Case No. S253677

In the

SUPREME COURT

of the

STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff and Appellant,

v.

AMN SERVICES, LLC,
Defendant and Respondent.

AFTER A PUBLISHED DECISION BY THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D071865
SAN DIEGO SUPERIOR COURT CASE NO. 37-2014-00012605-CU-OE-CTL
HONORABLE JOEL PRESSMAN (Ret.)

PLAINTIFF-APPELLANT KENNEDY DONOHUE'S OPENING BRIEF ON THE MERITS

WILLIAM B. SULLIVAN (171637)
ERIC K. YAECKEL (274608)
SULLIVAN LAW GROUP, APC
2330 Third Avenue
San Diego, California 92101
(619) 702-6760 Telephone
helen@sullivanlawgroupapc.com
yaeckel@sullivanlawgroupapc.com

RUPA G. SINGH (214542)
Appellate Counsel
NIDDRIE ADDAMS FULLER SINGH LLP
An Appellate Boutique
600 West Broadway, Suite 1200
San Diego, California 92101
(619) 744-7017 Telephone
rsingh@appealfirm.com

Attorneys for Plaintiff, Appellant and Petitioner Kennedy Donohue

CP COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

I.
ISSUES PRESENTED

This Court granted review on the following issues:

1. Can employers use rounding practices, upheld **only** in the overtime context, to shorten or delay meal periods despite the clear statutory mandate that employees are to be provided a meal period of "not less than 30 minutes" that starts "no later than the end of an employee's fifth hour of work?"

   a. Is there a distinction between (i) overtime statutes protecting employees' fiscal interest by ensuring fair compensation for a full eight-or-more-hour workday, and (ii) meal period laws ensuring employees' health and well-being with 30-minute meal periods every five hours to let them rest and recharge?

   b. Can the fact that rounding may, in the long run, pay employees for the time they were actually on break nullify the denial of a timely or full meal period, which also affords employees the statutory right to an extra one hour of pay?

2. Does *Donohue* conflict with other California cases adopting the framework that non-compliant time records create a rebuttable presumption of meal period violations?

a. Is *Donohue* correct that this presumption applies only at the class certification stage?

b. Does this Court's depublication of cases declining to adopt, limiting the application of, or ignoring the "rebuttable presumption" make this issue ripe for review?

II.
INTRODUCTION

California law requires employers like defendant-respondent AMN Services, LLC (AMN) to provide employees a meal period not less than 30 minutes no later than the end of the fifth hour of work. Employers must also provide specified, minimum rest periods. The settled purpose of these meal and rest period protections is to lessen the strain on employee health and safety due to long stretches of physical or mental exertion with no rest. AMN violated the meal period guarantees by importing a timekeeping system from the overtime arena that rounds employees' punch times to the nearest ten-minute increment, including the start and end of their shifts and their meal periods. Over the five-year class period, this led to nearly 40,110 short meal periods of less than 30 minutes and 6,651 delayed meal periods starting later than the end of the fifth hour of work. Through incremental encroachments, plaintiff-appellant Kennedy

Donohue (Donohue) and the 500-plus employee class thereby lost their basic health and safety guarantee to full, timely meal periods.

None of the grounds the Court of Appeal adopted at AMN's urging justify this result. First, unlike meal period laws, overtime rules protect employees' fundamentally different right to fair pay for an eight-plus hour workday. Assertedly "neutral" rounding practices previously allowed in the overtime arena, where only money is at stake, make no sense in the meal period context, where permanent, incalculable harm to employees' health and safety is at issue. Second, employees do not benefit in the long run because their time is sometimes rounded up and sometimes rounded down. The irreversible harm to an employee's welfare from a short or delayed meal period one day is not restored by a timely and full meal period another day; rather, the cumulative negative health impact of periodic non-compliant meal periods only magnifies over time. Also, the statutory penalty of one hour's pay for each non-compliant meal period is worth far more than occasional pay for a few extra minutes while the employee was on a meal break. Finally, efficiency does not justify outdated rounding practices because existing technology, including AMN's system, records punch times to the exact minute.

By erroneously affirming adjudication of the valid meal period claim against the class, the Court of Appeal also mistakenly denied

plaintiff the benefit of a rebuttable presumption against AMN arising from its duty to keep accurate time records. In her concurrence in a seminal employment case, Justice Werdegar proposed that evidence of Labor Code violations in an employer's time records should give rise to a rebuttable presumption that the violations did occur. (*Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1053 [Werdegar, J., conc.] (*Brinker*).) Courts began to adopt this time-record presumption as a way for employees to establish *prima facie* meal period or other violations, shifting the burden of rebuttal to employers. Though many courts allowed the presumption at the class certification stage, the case's procedural posture was not their reason for doing so. Nor is the presumption as proposed in *Brinker* tied to any stage of a case. But, like a minority of other courts, the Court in *Donohue* refused to apply the presumption at summary judgment. This ignored both that an employer's duty to keep accurate records is the same regardless of whether the inquiry is class certification or merits-based, and that the presumption's rebuttable nature allows employers a viable defense at *every* stage.

Because obsolete rounding practices and an artificially limited time-record presumption will harm countless employees across this State besides Donohue and the class, this Court should restore meal period guarantees and clarify the presumption's uniform application.

II.
STATEMENT OF FACTS

A. The Parties

Defendant-Respondent AMN is a health care and staffing company whose employees recruit nurses for temporary contract assignments. (8 AA 2194, ¶2.) Plaintiff-Appellant Donohue worked as a non-exempt nurse recruiter at AMN for less than two years between 2012 and 2014. (*Ibid.*) Donohue and other non-exempt recruiters did not have pre-determined shifts but were expected to work eight-hour days. (8 AA 2195, ¶5.) AMN had to provide such non-exempt employees meal and rest breaks under California law, and had a written policy allowing as much. (1 AA 232, ¶3; 235–238.) In practice, however, AMN, a sales-driven company, had an office culture that created pressure on recruiters like Donohue to be on the phones and work as much as possible instead of taking their full meal periods and rest breaks. (2 AA 330–342; 530–532, ¶¶9–17.)

B. AMN's "Team Time" Timekeeping System

During the relevant time, AMN designed, created, and employed an electronic timekeeping system called "Team Time." (8 AA 2206, ¶3; 9 AA Vol. 2333–2334, 2344–2347, 2357.) Donohue and all non-exempt employees clocked in and out of Team Time by clicking an icon on their computers to record the hours they worked

daily, including the start and end of their meal periods. (9 AA 2350–2351.) This meant four punches on average—on arrival, at departure, to start a meal period, and at the end of lunch. (8 AA 2071.)

To calculate employees' work time, compliant breaks, and compensation, Team Time rounded the actual punch times up or down to the nearest ten-minute increment. (8 AA 2207, ¶5; 9 AA 2337–2339.) For example, as relevant to the meal period claim, if an employee started a meal period at 12:04 and ended it at 12:26 p.m., Team Time would initially record each entry to the precise minute as the *actual* time. (9 AA 2324; 2368–2372; 2403, ¶6.) But, to calculate time worked, time on break, and pay, Team Time would round the "clock in" and "clock out" time to the nearest ten-minute increment and show the alteration as the employee's time, meaning 12:04 would be shown rounded to 12:00 p.m., and 12:26 to 12:30 p.m. (9 AA 2337–2339.) Team Time thus could and did record employees' actual punch in and punch out times, but took the extra step of redacting and overriding these actual times on the time records with employees' rounded times. (2 AA 345, ¶6; 9 AA 2338–2339, 2341.)

C. Short and Delayed Meal Periods at AMN

Over five years, this time rounding resulted in thousands of both "short" meal periods that lasted *less* than the full 30 minutes

and "delayed" meal periods that began *after*, and not *at*, the end of the fifth hour of work. (9 AA 2403–2408.)

A short meal period means an instance when the employee's *actual* time punches showed that the meal period lasted less than 30 minutes, but AMN's *rounded* times reflected a full, 30-minute meal period. (9 AA 2403, ¶10.) For example, on January 8, 2013, Donohue punched in an *actual* meal period start at 11:02 a.m. and an *actual* meal period end at 11:25 a.m., meaning her *actual* meal period was only *23 minutes*. (9 AA 2326, 2368–2369.) But, after rounding to the nearest ten-minute increment by Team Time, the meal period was altered to reflect an 11:00 a.m. start and an 11:30 a.m. end, showing an ostensibly compliant 30-minute meal period. (*Ibid.*) Because it only compensated employees based on rounded times, AMN neither paid Donohue the statutory penalty of an extra hour's pay for a non-compliant meal period, nor for the seven minutes she actually worked during her short meal period (*Ibid.*; 9 AA 2338–2339; 2341.)

