Case No. S253677

SUPREME COURT
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In the

SUPREME COURT

of the

STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff-Appellant and Petitioner,

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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

I.
INTRODUCTION

Contrary to the theme of AMN's answering brief, Donohue did not obtain review to create an entirely new framework of "crushing" employer liability or to overrule *Brinker Restaurant Corporation v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004 *(Brinker)*. Rather, as this Court recognized by granting review on both issues exactly as she framed them, Donohue sought to settle and secure uniformity on two weighty questions of employment law that impact potentially thousands of employers and employees across California.

With respect to the first issue, that is, whether AMN's seemingly "neutral" time rounding policies eviscerate meal period protections, AMN offers improper, incorrect or meritless defenses. First, AMN's objection that Donohue failed to properly raise this issue has been uniformly rejected—by the trial court on summary judgment, when the Court of Appeal decided this issue on the merits, and when this Court granted review on this issue, all over AMN's identical objection. Second, AMN is wrong that the real underlying question is whether employers using time rounding still compensate employees "for all time worked." As Donohue established, meal period laws protect employees' non-compensable right to rest,

recharge, and be free from the employer's control for 30 minutes at the end of the fifth hour of work, not their separate right to full pay for all time worked. Finally, AMN's claim that employees cannot prove meal period violations because they certified in their timecards that they suffered no such violations without being paid statutory penalties ignores its timekeeping system's design flaw. By flagging meal periods as non-compliant only *after* rounding punch times, AMN's system recorded non-compliant meal periods as compliant. Employees could hardly certify a meal period as non-compliant if the system never flagged it as such, leading to inaccurate certifications.

As to the second issue, that is, whether the time-record presumption applies beyond the class certification stage, AMN begins by mistakenly asserting that there is no confusion on the issue. But divergent analysis in published and depublished decisions indicate that appellate courts are, indeed, divided. AMN also wrongly elevates *Brinker's* procedural posture from coincidence to settled law. Justice Werdegar did propose the time-record presumption in a case that happened to involve review of a certification ruling. But because *Brinker's* procedural posture is not the genesis or the basis of the presumption, that happenstance does not justify applying the presumption only at the certification stage in perpetuity. Rather,

based on employers' duty to always maintain accurate time records, the presumption should logically be used to give such records the same evidentiary value at *every* stage of a case. Nor will prohibiting the rounding of meal period punches or applying the presumption beyond class certification force employers to "police" meal breaks in violation of *Brinker*. Rather, employers will still only need to relieve employees of duty for a 30-minute meal period at the end of the fifth hour of work. Once relieved of duty, employees will still be able to choose to skip a meal period or take a short or delayed one. The only difference will be that time records will document the start and duration of meal periods based on actual, not rounded, punch times.

Accordingly, this Court should prohibit the evisceration of meal period guarantees through obsolete time rounding practices. It should also end confusion in the law by clarifying that the time-record presumption, if relevant, can apply at any stage of a case.

II.
ARGUMENT

A. AMN's Objection that Donohue Failed to Preserve for Review Whether Its Time Rounding Policies Defeat Meal Period Protections is Untimely and Improper

As it did during briefing before the trial court, Court of Appeal, and this Court in opposing the grant of review, AMN repeats that

Donohue's failure to raise her "meal-period rounding" claim in her complaint warrants an affirmance. But AMN is wrong, and every court presented with this argument has already rejected it.

In its summary judgment ruling, the trial court only recited that one of AMN's grounds for summary adjudication was that "Plaintiffs' theory that the rounding practice resulted in meal period violations is not pled in the operative Complaint." (13 AA 3472, 3482.) Far from finding that this constituted waiver of the meal period claim, the trial court went on to address the issue of meal period violations and Donohue's underlying theory on the merits. (*Id.* at p. 3482.) This is not surprising as AMN put the question at issue by first advancing the affirmative defense of time rounding to Donohue's meal period claims (1 RT 5–8; 1 AA 93; 8 AA 1984–1985). Also, the trial court had already found in its certification order that the common issue of fact and law presented by the meal period class was whether "the time system in place for all employees improperly alters the recorded meal periods" and "fails to properly pay meal break penalties for shortened or delayed meal breaks." (4 AA 1016.)

