by the same standards as the general public without the risk of creating unexpected compensable time.

Fifth, the Amici emphasize that construction employers routinely work on sites that feature roadways with basic road rules, single ingress/egress pathways, checkpoints, and other restrictions. The industry will therefore suffer, with unaccounted and unexpected back-wage claims, from a rule that creates compensable time based on these criteria.

V.

TIME SPENT DURING MEAL PERIODS ON REMOTE CONSTRUCTION WORK SITES IS NOT COMPENSABLE

The Amici address two separate points regarding the wage claims associated with the on-site meal periods: first, the interplay between the meal period exemptions and "hours worked"; and second, limitations to "hours worked" principles in the meal period context.

A. Wage Order 16, Section 10(E) Presents No Conflict With Labor Code Sections 1194 and 1197

The Amici concur with Respondent's Answer Brief discussing why a collective bargaining agreement can designate a meal period as unpaid while confining employees to the worksite due to the collective bargaining agreement exemption under Section 10(E) of the Wage Order.

The Amici separately emphasize that the Section 10(E) exemption creates no conflict with the requirement to pay at least the minimum wage.

Labor Code sections 1194 and 1197 establish a broad, enforceable state right to the minimum wage. But the California Labor Code does not define "hours worked"—the reference point for all time for which minimum wages must be paid.

As this Court's decisions make clear, the concept of "hours worked" is a creature of the Wage Orders established in the definitions under Section 2 of the Wage Orders. (*See Frlekin*, *supra*, 8 Cal.5th at 1042, 1046; *Morillion*, *supra*, 22 Cal.4th at 581.) There is no general, common law definition of "hours worked" except what derives from the Wage Orders' definitions. In other words, there is no freestanding right to minimum wages that does not derive from the Wage Orders' definition of "hours worked." And the same Wage Order that defines "hours worked" can modify or abrogate its definition by means of exemption or redefinition. (*See Bono Enterprises, Inc. v. Bradshaw*[5] (1995) 32 Cal.App.4th 968, 977 [discussing Wage Order 5's alternative definition of "hours worked" incorporating the FLSA].)

Accordingly, Wage Order 16 is free to abrogate its own definition of "hours worked" with respect to unpaid meal periods covered under a qualifying collective bargaining agreement— and does so by modifying Section 2(J) through Section 10(E). Thus, Petitioner's argument that Section 10(E) is trumped by "non-waivable" rights under Labor Code sections 1194 and 1197 is fatally flawed, because those non-waivable rights originate from the Wage Orders. (*See* Petitioner's Reply Brief ("PRB") at pp. 33-34.)

[5] *Bono* was abrogated by this Court on other grounds.

B. The Record Does Not Provide a Valid Basis to Establish a Broad Hours Worked Rule for "Confined" Meal Periods

In its third certified question, the Ninth Circuit assumed for factual purposes that the workers were actively "prohibited from leaving" the worksite and asked this Court whether a qualifying collective bargaining agreement and the exemptions under Labor Code sections 512(e)-(f) and Wage Order 16 Section 10(E) eradicate the obligation to pay minimum wage for designated unpaid meal periods despite the confinement. (*Huerta, supra*, 39 F.4th at 1185-86.)

This Court may narrowly answer the collective bargaining agreement exemption question without designing a broader rule on the circumstances in which a worker may or may not have been effectively "confined" to a worksite or "prohibited from leaving" for the purpose of meal period compliance under Labor Code section 512 and the concept of "hours worked" under the Wage Orders.

Construction industry employers frequently employ workers on remote worksites. Some worksites, such as mines, logging camps, and offshore oil rigs, are so remote that there is no plausible chance that an employee could *leave* the facility within thirty minutes and return to duty on time.[6] In such situations, there is no functional difference about whether an employer "allows" the workers to leave the premises during their 30 minute meal period. Neither the wage orders nor the Labor Code confer a duty on employers to pay for meal periods when there is no meaningful choice to leave the premises.