A delayed meal period is an instance when an employee's *actual* punch times reflected that the start of a meal period was *after* five hours of work, but AMN's "rounded" times reflected that the employee clocked out for a meal period at five or fewer hours of work. (9 AA 2404, ¶15.) For example, on May 14, 2013, Donohue punched in for her *actual* workday at 8:27 a.m. and punched out for

an *actual* meal period at 1:31 p.m., meaning she began her meal period after an *actual* five hours and four minutes of work. (9 AA 2327, 2374–2375.) After rounding by Team Time, however, the workday start was altered to 8:30 a.m. and the meal period start to 1:30 p.m., showing she began her meal period at the end of exactly five hours of work. (*Ibid.*) Again, because it only compensated employees based on rounded times, AMN neither paid Donohue the statutory pay penalty for a non-compliant meal period, nor for the four extra minutes of work between the end of her fifth hour of work and the start of her late meal period. (*Ibid.*; 9 AA 2338–2339; 2341.)

D. Waiving Violations or Requesting Penalties

AMN allowed employees to either waive their right to a compliant meal period or request a meal period penalty of one extra hour's pay, but the *only* way to do so was through Team Time. (9 AA 2327, 2335–2336, 2351, 2353–2354.) Thus, if Team Time flagged a potential meal period violation, a "prompt" would issue on the employee's computer screen, making a portion of the screen "go red." (9 AA Vol. 2359–2361.) The employee could then only continue working by choosing one of the following options from a dropdown menu: (1) a timely, 30-minute meal period was provided, but skipped voluntarily; (2) a timely, 30-minute meal period was provided, but a shorter/later break was taken voluntarily; or (3) a

compliant meal period was not provided, thus automatically triggering the penalty of one extra hour's pay. (1 AA 245; 2 AA 314, ¶7.)

As designed, however, Team Time would *not* issue a prompt (or make the screen go red) based on the employee's *actual* punch times; instead, it would only do so by reviewing the rounded times. (9 AA 2365–2366.) Thus, if an employee got an *actual* short or delayed meal period, which Team Time rounded to show a compliant meal period that lasted a full 30 minutes or began at the end of the fifth hour of work, the system would not recognize a violation or issue the necessary automatic prompt. (9 AA 2327–2328, 2365–2366, 2403–2405; 11 AA 2912–2914.) Without the prompt and its accompanying dropdown menu, employees could neither opt to waive their right to a compliant meal period nor request a pay penalty for a short or delayed meal period. (9 AA 2327, 2335–2336, 2351, 2353–2354.) As a result, there was no record of Donohue notifying AMN that she had not been provided a compliant meal period or requesting a pay penalty. (8 AA 2164, ¶10.)

A final option for AMN employees was that they could contact supervisors if their punch times were inaccurate, for example, if they forgot to log in or out, or performed work while clocked out. (8 AA 2058, 2195, ¶8; 2 AA 276–305.) In such instances, supervisors could

unlock or "green out" timesheets to let employees manually adjust punch times. (*Ibid.*) Donohue and other employees did occasionally request to correct such omissions. (8 AA 2062–2065, 2141–2146; 5 AA 1288–7 AA 1899, ¶¶16, 17.) But, as Donohue testified, there was also an overriding office culture at AMN of working through break and meal periods without seeking manual adjustments, and simply checking the box at the end of pay periods to submit timecards as valid and get paid. (10 AA 2618–2619, 2623, 2626–2627, 2652.)[1]

Notably, AMN stopped using Team Time while this suit was pending, switching to a timekeeping system that does *not* round employees' times, but uses actual punch times to calculate time worked, pay, and meal periods. (8 AA 2206, ¶¶3, 6; *id.* at 2165, ¶10.)

E. Meal Period Violations

Given its design flaw, Team Time ignored actual punch times and failed to flag short and delayed meal periods as potentially non-compliant. (9 AA 2365–2366.) But there was other evidence to confirm meal period violations. For example, Donohue repeatedly testified that "our lunches were really short because we had to be on the phones;" breaks were "highly frowned upon;" and "literally" no

[1] The trial court excluded these excerpts of Donohue's deposition and her declaration in full, but the Court of Appeal considered both after deeming them admissible. (*Donohue v. AMN Serv., LLC* (2018) 29 Cal.App.5th 1068, 1091, 1103–1105 & fn. 30, 50.)

one took breaks given the "top down . . . pressure" to get back on the phone to recruit nurses and make AMN money. (10 AA 2619; *id.* At 2618, 2623.) She also recalled being "routinely discouraged from taking meal and rest breaks" and being "called back to my desk—over the intercom—on several occasions when attempting to take meal and rest breaks." (10 AA 2652; *id.* at 2626–2627.)

Likewise, only 30 of 39 of the current employees whose declarations AMN submitted actually testified "that they 'always' or 'usually' take uninterrupted lunches of at least 30 minutes" (1 AA 92:8–11; 2 AA 358–360, ¶¶3–6); in other words, nine employees admitted to not "always" or "usually" getting uninterrupted 30-minute lunches. Further, plaintiff's expert, a statistics professor, confirmed from AMN's own verified time records the instances of short and delayed meal periods for which AMN employees were neither asked to, nor could, waive their right to a compliant meal period or request the resulting penalty pay. (9 AA 2403–2408.) These records showed that, over five years, there were approximately 40,110 short meal periods and 6,651 delayed meal periods. (9 AA 2404–2405, ¶¶12–17.) Based solely on AMN's payroll records showing employees' current rates of pay, plaintiff's expert calculated that AMN owes the 500-member class no less than $802,077.08 in meal period penalties. (9 AA 2405–2406, ¶¶18–24.)

Even AMN's expert, a labor economist and statistician, admitted that its rounded time records showed some meal periods that were "shorter than 30 minutes" and some that "began after the employee's fifth hour of work." (8 AA 2168, ¶23.) But he asserted that this was offset by the class being paid 85 more hours based on their rounded, and not their actual, punch-in and punch-out times. (10 AA 2751–2752, 2756–2757 ¶¶7, 9, 25–26.) Based on this, he opined that the rounding was "facially and mathematically neutral" as applied to meal periods. (10 AA 2752, ¶11.) But, AMN's expert never factored in that employees' right to a one-hour pay penalty for each of the thousands of non-compliant meal periods would amount to much more than 85 extra hours of pay. (*Id.* at 2749–2757.)

III.
STATEMENT OF THE CASE

A. Operative Complaint and Meal Period Claim

Donohue filed the underlying wage and hour class action and representative action against AMN on April 23, 2014. (13 AA 3534.) In her operative, second amended complaint, Donohue alleged violations of the California Labor Code on her behalf and on behalf of a proposed class and representative group of AMN's current and former non-exempt nurse recruiters in California. (1 AA 8–12, ¶¶11, 12, 14–21.) Among other claims, Donohue alleged that AMN failed to

provide her and the putative class legally compliant meal periods or pay penalties for non-compliant meal periods. (1 AA 10–12, ¶¶16.c, 24–31.) Consistent with her notice letter under the Private Attorney General Act (PAGA), challenging AMN's "illegal rounding policy," Donohue alleged that its "time shaving" or "rounding" practices contributed to its failure to pay her and other employees their full compensation. (1 AA 10 14, ¶¶16.a; *id.* at 27–28, 35.)

B. Grant of Class Certification

On October 13, 2015, the trial court granted certification of a class of all California non-exempt former or current AMN nurse recruiters from April 23, 2010 onwards as to five of Donohue's six claims, including for failure to provide compliant meal periods. (4 AA 1013–1019.) Because AMN phased out its Team Time system on April 26, 2015, while this suit was pending, that date marks the end of the five-year class period for plaintiff's meal period claim. (7 AA 2206, ¶3; 8 AA 2206, ¶3 & 2164, ¶9; 9 AA 2403, ¶5.) There were approximately 550 or fewer members in the certified class for the meal period claim. (10 AA 2750–2751, ¶4.) The meal period claim that the trial court certified was as follows: Whether AMN's timekeeping system "alters the recorded meal periods and whether it fails to properly pay meal break penalties for shortened or delayed meal breaks." (4 AA 1016.) The trial court also determined that

AMN's defenses to the meal period claim, including "'Rounding' policies," could be resolved on a class-wide basis. (4 AA 1018.)

