Case No. S243805

IN THE SUPREME COURT OF CALIFORNIA

AMANDA FRLEKIN, et al.,

Plaintiff and Appellant,

v.

APPLE, INC.,

Defendant and Respondent.

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

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES IN SUPPORT OF PLAINTIFF AND APPELLANT

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES

Pursuant to California Rule of Court 8.520(f), Bet Tzedek Legal Services respectfully requests leave to file the attached amicus curiae brief in support of plaintiff, appellant and petitioner Amanda Frlekin.

Bet Tzedek – Hebrew for the "House of Justice" – was established in 1974 as a nonprofit organization that provides free legal services to Los Angeles County residents. Each year, Bet Tzedek's attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist over 20,000 people regardless of race, religion, ethnicity, immigration status, or gender identity. Bet Tzedek's Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through individual representation before the Labor Commissioner, civil litigation, legislative advocacy, and community education.

Bet Tzedek's interest in this case comes from over 15 years of advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the correct development of California's worker-protection laws, including those governing the compensability of bag and security searches. Bet Tzedek believes that tying compensability to whether a bag check is "avoidable" does not provide a useful standard in light of the real-life reasons why many low-wage workers bring bags or other items to work. A rule allowing uncompensated bag checks would cause particular harm to California's low-wage workers because these employees often do not have the option to leave bags in vehicles or at home, and may be more likely to bring bags to work due to factors such as their need to hold down multiple jobs.

Bet Tzedek's proposed amicus curiae brief does not restate the same arguments made by the parties, but instead aims to assist the court by analyzing the real-life, everyday reasons why low-wage workers bring bags and packages to work, which defy categorization as either "convenient" or "necessary." In the specific context of bag and security searches, it is both practically unworkable and legally unsupportable to tie compensation to how "necessary" and "unavoidable" it is to bring a bag to work. Relatedly, the proposed brief adds analysis to the parties' discussions of whether bag-check time can be compensated under the "suffer or permit" test for "hours worked" under California law.

Pursuant to California Rule of Court 8.520(f)(4), Bet Tzedek affirms that no party or counsel for a party to this appeal authored any part of this proposed amicus brief. No person other than Bet Tzedek and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, Bet Tzedek respectfully requests leave to file its proposed amicus brief.

DATED: August 7, 2018 **KINGSLEY & KINGSLEY, APC**

By: _____

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INTRODUCTION

As understandable as it may be for companies to want to prevent product theft and secure their stores, the imposition on employee time in assisting with these goals can be significant. Bet Tzedek's clients, and workers represented by its community partners, undergo various forms of screenings at work, including bag checks, visual inspections, pat-downs, and metal detector scans. Some employees spend hours in the aggregate waiting for and participating in these screenings. Although an employer's decision to impose such searches may be triggered by an employee's pre-search actions, like bringing a bag to work or wearing a coat, the search time should still be compensated as "hours worked" under California law.

In light of the real-life reasons why employees bring bags, purses, and other items to work, Apple's proposed rule pinning compensability on whether an employee can "avoid" bringing a bag does not offer a workable standard, let alone an employee-protective one. Low-wage workers, including Bet Tzedek clients, bring bags, purses, and other items to their jobs for reasons that defy categorization as either an avoidable "convenience" or an unavoidable "necessity." A worker with two jobs may not be able to avoid taking a change of clothes to work. One who attends school while working may not be able to avoid bringing a book. And a worker who relies on public transit may not have the option to leave items in a car. Compensation under the "control" test should not hinge on an employee's reasons for bringing an item to work. Instead, it should hinge on the degree of "control" the employer elects to exercise during the search of that item.

If the Court chooses to reach the question of compensability of bag checks under the "suffer or permit to work" test, it should adopt the definition of "work" promoted by Frlekin, and reject Apple's argument that "work"

must be "unavoidable" and part of the duties an employee was "hired to perform." (ABM at pp. 41-42, citing ER 20; ABM at p. 53.) This Court has already disposed of the notion that unavoidability is an element of "work" under the "suffer or permit" test. Moreover, the "hired to perform" test stems from an employer-protective liability exemption contained in the federal Portal-to-Portal Act and does not comport with the employee-protective purposes of the California Labor Code.

