Case No. S275431

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GEORGE HUERTA,
Plaintiff and Appellant,

v.

CSI ELECTRICAL CONTRACTORS, INC.,
Defendant and Respondent.

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

On Appeal From The United States District Court
For The Northern District Of California
Honorable Beth Labson Freeman
D.C. 5:18-CV-06761-BLF

APPLICATION TO FILE AMICUS BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT CSI ELECTRICAL CONTRACTORS, INC.; PROPOSED BRIEF OF *AMICI CURIAE*

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AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.520(f) of the California Rules of Court, proposed *amici curiae* Employers Group and California Employment Law Council ("CELC") respectfully request permission to file the enclosed *amici curiae* brief in support of Respondent CSI Electrical Contractors, Inc. The proposed *amici curiae* brief offers a unique perspective on why the Court should conclude that time spent by workers before and after a shift on commuting activities while on the employer's premises and subject to the employer's reasonable "rules of the road" restrictions is not compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16. The proposed *amici curiae* brief further offers a helpful perspective on why the Court should not conclude that time spent taking an unpaid, duty-free meal period while on an employer's premises is compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under California Labor Code Section 1194, when geographical or other bona fide practical limitations preclude or impair an employee's ability to leave the

employer's premises, and the employee is not otherwise restricted from leaving the employer's premises by the employer.

Amici do not seek to merely repeat the arguments in Respondent's Brief. Rather, amici present additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

STATEMENT OF INTEREST

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is distinctively able to assess both the impact and implications of the issues presented in employment cases such as this one. The Employers Group has been involved as amicus in many significant employment cases, including *Oman v. Delta Air Lines, Inc.*, 9

Cal. 5th 762 (2020); *Duran v. U.S. Bank National Association,* 59 Cal. 4th 1 (2014); *Brinker Restaurant Corp. v. Superior Court,* 53 Cal. 4th 1004 (2012); *Reid v. Google, Inc.,* 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group,* 48 Cal. 4th 104 (2010); *Chavez v. City of Los Angeles,* 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.,* 47 Cal. 4th 272 (2009); *Arias v. Superior Court,* 46 Cal. 4th 969 (2009); *Amalgamated Transit Union Local 1756, AFL-CIO v. Superior Court,* 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008); *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co. Inc.,* 42 Cal. 4th 217, (2007); *Murphy v. Kenneth Cole Productions, Inc.,* 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court,* 40 Cal. 4th 360 (2007); *Smith v. Superior Court,* 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.,* 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions,* 38 Cal. 4th 264 (2006); *Reynolds v. Bement,* 36 Cal. 4th 1075 (2005); *Miller v. Department of Corrections,* 36 Cal. 4th 446 (2005); and *Sav-on Drug Stores, Inc. v. Superior Court,* 34 Cal. 4th 319 (2004).

CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership includes more than 80 private sector employers, including representatives from many different sectors of the nation's economy (health care, aerospace, automotive, banking, technology, construction, energy,

manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ hundreds of thousands of Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, such as: *Duran*, 59 Cal. 4th 1; *Brinker*, 53 Cal. 4th 1004; *Harris v. Superior Court*, 53 Cal. 4th 170 (2011); *Chavez*, 47 Cal. 4th 970; *Hernandez*, 47 Cal. 4th 272; *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy*, 40 Cal. 4th 1094; *Green v. State of California*, 42 Cal. 4th 254 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317(2000); and *Armendariz v. Foundational Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

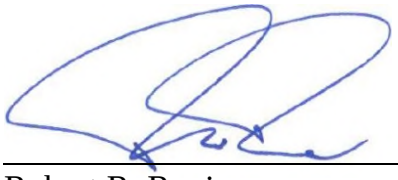
No current party in this case, or counsel for any current party in this case, authored the proposed *amici curiae* brief or any part of the brief. No person or entity other than the Employers Group or CELC contributed any money to fund the preparation or submission of this brief.

Accordingly, the Employers Group and CELC respectfully request that the Court accept the enclosed *amici curiae* brief for filing and consideration.

