No. S253677

In the

Supreme Court of California

KENNEDY DONOHUE.,

Plaintiff – Appellant – Petitioner,

vs.

AMN SERVICES, LLC,

Defendants – Appellees.

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.)

APPLICATION FOR LEAVE TO FILE BRIEF AND [PROPOSED] BRIEF OF AMICUS CURIAE MOON & YANG, APC AND CLIENTS OF MOON & YANG, APC AND MOSS BOLLINGER LLP IN SUPPORT OF PETITIONER KENNEDY DONOHUE

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE MOON & YANG, APC, ITS CLIENTS, AND CLIENTS OF MOSS BOLLINGER LLP

Pursuant to California Rules of Court, rule 8.520(f), MOON & YANG, APC ("MYL"), on its own behalf, on behalf of its many clients impacted by the issues raised in this matter, and on behalf of the many clients of Moss Bollinger LLP impacted by issues raised in this matter, respectfully requests leave to file the attached amicus curiae brief in support of Plaintiff, Appellant and Petitioner Kennedy Donohue.

MYL is a law firm focused on the representation of employees throughout California in individual, class action, and representative action matters, including wage and hour class action lawsuits similar to this matter. Attorneys at MYL have taken an active role, both at MYL and elsewhere, in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting employee rights in wage and hour cases.

Moss Bollinger LLP is a law firm focused on the representation of employees and consumers throughout California in individual, class action, and representative action matters, including wage and hour class action lawsuits similar to this matter. Attorneys at Moss Bollinger LLP have taken an active role, both at Moss Bollinger LLP and elsewhere, in advancing and protecting the rights of California employees by, among other things, submitting numerous amicus briefs and letters on issues affecting employee rights in wage and hour cases.

H. Scott Leviant, the undersigned, has submitted briefs to this Court, both as counsel for *amicus curiae* and party-counsel, focused on wage and hour issues,

including, most recently, all briefing on behalf of the plaintiff in *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018).

Dennis Moss, of Moss Bollinger LLP, has submitted briefs to this Court, both as counsel for *amicus curiae* and party-counsel, focused on wage and hour issues, on multiple occasions, including, most recently, as counsel for plaintiffs in the matters of *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018) and *Melendez v. San Francisco Baseball Assocs. LLC*, 7 Cal. 5th 1 (2019). Mr. Moss has obtained review by this Court on behalf of his clients on at least six occasions, beginning with *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999).

MYL, on behalf of its many clients, and Moss Bollinger LLP, on behalf of its many clients, both have an abiding interest in the correct development and interpretation of California labor laws, including the requirements that employers compensate employees for all time worked and provide fully compliant 30-minute meal periods.

The proposed amicus curiae brief prepared by MYL and Moss Bollinger LLP, on behalf of their clients, will assist the Court in three ways. First, it will review the means by which rounding concepts intruded into California wage and hour law without supporting basis for the intrusion therein. Second, it will propose a clear framework for analyzing the concept of rounding as applied to California's various wage and hour obligations that is logical and unified, rather that disparately formulated as between meal period obligations and pay obligations. Third, and directly resulting from the first and second, it will provide a basis, as part of the Court's review, for rejecting federal time rounding rules adopted by district courts of

appeal permitting employers to utilize rounding systems that fail to pay some employees for all the time they worked.

Pursuant to California Rule of Court, rule 8.520(f)(4), MYL and Moss Bollinger LLP affirm that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, MYL respectfully submits that this proposed brief may be of assistance to the Court in deciding the matter, and therefore request the Court's leave to file it.

Dated: February 5, 2020

Respectfully submitted,

MOON & YANG, APC

By: 
H. Scott Leviant

MOSS BOLLINGER LLP
Dennis F. Moss

Counsel for proposed Amicus Curiae and
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PROPOSED BRIEF OF AMICUS CURIAE MOON & YANG, APC, ITS CLIENTS, AND CLIENTS OF MOSS BOLLINGER LLP

I. INTRODUCTION

Moon & Yang, APC ("MYL"), on its own behalf, and MYL and Moss Bollinger LLP on behalf of their many clients impacted by the issues raised in this matter as amicus curiae, submit this brief in support of Petitioner and Plaintiff Kennedy Donohue. This Court should reverse the Court of Appeal's erroneous conclusion that an employer's practice of rounding employee meal period time complies with its obligations under California law to provide timely and compliant meal periods.