AMN nevertheless argued on appeal that Donohue had relied on "unpled theories of liability." (Respondent's Br. at p. 1.) The Court of Appeal acknowledged AMN's argument, but went on to address

Donohue's theory that time rounding should "*never* be applied to meal period time punches" on the merits. (*Donohue v. AMN Servs., LLC*, 29 Cal.App.5th 1068, 1086, 1088–1091 [emphasis in original] (*Donohue*).) In doing so, the Court of Appeal implicitly overruled any objection that Donohue had forfeited either the theory or appellate review of it. In now stating that the Court of Appeal noted that Donohue "never raised her meal period-rounding claim in the complaint," AMN fails to explain that the Court of Appeal was only summarizing one of the grounds AMN advanced for summary judgment, not making a determination that claim for meal period violations based on time rounding was waived. (*Compare* Answer Br. at p. 18 with *Donohue*, 29 Cal.App.5th at p. 1086.)

Nonetheless, AMN yet again argued, in opposing Donohue's Petition for Review, that the trial court's alleged finding that she had waived the meal period theory at issue warranted denial of review. (Answer to PFR at pp. 5–6, 13–14.) But as discussed, the trial court made no such finding. And, when this Court granted review, including on the allegedly waived issue of time rounding's impact on meal period punches exactly as Donohue articulated it, this Court also implicitly overruled AMN's often-repeated waiver objection.

Under these circumstances, AMN's continuing waiver objection appears to disguise its ongoing, improper disagreement with this Court's determination that time rounding of meal period punches presents a novel issue with important statewide implications that warrants review. But the time for AMN to oppose the grant of review has long passed. The repetition of this rejected argument does not and should not provide grounds for this Court to decline to decide the merits of the issue on which it granted review.

B. Donohue Does Not Conflate Time Rounding, Overtime Laws, and Meal Period Guarantees, But Establishes that Rounding Cannot Be Imported from the Overtime to the Meal Period Arena Precisely Because the Two Are So Fundamentally Different

AMN accuses Donohue of: (1) conflating distinct concepts of employment law in arguing against time rounding of meal period punches, and (2) secretly advocating to outlaw all time rounding. In reality, Donohue has only highlighted the fundamental differences between overtime and meal period laws, which the Court of Appeal erroneously failed to consider in applying the same neutrality rationale concerning time rounding to both. And Donohue's showing that time rounding is an obsolete practice that employers can exploit is not meant to advocate for anything other than a prohibition of time rounding of meal period punches, the actual issue on review.

AMN nevertheless continues to justify time rounding of meal period punches based on cases, arguments, and evidence that employees can be compensated for all their time worked. This ignores the intangible, non-compensable harm to employees' health and safety from a short or delayed meal period due to time rounding.

1. AMN Confuses, and Thus Fails to Refute, the Argument that the Differences Between Overtime and Meal Period Laws Impact the Application of Time Rounding Policies

AMN purports to agree that "an employee's entitlement to compensation for all hours worked on the one hand, and his or her entitlement to be relieved of duty for a non-working meal period on the other" are "distinct rights." (Answer Br. at p. 18.) Yet it fails to further address the implications of the critical differences underlying overtime versus meal period guarantees in the context of its time rounding policies. As Donohue established, overtime laws focus on financial compensation for all work performed while meal period laws safeguard employees' safety and mental, physical, and emotional well-being. (Op. Merits Br. at pp. 20–24.) As a result, AMN fails to refute Donohue's showing that the important differences between these two arenas of employment law warranted a nuanced analysis of whether AMN's time rounding policies were neutral in each context, which the Court of Appeal failed to perform.

Instead, AMN first defaults back to a modified waiver objection, asserting that Donohue only argued for the first time at summary adjudication that the neutrality analysis of time rounding in the overtime context could not apply to meal period punches. (Answer Br. at p. 19.) But this waiver argument fails because the trial court and the Court of Appeal implicitly rejected it by addressing this argument on the merits. Nor does it matter that Donohue chose not to seek review on the portion of her claim asserting that time rounding of meal period punches also entitled her to unpaid wages for time she was actually working, but was deemed to be on a meal break due to time rounding. (*Id.* at p. 20.) Because she sought and secured review on the portion of her claim asserting that time rounding eviscerated the guarantee of a 30-minute meal period after the fifth hour of work, *that* issue remains ripe for adjudication.