Dated: December 13, 2022

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



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***AMICI CURIAE* BRIEF**

I. PRELIMINARY STATEMENT

This Court has repeatedly recognized that, under California law, "[c]ommuting is an activity that [ ] is not generally compensable." *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1051 (2020) (citing *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 587 (2000)). This has been the law since at least 75 years ago, when California adopted the current "hours worked" standard that defines the time for which an employee is entitled to compensation, and departed from the prior "hours employed" standard which in several respects treated an employee's presence on the work premises as compensable time. This shift came in response to the *Andersen v. Mt. Clemens Pottery Co.* ("*Mt. Clemens*"), 328 U.S. 680 (1946), decision in which the U.S. Supreme Court interpreted the FLSA to require compensation for certain waiting time and travel on the employer's premises, even though no work was being performed during that time. In parallel to Congress' passage of the Portal-to-Portal Act in response to the *Mt. Clemens* decision, California's Industrial Welfare Commission ("IWC") transitioned to the "hours worked" standard still the law today, and effectively cemented commute time as non-compensable time.

Appellant asks this Court to upset this decades-old standard and effectively hold that potentially every worker in California is entitled to compensation for part of their commute starting at the moment they come

onto their employer's premises, unless they are permitted to both enter and exit at will (i.e., without having to confirm their right to be on the premises) and to conduct themselves in any manner they please until the moment they have clocked in for work. This is not, and should not be, the law.

II. ARGUMENT

A. Time Spent Commuting to or from Work Is Not Compensable Merely Because Part of that Commute Necessarily Occurs on the Employer's Premises and the Employee Must Follow Common Sense Rules While on the Premises.

The purported employer restrictions and requirements that Appellant complains of in this matter fall into two general categories. First, Appellant identifies several items that pertain to the rules for accessing the 72,000-acre private ranch where he performed work for CSI (the "Site") and traveling in a vehicle within it. This includes the requirement that employees show their badges upon entering the Site (POB at 12), and comply with the "rules of the road," such as not exceeding the speed limit or passing other vehicles (POB at 14-15), driving vehicles only on the access road and in the parking lots (POB at 16), and not wearing ear buds or ear pods *while driving* (i.e., non-drivers could use them) (POB at 16). These rules apply to *drivers* only and are analogous, if not identical, to the "rules of the road" that govern drivers on public roads and parking lots and most private roads and parking lots accessible to the public. Workers and visitors typically encounter the same or similar "rules of the road" when they enter most government and business premises such as courthouses, malls, amusement parks, airports, college campuses, public parks, and local government buildings.

Second, Appellant identifies several items that pertain to prohibitions on the workers' conduct on the Site. These prohibitions

include not: engaging in discriminatory or harassing conduct (POB at 14); engaging in horseplay, gambling, or practical jokes (POB at 14); playing loud music (POB at 15); disturbing cattle and local wildlife (POB at 15); wandering onto restricted portions of the premises marked by boundary fences, stakes, and ribbons; or smoking (POB at 16). Again, each of these rules are analogous, if not identical, to those that workers and visitors must follow when they are on the premises of most government and business premises.

Two points are salient here. First, none of what Appellant describes as factors of "control" during his commute—showing one's badge to enter the Site, driving at an appropriate speed limit, refraining from smoking, not disturbing wildlife, etc.—constitutes "tasks or exertion that a manager would recognize as work." *Hernandez v. Pacific Bell Telephone Co.*, 29 Cal. App. 5th 131, 142 (2018). Second, it can hardly be disputed that the portion of Appellant's commute that takes place on the premises provides no benefit to the employer that is distinguishable from the portion of Appellant's commute that occurs off the premises, i.e., it is simply Appellant getting himself to work and returning home. Indeed, it is similar to an employee parking in a commercial parking lot who must spend time getting a ticket to enter the lot or waiting at a kiosk or at the gate to pay for the parking before exiting the lot. In other contexts involving time outside of the usual work hours (e.g., on-call time cases), this Court has recognized that benefit to the employer is an indicium of whether an employer requirement or restriction constitutes sufficient "control" to render time compensable as "hours worked." *See e.g.*, *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833, 840 (2015) ("Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer").

As explained below, legislative history of the "hours worked standard" confirms that California law does not require employers to compensate employees for time spent commuting to work. Further, the common sense rules at issue here governing access to the Site and acceptable conduct at the Site do not rise to a level of control that the Legislature, the IWC, or California courts have identified as constituting compensable time as "hours worked."

1. The Legislative History of California's "Hours Worked" Standard Demonstrates That California Rejected the Notion That Employees Are Entitled to Compensation for Time Spent Commuting to Work.