The first issue addressed in this matter is:

> 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?"

(AOB, at 1.) In this brief, we refute the assumption, built into this question, that the rounding practices approved by in the overtime contexts were properly upheld by showing the negative consequences individual employees may experience from not being paid for all their work due to time rounding.

There is an unsupported notion spreading among some California Courts, a notion that it is okay to use time clock entry rounding to shortchange the rights of some employees, so long as the employer over-provides benefits (such as pay, meal period duration, etc.) to some *other* employees through the single practice of time rounding. No longer are employees seen as distinct persons, with individual statutory

entitlements. Instead, they are mere data points in the calculation of a group average, a gross dilution of the concept of employee protection embodied by the totality of California's wage and hour laws and duly promulgated regulations.[1]

This idea of "average" compliance – an unwarranted instantiation of the proverbial robbing of Peter to pay Paul – has no basis or origin in California wage and hour law. Nor is it grounded in the enabling regulation of the Industrial Welfare Commission, set forth in the various Wage Orders adopted under statutory authorization. Aggregate compliance eliminates the employee as a protected individual, leaving each employee at the mercy of some sort of concocted, average group rights test.

If this Court rejects the results of rounding systems, upheld by lower courts, because they deny some employees the protections of California law, the issue posed in this matter will properly be resolved as to all employees adversely impacted by the application of rounding. No matter whether the adverse impact is that employees receive a non-compliant meal period or pay for fewer than all their hours worked, this Court can and should reverse the Court of Appeal decision and its associated framework to deter future instances of non-compliance with California law instigated by rounding.

In this matter, Petitioner contends that it is inconsistent with California's strict meal period requirements to permit the use of rounded time clock entries to determine

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[1] The IWC Wage Orders have the force of law and are interpreted like statutes. *Kilby v. CVS Pharmacy Inc.,* 63 Cal. 4th 1, 11 (2016) ("The IWC's wage orders are to be accorded the same dignity as statutes.").

meal period compliance. Amicus MYL agrees unequivocally with the contention that meal period compliance should be determined by evaluating what an individual employee received, not by considering altered time clock events. Petitioner, in arguing the foregoing, protectively suggests that meal period time rounding might be analyzed as distinct from time rounding related to compensation (due to the erroneous treatment of time rounding for pay purposes by the DLSE and district Courts of Appeal). While this is understandable (given the prevailing misplaced assumption that Federal rounding practices are applicable under California law), it is also needlessly complicated and logically incorrect to treat meal periods differently than wage payment obligations.[2]

The logical problem with approaching meal period rounding in a vacuum is that meal periods are inseparably intertwined with time keeping for wage payment purposes. Consider the interaction of a meal period within an employee's daily shift. If an employer rounds all time clock events, then, by definition, the meal period in and out clock events are also captured and then rounded. Thus, the very rationale that renders the rounding of meal periods unlawful where it changes a non-compliant meal period into a compliant one also compels the conclusion that rounding of clock in and clock out times for pay purposes is unlawful when, over time, it underpays an

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[2] Petitioner's core view is consistent with the approach advocated herein because Petitioner also expressed in her Reply Brief the position that time rounding is inconsistent with California employment law, but chose to confine the briefing to the issue on which review was expressly granted, addressing rounding as it relates to meal period compliance. In this brief, amici take the position that addressing meal periods while ignoring wage payment rounding would cause a disconnect, since the flaw underlying rounding and its adverse impact on individual employees appears both in the meal period and the wage payment context.

employee (transforming, according to a few Courts of Appeal, a non-compliant wage underpayment into a compliant payment). This Court need not seek to craft disparate rules for the treatment of pay-based rounding and meal period rounding when California's laws and regulations, and this Court's many decisions comparing California wage and hour law with the federal approach to those same issues, supply the principles necessary to decide the legality ***of the results*** of any rounding system:

- First, California's wage and hour laws are almost universally more protective of employees than federal law. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 839 (2018), *as mod., reh. den.* (Aug. 29, 2018) (*Troester*) ("On a number of occasions, we have recognized the divergence between IWC wage orders and federal law, generally finding state law more protective than federal law.")
- Second, California does not incorporate federal definitions or standards into California wage and hour law other than in instances where that incorporation is expressly stated. *Troester, supra* 5 Cal. 5th at 839, quoting *Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 843 (2015) ("We have stated that, '[a]bsent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time ... is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication.' ").
- Third, California defines hours worked differently than federal law. *See, e.g., Morillion v. Royal Packing Company*, 22 Cal. 4th 575, 582

(2000) (California "hours worked" definition more protective than federal law); *Armenta v. Osmose, Inc.,* 135 Cal. App. 4th 314, 324 (2005) (no averaging to check minimum wage compliance); *see also Troester, supra* 5 Cal. 5th at 840.

- Fourth, the rights defined by the Labor Code and associated Wage Orders are, overwhelmingly, individual rights held by each employee, independent of compliance as to other employees. As stated in *Troester, supra* 5 Cal. 5th at 840, "The Labor Code also contemplates that employees will be paid for all work performed." *See, e.g.*, Lab. Code § 510(a) (refers to overtime pay "for ***an*** employee"); Lab. Code § 1194 ("any ***employee*** receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation"); Lab. Code § 226.7 ("An employer shall not require ***an employee*** to work during a meal or rest or recover period…"). A system that sanctions non-payment of wages to any employees for any of their work necessarily runs afoul of California law.
- Finally, a fifty year old Federal Regulation neither incorporated into California Wage Orders nor into the Labor Code, that effectively denies any employee pay for all of his or her work, must not control the interpretation and application of California law notwithstanding the DLSE's misplaced use of the Federal regulation in its Enforcement

Manual. *Troester, passim.*

Applying these principles, the only viable test is to ask, ***as to each separate employee***, does rounding permit an employer to reduce its compliance with an obligation imposed by the Labor Code and associated regulations? In the case of the obligation to pay for ***all*** time worked, the question as to each separate employee is whether, over time, rounding results in the payment of less than all time worked for that *individual* employee. In the case of the obligation to provide a compliant meal period, the applicable questions as to each employee is whether rounding causes a meal that was ***less*** than 30 minutes to be "recorded" as lasting 30 minutes, or a meal period that actually commenced after the end of the fifth hour of work to be "recorded" as starting earlier.

This straightforward test for evaluating an employer's lawful compliance with individual employee rights under the Labor Code is true to this Court's analysis in *Troester*, applying the wisdom of *Troester*'s *de minimis* analysis to the uncannily parallel rounding system context. *See Troester*, 5 Cal. 5th at 848. *Troester*'s take on the challenges of tracking small amounts of time applies with equal force in the rounding context. ***As to each separate employee***, does the *result* of rounding permit an employer to reduce the extent of its compliance with an obligation imposed by the Labor Code and associated regulations? If the answer is yes, the *result* of rounding is unlawful under California law.

It is worth emphasizing that rounding, as an abstract concept, is neither lawful nor unlawful, but, as employer argue, neutral. Rounding of time clock events is a mathematical calculation, based on some rule set, applied to an employee's time clock

events. However, the ***results*** of that rounding can be unlawful, and are as applied by many employers to date, including this case. When rounding denies *an* employee his or her complete pay or records a non-compliant meal period as compliant, its ***result is*** unlawful even if the practice of time rounding is facially neutral. To hold otherwise would create an extra-statutory procedure with the power to override the strict requirements of California's Labor Code and the implementing regulations of the Wage Orders.