For these reasons, the Court should answer the certified question in the affirmative and hold that the time employees spend waiting for and undergoing searches of their bags, purses, and other items is compensable as "hours worked" under California law.

DISCUSSION

California's Industrial Welfare Commission ("IWC") Wage Orders contain a broad definition of "hours worked," in keeping with the state's public policy to vigorously protect employees in the workplace. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 582.) Under the Wage Orders, "hours worked" means "'the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so . . . .'" (*Troester v. Starbucks Corporation* (Cal., July 26, 2018, No. S234969) __ Cal.5th __ [2018 WL 3582702], at *4.) As this Court recently noted, the purpose of this provision, and that of California's Labor Code and Wage Orders generally, is "the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours." (*Id.* at p. *3.)

Apple inserts an "unavoidable" element into the "hours worked" provision, arguing that, "[u]nder either prong of the 'hours worked'

definition, time spent waiting for and undergoing bag checks is not compensable because employees can avoid the checks entirely by choosing not to bring a bag to work." (ABM at p. 21.) It is not surprising that Apple first made this argument in opposing class certification, because tying compensability to each employee's personal motivation for binging a bag could make some bag-check cases difficult, if not impossible, to litigate on a collective basis. (See ABM at p. 14, citing SER 27–29 ["Apple argued that the district court should deny class certification because determining the reasons employees brought bags to work—whether out of necessity or purely out of convenience—could be resolved only on an individualized basis."].)

While it is understandable why employers would advocate a subjective, employee-by-employee standard, upon examination, the categories of avoidable "convenience" and unavoidable "necessity" break down. The low-wage workers whom Bet Tzedek represents bring items to work for many reasons. An employee with an hour-long bus ride, or one who attends school while working, may deem it "necessary" to bring a book to work, while a book may be a convenience for an employee with a shorter commute or one who reads for pleasure. An employee with a headache may see Tylenol as a necessity, but one with the same headache may see it as a convenience if he or she can get by without medication. An employee who can't afford to buy a lunch or who works in a location without a nearby place to purchase food may see bringing lunch as a necessity, whereas one who can afford to buy lunch or who has access to a nearby food vendor, may see the lunch bag as a convenience.

Apple directs the Court's attention away from these thorny issues by pointing to the district court's class certification order, and by claiming that

as a result of that order, this Court may not consider any of the real-life, everyday reasons why people bring bags to work. (ABM at pp. 15–16; see also ABM at p. 11 ["*this* case, as it comes to this Court, does not raise any of those questions."].) However, as the Ninth Circuit recognized, Apple's proposed rule encompasses such questions by predicating compensability broadly on "the reasons employees br[ing] bags to work." (ABM at p. 14; see *Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, 873.) In California, compensation for time spent undergoing bag searches cannot hinge on employees' specific motivations for carrying a purse or bag to the workplace, or whether doing so is "avoidable." Such an interpretation would construe the Wage Orders' "hours worked" provision to protect employers, rather than "liberally construe[ing] the Labor Code and wage orders to favor the protection of employees." (*Troester*, *supra*, __ Cal.5th __ [2018 WL 3582702], at *3.)

A. Allowing Employers to Impose Uncompensated Bag Checks Poses Special Harm to California's Most Vulnerable Workers.

1. Bag and Security Searches Have Become Common in Warehouses, Factories, and Other Non-Retail Workplaces.

Many employers routinely require employees to undergo workplace screenings to further employer goals of loss prevention and workplace security. Screening practices can vary, from walking through a metal detector, to standing in place while a manager or security guard frisks the employee or "wands" her clothing, to undergoing a search of the employee's coat or bag. It is not uncommon for employers use the threat of discipline to enforce their search requirements.