C. Summary Judgment for AMN

Over a year later, AMN moved for summary judgment, and Donohue cross-moved for summary adjudication as to, among other issues, the meal period claim. (7 AA 1955; 9 AA 2277.) On November 28, 2016, after concurrent briefing and a hearing, the trial court denied Donohue summary adjudication and granted AMN summary judgment in full. (9 AA 3470–3475.) As to the meal period claim, the trial court rejected plaintiff's evidence that, for example, the class was not paid 2,631.583 hours due to short or delayed meal periods. (9 AA 2408, ¶33.) According to the trial court, the uncompensated hours were offset by instances when time rounding caused AMN to overpay employees for a few extra minutes when they were not actually working, but on a meal break. (13 AA 3472–3473.)

D. Appeal and Petition for Review

Donohue unsuccessfully moved for reconsideration, and, once the trial court entered judgment in AMN's favor, timely filed the underlying appeal in February 2017. (*Donohue v. AMN Servs., LLC* (2018) 241 Cal.Rptr.3d 111, 121.) The Court of Appeal affirmed the judgment in its entirety on November 21, 2018 (*ibid.*), and later

granted two amici's requests to publish the decision. (*Donohue v. AMN Servs., LLC* (2018) 29 Cal.App.5th 117 (*Donohue*).)

As to the meal period claim, the Court of Appeal disagreed that time rounding as applied to meal periods eviscerates the guarantee of a timely and full 30-minute meal break, holding that rounding is as permissible in the meal period arena as in the overtime arena if it is fair and neutral on its face and as applied. (*Id.* at pp. 1082–1086, 1088–1089.) It affirmed the determination that AMN's rounding policy was neutral, facially and as applied to meal period punches, because, in the long run, it did not result in a failure to compensate employees for all the time they actually worked. (*Id.* at pp. 1088–1091.) The Court of Appeal also rejected plaintiff's evidence that AMN had a presumptive policy or practice of denying meal periods based on its verified time records, which showed numerous instances of short or delayed meal periods. (*Id.* at p. 1086–1088.) It concluded instead that the rebuttable time-record presumption only applies at the class certification stage, not at the merits-based summary judgment stage. (*Id.* at pp. 1087–1088 & fn. 25.)

This Court granted Donohue's timely petition for review on March 27, 2019 on the two issues quoted in the Issues Presented Section—(1) whether rounding practices can apply to meal period

time punches and (2) whether the time-record presumption should apply at summary judgment or trial, not just at class certification.

IV.
ARGUMENT

A. Time Rounding Eviscerates Two Long-Standing Meal Period Guarantees, Improperly Authorizing Meal Breaks of Less Than Thirty Minutes and Delaying Their Start After the End of the Fifth Hour of Work

California law has long guaranteed two basic meal period protections—(i) that employers must provide employees with meal periods of "not less than 30 minutes" (Labor Code, § 512 subd. (a); IWC Wage Order 5); ***and*** (ii) that meal periods must start "no later than the end of an employee's fifth hour of work[.]" (IWC Wage Order 4, § 11, codified as Title 8, § 11040, subd. 11; *Brinker, supra*, 53 Cal.4th at p. 1041.) When, as here, time rounding is used to calculate the duration and start of meal periods, it necessarily creates an erroneous exception to the guarantee of an *actual* 30-minute meal period that starts *at*, not after, the end of the fifth hour of work. By authorizing short or delayed meal periods for employees for the first time under California law, the Court of Appeal committed two fundamental errors of statutory interpretation—it misconstrued the meal period laws and wage orders contrary to their plain language, and it misapplied them to undermine their sole, legislative purpose.

1. Time Rounding Violates the Plain Language of Meal Period Provisions in the Labor Code and Wage Orders

This state's meal (and rest) period laws are governed by "two complementary and occasionally overlapping sources of authority"—the provisions of the Labor Code enacted by the Legislature, and a series of 18 wage orders issued by the Industrial Wage Commission (IWC) codified in regulations. (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 839 (*Troester*); *see also* Labor Code §§ 226.7, 512; IWC Wage Order 4, § 11, codified as C.C.R. Title 8, § 11040.) As this Court has frequently affirmed, "[t]he IWC's wage orders are to be accorded the same dignity as statutes," and take "precedence over the common law to the extent they conflict." (*Troester, supra*, 5 Cal.5th at p. 839; *Brinker, supra*, 53 Cal.4th at p. 1027.)

Meal and rest period provisions in both the Labor Code and relevant IWC wage orders provide bright lines on the precise timing requirements for full, timely, and compliant meal and rest periods:

- "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of *not less than* 30 minutes" (Labor Code, § 512, subd. (a) [emphasis added]);
- Per "section 512, subdivision (a), as under Wage Order No. 5, an employer's obligation when providing a meal period

is to relieve its employee of all duty for an uninterrupted 30-minute period. . . . [that starts] after no more than five hours [of work]" (*Brinker, supra*, 53 Cal.4th at pp. 1038, 1042);

- Employers must provide ten minutes of paid rest every four hours of a longer shift or ten minutes of paid rest after three and a half hours for shorter shifts (Code Regs., tit. 8, §§ 11010-11150, subd. (12)(A) & § 11160, subd. (11)(A));
- "An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission" (Labor Code, § 226.7, subd. (b));
- "If an employer fails to provide an employee a meal or rest or recovery period . . . the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." (*Id.*, § 226.7, subd. (c));

These meal period laws and wage orders are clear and unambiguous, providing employees the right to meal and rest periods of specified duration at stated intervals, or a one-hour pay penalty for each day of noncompliance. As a result, they need not be further interpreted.

Rather, these meal period laws and wage orders must be read literally and applied without "further inquiry":

> The task of interpretation is to determine the legislative intent, looking first to the words of the wage order, construed in light of their ordinary meaning and statutory context. . . . If the language of the wage order is clear, it is applied without further inquiry.

(*Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98, 107 (*Vaqureo*); *Gomez v. Superior Court (Felker)* (2012) 54 Cal.4th 293, 300 ["we first 'scrutinize the actual words of the statute, giving them a plain and commonsense meaning'"]; *Pineda v. Bank of Am., N.A.* (2010) 50 Cal.4th 1389, 1394 ["the words of the statute, '. . . generally provide the most reliable indicator of legislative intent.'"].)

Rounding to the nearest ten-minute increment violates the plain language of these timing requirements by deeming a 23-minute lunch that begins at 11:02 a.m. and ends at 11:25 a.m. to be a 30-minute lunch that begins at 11:00 a.m. and ends at 11:30 a.m. (9 AA 2326, 2368–2369.) Similarly, rounding undoubtedly characterizes as compliant a late meal period that begins four minutes later than the end of the fifth hour of work by rounding an arrival punch time of 8:27 a.m. and a meal period start at 1:31 p.m. to 8:30 a.m. and 1:30 p.m. respectively, making it seemingly start at exactly five hours. (9 AA 2327, 2374–2375.) Setting aside for now whether these encroachments are offset by occasional overpayments or justified by

efficiency or other reasons, there can be no valid construction of bright line meal period statutes and wage orders that authorizes even seemingly *de minimis* exceptions to their plain language. (*J. Paul Getty Museum v. Cnty. of Los Angeles* (1983) 148 Cal.App.3d 602, 606 [given evidence of "legislative intent" from the statue's "express language," "there is no need to resort to any maxim of statutory construction to discern the intent and scope of the [statute]"].)

Thus, the Court of Appeal erred by failing to interpret the meal period statutes and wage orders as plainly written, and by reading in an unstated rounding exception to an employee's entitlement to a 30-minute meal period no later than the end of five hours of work.

2. Time Rounding Also Contravenes the Express Legislative Intent Underlying Meal Period Laws to Protect Employee Health, Safety and Welfare

Within the already employee-protective general framework of California labor laws, the specific legislative intent behind meal and rest period laws and relevant IWC wage orders is to protect employee health and safety. This further prohibits importing rounding practices from the overtime to the meal period arena. The intentional focus on employee welfare underlying meal and rest period protections began with the IWC wage orders:

> Concerned with the health and welfare of employees, the IWC issued wage orders mandating the provision of meal and rest periods in 1916 and 1932, respectively.

> [Citation] The wage orders required meal and rest periods after specified hours of work.

(*Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1105 (*Murphy*); *id.* at 1113 ["health and safety considerations . . . are what motivated the IWC to adopt mandatory meal and rest periods in the first place"].) Subsequent wage orders dealing with meal and rest periods again recognized the importance of providing employees an opportunity to rest and recharge:

> The legislative history of the IWC's 1976 Wage Orders indicates that a "meal period is necessary for the welfare for employees" and that the "general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion."