Turning to the merits, AMN cannot justify the Court of Appeal's decision to affirm time rounding as neutral in every context without undertaking an analysis that, as AMN itself puts it, would have required it to treat meal period punches "separately" from all other punch in and punch out times. (*Ibid.*) Without undertaking such an analysis, the Court of Appeal imported to the meal period arena the neutrality analysis of time rounding in the context of lost

compensation or overtime claims articulated in *See's Candy Shops, Inc. v. Superior Court (Silva)* (2010) 210 Cal.App.4th 1138, 1159–1160 (*See's Candy I*). AMN defends the Court of Appeal's decision not to treat meal period punches separately from other punches by explaining that "even if meal period punches *were* examined in isolation, AMN's rounding system was mathematically neutral and in fact overcompensated Recruiters *for the time they actually worked.*" (Answer Br. at p. 20 [first emphasis in original].) But this is precisely the problem. By improperly analogizing overtime and meal period laws, the Court of Appeal erroneously borrowed the neutrality rationale of time rounding in the overtime arena—that employees are compensated for all the time worked in the long run—and applied it to the meal period arena *without* evaluating the health and safety considerations unique to meal period guarantees.

One such unique consideration is that a short or late meal period due to time rounding causes irreparable, non-economic harm to employees' health and safety *distinct from* the lack of full compensation for all the time worked. (*Lazarin v. Superior Ct. (Total Western, Inc.)* (2010) 188 Cal.App.4th 1560, 1582–83 ["'it may be difficult to assign a value to these noneconomic injuries'" concerning non-compliant meal or rest periods].) Another special

consideration underlying meal period guarantees is that the cumulative health deficit from the loss of an employee's right to rest and recharge for 30 minutes at the end of the fifth hour of work *one day* is not remedied by getting an early or long meal period due to time rounding *another day*. (*Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1113 ["Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress"]; *cf. Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 844 [even few extra minutes of work each day due to short or late 10-minute rest periods adds up].) By overlooking these considerations and focusing only on the fact that employees would be compensated for all the time they worked in the long run, the Court of Appeal, not Donohue, improperly conflated overtime and meal period laws.

AMN's familiar response is that the "fundamentally different rationales behind overtime and meal period laws. . . . appear nowhere in the briefing Plaintiff submitted," and that the Court of Appeal did not need to "anticipate theories and arguments" allegedly never put before it. (Answer Br. at p. 21.) But as Donohue has shown, once AMN raised the defense of time rounding to her meal period claim, she properly raised and presented her argument that time rounding should not be imported to the meal period arena

because of the protective nature of meal period laws throughout the case. For example, in response to one such argument by Donohue, the trial court found that, even if "no case has ever applied rounding to 'meal breaks.' . . . the rationale behind allowing rounding for work time would be the same for meal break time." (13 AA 3472.) Similarly, Donohue stressed the fundamental employee protective nature of meal period laws on appeal, but the Court of Appeal nevertheless applied the rationale for time rounding in the overtime arena. (*Compare* Op. Br. at pp. 16-17 *and* Reply Br. at pp. 2-4, 14 *with Donohue*, 29 Cal.App.5th at pp. 1085, 1089–1090.)

Admittedly, Donohue has expanded upon this argument now. But appropriately so as she either failed to explain the issue's significance adequately, or the courts previously failed to understand it sufficiently. Regardless, the Court of Appeal erroneously failed to evaluate the unique health and welfare protections underlying meal period laws in finding that the *same* rationale justified the use of time rounding in both the meal period and the overtime arena.

2. <u>While There is No On-Point, Direct Case on this Issue of First Impression, Donohue Shows that the Weight of Authority Prohibits Rounding of Meal Period Punches</u>

AMN's criticism that Donohue fails to cite legal authority that directly prohibits time rounding of meal period punches misses the

mark. As Donohue freely admits and repeatedly explains, this is an issue of first impression, and no case has directly allowed time rounding of meal period punches. A logical corollary to this reality is that no case has directly prohibited time rounding of meal period punches either. Rather, courts addressing time rounding confine their analysis to whether it is neutral in the sense that it compensates employees for actual time worked in the long run, without evaluating its impact on health and safety protections underlying the guarantee of a 30-minute meal period at the end of the fifth hour of work.

This is true of *AHMC Healthcare, Inc. v. Superior Court (Letona)*, in which the Court held that time rounding of all punches to the nearest quarter hour, including those surrounding meal periods, was neutral because "employees as a whole were significantly overcompensated" over time. ((2018) 24 Cal.App.5th 1014, 1027 (*AHMC Healthcare*), *review denied* (Oct. 10, 2018).) The only issue raised and addressed in that case was the economic fairness of a time rounding system to the extent that it did "not systematically undercompensate employees" but led instead to "a net economic benefit to employees viewed as a whole." (*Id.* at p. 1028.) The court in *AHMC Healthcare* did not once address meal period obligations or the rationale behind them. Where the issue is not the

impact of time rounding on employees' economic rights, but on their health and safety, no case allows or prohibits rounding of meal period punches or addresses these important considerations. This legal landscape underscores why it is imperative that this Court adjudicate the question at issue, that is, the meal period violations resulting from AMN's time rounding policies.