Screenings in the name of "loss prevention" have become common in retail spaces as they offer an inexpensive way for companies to protect products from the possibility of employee theft. (Sennewald and Christman, Retail Crime, Security and Loss Prevention: An Encyclopedic Reference (2008) p. 302 [noting that companies shifted away from trying to apprehend thieves to "the concept of 'loss prevention'; i.e., the protection efforts . . . directed toward shortage reduction, which in turn increases profitability"]; see also ER 201–205 [Apple's "loss prevention" policy making all staff "responsib[le]" for "internal theft"]; RBM at pp. 35-36.)

Imposing searches is not the only means by which retail employers attempt to prevent losses, but an abundance of recent cases challenging off-the-clock bag and security searches shows that such screenings have become common in California. (*See, e.g., Kullar v. Foot Locker Retail, Inc.* (2011) 191 Cal.App.4th 1201, 1204 [California shoe retailer]; *Ser Lao v. H&M Hennes & Mauritz, L.P.* (N.D. Cal., Oct. 25, 2017, No. 5:16-CV-00333-EJD) 2017 WL 4808814, at *1 [California clothing retailer]; *Greer v. Dick's Sporting Goods, Inc.* (E.D. Cal., Apr. 13, 2017, No. 2:15-CV-01063-KJM-CKD) 2017 WL 1354568, at *5 [California sporting goods retailer]; *Ayala v. Coach, Inc.* (N.D. Cal., Oct. 17, 2016, No. 14-CV-02031-JD) 2016 WL 9047148, at *1 [California handbag retailer]; *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.* (C.D. Cal. 2015) 311 F.R.D. 590, 594 [California salon products retailer]; *Kurihara v. Best Buy Co., Inc.* (N.D. Cal., Aug. 30, 2007, No. C 06-01884 MHP) 2007 WL 2501698, at *1 [California electronics retailer]; see also Purpira, Security and Loss Prevention, An Introduction (6th ed. 2013) p. 177 [reporting that employers have established theft reporting programs, including hotlines for employees]; Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*

(2011) 48 Am. Bus. L.J. 285, 308-309 [surveying extent of electronic workplace surveillance].)

Non-retail employers also screen employees for loss prevention and security reasons. In recent years, some of the country's largest employers have imposed searches at distribution and sorting centers, power plants, food-processing plants, and mail-sorting centers, among other workplaces. (See, e.g., *Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513, 515 [Amazon warehouse]; *Gorman v. Consolidated Edison Corp.* (2d Cir. 2007) 488 F.3d 586, 591 [power plant]; *In re Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation* (W.D. Ky., June 20, 2017, No. 3:14-CV-290-DJH) 2017 WL 2662607, at *1 [Amazon fulfillment center]; *Valdez v. The Neil Jones Food Company* (E.D. Cal., Nov. 2, 2015, No. 113CV00519AWISAB) 2015 WL 6697926, at *1 ["canning and packing facilities"]; *Cervantez v. Celestica Corp.* (C.D. Cal. 2009) 618 F.Supp.2d 1208, 1215 [product fulfillment and electronics support center]; *Anderson v. Purdue Farms, Inc.* (M.D. Ala. 2009) 604 F. Supp. 2d 1339, 1359 [chicken processing plant]; *Ceja-Corona v. CVS Pharm., Inc.* (E.D. Cal. Mar. 4, 2013) No. 1:12-cv-01868, 2013 WL 796649, at *9 [CVS pharmacy distribution center]; *Sleiman v. DHL Express* (E.D. Pa. Apr. 27, 2009) No. 5:09-cv-00414, 2009 WL 1152187, at *4-5 [mail-sorting center].)[1]

Warehouse workers, in particular, are now often compelled to stand in line for lengthy periods of time to have their bags and/or clothing searched before exiting a facility for a rest break, meal period or at the end of a shift.

[1] Granted, not all of these employers require a search only for employees who bring a bag or take some other pre-search action. However, the employers that already require searches may adapt their policies to make searches contingent on employees' pre-search activities if the Court rules that such searches are non-compensible.