(*Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1257; *Lazarin v. Superior Court (Total Western, Inc.)* (2010) 188 Cal.App.4th 1560, 1571 (*Lazarin*) [IWC adopted or amended working condition orders as to break and meal periods and rest days "consistent with the health and welfare of those workers"].)

Meal period statutes, including Sections 227.6 and 512 of the Labor Code, embody the same legislative intent as the IWC's wage orders, forming an integral "part of the remedial worker protection framework." (*Cal. Mfrs. Ass'n. v. Indus. Welfare Comm.* (1980) 109 Cal.App.3d 95, 115 [mandatory meal and break period rules address some of "the most basic demands of an employee's health and

welfare"]; *accord Indus. Welfare Comm. v. Superior Court (Cal. Hotel and Motel Ass'n)* (1980) 27 Cal.3d 690, 724.) While overtime rules protect employees' very important financial interests, courts have long recognized that meal periods protect employees' greater and fundamentally different interest in health, safety, rest, and freedom from the employer's control for an uninterrupted 30 minutes. (*Murphy, supra*, 40 Cal.4th at p. 1113 ["Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low wage workers who often perform manual labor."]; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 586 ["being forced to forgo rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks"]; Cal. Bill Analysis, A.B. 2509 Sen., 8/07/2000 ["widespread" practice of forcing farm workers to labor during either meal or break periods "contributes to increased job place injuries"].)

Given that full and timely meal periods protect such intangible and arguably incompensable health interests, even seemingly *de minimis* encroachments through rounding meal period punch times nullifies the sole intent and purpose of meal period protections—for employees to rest and recharge for "not less than" 30 minutes. (*Lazarin, supra*, 188 Cal.App.4th at pp. 1582–83

["'it may be difficult to assign a value to these noneconomic injuries'" related to non-compliant meal or rest periods] (citation omitted); *Vaquero, supra*, 9 Cal.App.5th at p. 111 ["The purpose of the break period is to rest, not to work"]; *Kaanaana v. Barrett Bus. Servs., Inc.* (2018) 29 Cal.App.5th 778, 801 (*Kaanaana*) [rejecting "*de minimis*" intrusions of three to five minutes into employees' 30-minute meal period when they were subject to their employer's control]; *Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 524 (*Carrington*) [declining *de minimis* defense to late meal periods].) As this Court noted in the analogous context of ten-minute rest periods at specified work intervals, the "strict adherence" to the Labor Code's bright line requirements has required it to "scrupulously guard[] against encroachments on this 10-minute period." (*Troester, supra*, 5 Cal.5th at p. 844 [few extra minutes of work each day add up]; *Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal.5th 257, 265 (*ABM Security)* [given "parallel treatment" of meal and rest periods, for failing to provide either of which the statutory premium-pay remedy is the same, both have the same "protective purpose" and impose the same obligations on employers].)

Any exception to the guarantee of a timely, "not less than" 30-minute meal period violates this Court's oft-repeated mandate that

courts must interpret the Labor Code and wage orders liberally, adopting the construction "that best gives effect to the purpose of the Legislature and the IWC" to protect employees from unfair working conditions. (*ABM Security, supra*, 2 Cal.5th at p. 262; *Troester, supra*, 5 Cal.5th at p. 839; *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667; *Brinker, supra*, 53 Cal.4th at pp. 1026–1027; *Murphy, supra*, 40 Cal.4th at p. 1103.)

Thus, the Court of Appeal erred by failing to apply meal period laws to further their sole legislative purpose, mistakenly authorizing delayed or short meal periods that fail to protect employee health, minimize safety risks, or provide freedom from employer control.

B. Time Rounding of Meal Period Punch Times Is Not Neutral On Its Face or As Applied, Harms Employees In Ways That Cannot Be Offset, and Does Not Advance Administrative Ease or Other Efficiencies

At AMN's urging, the Court of Appeal improperly justified applying time rounding practices to meal period time punches based on three inapplicable, flawed considerations that do not support creating an exception to bright line meal period guarantees. All time rounding accomplishes is to help for-profit employers like AMN make or save more money at the expense of their employees' welfare.

1. While Time Rounding Allows Work Hours and Compensation To Be Calculated with Negligible Errors, Its Incremental Encroachment on Meal Periods Eviscerates the Underlying Protections Altogether

To understand why time rounding does not transfer from the overtime and wage context, in which it arose decades ago, to the meal period arena, the history and origin of rounding becomes important. The term "rounding" comes from a section in the Federal Code of Regulations enacted in 1962 titled "Use of time clocks" which describes rounding as a practice "particularly where time clocks are used," "of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour." (29 C.F.R. § 785.48, subd. (b).) Even though rounding could lead to discrepancies of up to 15-minute intervals—sometimes to the employer's benefit when time is rounded up and sometimes to the employee's benefit when rounded down—the rationale was that "this arrangement averages out so that the employees are fully compensated for all the time they actually work." (*Ibid.*)

Based on this, California state and federal courts had upheld rounding, until now, in the overtime context as a convenient tool for calculating employees' *total hours worked* and *wages owed* as long as rounding is applied in a way that is not detrimental to employees:

> [A]ssuming a rounding-over-time policy is neutral, both facially and as applied, the practice is proper under California law because its net effect is to permit employers to efficiently calculate hours worked *without imposing any burden on employees.*

(*See's Candy Shops, Inc. v. Superior Court (Silva)* (2010) 210 Cal.App.4th 889, 903 (*See's Candy I*) [emphasis supplied]; *accord Corbin v. Time Warner Entertainment–Advance/Newhouse Partnership* (9th Cir. 2016) 821 F.3d 1069, 1076 [rounding offers "employers a practical method for calculating work time and a neutral calculation tool for providing full payment"].) Despite the benefit of this historical development of the law, the Court of Appeal in *Donohue* became the first to announce that time rounding may be legally exported from the overtime to the meal period arena if it is fair and neutral. (*Donohue, supra*, 29 Cal.App.5th at pp. 1082–1091.) But the Court of Appeal got it wrong, starting with its premise that overtime and meal period laws are comparable or analogous.

Admittedly, using time rounding as a wage calculation tool in the overtime arena has been deemed fair and neutral where, in the long run, employees paid a few minutes less one day because of rounding up are theoretically paid a few minutes extra another day due to rounding down. This protects employees' financial interest in fair wages, including earning time-and-a-half pay for work beyond an eight-hour day. But this rationale does not transfer to the meal

period context, where employees' interest in strict enforcement of meal period protections is not that they are fully compensated for all their work, but that they get an uninterrupted, 30-minute meal period to rest, recharge, be free of the employer's control, and even attend to personal matters. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255 [meal periods are "*not* aimed at protecting or providing employees' wages," but instead concerned with "ensuring the health and welfare of employees" (emphasis added)]; *Cal. Mfrs. Assn. v. Indus. Welfare Comm., supra*, 109 Cal.App.3d at pp. 114–115 ["health and safety considerations (*rather than purely economic injuries*)" led to the adoption of mandatory meal and rest periods (emphasis added)].)

Even the penalty under Section 226.7 of an extra hour's pay for a non-compliant meal period per workday addresses the risk to employees' health from a non-compliant meal period, instead of trying to pay them a fair wage for it. (*Murphy, supra*, 40 Cal.4th at p. 1113 [Section 226.7 pay penalty addresses "the noneconomic injuries employees suffer from being forced to work through rest and meal periods."]; *Naranjo v. Spectrum Sec. Servs., Inc.* (2009) 172 Cal.App.4th 654, 666 [one-hour "premium wage" penalty in excess of time worked during a non-compliant meal period compensates an employee "for the adverse condition (i.e., the potential hazard to

their health and welfare from the denial of rest and meal breaks)"]; Cal. Bill Analysis, A.B. 2509 Sen., 8/07/2000 [pay penalty is an enforcement tool to ensure future compliance with prohibition on forcing employees to work during meal or break periods].)

Thus, a rounding policy might be neutral on its face and as applied in the overtime arena because, in the long run, it does not interfere with the underlying right it guarantees—that is, *fair* wages for all time worked. But the same policy cannot be neutral in the meal period arena because, whatever wages it pays them in the long run, it still eviscerates employees' non-economic, incompensable interest in health and safety by distorting the start or duration of meal periods to make them *seem* compliant. The trial court failed to even recognize this important difference in rationale behind allowing rounding in the overtime context versus in the meal period arena in granting AMN summary judgment on the meal period claim:

> [P]laintiff argues that no case has ever applied rounding to "meal breaks." Even if true, the rationale behind allowing rounding for work time would be the same for meal break time. Plaintiff highlights a distinction without a difference.