Appellant calls on this Court to expand dramatically the meaning and scope of what constitutes "hours worked" as used in the Wage Orders, and hold that employees are entitled to compensation virtually any time they enter their employer's premises. As Respondent explains, this is contrary to the holdings and reasoning of relevant California case law. In addition, the legislative history of the "hours worked" standard confirms that California specifically intended to make it law that employers are not required to pay employees for their commute time.

Prior to 1947, the Wage Orders implemented a different standard for compensation, specifically the "hours employed" standard. The Wage Orders provided a definition for "Hours employed" that was markedly different from the definition in the present Wage Order No. 16 at issue, as well as the other wage orders. By way of example, in 1947, Wage Order No. 4 defined "Hours Employed" to include time that:

> 1. A woman or minor is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed workplace.
>
> 2. A woman or minor is suffered or permitted to work, whether or not required to do so. Such time includes, but shall not be limited to, time when the employee is required to wait on the premises while no work is provided by the employer, and time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day."

(Order 4 N.S. (1943).) Notably, this "hours employed" standard facially reflected the protective principle that women and children were entitled to compensation when they were "required to be on the employer's premises," including specifically "time when the employee is required to wait on the premises while no work is provided by the employer" and "time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day." In this case, Appellant advocates the same outcome as what the "hours employed" standard required. For example, Appellant argues that "driving on the Access Road to the designated parting [sic] lots on the Site constitutes activity that CSI required" and that this commuting time is compensable because it "is time during which the workers are necessarily required to be on the Site." (POB at 40.)

While that may have been the expected interpretation under the "hours employed" standard, California law changed specifically to avoid that result. The change from the former "hours employed" standard to the current "hours worked" standard came about in the aftermath of the U.S. Supreme Court's 1946 *Mt. Clemens* decision. There, the Court interpreted the FLSA to require compensation for waiting time, travel time, and other preliminary and postliminary activities. *Mt. Clemens*, 328 U.S. at 692-93. Similarly, that time was also compensable as "hours employed" under California's then-effective 1943 Wage Orders. As Respondent points out (ROB at 9), the *Mt. Clemens* decision generated disastrous consequences, and Congress soon deliberated over the scope of compensable time under the FLSA in early 1947. The result was the passage of the Portal-to-Portal Act, which Congress enacted on May 14, 1947, 29 U.S.C. §§ 251 *et seq*. This Act amended the FLSA to exclude preliminary and postliminary activities, as well as travel time, from the federal definition of "hours worked." Specifically, the Act stated that employers were not required to compensate employees for the following activities:

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on

> any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases such principal activity or activities ..."

29 U.S.C. § 254(a)(1) and (a)(2).

Significantly, the California Industrial Welfare Commission ("IWC") undertook a nearly simultaneous process to redefine California's standards regarding compensable time. Approximately two weeks after the passage of the Portal-to-Portal Act, on June 1, 1947, the IWC promulgated revised wage orders that changed the term "hours employed" to the federal term "hours worked." The transition was not an arbitrary change in terminology; it redefined the scope of compensable time. Since 1947, the definition of "hours worked" incorporated into the Wage Orders reads as follows:

> "'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."

See e.g., Cal. Code Regs., tit. 8 § 11160, Subd. 2(J)).

Significantly, the "hours worked" definition removed the verbiage in the "hours employed" standard requiring compensation for (1) time an employee "is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed workplace," (2) time "when the

employee is required to wait on the premises while no work is provided by the employer," and (3) "time when an employee is required or instructed to travel on the employer's business after the beginning and before the end of her work day." Not coincidentally, these activities are substantially identical to those that Congress excluded from compensable time under the FLSA via the passage of the Portal-to-Portal Act. The textual shift in the terminology and its corresponding definition, together with the context of the change in law occurring in parallel at the federal level, permits only one logical interpretation: the IWC revised its definition of "hours worked" specifically to exclude commute time from California's standard for compensable time, including specifically the portion of commute time that necessarily occurs on the premises of the employer.

2. Under This Court's Precedents, Commute Time Becomes Compensable Only When the Employer Restricts the Employee's Activities to Such a Degree That It No Longer Resembles an Ordinary Commute.