DISCUSSION

II. FEDERAL TIME ROUNDING PRACTICES IMPROPERLY ADOPTED BY THE DLSE IN ITS ENFORCEMENT MANUAL HAVE INCREASINGLY EVISCERATED EMPLOYEE PROTECTIONS UNDER CALIFORNIA LAW

A. The DLSE Imported a Federal Rounding Regulation in Its Enforcement Manual Without Basis and in Violation of the Administrative Procedures Act, Which Courts of Appeal Improperly Effectuated in Conflict with California's Wage and Hour Requirements

More than 50 years ago, around the time it adopted the *de minimis* doctrine, the United States Department of Labor adopted a regulation pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq., permitting the use of historical rounding practices for purposes of satisfying wage obligations under the FLSA. The regulation, in relevant part, states that in "some industries, particularly where time clocks are used, there has been the practice for many years 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...For enforcement purposes this practice of

computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." 29 C.F.R. § 785.48(b) (2011). When that regulation was originally adopted – and at all times since, just like the *de minimis* doctrine – California's Labor Code and California's Wage Orders promulgated by IWC under authority of the Labor Code made no mention of rounding as a practice authorized under California law.

Though California's Labor Code and implementing Wage Order have never adopted the federal rounding regulation, approved of the federal rounding regulation, or independently stated any rounding rule at all, the DLSE decided to adopt the federal rounding regulation in its Enforcement Manuals. The last revision to the DLSE Enforcement Manual states, in regard to rounding:

> Rounding Practices. Rounding practices may be accepted for enforcement purposes by the Labor Commissioner, provided that such a practice is used in a manner that will not result, over a period of time, in a failure to compensate employees properly for all the time they have actually worked. ***The Labor Commissioner utilizes the practice of the U.S. Department of Labor of "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions.*** (29 CFR § 785.48(b)). The federal regulations allow rounding of hours to five minute segments. Recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour has been the practice in some industires [sic] for many years. However, under such practices an employee must be fully compensated for all the time they actually work.

The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised), (August 2019), § 47.3 (DLSE Enforcement Manual) (emphasis added). The DLSE provided no statement of a basis for its decision to utilize "the practice of

the U.S. Department of Labor." The Administrative Procedures Act exists precisely for this reason, and the DLSE is well aware of that, stating on it's website: "Pursuant to Executive Order S-2-03, the DLSE opinion letters and the Enforcement Policies and Interpretations Manual are currently under review to determine their legal force and effect and to ensure compliance with the requirements of the Administrative Procedures Act."[3]

The DLSE's enforcement position on the rounding of employee time clock events remained in the DLSE Enforcement Manual, without further event, for many years. Then, in 2012, the Court in *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012) adopted the DLSE's underground regulation in the absence of any California law or duly enacted regulation justifying that adoption. The *See's Candy* Court said: "Although California employers have long engaged in employee time-rounding, there is no California statute or case law specifically authorizing or prohibiting this practice." *See's Candy*, 210 Cal. App. 4th at 901.[4] After briefly

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[3] *See*, https://www.dir.ca.gov/dlse/Manual-Instructions.htm (last viewed January 30, 2020). In addition to the tacit recognition on its website that the DLSE Enforcement Manual is, often, an unlawful underground regulation, much of the Introduction of the DLSE Enforcement Manual is devoted to an attempt at justifying the DLSE's decision not to utilize "the very time consuming process of the Administrative Procedures Act" when issuing its DLSE Enforcement Manual and Opinion Letters. While some aspects of the DLSE Enforcement Manual are supported by citations to California Court decisions, the DLSE originally imposed its view of rounding with no supporting basis under California law. The DLSE *now* also cites to *See's Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889 (2012) in support of its rounding construction, which is circular, since, *See's Candy* cited to the DLSE Enforcement Manual in support of its conclusion, rather than any California law or regulation.

[4] This statement in *See's Candy* summarizes, in one sentence, the erroneous focus on rounding as lawful or unlawful act, without addressing the consequences to the individual of that rounding. As noted above, *rounding*, in and of itself is not the

reviewing *federal* law on rounding, the *See's Candy* Court observed:

> ***Although there are no California reported decisions holding the federal standard applies under California law***, the agency empowered to enforce California's labor laws (DLSE) has adopted the federal regulation in its manual (DLSE Enforcement Policies and Interpretations Manual (2002 rev.) (DLSE Manual)).