(13 AA 3472.) The Court of Appeal compounded this error when it rejected, as "hypothetical," Donohue's argument that "a rounding policy should *never* be applied to meal periods because to do so 'would quickly eviscerate employee[s'] statutory right to full 30

minute meal periods,' especially in the context of rounding to the nearest quarter hour." (*Donohue, supra*, 29 Cal.App.5th at p. 1090.)

But there is nothing hypothetical about the recognized fact that every minute matters in policing the requirement that employers provide uninterrupted meal periods of "not less than" 30 minutes: "'When time is scarce, minutes count. On a 30 minute break, time is scarce.'" (*Kaanaana, supra*, 29 Cal.App.5th at p. 801; *cf. also, Troester, supra*, 5 Cal.5th at p. 847 ["a few extra minutes of work each day can add up" to not be "de minimis at all to many ordinary people who work for hourly wages"]; *cf. also*, DLSE Manual, § 45.3.3 (Apr. 2017) [because IWC wage order mandates that rest period must last ten minutes "net," employer may not count periods of less than ten minutes as rest periods, except for certain workers in extended care homes].)

By importing time rounding to meal period time punches because it was authorized in the overtime arena by *See's Candy I*, the Court of Appeal mistakenly divorced both the practice of time rounding and the labor provisions from their respective rationales—as an administrative tool to calculate all hours worked and related compensation for those hours. This is why the California Division of Labor Standards Enforcement never once mentions meal periods in provisions on "rounding" in its Enforcement Policies and

Interpretations Manual (DLSE Manual), which only lists rounding as a tool to calculate *hours worked.* (DLSE Manual, §§ 47, 47.3 (Apr. 2017). Nor does any of the several sections in the DLSE Manual devoted to meal period obligations and rights—which mirror the Labor Code and IWC wage orders on mandatory meal periods—mention, discuss or contemplate time rounding. (*Id.*, § 45-1.)

In addition to ignoring the interpretation memorialized in the DLSE Manual by the state agency charged with its enforcement, the Court of Appeal also overlooked that the rationale for allowing time rounding in the overtime arena *is* tied to the very different purpose of overtime rules to pay fair wages, as this Court recently recognized:

> [C]ritically, *See's Candy* rested its holding on its determination that the rounding policy was consistent with *the core statutory and regulatory purpose that employees be paid for all time worked.* Starbucks argues for a departure from that principle, and we conclude no such departure is warranted in this case.

(*Troester, supra,* 5 Cal.5th at p. 833.) AMN turned this proposition on its head, arguing erroneously that there was no support for plaintiff's position that the *See's Candy I* rule authorizing rounding should be read to contain an unstated exception for meal period time punches. (Resp. Br. at p. 16.) The Court of Appeal mistakenly agreed:

> This standard [in *See's Candy I*] contains no limitation to suggest it does not apply (or should not be applied) to meal periods. Neither Donohue's briefs nor our independent research has disclosed any such limitation,

> and the policy that we considered, applied, and resulted in our decision in *See's Candy I, supra*, . . .—namely, "recogni[tion] that time-rounding is a practical method for calculating worktime and can be a neutral calculation tool for providing full payment to employees"—applies to the timekeeping of meal periods as well as to the timekeeping of the beginning of an employee's shift as in *See's Candy I*.

(*Donohue, supra*, 29 Cal.App.5th at pp. 1989–1090.) But because the adoption of time rounding in *See's Candy I* was, in fact, *tied to* and *borne out of* the purpose underlying both rounding practices and overtime rules, there was (and is) an unstated, implicit limitation of time rounding as a tool that has only been approved in that arena.

Given the fundamentally different rationales behind overtime and meal period laws, the possibly neutral use of time rounding in the first arena does not transfer to the second, where it only distorts the statutory purpose of meal period guarantees. (*Troester, supra*, 5 Cal.5th at p. 833 [rejecting federal *de minimis* doctrine for state law claim for failure to pay supervisors for a few minutes of work before and after they clocked in and out because it was contrary to the purpose of relevant Labor Code provisions and IWC wage orders].)

2. Being Paid for a Few Extra Minutes of Work When Employees Are Actually On Meal Breaks Due to Time Rounding Does Not Offset the Health Deficits or Forfeited Pay Penalty From Noncompliant Meal Periods

The Court of Appeal's second rationale for authorizing time rounding of meal period time punches was that AMN's rounding policy is neutral, facially and as applied, to meal periods. Not so.

Time rounding is *not* neutral on its face in the meal period context because, even if the employer rounds the time up and down with the same frequency, employees lose the right to a full, timely meal period on certain workdays, as well as to a premium penalty of an extra hour's pay for a non-compliant meal period. Once lost, this time to rest and recharge can never be recovered. Nor can any pay penalty be sought when, as here, an automated rounding system makes the meal period seem compliant. As even AMN's expert admitted, AMN's records showed that employees experienced some short and delayed meal breaks over the five-year class period. There is no evidence that the statutory pay penalty was ever paid to employees for any of these meal period violations.

Nevertheless, the Court of Appeal faulted Donohue for certifying AMN's compliance with meal period laws at the end of each pay period and failing to provide evidence that she had either reported any non-compliant meal periods. But, as Donohue testified,

she signed the bi-weekly certification because she could not submit her timecard or get paid otherwise, and not to "certify" that she always received compliant meal and rest breaks. (10 AA 2652, ¶3.) And, due to automatic rounding, the timekeeping system failed to even flag non-compliant meal periods, hiding the violations from everyone, including employees who do not keep their own "parallel" time records to track punch times:

> Software can also create information asymmetries. *Employees who lose pay as a result of rounding may not know about the software functionality or their lost wages, unless they keep meticulous parallel time records of their own (an unlikely assumption).*

(CHARLOTTE S. ALEXANDER AND ELIZABETH TIPPET, *The Hacking of Employment Law* (Fall 2017) 82 MO. L. REV. 1, 974 [emphasis added].) Under these circumstances, drawing a negative inference from an employee's failure to report the employer's meal period non-compliance impermissibly shifts the burden of keeping accurate time records from the employer to the employee.

Contrary to the Court of Appeal, AMN's rounding policy is also *not* neutral as applied because, as Donohue's expert established, it caused class members to experience thousands of short and delayed meal periods over five years for which no penalty was paid (40,110 short meal periods and 6,651 delayed meal periods). The Court of Appeal mistakenly rejected plaintiff's expert testimony about how

rounding was actually applied at AMN, asserting that he improperly only looked at actual punch times, not rounded punch times, to calculate whether meal periods were non-compliant.

But AMN indisputably used rounded punch times, not actual punch times, to calculate both the hours its employees worked and its compliance with meal period laws. Therefore, the only way to examine whether rounding negatively impacted employees was to evaluate whether the actual times *without* rounding would have led to full and timely meal periods instead of short or delayed meal periods. As AMN's expert admitted, "AMN paid employees on the basis of rounded punches, rather than actual punches" during the class period. (10 AA 2752, ¶10.) Plaintiff's expert's methodology was thus sound in trying to determine whether rounding of employees' *actual* punch times was detrimental to their right to a full and timely meal period each workday, and, therefore, not fair or neutral.

The Court of Appeal also criticized plaintiff for failing to offset minutes lost during a meal period one day to those gained another day. But it is only by comparing apples to oranges that employees' loss of compliant meal periods can be deemed offset either (1) through compliant or longer meal periods another day or (2) by being paid occasionally for a few extra minutes when they were actually on a break whose end time was rounded down. In

reality, losing time to rest, recharge, be free of employer control, and attend to personal tasks can *never* be offset or nullified by a break that lasts longer than 30 minutes or starts on time on a different day. (*Murphy, supra*, 40 Cal.4th at p. 1113 [focusing on "lack of a perfect correlation between the section 226.7 remedy and the employee's economic injury" ignores "the noneconomic injuries employees suffer from being forced to work through rest and meal periods."].)

Nor does it matter that, according to AMN's expert, the average meal period was 45.6 minutes long based on rounded time entries over the entire class period. (8 AA 2169, ¶31.) By using the rounded numbers, AMN's expert made it impossible for the "average" meal period to be anything *but* longer than 30 minutes. Even if the expert's methodology were proper, the stress, lack of rest, and other negative health impacts and safety risks from even occasional non-compliant meal periods only accumulates over time notwithstanding employees' ability to take full, longer, or timely meal periods on other days during the same time. (*Murphy, supra*, 40 Cal.4th at p. 1113 [noting the greater risk of work-related accidents and increased stress for employees from the denial of rest and meal periods].) That rounding makes a short or delayed meal period seem compliant is a separate, independent harm that is not offset either by getting a longer or timely meal period another day or

being paid for all hours worked in the long run. As a result, it fails the test for neutrality used in the overtime and wage arena on which the Court of Appeal relied. *(E.g., Corbin v. Time Warner* (9th Cir. 2016) 821 F.3d 1069, 1076 [finding practice of rounding punch-in and punch-out times to the nearest quarter hour neutral because employees gained and lost work minutes and compensation at the same rate in the long run, even if not at every pay period].)