As recently as its decision in *Frlekin*, this Court reiterated that "the time employees spend commuting from home to the departure points and back again is not compensable." *Frlekin*, 8 Cal. 5th 1038, 1050 (citing *Morillion*, 22 Cal. 4th at 587-88. In *Morillion*, this Court held that the time the employees there spent traveling on buses which the employer required them to use was not "an ordinary commute from home to work and back that employees take on their own," but was "compulsory travel time," a term it adopted precisely "to distinguish between

travel to and from a work site that an employer controls and requires, and an ordinary commute from home to work and back that employees take on their own"). *Morillion*, 22 Cal. 4th at 579. And the employees were "under [the employer's] control" because the employer's restrictions "do[] not allow them to use 'the time effective for [their] own purposes.'" *Id*. at 586 (second alteration and quotation marks in original) (citing *Bono*, 32 Cal. App. 4th 968, 975 (1995)). The Court elaborated:

> [D]uring the bus ride plaintiffs could not drop off their children at school, stop for breakfast before work, or run other errands requiring the use of a car. Plaintiffs were foreclosed from numerous activities in which they might otherwise engage if they were permitted to travel to the fields by their own transportation. Allowing plaintiffs the circumscribed activities of reading or sleeping does not affect, much less eliminate, the control Royal exercises by requiring them to travel on its buses and by prohibiting them from effectively using their travel time for their own purposes. Similarly, as one amicus curiae suggests, listening to music and drinking coffee while working in an office setting can also be characterized as personal activities, which would not otherwise render the time working noncompensable.

22 Cal. 4th at 586.

Morillion then responded to the objection that its rule would render all commute time compensable, emphasizing that the employer there exercised a "level of control" that meaningfully restricted "when, where and how plaintiffs must travel."

> In contrast to Royal's employees, employees who commute to work on their own decide when to leave, which route to take to work, and which mode of transportation to use. By commuting on their own, employees may choose and may be able to run errands before work and to leave from work early for personal appointments. The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative.

Id. at 586-87 (citing *Bono*, 32 Cal. App. 4th at 975; *Aguilar v. Association for Retarded Citizens*, 234 Cal. App. 3d 21, 30 (1991)).

Two salient points emerge from *Morillion*'s analysis. First, it is not the mere fact of employer control but the *level* of control that transforms an ordinary commute into compulsory travel time. Second, only control that denies employees options *that would otherwise be available to them* can transform an ordinary commute into compulsory travel time. *Morillion* cited specific, real-world examples of activities which an employee might perform while traveling to and from work *but for* the requirement to travel on the employer-provided bus (run errands on the way to work, drop off their children at school, etc.). Moreover, these were activities which

employees might plausibly engage in, were they not restricted by the employer's requirement to ride on the company-provided bus. *See also Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1061-62 (9th Cir. 2010) (employee driving company vehicle was not permitted to make stops between work and home during the commute on public roads). Because they were "foreclosed from numerous activities *in which they might otherwise engage*" but for the restrictions imposed by the employer (for example, in *Morillion*, a requirement to travel on the employer-provided bus), they were prohibited from "effectively using their travel time for their own purposes," transforming an ordinary commute into "compulsory travel time."

3. CSI's Rules Do Not Foreclose Plaintiffs from Activities in Which They Might Otherwise Engage During Their Travel, But For Those Rules.

Appellant's argument that CSI's rules prevented workers from using their travel time on the site effectively for their own purposes misses the mark because it recounts what they could not do during that time, without ever establishing that they could have engaged in those activities *but for CSI's rules.* As those activities would not be reasonably available to them, regardless of CSI's rules, they are no basis to conclude that CSI's rules exerted sufficient control over them to convert their commute into compulsory travel time.

Many of the restrictions of which Appellant complains are not "activities in which [the workers] might otherwise engage" simply due to the geographic location of the worksite. Appellant was engaged to perform services at the California Flats Solar Project, which was located on 2,900 acres of a privately-owned, 72,000-acre cattle ranch in an undeveloped area of Monterrey County. The closest public road was more than five miles away. Simply by virtue of the location, geography and land ownership, Appellant's only option was to use the private access road, and he was effectively confined to that road until he reached the Project where he was to perform services, regardless of any restrictions imposed on him by CSI. Moreover, as he was traveling through a remote, undeveloped privately-owned cattle ranch, he was unable to run errands, get something to eat, or do other things he might normally do outside the site, simply because those activities were not available and irrespective of CSI's rules. Analogously, forestry workers engaged to harvest timber in a public forest might have to travel several miles on isolated forest roads on their way to or from work, where there would be no opportunity to engage such activities, or workers in a remote mountain vacation lodge might be limited to commuting on a single access road for many miles. Such roads often have limited or no development (e.g., grocers, schools, etc.) and may even lack a shoulder lane or other space to pull over or park, effectively limiting the commuting workers to driving on the access road and no other activity. As with the

access road on the Site at issue here, the lack of opportunities to engage in personal activities while commuting in these examples exists because of the location of the worksite, surrounding geography, and absence of development along the commuting route, not any requirement or restriction of their employers.