(See, e.g., *Vance v. Amazon.com, Inc.*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); *Kilker v. Apple, Inc.*, No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013); *Allison v. Amazon.com, Inc.*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); *Suggars v. Amazon.com, Inc.*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Johnson v. Amazon.com, Inc.*, 1:13-cv- 153 (W.D. Ky. Sept. 17, 2013); *Davis v. Amazon.com, Inc.*, No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013); *Gibson v. Amazon.com, Inc.*, No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013); *Rosenthal v. Amazon.com, Inc.*, No. 1:13-cv-1701 (D. Del. Oct. 15, 2013).) Some warehouses with security-screening and bag-check policies employ thousands of workers, and the wait to leave the facility can become so long that employees "choose" to stay on site during their meal breaks in order not to have to stand in the security line.

While the present case involves bag checks at a retail technology store, many employees undergoing various types of searches in retail and non-retail spaces will be harmed by Apple's proposed rule allowing bag-search time to go uncompensated whenever bringing a bag to work is "avoidable." More employers will impose uncompensated searches even though "employers are in a better position than employees to devise alternative[]" theft-prevention measures—ones that do not place the "entire burden" (that is, leave your bags and phones at home or be searched) on the employees. (*Cf. Troester, supra,* __ Cal.5th __ [2018 WL 3582702], at *9.) Moreover, if Apple's proposed rule is adopted, employee searches will last longer and become more physically intrusive, because employers will have no incentive to shorten search time or diminish a search's scope. And more

employers will find ways to attach so-called "choices" to their search rules, in order to claim that mandatory searches are supposedly "avoidable."[2]

The burden of all this will be felt most heavily by the low-wage workers across California whom Bet Tzedek represents. Such an outcome would flout the foundational principle that the Wage Orders' requirements must be "liberally construed ... in order to favor the protection of employees." (*Id.* at *3, citing *Augustus v. ABM Security Services, Inc.*, (2016) 2 Cal.5th 257, 262.)

2. The Real-Life Reasons Why Low-Wage Workers Bring Bags and Packages to Work Defy the Categories of "Convenient" and "Necessary."

A rule pinning compensability on whether an employee can "avoid" bringing a bag to work fails to capture the real-life, everyday reasons why many low-wage workers bring bags or packages to their jobs. Employees, including Bet Tzedek clients, who may work in canning and packing facilities, warehouses, or meat processing plants, bring items to work for various reasons that do not fit neatly on a spectrum from "convenient" to "necessary." (See OBM at 5–6; ER 553:23–25.) For this reason, a rule allowing bag checks to go uncompensated when an employee's decision to bring a bag is deemed "convenient" or "voluntary," and therefore "avoidable," does not provide a workable, employee-protective standard..

As authority for Apple's rule that no control exists during a security screening triggered by an employee's "voluntary" decision to bring a bagApple points to cases involving "required" transportation, which offer

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[2] For example, Bet Tzedek has represented low-wage workers who must clean out cockroaches from a microwave for no pay if they "choose" to use the microwave to heat up their lunch, because the employer has decided to save money by not hiring a cleaning staff to perform this task.

limited assistance in the factually distinct context of bag and security searches. (ABM at p. 25.) Unlike the transportation cases, in which an employer either required a form of transportation or not, and the dispute was over *the time spent in transit*, bag checks are often imposed in the absence of an employer requirement to bring a bag to work, and there is no claim for compensation for the *time spent bringing the bag*.[3] (Cf. *Morillion, supra*, 22 Cal.4th at p. 578; *Overton v. Walt Disney Co.* (2006) 136 Cal.App.4th 263, 266.)

By superimposing the *Morillion* rule onto an employee's subjective pre-search decision to bring a bag, Apple proposes a new rule that fails to account for the real-life reasons why workers bring bags, purses, and other items to work. Items that low-wage workers bring to work can include, for example, food to eat during a meal break, a water bottle, snack items, tools or equipment for use at work, reading material for a long bus or train ride, medications, personal identification, hand soap, feminine hygiene products, and a uniform or change of clothes to be used at a second job. It is impossible to say which of these items an employee can reasonably "avoid" bringing. An employee who has eaten before work may be able to avoid bringing a lunch bag. One employee may be able to make it through an entire shift without water, whereas for another, water is a necessity. Tylenol may be a "personal convenience" to an employee who gets mild headaches, but a

[3] When it comes to bag checks, the equivalent scenario in the transportation context is not "compulsory travel time" as in *Morillion*, but an employer that makes employees who drive to work sit through on-the-job vehicle inspections. (*Morillion, supra,* 22 Cal.4th at p. 578.) While there may be no employer "requirement" to drive, it is expected that employees may do so. The reasons why employees drive to work instead of walking, riding a bicycle, or taking transit are impelled by real-life circumstances, just like the reasons they bring bags.