Finally, when the Court of Appeal agreed with AMN's expert that its rounding policy was neutral because class members were overpaid for approximately 85 extra hours as a result of their rounded punch times as compared to their actual times (*Donohue, supra*, 29 Cal.App.5th at p. 1090 & fn. 29), it ignored a fundamental flaw in this analysis. That flaw is that the above scenario does not factor in the automatic, mandatory penalty of an extra hour's pay for each non-compliant meal period per workday. (*See* Labor Code, § 226.7, subd. (c) [if employer fails to provide employee with meal, rest, or recovery period in accordance with law, "the employer ***shall*** pay the employee one additional hour of pay at the employee's regular rate of compensation"] (emphasis added); *Safeway, Inc. v. Superior Court (Esparza)* (2015) 238 Cal.App.4th 1138, 1155 ["the employee is 'immediately' entitled to this premium wage, without any demand or claim to the employer"].)

A few extra minutes of pay here and there while the employee was actually on a meal break cannot add up to be greater than the statutory penalty of *an extra hour's pay* for the thousands of short or delayed meal periods per workday plaintiff's expert calculated. Yet AMN's expert, and the Court of Appeal, failed to offset the alleged overpayment of 85 extra hours to employees against the amount they would be owed as a statutory penalty for each of the thousands of non-compliant meal periods over the five-year class period.

The error in the Court of Appeal's conclusion that time rounding is neutral in the meal period context is further exemplified by its reasoning that the neutrality is not based on the frequency of penalties, but "how often the application of the rounding policy results in rounding up and rounding down." (*Donohue*, 29 Cal.App.5th at p. 1090.) In reality, a rounding policy is only neutral, even in the overtime arena, if "its net effect is to permit employers to efficiently calculate hours worked without imposing any burden on employees." (*See's Candy I, supra*, 210 Cal.App.4th at p. 903.) In the meal period context, a rounding policy's net effect can only avoid imposing a burden on employees if it *both* somehow offsets occasional violations with over-compliance, *and* allows the employee to collect statutory penalties for the employer's non-compliance. But, for the reasons discussed, when the non-compliance exacts a health

and safety detriment, as in the meal period context, there can *never* be any over-compliance to offset it. All the more so if, as here, the few extra hours of pay to employees while they were on a break cannot compare to the statutory pay penalty they lose for thousands of non-compliant meal periods. As a result, the net effect of rounding meal period punches is to impose a double burden on employees—occasional non-compliance that both harms their health and safety permanently and denies them the automatic statutory pay penalty.

Notably, when the Court of Appeal dismissed the lost pay penalty as mostly irrelevant to its neutrality analysis, it supplanted the Legislature's determination with a judicial view of what might fully compensate employees for the loss of a compliant meal period. Courts, however, are generally ill-equipped to weigh competing remedies and determine policy, which is better left to legislative bodies. (*Cf. Roper v. Simmons* (2005) 543 U.S. 551, 618 [legislatures are "better qualified" than courts to weigh and evaluate which view of science is better]; *Wisconsin v. Yoder* (1972) 406 U.S. 205, 234–235 [recognizing "obvious fact" that not being school boards or legislatures, courts are ill-equipped to determine necessity of discrete aspects of state's compulsory education program]; *Wells Fargo Bank v. Superior Court (Wertz)* (1991) 53 Cal.3d 1082, 1099 [it is not the judiciary's role to second-guess the wisdom of the

Legislature's choices]; *accord Citizens for Parental Rights v. San Mateo Cnty. Bd. of Educ.* (1975) 51 Cal. App. 3d 1, 32].)

The Court of Appeal deemed time rounding of meal periods neutral only by erroneously focusing on whether an employer like AMN rounded employee punch times up and down equally, while (1) ignoring that a short or delayed meal period one day can never be offset by a timely, full, or even longer one another day, and (2) dismissing the lost statutory pay penalty as largely irrelevant.

3. Instead of Providing Administrative Ease, Obsolete Rounding Practices Hide Violations Noted In Systems That Record Punches to the Minute, Letting Employers Profit at the Expense of Their Employees' Welfare

Although not expressly stated, the Court of Appeal's opinion suggests that authorizing rounding practices in the employment law arena generally creates presumed administrative efficiencies for the employer without harming the employee. In fact, the record is to the contrary. As addressed in Donohue's supplemental brief to the Court of Appeal following this Court's decision in *Troester*, time rounding is technologically outdated, and is being exploited to benefit employers' bottom line at the expense of their employees' well-being. (*See* Letter Br. at p. 4 (Aug. 8, 2018).)

As discussed, rounding regulations were enacted over 55 years ago, when only analog time clocks or handwritten timecards were in

use at most workplaces. (*E.g.*, 29 C.F.R. 785.48.) Rounding practices thus address a problem that no longer exists in the modern business world. (*Ibid.* [discussing that time rounding began on factory floors, where hundreds or thousands of employees would wait in line to "punch-in" or "punch-out" of a single time clock]; ELIZABETH TIPPETT, *et al.*, *When Timekeeping Software Undermines Compliance* (2017) 19 YALE J. L. & TECH. 1, 38 ["rounding rules represented a practical allowance from a predigital era, where computing time sheets by hand, by the minute, would have been extremely burdensome].) Given technological advances, there is no need to adopt rules based on concerns that no longer exist:

> [M]any of the problems in recording employee worktime discussed in *Anderson* [*v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680] 70 years ago, when time was often kept by punching a clock, may be cured or ameliorated by technological advances that enable employees to track and register their worktime via smartphones, tablets, or other devices. We are reluctant to adopt a rule purportedly grounded in "the realities of the industrial world" (*Anderson, supra*, 328 U.S. at p. 692) when those realities have been materially altered in subsequent decades.

(*Troester, supra*, 5 Cal.5th at p. 846.) Here, AMN's Team Time computer system automatically recorded employees' punch in and punch out times to the exact minute, including for meal periods. (9 AA 2324, 2368–2372.) Thus, there is no need for rounding to either pay employees for all the time they worked or to ensure meal

and rest period compliance. (TIPPETT, *et al.*, 19 YALE J. L. & TECH. at p. 38 [no "efficiency-based justification exists for incorporating rounding into timekeeping software, which can both track and compute time at the millisecond level, automatically."].)

Rounding is actually more inefficient on electronic timekeeping systems as employers have to first record the precise times employees clocked in and out to start and end their shifts or meal periods, and then go the extra step of rounding that time to calculate compensation, meal and rest period compliance, and pay penalties. (9 AA 2337–2339.) Thus, employers gain no administrative ease by rounding the start and end punch times for meal periods, but rounding actually curtails, or at least has the potential to curtail, employees' meal period guarantees.

This begs the question—if rounding is inconvenient and systems already record actual punch times, then why do employers like AMN (and the employer-organizations who appeared as amici) advocate for a rounding practice that alters the exact start and end times of employee meal periods, and creates less accurate records? Subject to proof at future trial, plaintiff is seeking to develop evidence that the widespread use of rounding is highly profitable for employers by cutting costs and circumventing basic labor protections across various industries. For example, a leading payroll

system provider promises employers that "evaluating your punch rounding scheme can save you both time and money on a remarkable scale." (LAUREN NAWFEL, *Megan's Maxims-Controlling Costs* (June 8, 2018) available at https://www.kronos.com/blogs/working-smarter-cafe/megans-maxims-controlling-costs.) Another leading timecard provider explains that employers can use its products to "[s]ave an average of 40 minutes per week per manager with automated alerts, timecard approvals, scheduling, exception reports and more." (ADP, *Time and Attendance*, available at https://www.adp.com/what we offer/time and attendance.aspx.)

Scholars in the field also warn that technological advances in timekeeping software are being exploited by employers to round employee times and undermine wage and hour compliance without employees' knowledge:

> [S]oftware's gradual accession in the workplace is not all positive. Using software, firms can implement systems that are largely consistent with existing laws but avoid or evade rules on the margin. For example, time-keeping programs can be set to 'round' hourly employees' timecards to the nearest quarter-hour. Though any given employee might lose only a few minutes per day, software's ability to automate this function and apply it across an entire workforce can result in significant losses – and wage and hour law violations – in the aggregate.