Similarly, other supposed restrictions were activities foreclosed by the circumstance that the work Appellant was engaged to perform took place on a large tract of private property. Not surprisingly, the property owner granted only limited access to its property for specific purposes, at specific times, and subject to specific conditions. It allowed Appellant to use only a specific road and only during certain hours, required him to remain in his vehicle, to respect the Site's rules of the road (speed limits, no passing, stop only in designated places, no honking or loud music, etc.), and to avoid disturbing wildlife or damaging vegetation. It also imposed various safety rules, including prohibiting use of alcohol and drugs, smoking, practical jokes, or horseplay, and retained the right to search Appellant, his property and/or his vehicle. Analogously, workers in an airport restaurant would only be able to reach their place of work by walking up to ten minutes through the airport, during which time they would be subject to safety and security rules far more restrictive than outside the airport. Or an airplane mechanic would be required to travel on a specified path to reach the aircraft to be repaired, with no loitering, and

only at the times required to begin or end the assigned work. In such cases, regardless of the employer's rules, the property owner's restrictions foreclose these activities, and they are not activities in which the employee might otherwise reasonably engage, but for the employer's rules.

And still other supposed restrictions were no different than restrictions workers commonly encounter when traveling to and from work on public roads. Even during a normal commute, one must obey speed limits, which can be quite low when road construction is taking place, a road has been damaged, or special traffic restrictions are in place. Passing and stopping are often restricted, e.g., where roads have only one lane in each direction or where parking is prohibited. Drivers and vehicles are always subject to search and testing for drugs/alcohol (within constitutional limits).

To hold that such rules transform this commute time into compensable time would mean that employers must either pay employees for all the time they are on private property (whether the employer's or a third party's), which is inconsistent with California's "hours worked" standard, as explained above. Appellant understands this is not the law, as he does not argue with respect to his meal periods that the rules prohibiting smoking, discrimination, fighting, loitering, etc. transform the meal period into an on-duty meal period.

4. The Court Should Clarify the Factors That Distinguish a Non-Compensable Ordinary Commute from Compulsory Travel.

The Ninth Circuit's Order certifying the questions to Court is clear that prior decisions like *Frlekin* and *Morillion* do not provide adequate guidance for employers and lower courts alike in addressing compensability questions with respect to commuting scenarios.

In *Frlekin*, this Court acknowledged "there are inherent differences between cases involving time spent traveling to and from work, and time spent *at* work." *Frlekin*, 8 Cal. 5th at 1051. In so doing, the Court distinguished the circumstances and corresponding analysis involved in the compulsory travel time in *Morillion* from the security checks in *Frlekin*. *Id*. The same logic applies in reverse. Although Appellant strenuously attempts to impose the analytical framework of *Frlekin* here, it simply makes no sense to liken the employer interests and control factors at issue in invasive personal security checks in *Frlekin* to the commute time here, wherein the employee simply has to abide by common sense "rules of the road" and acceptable conduct rules for being on the premises.

The Court should take this opportunity to provide guidance for commute time cases like this one. In evaluating whether time spent commuting is compensable, the Court's analysis should start from the significant change in 1947 by the IWC from an "hours employed" to an "hours worked" standard implemented following the *Mt. Clemens* decision

and the federal enactment of the Portal-to-Portal Act, which clearly demonstrated an effort to make clear that commute time was not treated as compensable time. This also aligns with this Court's prior jurisprudence. *See e.g., Frlekin*, 8 Cal. 5th 1038, 1050 ("[I]n *Morillion*… [w]e clarified that the time employees spend commuting from home to the departure points and back again is not compensable.") (citing *Morillion*, 22 Cal. 4th at 587-88).