Notably, the question at issue is *not*, as AMN argues, whether the Court of Appeal "correctly" found that rounding can be applied to meal period time punches "to calculate the total time worked for purposes of wage compensation." (Answer Br. at p. 22.) Rather, as discussed, Donohue expressly did not seek or secure review on the issue AMN continuously insists is the real, underlying question—whether employees also lost wages when rounding their meal period punches up from 25 to 30 minutes meant that they were not paid for the five minutes they were actually working. Rather, the issue under review is whether applying time rounding policies to meal period punches eviscerates the unique health and safety protections underlying such laws *regardless* of whether employees are assertedly fully compensated for all the time actually worked in the long run.

For this reason, the plain language of meal period statutes and wage orders, guaranteeing a 30-minute meal period at the end of the

fifth hour of work, with limited exceptions not at issue here, provides critical support for the conclusion that time rounding can never be neutrally applied to meal period punches. (Labor Code §§ 226.7, 512; IWC Wage Order 4, § 11, codified as C.C.R. Title 8, § 11040; *Brinker,* 53 Cal.4th at pp. 1038, 1042 [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].") Further support comes from the Enforcement Policies and Interpretations Manual (DLSE Manual) of the California Division of Labor Standards Enforcement, which never mentions meal periods in provisions on "rounding," and only lists rounding as a tool to calculate *hours worked.* (DLSE Manual, §§ 47, 47.3 (Apr. 2017).)

Nor does it matter that prohibiting unlawful time rounding of meal period punches might make "rounding all but impossible" entirely because, as a practical matter, employers will not be able to round certain time punches and not others. (Answer Br. at p. 23.) Preliminarily, this argument wrongly assumes that time rounding policies are worth salvaging because they provide employers administrative ease or efficiency. But as Donohue established, time rounding is an obsolete technological practice from which even AMN has distanced itself, and which scholars criticize as allowing

employers to exploit wage and hour compliance. (Op. Merits Br. at pp. 41–44.) Regardless, even if time rounding policies were objectively useful to calculate time worked, that alone would not justify applying them where they demonstrably threaten employees' health and safety, as in the context of meal period time punches.

3. Contrary to AMN's Claim, Expert and Other Evidence Establish that Its Time Rounding Policies Regularly Masked Non-Compliant Meal Periods

AMN misunderstands the precise meal period violations at issue by focusing on the fact that employees did not use the mechanisms in place to flag meal period violations, and that employees sometimes benefitted from rounding "with respect to *payment for time worked.*" (Answer Br. at pp. 23–24, 26 [emphasis in original; citation omitted].) In reality, Donohue's failure to recall any specific meal period violations years after the fact resulted from how AMN's Team Time system was designed and worked. As AMN admits, employees punch in and punch out times at the beginning and end of their workdays, and surrounding meal periods, were automatically rounded to the nearest tenth of an hour. (9 AA 2365–2366.) It was only based on these rounded times on electronic timesheets that an automated drop-down menu asked employees to certify what occurred where a seemingly non-complaint meal period

was flagged. (9 AA 2327, 2335–2336, 2351, 2353–2354, 2365–2366.) But because the timesheets only reflected rounded punch times, they regularly failed to flag the short or delayed meal periods identified by Donohue's expert. Thus, employees had no chance to report or even see that they had experienced a short or delayed meal period. This resulted in systemic underreporting of non-compliant meal periods, undermining AMN's defense that employee certifications of timesheets conclusively established the neutrality of its time rounding policies.

AMN's reliance on evidence that it also did provide employees many compliant meal periods does not undermine Donohue's claims that inherent flaws in its timekeeping system hid a separate subset of shortened or delayed meal periods from being flagged or reported. (Answer Br. at pp. 23–24.) Nor is there merit to AMN's argument that Donohue's failure to report any meal period violations meant that she always received compliant meal periods throughout her employment. (*Ibid.*) To the contrary, evidence showed that she personally experienced shortened and delayed meal periods due to time rounding for which no meal period penalty was paid. As just one example, on January 8, 2013, Donohue's actual meal period start time was 11:02 a.m. and end time was 11:25 a.m., resulting in

an actual **23-minute** meal period. (9 AA 2326, 2368.) AMN's Team Time system rounded these punches to show a meal period start time of 11:00 a.m. and end time of 11:30 a.m., seeming to result in a 30-minute meal period for which no statutory penalty was paid. (9 AA 2326, 2368–2369.) Donohue did not, and could not, waive her right to a compliant meal period as the timekeeping system failed to prompt the employees for a certification when the *rounded* times showed a full 30 minutes.