(ALEXANDER & TIPPET, *supra*, 82 MO. L. REV. at p. 974.) Rounding is thus no longer being used for its intended purpose of calculating

hours and processing payroll efficiently, with least managerial time. Instead, it is being used as a tool to save employers time and money regardless of the adverse, cumulative impact on their employees. This is true even when rounding policy *appears* to be fair and neutral on its face because, as discussed above, rounding as applied to already short, 30-minute meal periods creates small discrepancies that advantage employers without being noticeably harmful:

> [R]ounding remains a key feature in timekeeping software because it can be used to favor the employer's interests over the employee's, in the aggregate. While courts do not permit overtly unfair rounding rules, facially neutral rounding rules can act like casino odds when they interact with employer attendance policies – consistently favoring "the house."

(TIPPETT, *et al.*, 19 YALE J. L. & TECH. at p. 38.)

In today's world, rounding does not merely free the employer from policing whether the employees it relieved of duty for the designated time do any work during the meal period. (*Brinker, supra*, 53 Cal.4th at pp. 1034, 1041). Instead, rounding covers up meal period violations wholesale by changing punch times of non-compliant meal periods to make them seem compliant. Though this is, indeed, a benefit of rounding, it is not, and should not be, a legal one. And it is not isolated to just a few employers; as shown by evidence AMN submitted, and the representations of amici who sought publication of the *Donohue* opinion, rounding is used by a

high percentage of employers across the country. (5 AA 1153, ¶5; CELC Letter at pp. 1–2 (Dec. 3. 2018) [noting, as organization of "approximately 80 major California employers" that "[n]umerous of our members utilize rounding policies like the policy described in your Opinion"]; Employers Group Letter at pp. 1–2 [acknowledging, as organization representing "nearly 3,000 California employers of all sizes and a wide range of industries, which collectively employ nearly 3 million employees," that many of its members "use timekeeping systems which employ 'rounding' principles"].)

Without this Court's intervention, rounding as now authorized in the meal period arena creates the potential to endanger millions of employees' meal period protections across this State.

C. Consistent With Its Origins and Rebuttable Nature, The Time-Record Presumption Should Apply At Any Stage of A Case If Time Records That Employers Must Maintain Accurately Show Meal Period Violations

Donohue weakens another doctrinal protection: The Court of Appeal's decision undermines employees' use of the time-record presumption against employers by artificially and categorically limiting its application to the class certification stage, and never for summary judgment (or presumably trial). This conflicts with both the presumption's origin and its rebuttable nature. Clarification is

needed given inconsistent treatment by intermediate courts and this Court's depublication of certain decisions limiting the presumption.

1. Because It Arises From an Employer's Duty to Keep Accurate Time Records, the Time-Record Presumption Should Apply at Any Stage of a Case

California has long required employers to retain accurate employee time records that, among other things, reflect the time employees spend at work and on meal periods. (Labor Code, §§ 226, subd. (a) & 1174, subd. (d) [requiring accurate records of hours worked daily]; IWC Wage Order 4-2001, Cal. Code Regs., tit. 8, §§ 11040, subd. (7)(A), 7(A)(3) & 11(A) [requiring accurate information when the employee begins and ends each work period, meal periods, split shift intervals and total daily hours worked].) It was based on this statutory duty to retain accurate time records that Justice Werdegar proposed in her concurrence in *Brinker* that evidence of Labor Code violations within time records—including missing, shortened or delayed meal periods—should give rise to a "rebuttable presumption" of a meal period violation. (53 Cal.4th at p. 1053 [describing presumption as arising from and consistent with the policy underlying meal period recording requirement].)

Given that the time-record presumption flows from employers' existing duty to accurately record employee meal periods, it was wrong for the Court of Appeal in *Donohue* to follow a minority of

other courts in concluding that the presumption only applies at the procedural class certification stage. (*Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 254 (*See's II*) [rejecting time-record presumption at summary judgment], *review den.* Mar. 22, 2017.) Admittedly, issues of commonality, ascertainability, and typicality pervade the certification inquiry, while summary judgment evaluates the merits of the claims. But the *Donohue* Court incorrectly reasoned that the burden-shifting standard inherent in summary judgment (or at trial) contradicts applying the time-record presumption at that stage. (29 Cal.App.5th at p. 1088 & fn. 25.) In reality, burden shifting also occurs at the class certification stage, where plaintiffs must establish that the employer has a policy or practice of the violations at issue that can be adjudicated class-wide, shifting the burden to the employer to show that individual issues predominate.

Where, as here, an employer has a stated policy to provide compliant meal and rest periods, but its records show thousands of short or delayed meal periods, the time-record presumption can and should apply, period. The procedural posture of the case does not matter as long as the showing of a common practice of violations is limited to the inquiry at hand. Thus, at certification, the showing would be that there is a common practice that can be tried on a class-wide basis. At summary judgment, the showing would be that the

class experienced the common practice that constitutes the violation. At each stage, the employer would have the same opportunity to rebut the presumption. Applying the presumption as a burden-shifting mechanism at any stage is all the more appropriate when it does not conflict with, but rather, is consistent with, other evidence of the employer's practices. Here, for example, the presumption is consistent with evidence of a workplace culture that discouraged employees from taking meal periods and rest breaks despite the company's written policy allowing compliant meal periods.

Though several other courts have, indeed, adopted the presumption only during the class certification inquiry, they did not do so because of this procedural happenstance, but based on the duty California places on employers to maintain accurate time records. (*E.g.*, *ABM, supra,* 19 Cal.App.5th at p. 311 [since employers must record their employees' meal periods, "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided"]; *Safeway, supra*, 238 Cal.App.4th at pp. 1159–1160 [time records kept by employer, as required, that showed lack of lawful meal periods created a presumption that meal period violations existed, shifting the burden to the employer that it did relieve employee of duty but employee

waived meal period]; *Lubin, supra*, 5 Cal.App.5th at p. 951 [spreadsheet generated by employer can be used to show which employees had a paid on-duty meal period given employers' duty to record their employees' meal period].)

The employers' duty to maintain accurate time records—which is the foundation of the presumption—remains the same at every stage. (*Bradley v. Networkers Internat'l, LLC* (2012) 211 Cal.App.4th 1129, 1144–1145.) Under these circumstances, artificially limiting the time-record presumption from being used at summary judgment (or trial) undermines an important tool in employees' arsenal to use evidence uniquely in the employers' possession to prove class-wide meal period violations on the merits.

2. The Rebuttable Nature of the Time-Record Presumption Allows Employers to Establish Meal Period Compliance at Certification, Summary Judgment, or Trial

As the cases acknowledge, an employer against whom the presumption arises may still rebut the presumption with testimonial, expert, or documentary evidence that it timely relieved employees of duty for a full 30-minute meal period or that an employee waived the compliant meal period. (*Safeway, supra*, 238 Cal.App.4th at pp. 1159–1160.) The rebuttable nature of the presumption addresses the concern that applying the time-record presumption at summary judgment might upend the substantive law that employers only need

to provide the opportunity for employees to take a compliant meal period, and impose liability based merely on time records showing that employees work through meal periods with their employer's knowledge. This is because, even after the presumption arises, employers can establish that time records notwithstanding, employees consented to work through meal periods or waived the right to meal period penalties.

Even AMN argued on appeal that, whatever its time records presumptively evidenced in terms of short, late or missing meal periods, it could prove through expert, testimonial, and other evidence that it complied with meal period laws and wage orders. (Resp Br. at p. 28 ["AMN subsequently met its summary judgment burden to rebut that presumption by providing voluminous evidence of meal period compliance"].) Moreover, the issue of whether employees waived a compliant meal period has always been an affirmative defense, which is incumbent on the employer to prove regardless of whether the time-record presumption applies:

> An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it.

(*Safeway*, 238 Cal.App.4th at 1159-60.) Thus, the presumption would have been applied consistent with all the evidence and without prejudicing AMN's ability to defend itself on the merits because its time records confirmed thousands of deficient time entries. Moreover, it was undisputed that AMN had no employee waivers of the shortened and delayed meal periods at issue—or evidence of paying related pay penalties—because AMN's Team Time system never flagged these violations due to rounding. Additionally, there was other evidence of a workplace culture that promoted such noncompliance with meal period and rest breaks.