To the extent that questions arise regarding purported employer-imposed restrictions on the employee during the time they spend traveling to the worksite and whether such restrictions constitute control excessive enough to convert non-compensable commuting time into compensable hours worked, the Court should identify factors to assess whether the employer is exercising the type of control long recognized as constituting "hours worked." Such factors might include: (a) whether the requirement/restriction is the same or analogous to rules of conduct that generally apply to non-employees under similar circumstances, (b) whether the requirement/restriction derives from geographical or other bona fide practical limitations outside of the employer's control, (c) whether the requirement/restriction actually restricts a realistic opportunity to engage in personal pursuits in which the employee might otherwise engage during the travel time, (d) whether the requirement/restriction is for the benefit of the employer, and (e) whether the requirement/restriction are affirmative or

mandatory in nature, rather than prohibitive. Each of these factors provides a lens through which courts can evaluate the "level of control" that the requirement/restriction entails (*Morillion*, 22 Cal. 4th at 586), within a logically applicable framework.

5. Failure to Consider Whether the Employer's Restrictions Deprive the Employee of Options That Would Otherwise Be Available Will Wreak Havoc for California Employers in Numerous Industries.

Although framed in the context of Wage Order No. 16 and the specific workplace premises at the California Flats Solar Project, the consequences of this Court adopting the expansion of the term "hours worked" that Appellant advocates cannot be understated. The term "hours worked" and definition provided in Wage Order No. 16 are identical to those found in the other Wage Orders governing workplaces in other industries. And the general characteristics of the California Flats Solar Project premises that Appellant highlights and dramatizes to support his argument are found in workplaces across many industries: large-sized premises, access restricted to authorized persons via badges or identification cards, designated points of access to the premises, designated pathways to travel within the premises, restriction of access to certain portions of the premises, and policies governing acceptable conduct on the premises. For example:

- Courthouses, City/County Government Buildings, School Campuses, and Airports: In virtually all such workplaces, employees typically swipe or present a badge or identification card to pass the security or use an elevator. Employees must also abide by rules promulgated by the employer and/or property owner whenever they are on the premises, even if they are not on the clock (i.e., no smoking, no weapons, no trespassing into office or spaces to which they have not been granted access in connection with their employment, etc.).
- Amusement Parks, Studios, Refineries, Large Construction Sites, and Distribution Centers: Employers like these generally employ workers in large-sized premises that employees enter through designated points of access to the premises. Employees are often required to travel to their designated work areas on specified paths (e.g., non-customer areas) to avoid, for example, safety hazards, areas where other workers are actively performing work, and interactions with customers prior to the employee being on the clock and ready to work.
- Outlet Malls, Remote Tourist Attractions: Although many employers at outlet malls and remote tourist attractions (e.g., on an island or in the desert) do not ask employees to "badge in" to gain access to the work premises, the remote location of these

> workplaces often means that there are limited paths of travel to the workplace—indeed, there may be only one road employees may take to work. Getting to work can also entails a lengthy commute to work. For safety or customer related reasons, employees are almost always required to abide by generally-applicable, common-sense rules when they are on the premises, even before they arrive at the location where they will perform services.

It is readily apparent that the outcome Appellant advocates would disproportionately impact employers with employees who work in a relatively smaller portion of a larger premises, and employers with work premises in remote locations. Even office-setting employers, however, would find themselves in the crosshairs of Appellant's theory. Most high-rise buildings in the downtown areas of Los Angeles, San Francisco, Sacramento, and other metropolitan cities restrict access to the building to employees of the tenants of the building and their permitted guests. This access restriction is often enforced via a "badge flashing" or "badge swipe" process not dissimilar to the one Appellant contends amounts to compensable work. Likewise, most office-setting workplaces operate during the same general "business hours" window, with employees starting around the same times at the hour and/or half hour marks between 7:00 and 9:00 am. At the end of the workday, many hourly employees will in turn

finish the workday around the same time. Naturally, this can create congestion at the elevators, lobby, and in any underground or adjacent parking structure. Appellant would have this Court hold as compensable much, if not all, of the time that employees spend getting to and from work while in the building and/or parking structure. No California decision has ever held such time to be compensable, and no reasonable person expects compensation for such time.