The workings of AMN's time keeping system did not cause and do not constitute the meal period violation, as AMN mistakenly claims Donohue asserted. (Answer Br. at p. 13.) Rather, the way that Team Time worked undermines AMN's claim that its system acted as a "fail safe mechanism" to identify meal period violations. (*Id.* at p. 12.) It also shows that, contrary to AMN's defense, its proffered employee certifications fail to establish that its time rounding policies never led to non-compliant meal periods for which it paid no statutory penalties. Especially in light of expert and other evidence of meal period violations when AMN failed to relieve employees for a full 30 minutes at the fifth hour of work. For example, Donohue's expert established over 46,000 instances of short or late meal periods (9 AA 2404–2405, ¶¶14–15) with no corresponding payment

of meal period penalty (*Id.* at pp. 2327, 2335–2336, 2351, 2353–2354.) Donohue also testified to a work culture that discouraged meal and rest breaks so employees could get on the phones to recruit candidates; of times when she was called back to her desk on the intercom during lunch or meal period breaks; and of sales-driven pressure to take short or late meal periods. (9 AA 2412–2413 ¶¶6–8; 10 AA 2618, 2619, 2623, 2626–2667, 2652.)

AMN's reliance on other evidence to dispute Donohue's deposition and declaration testimony only accomplishes two things, neither of which defeats Donohue's meal period claim at issue. First, by citing evidence that Donohue and others were relieved of duty and provided meal periods on many occasions, AMN only underscores that there were genuine disputes of triable fact regarding meal period violations that should have precluded summary judgment. (Answer Br. at pp. 11–14, 23–25.) All the more so as Donohue has never asserted that AMN provided *no* compliant meal periods. Second, by questioning Donohue's credibility and emphasizing emails or texts showing that she sometimes ran errands during meal periods or skipped them to get overtime (*id.* at pp. 5–7), AMN improperly resurrects its failed challenge to Donohue's adequacy as a class representative. But the class certification ruling

is not on review. Thus, AMN cannot re-litigate the trial court's finding that Donohue is an adequate class representative on, among others, the common question whether AMN's timekeeping system "alters the recorded meal periods" and "fails to properly pay meal break penalties for shortened or delayed meal breaks." (4 AA 1016.)

Further, AMN's argument that employees got paid for all the time they actually worked is both wrong and irrelevant to the issue presented. If there were non-compliant meal periods that were never flagged for approval or reporting, then it means that employees were also denied statutory one-hour pay penalties for such meal periods. (Labor Code § 226.7, subd. (c).) As discussed, there were over 46,000 instances of short or late meal periods with no corresponding payment of a meal period penalty. Because these statutory penalties add up to much more than the amount employees were paid for working a few minutes while they were actually on a meal break, the Court of Appeal incorrectly concluded that employees were fully compensated for the actual time they worked. The Legislative determination that full and fair compensation includes not just pay for actual time worked, but also statutory penalties for non-compliant meal periods, cannot be overcome by a contrary judicial determination. Further, as discussed, compensation for an extra few

minutes or even hours in the long run cannot remedy the cumulative effect on employees' health and safety from periodically missing the opportunity to rest and recharge during a compliant meal period.

There is also no inconsistency between Donohue's practice of manually reporting her punch times when she forgot to clock in or out and her argument that her timesheet certification has limited value. This is because, as discussed, AMN's timekeeping system flagged a meal period as non-complaint only after applying time rounding to actual punch times. Donohue, like other employees, was therefore only given the option to certify that the *rounded* punch times on her timesheets showed that she received a 30-minute meal period at the end of her fifth hour of work. Because the timekeeping system periodically masked non-compliant meal periods, there was no opportunity to report these instances unless employees took on the impermissible burden of tracking their actual punch in and punch out times every day for every meal period.