3. Confusion in the Intermediate Courts Coupled With This Court's Depublication of Certain Cases Rejecting, Limiting, or Ignoring the Presumption Further Signals that Uniformity of Decisions is Necessary

Some courts have adopted the time-record presumption without question and some with caveats. Six days after deciding *Donohue*, the same Court of Appeal in a different published case approved using the presumption at trial, when used in conjunction with other evidence, to affirm liability and damages for meal break violations. (*Carrington, supra*, 30 Cal.App.5th at p. 527.) The lack of consistency and confusion has also reached federal and state trial courts confronted with the issue, as exemplified by the following:

- *Torres v. Goodwill Indus. of San Diego Cnty.* (July 18, 2018) Case No. D072271, 2018 WL 3454932, at pp. *10–*11 [trial court did not abuse its discretion by declining to apply time-record presumption because it came from Justice Werdegar's concurring opinion];
- *Manigo v. Time Warner Cable, Inc.* (C.D. Cal. Oct. 17, 2017) No. CV 16 06722 JFW (PLA), 2017 WL 5054368, at p. *4 [time records alone cannot create triable issue of fact regarding meal period compliance];
- *Roth v. CHA Hollywood Med. Ctr., L.P.* (C.D. Cal. Oct. 25, 2013), No. 2:12 CV 07559 (ODW), 2013 WL 5775129, at p. *5 [denying class certification for lack of common questions because plaintiff contended missed breaks could be determined from employment records];
- *Rojas Cifuentes v. ACX Pac. Northwest Inc.* (E.D. Cal. 2018) Case No. 2:14-cv-00697-JAM-CKD, 2018 WL 2264264, at p. *9 [collecting federal cases applying time-record presumption "as persuasive authority"];
- *Seckler v. Kindred Healthcare Operating Grp., Inc.* (C.D. Cal. Mar. 5, 2013) No. SACV 10 01188 DDP, 2013 WL 812656 at p. *8 ["if a meal period is not taken by the employee,

the burden falls on the employer to rebut the presumption that meal periods were not adequately provided"].)

Review and clarification from this Court is badly needed before the confusion progresses any further.

All the more so as this Court has ordered depublication of a series of cases that refuse to apply, limit the use of, or otherwise ignore the *Brinker* concurrence's rebuttable presumption. (*See, e.g, In re Walgreen Co. Overtime Cases* (2014) 231 Cal.App.4th 437 [depublished February 18, 2015, after trial and appellate court rejected the time-record presumption when denying certification of a proposed meal period class]; *Hernandez v. Chipotle Mexican Grill* (2012) 208 Cal.App.4th 1487, n.7 [review denied and depublished December 12, 2012 after Second District Court of Appeal rejected plaintiff's argument that employer could not rely on the inaccuracy of its own records to defeat certification of a meal period and rest period class]; *Lamps Plus Overtime* Cases (2012) 209 Cal.App.4th 35, n.8 [review denied and depublished December 12, 2012 after Second District Court of Appeal rejected argument based on *Brinker* that employer's failure to keep accurate time records creates a rebuttable presumption that violations occurred, and supports certification].) As a result, the only published case left standing to reject the presumption, besides *Donohue and See's II*, is *Serrano v.*

Aerotek, Inc. (2018) 21 Cal.App.5th 773, in which the First District Court of Appeal rejected the use of time records showing late and missed meal periods to create a presumption of violations because the employer is only required to provide compliant meal periods, not ensure that employee takes them. (*Id.* at p. 778.)

Decisional law conflicts on when to apply the time-record presumption to cases involving meal period violations. Though depublication does not carry any precedential value, this Court's depublication of some of these opinions has resulted in speculation and confusion about the state of the law on this subject in California. Regardless of the facts of any particular case, adopting the time-record presumption as law is hardly a radical step. The time-record presumption already aligns with employers' record keeping duties. It provides employees a tool to prove up meal period violations using an employer's standard time record evidence. It lets employers rebut the evidence. And it allows them to implement a system to have employees confirm when shortened or missed breaks are voluntary.

Without the presumption, employers will argue (like AMN has) that every individual must be brought into Court to be asked why their time records show short or missing breaks before a violation can be proven. This is an unfair burden to place upon California employees given the mandate of accurate records. These

individualized inquiries would surely be the death knell of class and representative action meal period cases. If this Court adopts the presumption from a proposal to a rule of law, it will also promote employers' compliance with meal period laws and reaffirm that their existing purpose is to place onus on employers to accurately track their employees' meal periods. Adopting this presumption as law (as many courts have done) will further uphold the employee protective nature of the meal period laws, providing employees a straightforward tool to prove meal period violations in a class, or representative, action.

A decision by this Court on this aspect of *Donohue* is necessary to uniformly develop the rule that the rebuttable presumption is the law and not a proposal to be given varying weight, and that it can be used at *both* the class certification and summary judgment stages.

VI.
CONCLUSION

When it authorized the use of time rounding practices to calculate the start and duration of an employee's meal periods, the Court of Appeal erroneously allowed employers across California to provide short and delayed meal periods contrary to the plain language and legislative intent of meal period laws. It compounded this error by relying on improper, inapplicable, or flawed rationales

that are both inconsistent with the purpose underlying meal period guarantees and ineffectual in neutralizing the harm to employees' health or safety. It also ignored that its decision perpetuates a practice that, though rendered obsolete by existing technology that records time to the exact minute, is used by employers to their benefit without regard to its adverse impact on employees.

The Court of Appeal also erred in categorically rejecting the use of the time-record presumption at summary judgment. This overlooked the presumption's appropriate use throughout the case in shifting the burden of proof to employers if their time records show discrepancies that can either be adjudicated class-wide or presumed to occur. All the more so because the rebuttable nature of the presumption protects employers' right to due process at every stage of the case by providing them the ability to defend themselves.

Accordingly, this Court should reverse and remand, instructing the Court of Appeal to (1) vacate the grant of AMN's summary judgment motion and the denial of plaintiff's summary adjudication motion as to the meal period claim; and (2) enter judgment in plaintiff's favor on the meal period claim. Moreover, for the uniform development of the law, this Court should vacate the Court of Appeal's determination that the time-record presumption as proposed applies only at the class certification stage, and clarify

instead that it both has the force of law and that it applies at any procedural stage of an employment law class action.

Dated: July 31, 2019

SULLIVAN LAW GROUP, APC

By: _____

William B. Sullivan
Eric K. Yaeckel
Andrea J. Torres-Figueroa
Ryan T. Kuhn

NIDDRIE ADDAMS FULLER SINGH LLP

By: _____

Rupa G. Singh, Esq.
Appellate Counsel

Attorneys for Plaintiff-Appellant KENNEDY DONOHUE

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Opening Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 12,405 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: July 31, 2019

NIDDRIE ADDAMS FULLER SINGH LLP

By: _____

Rupa G. Singh, Esq.
Appellate Counsel

Attorneys for Plaintiff-Appellant KENNEDY DONOHUE

State of California)
County of Los Angeles)
)

Proof of Service by:
✓ US Postal Service
✓ Federal Express

I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017.

On 07/31/2019 declarant served the within: Plaintiff-Appellant Kennedy Donohue's Opening Brief on the Merits **upon:**

1 Copies ✓ FedEx USPS

SERVICE ON ALL PARTIES LISTED ON THE ATTACHED SERVICE LIST.

1 Copies FedEx ✓ USPS

ATTORNEY GENERAL (San Diego Office)
P.O. Box 85266
San Diego, California 92186-5266

Counsel for The People

1 Copies FedEx ✓ USPS

OFFICE OF THE DISTRICT ATTORNEY
Appellate Division
P.O. Box X-1011
San Diego, California 92112

Counsel for The People

Copies FedEx USPS

the address(es) designated by said attorney(s) for that purpose by depositing **the number of copies indicated above,** of same, enclosed in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of California, or properly addressed wrapper in an Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of California

I further declare that this same day the **original and** copies has/have been hand delivered for filing OR the **original and** 8 copies has/have been filed by ✓ third party commercial carrier for next business day delivery to:

AND ELECTRONICALLY SUBMITTED:

SUPREME COURT OF CALIFORNIA
350 McAllister Street
Room 1295
San Francisco, California 94102-4797

I declare under penalty of perjury that the foregoing is true and correct:

Signature: Stephen Moore

SERVICE LIST

Service via FedEx on the Following Participants:

Mary Dollarhide DLA Piper LLP 4365 Executive Drive Suite 1100 San Diego, California 92121 *Attorney for Respondent,* *AMN Services, LLC*	Betsey Boutelle DLA Piper LLP (US) 401 B Street Suite 1700 San Diego, California 92101-4297 *Attorney for Respondent,* *AMN Services, LLC*