Lastly, the definition of "hours worked" set forth in the IWC wage orders and upon which plaintiffs now rely for this new theory of liability has not changed in more than seven decades and was adopted to exclude non-working commute time on an employer's premises. During that time, employers on controlled worksites like movie studios, airports, courthouses, amusement parks, refineries, company and school campuses, and the like have operated in similar fashion to the circumstances set forth in this case without the Legislature, the DLSE, or any California court acting to impose liability upon an employer for such commute time. The most compelling explanation for this inaction is that the Legislature, DLSE, and California courts have always understood such commute time to be non-compensable. *Cf. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 400 (9th Cir. 2011) ("[W]hile it is possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department

noticing [, the] more plausible hypothesis is that the ... industry has been left alone because DOL believed its practices were lawful.")

For these reasons, this Court should make clear that California law does not mandate compensation for such commonplace and largely unavoidable features of modern-day commutes, even when some of that commute time necessarily occurs on property controlled by the employer, and employees are subject to common sense rules regarding access/path of travel and acceptable conduct on the premises.

B. An Employee Is Not Entitled to Compensation for Time Spent Taking an Unpaid Meal Period on the Premises When the Employee's Ability to Leave the Premises Is Precluded or Impaired by Geographical or Other Bona Fide Practical Limitations, and the Employee Is Not Otherwise Restricted by the Employer.

In responding to the issues raised by Ninth Circuit's third certified question, the Court should be mindful of an important point not addressed in the Parties' briefs. Specifically, the Court should be wary of painting all "restrictions" on an employee's ability to leave the premises as "control" in one fell swoop without regard to the nature and source of such restrictions.

The Ninth Circuit's formulation of the third certified question frames the issue, without elaboration, as workers being "prohibited from leaving" the employer's premises without being "required to engage in employer-mandated activities." Appellant's Brief, however, sheds more light on the question. Appellant describes that workers were "prohibited" from leaving

the Site, among other things, by being told that they were required to stay on the job Site during the entire workday and being told that it would be a violation of the job Site rules if they reached the security entrance too early at the end of the workday. (POB at 43.)

The "prohibition" alleged by Appellant dovetails in this case with a geographical and practical limitation: as Appellant describes, the drive between the parking lot and the security gate could take "up to 45 minutes" alone, which does not include the time it would take an employee to get from the time clock to their vehicle. This reality naturally precludes an employee from leaving the employer's premises in the time allotted by a statutory 30-minute meal period. This reality—that there is not enough time to leave the premises during a meal period due to the size of the employer's premises—alone cannot suffice to amount to "control" by the employer during the employee's meal period. No California court has held this to be the case, nor should this Court indicate it to be the case here. Indeed, such time should not be considered compensable time where there is no *realistic opportunity* for the employee to leave the worksite. Similar practical limitations, such as traffic congestion at the exit point of a parking lot, reasonable speed limit restrictions, the location or number of exit points, may also impair, as a practical matter, an employee's ability to actually leave the employer's premises but also do not amount to "control" over the employee's time during their meal period, absent evidence that

these exist specifically to restrict the employee's meal period. Were this Court to hold that geographical and practical limitations of this kind convert an otherwise duty-free meal period into an on-duty meal period, it would lead to absurd results. For instance, employers would find themselves in the position of being required to place all time clocks at the perimeter of their premises, devoting copious resources to designing egress and exit paths for employees such that it would never take more than 15 minutes to travel to the perimeter of the premises, or simply restricting the size of work locations around their meal period obligations. Certainly, none of these outcomes benefits employees or promotes the public policy purposes underpinning the meal period provisions of the Wage Orders.

III. CONCLUSION

For the reasons stated above, this Court should hold time spent on commuting activities while on the employer's premises in a personal vehicle is not compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16. This Court should also hold that when geographical or bona fide practical limitations that preclude or impair an employee's ability to leave the premises during a meal period, this alone does not amount to control sufficient to render a meal period as compensable as "hours worked" within the meaning of California Industrial Welfare Commission Wage Order No. 16, or under California Labor Code Section 1194.

Dated: December 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* the Employers Group and the California Employment Law Council certifies that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 6,433 words, exclusive of the title page, tables, this certificate, and proof of service, pursuant to California Rule of Court 8.204(c)

Dated: December 13, 2022

Robert R. Roginson

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I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Los Angeles in the office of a member of the bar of this court at whose direction the service was made. My business address is 400 S. Hope Street, Suite 1200, Los Angeles, California 90071, my electronic service address is elizabeth.mendoza@ogletree.com.

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Executed on December 13, 2022, at Los Angeles, California.

Elizabeth Mendoza	/s/ Elizabeth Mendoza
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12/13/2022

Date

/s/Elizabeth Mendoza

Signature

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