Also, as Donohue explained, she could not get paid or submit her timecards without first checking a box that said she had received compliant meal and rest periods. (10 AA 2652.) Thus, she felt she had "no choice" but to check the box, even when, as was frequently the case, she did not receive a compliant meal period. (*Ibid.*)

4. Without Hiding Sound Doctrinal Objections to Time Rounding Overall, Donohue Has Properly Limited Her Briefing to the Issue on Which Review Was Granted—Whether to Ban Rounding of Meal Period Punches

AMN incorrectly accuses Donohue of knowing that prohibiting time rounding of meal period punches may effectively outlaw time rounding altogether and of secretly advocating for such a result. Not so. Donohue does understand that prohibiting time rounding of meal period punches may effectively make it more impractical or inefficient for employers to apply time rounding altogether. Donohue also does not disavow the allegations in her complaint that time rounding is doctrinally incompatible with the protective nature of California employment law altogether, especially as applied at AMN. But she does not (i) attempt to resurrect that unsuccessful claim; (ii) believe that prohibiting time rounding of meal period punches would render it effectively unlawful altogether; or (iii) "affirmatively advocate" for such an outcome. (Answer Br. at p. 28.) Rather, Donohue properly submits evidence of how obsolete time rounding is as relevant to her meal period claim, including as confirmed by AMN's own change to a timekeeping vendor who uses employee's actual punch times. (8 AA 2206, 2165.) She also properly

limits her advocacy to outlawing time rounding of meal period punches, the actual issue on which she sought and secured review.

There is also nothing wrong with Donohue explaining that, on remand, she might present evidence undermining any claims justifying time rounding for administrative reasons, if allowed. Given that the ruling at issue is summary judgment, which focuses on admissible evidence, the trial court may well allow Donohue to present additional proof in support of her meal period claim to decide this case consistent with the rule of law this Court announces as the basis for its reversal. That Donohue relied on AMN's own time records and her expert's analysis does not categorically prohibit additional evidence under the appropriate circumstances on remand.

Thus, far from secretly advocating for crushing employer liability through yet another issue she allegedly "did not raise and preserve," Donohue seeks to avoid the crushing loss of health and safety guarantees underlying meal period laws through an issue she preserved and is now expressly under review. (Answer Br. at p. 29.)

C. Contrary to AMN's Arguments, It Is Necessary, Proper and Possible to Clarify the Time-Record Presumption's Application Consistent with *Brinker*

AMN is wrong that there is no need to clarify the scope and application of the time-record presumption just because it was

stated in a concurrence in *Brinker* or because its application has assertedly given rise to no conflicts. Regardless of how it was introduced, the time-record presumption has been applied by courts as law, but divergently. Also, *Brinker's* procedural posture logically does not, and categorically cannot, preclude applying the presumption beyond the class certification stage. This is because the evidentiary value of time records is, and should remain, the *same* throughout a case. Nor would applying the time-record presumption violate *Brinker's* no policing rule as it would not require employers to do anything different, as AMN knows from having eliminated time rounding and switched to recording employees' actual punch times.

1. Conflicting Decisions Applying the Time-Record Presumption Regardless of How and When It Was Proposed Necessitate the Requested Clarification

AMN's attempt to diminish the time-record presumption just because it was proposed in a concurrence fails because courts have rejected this very argument and acknowledged the persuasive impact of concurring opinions. (*See, e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 527 (*Carrington*) ["Even if the presumption discussed in Justice Werdegar's concurrence is not binding precedent, as Starbucks argues, it may nonetheless be persuasive, providing guidance to trial courts in certain

circumstances."]; *accord People v. Barba* (2013) 215 Cal.App.4th 712, 734, fn. 7 ["At a minimum, we consider [the concurrence] persuasive authority"].) Moreover, AMN ignores that many appellate courts have found the time-record presumption helpful, and tried to apply it as law notwithstanding that Justice Werdegar proposed it in a concurrence. This includes decisions cited in Donohue's Opening Merits Brief, including those later depublished, which also show underlying analytical confusion as to the time-record presumption's scope, application, and impact. (Op. Merits Br. at pp. 52-56.)