"necessity" for an employee who is prone to migraines. Reading material may be a "convenience" for an employee with a short bus ride, but a practical "necessity" for an employee with a long bus ride or for someone trying to complete school while working. An item that is optional one day may be necessary on another day, and one purse or bag may contain many items, some of which (like Tylenol, hand soap, or feminine hygiene product) an employee considers necessary, and others of which (like a magazine or snack) an employee considers optional.

As a specific example, Bet Tzedek works with warehouse employees and their representatives at fulfillment and sorting centers in southern California. It is common for employees at sorting centers in Los Angeles to take public transportation to work, whereas employees in centers located in the Inland Empire often drive. One center can employ up to 3,000 workers. Goods often arrive at a sorting center operated by a third-party logistics company, and then are transported to a distribution center operated by a retailer, such as Costco or Wal-Mart. Workers report temperatures exceeding 100 degrees in some warehouses. Temperatures can get even hotter inside the containers that workers enter to unload goods at the ports of Los Angeles and Long Beach. According to employee reports, some sorting and distribution centers do not offer clean water, making it incumbent on workers to bring water so they can make it through the day. Some warehouses lack a clean bathroom facility and hand soap, so employees take it upon themselves to bring these items. Some warehouse workers have second jobs and bring a change of clothes or a uniform to work. Not all warehouse facilities impose bag or security searches, but many do. Certain facilities impose security screenings on all employees as they exit, and others perform a bag or clothing

check more akin to Apple's (which will likely will become commonplace across the state if Apple's position on compensability is accepted).

One can envision various reasons why employees at warehouses like these may bring a bag or personal item to work, which cannot be captured by the labels of "convenient" or "necessary." Most would agree that a personal water bottle is necessary on a hot day and in a warehouse that doesn't offer clean water, but in a warehouse with potable water in which an employee works a shorter shift on a cooler day, it becomes harder to say whether a personal water bottle is a "necessity" or a "convenience." By the same token, an employee may make a personal judgment of whether the warehouse's bathroom facility is clean enough to use, and thus may decide to bring soap to work, or not, depending on that decision. It is impossible to say whether bringing soap, under these circumstances, is an unavoidable "necessity" or an avoidable "convenience."

A low-wage employee's likelihood of relying on public transit provides yet another illustration of the problems with a compensation standard tied to how "avoidable" it is to bring a bag into the workplace. Often, leaving personal items in a vehicle or at home is not an option for the workers whom Bet Tzedek represents. Although car ownership may be on the rise among low-income Los Angeles residents, these individuals are still more like to rely on transit than the general population. As reported by U.C.L.A.'s Institute of Transportation Studies, "Heavy transit use . . . is concentrated among the low-income population, and especially low-income foreign born residents." (Manville et al., Falling Transit Ridership: California and Southern California (UCLA Institute of Transportation Studies), p. 5.) While it's easy for Apple to say that employees can "simply . . . leav[e] their bags at home" or "in their cars," this assumes that employees drive cars to

work in which they can leave items, or that an employee can sit on a long bus or train ride with no book, phone, snack, water bottle, or other items. (See OBM at p. 25, citing ER 14, 174.) The everyday reality is quite different for many workers across California, especially those in low-wage jobs.