See's Candy, 210 Cal. App. 4th at 902. The *See's Candy* Court then declared that it would accept the DLSE's reliance on federal law. *See's Candy*, 210 Cal. App. 4th at 903. Running with this blessing, the DLSE updated the DLSE Enforcement Manual to cite to the *See's Candy* decision:

> In *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, the Court agreed with the employer's claim that its nearest-tenth wage rounding policy is consistent with state and federal laws "permitting employers to use rounding for purposes of computing and paying wages and overtime" and that the nearest-tenth rounding policy did not deny employees "full and accurate compensation." The Court held that the DOL regulation adopted by the DLSE recognizes "that time-rounding is a practical method for calculating work time and can be a neutral calculation tool for providing full payment to employees." "Assuming 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." In rejecting the plaintiff's argument that the rounding policy violated Labor Code § 204, the court stated that § 204 relates only to the timing of the payment of wages and creates no substantive right to wages. *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, reaffirmed the earlier case on a motion for summary judgment.

DLSE Enforcement Manual, § 47.3.1.

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issue. The ***result*** of rounding can, however, be unlawful. *See's Candy* should have focused on whether any particular employee was underpaid over time as a ***result*** of the rounding system at issue and declared, consistent with existing California law, that underpayment to an individual was the only test that had to be addressed. The DLSE's decision to impose a federal regulation on California wage and hour law was a separate error that violated the APA.

Once the federal treatment of rounding had a toe hold in California through the DLSE, the *federal* treatment of employee pay rights as an *aggregate* obligation, rather than the individual right it is under California law, quickly followed. In *Corbin v. Time Warner Entm't*, 821 F.3d 1069 (9th Cir. 2016), the plaintiff argued that if any employees lost pay on account of rounding over the period of time analyzed, those employees should be permitted to recover that underpayment. As summarized in *AHMC Healthcare, Inc. v. Superior Court*, 24 Cal. App. 5th 1014, 1021-23 (2018) – which, like *See's Candy*, unpersuasively sided with the federal treatment of adequate wage payments – the Ninth Circuit in *Corbin* rejected that contention. And it did in part by recognizing that federal standards, unlike California law, do not include an individual employee requirement:

> [Plaintiff] reads into the federal rounding regulation an "individual employee" requirement that does not exist. The regulation instead explicitly notes that it applies to "employee *s*" and contemplates wages for the time "*they*" actually work. 29 C.F.R. § 785.48(b) (emphasis added).

Corbin, 821 F.3d at 1077. In a holding diametrically opposed to the lesson of *Troester*'s *de minimis* position, the court in *Corbin* stated: "If the rounding policy was meant to be applied individually to each employee to ensure that no employee ever lost a single cent over a pay period, the regulation would have said as much." *Corbin*, 821 F.3d at 1077. The DLSE's initial, unsupported decision to rely upon *federal* law with respect to California wage and hour obligations has caused damage to wage payment rights of California employees who regularly put in extra time with their employers' knowledge, merely because other employees take advantage of rounding systems. Damage to meal period rights is merely the next step in the degradation of

California's employee-centric wage and hour laws that are substantially more protective of employees than either *federal* law or most other states' wage and hour laws.

B. The DLSE's Rounding Construction Is an Unlawful Underground Regulation That Cannot Withstand Scrutiny and Lacks Compelling Support in Courts of Appeal Decisions

The DLSE's assertion that federal rounding rules will be applied under California law, stated in the DLSE Enforcement Manual, is an improper "underground regulation," *i.e.* a regulation which was implemented without following the procedures set forth in the Administrative Procedures Act. *See Tidewater Marine Western Inc. v. Bradshaw*, 14 Cal. 4th 557, 574 (1996). As this Court declared with respect to that very Enforcement Manual, an underground regulation is entitled to no deference. *Id.*, at 577.

In *Tidewater,* this Court held that a portion of the DLSE Enforcement Manual which set forth a rule for determining whether California's Wage Orders apply to marine vessels operating off the coast of California was an invalid underground regulation. As *Tidewater* explains, subject to certain exceptions not relevant here, all regulations must be promulgated in accordance with the APA. There is a two-part test for determining whether an agency policy is a regulation. First, it sets forth a general rule that will decide a class of cases. Second, it implements, interprets or makes specific the law enforced by the agency. *Id.* at 570.