AMN's response that depublished decisions should not have been cited ignores Donohue's acknowledgment that this Court's depublication has no precedential value. (*Id.* at p. 55.) Moreover, these cases are not cited as precedent, but to establish that there is underlying confusion among appellate courts, and that depublication has only furthered the confusion. Thus, attempts to prevent courts' misapplication of the time-record presumption cannot continue to be addressed by depublication alone. Rather, the scope and the application of the time-record presumption warrants clarification, both for courts and litigants, for reasons previously discussed. (*Compare, e.g., Carrington*, 30 Cal.App.5th at p. [affirming use of presumption at trial as one piece of evidence of meal period

violations along with other testimony] *with Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 781 (*Serrano*) ["we specifically reject [plaintiff's] contention that "time records show[ing] late and missed meal periods creat[ed] a presumption of violations."].) Even if the confusion lies in misperceiving that plaintiffs seek to apply the time-record presumption as dispositive, not as rebuttable, there is conflict surrounding the presumption that warrants clarification.

2. *Brinker's* Procedural Posture Does Not Expressly or Implicitly Limit the Evidentiary Value of Employer Time Records to the Class Certification Stage in Perpetuity

AMN fails in its attempt to limit *Brinker* and Justice Werdegar's accompanying concurrence, as applicable only to cases in the same procedural posture, that is, involving class certification. But as the Court in *Brinker* stated, it did not grant review to clarify only issues of class certification, but "to consider issues of significance to class actions generally and to meal and rest break class actions in particular." (*Brinker*, 53 Cal.4th at p. 1017.) Consistent with this, *Brinker* clarified, among others, an issue of substantive employment law that is not confined to the class certification stage. That is, it explained that "an employer must relieve the employee of all duty for the designated period, but need not ensure that the employee does no work." (*Id.* at p. 1034.)

Nor did *Brinker* involve only a fact pattern in which time records showed "no meal period for a given shift over five hours," as AMN argues. (Answer Br. at p. 30.) Rather, plaintiffs in *Brinker* also alleged that the employer "engaged in time shaving, unlawfully altering time records to misreport the amount of time worked and break time taken." (*Brinker*, 53 Cal.4th at p. 1019 & fn.3.) This is strikingly similar to the meal period class that certified here to examine whether AMN's timekeeping system "alters the recorded meal periods" and "fails to properly pay meal break penalties for shortened or delayed meal breaks." (4 AA 1016.) Thus, *Brinker* is more analogous to the present circumstances and broader in its application than AMN's characterization.

Justice Werdegar also did not propose the time-record presumption based on either the procedural posture or limited facts presented in *Brinker*. Rather, she did so based on employers' statutory duty to retain accurate time records, stating 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. (*Brinker*, 53 Cal.4th at pp. 1053–1054 [Werdegar, J., conc.] [employer "have an obligation both to relieve their employees for at least one meal period for shifts of

five hours . . . *and* to record having done so"] [emphasis in original].) This followed the recognition that, while certification is essentially a procedural question that does not evaluate the merits of plaintiffs' claim, "'issues affecting the merits'" may be "'enmeshed with class action requirements'" or depend "upon resolution of issues closely tied to the merits." (*Id.* at p. 1023 [citation omitted].) Thus, instead of trying to "export the *Brinker* concurrence to force the lower courts to reach her preferred decision on the merits," Donohue merely seeks its application consistent with its plain language, and without depriving AMN of its opportunity to rebut the time record presumption. (Answer Br. at p. 31.)

Here, applying the presumption at summary judgment would mean that AMN's rounding policy, as evidenced in time records that reflect over 46,000 instances of short or delayed meal periods, would give rise to the rebuttable presumption of a common practice of short or delayed meal periods. AMN could rebut the presumption if it could establish that it always paid statutory penalties for the short or delayed meal periods unless employees certified that they chose to take a short or late meal period. But given evidence in the record that there were no corresponding penalties for the 46,000 short or delayed meal periods, Donohue could either establish that, or create

a triable dispute whether, AMN's time rounding policy led to meal period violations through AMN's own time records.

3. Applying the Time-Record Presumption Beyond Class Certification Does Not Force Employers to Police Meal Breaks in Violation of *Brinker*, But Reinforces that Time Records Have the Same Evidentiary Value Throughout

AMN's argument that applying the time-record presumption at the merits stage would violate *Brinker's* no policing rule is founded on the mistaken premise that employers would then be required to investigate violations evident in their time records. Notably, this was the plaintiff's argument in *Serrano* that the Court of Appeal went on to reject: "Serrano also argues that [defendant] Aerotek's failure to review time records and investigate whether meal period violations were occurring was a breach of its own duty to provide meal periods, not a nonactionable failure 'to police or ensure that meal periods are taken.'" (*Serrano*, 21 Cal.App.5th at p. 781.)