The difficulties engendered by Apple's false categories apply with equal force to searches of an employee's coat or clothes—circumstances to which employers will surely apply the rule from the present case. Some employees may find it "necessary" to bring a coat to work on a cold day even if this would trigger a search, whereas others may find that, under the same weather conditions, a coat is merely a comfort but not a "necessity." As this and the other examples provided above show, it is unworkable to hinge compensability on the "voluntariness" of the decision to carry a bag, purse, phone, or coat. Letting employers avoid paying for lengthy periods of time spent undergoing bag searches on the notion that some items constitute "conveniences" instead of "necessities" will result in underpayment to employees for all "hours worked," in violation of the IWC Wage Orders and their "employee-protective" purpose. (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 903.)

B. Employees are "Suffered or Permitted to Work" During Bag Checks.

Putting aside whether time spent undergoing mandatory bag checks qualifies for compensation under the "control" test, it surely does under the "suffer or permit to work" standard. Without restating the parties' arguments on this point, the following section addresses Apple's argument that "work" under the "suffer or permit" test must be "unavoidable" and that California should base its definition of "hours worked" on an exception to the federal

definition of "hours worked" contained in the Portal-to-Portal Act. Neither argument is persuasive.

1. "Unavoidable" is Not an Element of "Work" Under the "Suffer or Permit" Test.

Apple incorrectly suggests that an "unavoidable" requirement exists not only as an element of the "control" test, but also as an element of "work" that an employer "suffers or permits": "[u]nder *either prong* of the 'hours worked' definition, time spent waiting for and undergoing bag checks is not compensable because employees can avoid the checks entirely by choosing not to bring a bag to work." (ABM at p. 21, emphasis added.)

Unavoidability has never been an element of "work" under the "suffer or permit" test. As this Court held in *Morrillion*, "work" that an employer suffers or permits

> can include work such as unauthorized overtime, which the employer has not requested or required. "Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift . . . . The employer knows or has reason to believe that he is continuing to work and the time is working time. [Citations.]"

(*Morillion, supra,* 22 Cal.4th at pp. 584–585, quoting 29 C.F.R. § 785.11 (1998).) Under this standard, an employee who can avoid performing work but decides to work anyway must be compensated as long as his employer knows or should have known that the work has been performed.

As an application of this principle, the Court of Appeal held in *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 241 that an employer must compensate employees for work performed during a pre-shift grace period, even though the employer "had a strict policy against working during the grace period." (*Id.* at p. 251.) The employer in that case offered a grace

period in which employees could clock in early and clock out late "to provide flexibility in the manner and times that workers clock in and out of the shifts." (*Id.* at p. 241.) It was undisputed that the employer did not "require" work during the grace period (and, in fact, instructed employees to avoid work during this time), but the court determined that it was still relevant to compensability whether "employees were paid for the time they worked before their shifts." (*Id.* at p. 254.) As the same court had stated in a previous appeal in the same case: "If the evidence . . . shows that the employees were working or 'under the control' of See's Candy during the grace period and they were not paid for this time, they may be entitled to recover those amounts in the litigation and any applicable penalties." (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 911.)

Ultimately, the court upheld summary judgment for the employer based on undisputed evidence that, during the grace periods, employees generally "engage exclusively in personal activities, including leaving the premises to run quick errands, drinking coffee, applying makeup, and making personal calls." (*Id.* at p. 253.) As the employer produced undisputed evidence that unauthorized work generally did not occur during grace periods, and was compensated if it did, "there is no reasoned basis for concluding that employees were not fully paid for their time under the grace-period policy." (*Ibid.*)

As these and other cases show, whether an employee has a free choice to "avoid" work makes no difference under the "suffer or permit" standard. If the employer knows the work is occurring, it must provide compensation.

2. The Court Should Not Limit California's Definition of "Hours Worked" Based on Exceptions Contained in the Federal Portal-to-Portal Act.

Finally, the Court should construe time spent undergoing a bag check as "work" based on the common and ordinary meaning of "work" cited by Frlekin, not on employer-protective liability exemptions contained in the federal Portal-to-Portal Act. (See ABM at p. 53; RBM at p. 30.)

While *Troester* and *Morillion* leave no doubt that an employer with knowledge of work being performed must compensate for that work under the "suffer or permit to work" standard, those cases do not define "work." (See *Troester, supra,* __ Cal.5th __ [2018 WL 3582702], at *4, [quoting *Morillion*, *supra*, 22 Cal.4th at p. 585] [internal quotations omitted] ["the time during which 'the employee is suffered or permitted to work' encompasses the time during which the employer knew or should have known that the employee was working on its behalf."].)