Previously, this Court ruled that an employee must, *inter alia*, be "free to leave the premises" to enjoy a *compliant meal period*, but the ruling did not formally pertain to "hours worked" under the "control"

[6] In this regard, Wage Order 16 specifically applies to "certain on-site occupations in the construction, drilling, logging and mining industries."

prong. (See *Brinker Restaurant Corporation v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1036.) In *Bono, supra*, the Court of Appeal held that a meal period was compensable where the employees were prohibited from leaving the premises (32 Cal.App.4th at 975.) But the *Bono* court noted that some employees could leave if they made prior arrangements to reenter, and those employees would *not* have compensable claims. (*Id.* at 978, fn. 4.) Moreover, neither this Court in *Brinker* nor the *Bono* court were confronted with worksites in which the freedom to leave would be futile.[7]

The *Huerta* litigation is not an appropriate case to address these issues of vital significance to Amici's members. An overbroad, new rule—establishing employers' obligations to permit employees to leave remote worksites during meal periods or trigger "hours worked" under the control prong—would have serious detrimental effects on construction industry employers.

This Court should accordingly issue a narrow ruling limiting the compensability of meal periods taken on an employer's premises to situations in which the employee is actually free for practical purposes to leave the premises.

[7] For example, one may consider workers eating lunch on scaffolding structures of a high-rise building being constructed in San Francisco or Los Angeles, akin to those who helped build the New York Chrysler Building in the 1930s. By the same token, the employees who constructed a ride in a large amusement park, at a location which was a substantial distance from the park's entrance, would arguably be entitled to be paid all of the time they spent eating lunch at their work stations, if Petitioner is correct that this is the result when they cannot leave the site during their meal periods.

VI.

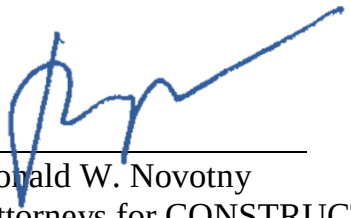
CONCLUSION

The Court should answer the certified questions by declining to hold that time spent in any of the three referenced circumstances constitute compensable "hours worked" under California law.

Dated: November 28, 2022

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO



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CERTIFICATE OF WORD COUNT

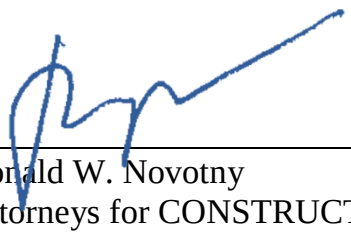
(Cal. Rules of Court, Rule 8.504(1)(d))

The text of this Petition consists of 5,006 words, including all footnotes, as counted by Microsoft Word, the computer program used to generate this Petition.

Dated: November 28, 2022

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By 

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PROOF OF SERVICE

(CODE CIV. PROC. § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, CA. 90703.

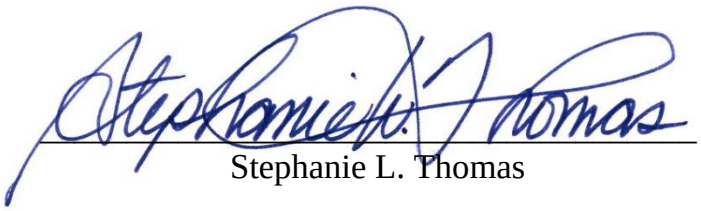
On November 28, 2022, I served the following document(s) described as **AMENDED APPLICATION OF CONSTRUCTION EMPLOYERS' ASSOCIATION, SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION AND SOUTHERN CALIFORNIA ASSOCIATION OF SCAFFOLD CONTRACTORS TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF IN SUPPORT OF CSI ELECTRICAL CONTRACTORS, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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

Executed on November 28, 2022, at Cerritos, California.



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Case No.
5:18-CV-06761-BLF

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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

11/28/2022
Date

/s/Stephanie Thomas

Signature

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Last Name, First Name (PNum)

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