But this is *not* Donohue's argument, and no more investigation would be required by employers than in the use of the time-record presumption at class certification. Rather, at each stage, whether class certification, summary judgment or trial, time records showing missing, short, or delayed meal periods would give rise to the rebuttable presumption that an employer did not comply with its

duty to relieve employees from duty for a full 30 minutes at the end of the fifth hour of work. Also at any stage, the employer could rebut the presumption with additional evidence showing that it either paid statutory penalties for all such non-complaint periods or that employees chose to take a non-complaint meal period. In other words, the employer need not investigate non-compliance reflected in its records for the time-record presumption to apply at the certification or any other stage. Or put another way, the employer need not investigate such non-compliance any further that it must to rebut the presumption at the class certification stage.

If AMN were right, then Justice Werdegar's concurrence in *Brinker* would have had to be incompatible with the majority opinion she also authored from the beginning. This is because applying the time-record presumption at the certification stage arguably also requires employers to investigate non-compliant meal periods evident in its time records to establish in rebuttal that they were isolated instances raising individualized issues, not common issues. But this is exactly what employers do to rebut the presumption at the certification stage by submitting contrary evidence *without* violating the majority ruling in *Brinker* that employers need not ensure that employees actually take their meal

breaks as long as they are provided the opportunity to do so. (*Cf., e.g., Brinker*, 43 Cal.4th at p. 1054 [Werdegar, J., conc.] ["Representative testimony, surveys, and statistical analysis are all available as tools to render manageable determinations of the extent of liability."].) And this is exactly what AMN argued in the Court of Appeal as having done in opposing summary judgment: "AMN subsequently met its summary judgment burden to rebut that presumption by providing voluminous evidence of meal period compliance." (Respondent's Br. at p. 28.)

Because the time-record presumption is, and would remain, rebuttable at any stage at which it were applied, it would not change employers' duties in violation of *Brinker*. Rather, if the presumption arose at any stage, employers could still establish that time records notwithstanding, other testimonial, expert, or documentary evidence showed that employees consented to work through meal periods or waived the right to a compliant meal period. (*Safeway, Inc. v. Superior Court (Esperaza)* (2015) 238 Cal.App.4th 1138, 1159–1160.) AMN would hardly have eliminated its time rounding policy if it meant that missed, delayed or short meal periods based on actual punch times evident in its time records would suddenly require it to police meal and rest period breaks.

A hypothetical scenario helps to illustrate that the time-record presumption is common sense and logical regardless of the posture of a case, including because it is rebuttable. Thus, where an employee's time records show 40 hours of work, but the employee's paystubs only show payment for 35 hours, a rebuttable presumption arises that there was an underpayment of five hours. The employer can rebut this presumption by establishing that employees routinely or in certain instances forgot to clock in or out, manually self-reported the wrong time, or took unpaid time off that was not reflected in the time records. Notably, such rebuttal would be available to, possible for, and proffered by the employer at any stage of the case to avoid the impact of the time-record presumption. Thus, the time-record presumption does not constitute a radical departure from the existing rule that employers must maintain accurate time records, or be required to rebut the presumption arising in the employee's favor from evidence of violations appearing in employers' time records.

Nor is Donohue advocating for the use of time records alone to establish any violation. Rather, as in *Carrington, supra*, Donohue is advocating for an employee class to establish that an employer's policy (here time rounding) leads to meal period violations, as shown

by, among other testimony and evidence, the employer's own time records. *(Carrington*, 30 Cal.App.5th 504, 527 [affirming use of time-record presumption at trial in conjunction with other evidence to establish liability and damages for meal period violations].)

III.
CONCLUSION

Contrary to AMN's refrain, Donohue has properly preserved for review the issues presented by raising them in the trial court, Court of Appeal, and in her Petition for Review. Donohue has also established that the weight of authority favors the merits adjudication she seeks. Because time rounding of meal period punches deprives employees of non-compensable harm to their health or safety, it cannot be justified by the rationale that employees are compensated for all the time they actually worked in the long run. Further, the time-record presumption is appropriately used throughout the case, in conjunction with other evidence, to shift the burden of proof to employers and offer rebuttal evidence if their time records show potential violations.

Thus, Donohue respectfully requests that this Court reverse and remand, directing 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; (2) enter judgment in plaintiff's favor on the meal period claim or determine that genuine disputes warrant a trial on the claim; and (3) evaluate the merits of this case by applying the time-record presumption along with all other relevant and admissible evidence.

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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 6,920 words, exclusive of the matters that may be omitted under subdivision (c)(3).

Dated: December 19, 2019

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