Apple promotes an employer-friendly definition of "work" as encompassing only "active job responsibilit[ies]" that "employees were hired to perform." (ABM at pp. 41-42, citing ER 20; ABM at p. 53.) It pulls this definition from the federal Portal-to-Portal Act, which is intended to "exempt[] employers from liability" for certain activities that are not part of the "principal activity or activities which such employee is employed to perform." (*Integrity Staffing Solutions, Inc. v. Busk* (2014) 135 S.Ct. 513, 517, quoting 29 U.S.C. § 254(a).) Federal law does contain a definition of "hours worked," but it is not the one contained in the Portal-to-Portal Act's liability exemptions. (Cf. 29 U.S.C. § 254(a); 29 C.F.R. §§ 785.6, 778.223.) As the restrictive definition that Apple proposes comes from a law that does

not aim to define "hours worked," but only to exempt employers from liability for certain work-related claims, Apple's proposal offers little help.

Even if federal law defined "work" to include only time spent performing activities which employees were "hired to perform," it would be inappropriate to incorporate such a definition into California law because it does not reflect the employee-protective purposes of the California Labor Code. As this Court recently stated:

> [a]bsent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time . . . is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication.' [Citation.] More recently, we have 'cautioned against "confounding federal and state labor law" [citation] and explained "that where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced."'

(*Troester*, *supra*, 2018 WL 3582702, at *4, quoting *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 843.)

Most importantly, defining "work" to include only time spent performing duties an employee is "hired to perform" would fail to compensate employees for a broad range of activities done on their employer's behalf. Often, employers hire employees to perform a general set of duties, rather than a specific set of tasks. In contrast to general job duties, an employee's "work" consists of hundreds or thousands of tasks that the employee performs on the employer's behalf. It's possible that not all of these tasks are within the scope of duties that an employer envisions. For example, an Apple sales associate may take it upon himself to clean up a spill on the floor even if he was not hired as cleaning staff. If this out-of-scope "work" is inconsistent with the employee's job duties, Apple's remedy

should be to tell the employee to leave spills to the housekeeping staff, or to discipline him otherwise, not to refuse to pay him for activities that Apple knows he is performing on its behalf.

CONCLUSION

For the reasons stated above, the answer to the Ninth Circuit's certified question should be "yes"—time that employees spend waiting for and undergoing searches of their bags, purses, and other items is compensable as "hours worked" under California law.

DATED: August 7, 2018 **KINGSLEY & KINGSLEY, APC**

By: _____

ARI J. STILLER, ESQ.
Attorneys for Amicus Curiae Bet Tzedek Legal Services

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text contains 5,303 words. (See Cal. Rules of Court, rule 8.520(c)(1).)

DATED: August 7, 2018 **KINGSLEY & KINGSLEY, APC**

By: _____

ARI J. STILLER, ESQ.
Attorneys for Amicus Curiae Bet Tzedek Legal Services

PROOF OF SERVICE

Amanda Frlekin et al., v. Apple, Inc.
Supreme Court Case No.S243805

The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within action. My business address is 16133 Ventura Boulevard, Suite 1200, Encino, California 91436

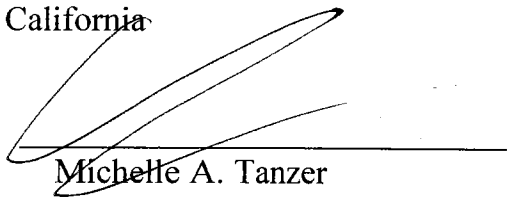
On August 7, 2018, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES IN SUPPORT OF PLAINTIFF AND APPELLANT** on the interested parties in this action.

I caused the above document(s) to be served on each person on the attached list by the following means:

[XX] I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on August 7, 2018, following the ordinary business practice, as indicated on the attached service list.

I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business. I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on August 7, 2018, at Encino, California.



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