The DLSE's adoption of a rounding rule for enforcement of Labor Code and Wage Order provisions, meets both prongs of that test and constitutes an underground

regulation. It is a general rule which governs a class of cases, and it interprets and implements the law enforced by the DLSE. Therefore, it is entitled to no deference. It is also not a correct statement of California law and should be disregarded, including because this Court has previously held that it is under no obligation to abide by the DLSE's interpretations (particularly when inconsistent with California law). *Mendiola,* 60 Cal. 4th at 848; *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1105 (2007). And the DLSE Enforcement Manual leaves no doubt that it intends to adopt federal, rather than state, wage and hour standards with respect to rounding doctrine:

> The Labor Commissioner utilizes the practice of the U.S. Department of Labor of "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions. (29 CFR § 785.48(b)).

DLSE Enforcement Manual § 47.3

Faced with the DLSE's unsupported reliance upon the weaker wage and hour standards under federal law, this Court should reject the DLSE's enforcement decisions for what they are — that is, a failure to follow and apply clear and unequivocal California law to employers' obligation to pay each employee for any and all time worked and to provide each employee a meal period that is compliant as to that employee.

Because California Courts of Appeal trace their rounding analysis back to the DLSE Enforcement Manual, through *See's Candy*, their decisions are unsupported, lacking any independent analysis of California law that would separately support the contention that rounding evaluated across a group of persons or aggregated rounding,

rather than on an employee-by-employee basis, is lawful. Rounding of meal period time clock events is equally unsupportable, as one must not only accept the DLSE importation of federal law into California law, but must then also apply it to the strict parameters that govern meal periods. *See*, e.g., *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012) (analyzing meal period obligations in detail).

C. Given Its Reliance on an Underground Regulation, *See's Candy* Must Be Rejected When Read to Countenance Rounding Systems that Deny Employees Pay for all Their Work Time

See's Candy, for its part, fails to state an independent basis for importing federal pay standards into California law, and *See's Candy* includes a number of faulty conclusions that render its decision to rely upon the DLSE Enforcement Manual unsupportable. First, *See's Candy* said, as to rounding, that "there is no California statute or case law specifically authorizing or prohibiting this practice." *See's Candy*, 210 Cal. App. 4th at 901. That is literally true but markedly inaccurate. As this Court emphasized in *Troester*, California law requires payment for all time worked, even minutes or seconds of time that can be captured. *Troester*, 5 Cal. 5th at 847 ("In light of the Wage Order's remedial purpose requiring a liberal construction, its directive to compensate employees for all time worked, ***the evident priority it accorded that mandate notwithstanding customary employment arrangements***, and ***its concern with small amounts of time***, we conclude that the de minimis doctrine has no application under the circumstances presented here.") A quarter-hour rounding system can shave 15 minutes of paid time off an employee's wages *in a single day*. Thus, while *See's Candy* could have stated that the word "rounding" is not mentioned

in California law, the practice of rounding is, by necessary implication, prohibited in instances where it causes violations of existing obligations imposed by California law.

Later, *See's Candy* said, "Assuming 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*, 210 Cal. App. 4th at 903. The Court's statement in this regard lacks an important limitation. Under California law, the "neutrality" of rounding must be examined as to each employee, else it does, in fact, impose a "burden" on some employees by underpaying them over time. In *Troester*, with regard to a *de minimis* defense to strict pay obligations, this Court said, "[W]e decline to adopt a rule that would require the employee to bear the entire burden of any difficulty in recording regularly occurring work time." Certainly, then, there can be no greater "burden" on an employee than underpaying the employee but responding to a complaint by saying, "Well, we overpaid another employee, so you are fine." The ultimate implication, then, of this nowhere authorized *aggregate* pay test would be to require an employee bringing an individual suit to recover unpaid wages due to rounding to engage in a classwide evaluation of pay sufficiency just to recover their own underpaid wages.

See's Candy attempted to defend the importation of a lax federal wage payment regulation on rounding by arguing that it protects ***employers***, paraphrasing from a federal court decision: "To hold otherwise would preclude [California] ***employers*** from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States." *See's Candy*, 210 Cal. App. 4th

at 903 (emphasis added). This basis for importing 29 CFR § 785.48 conflicts with the recognized policy of strict employee protection embodied in California's wage and hour laws and regulations. "Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide." *Prachasaisoradej v. Ralphs Grocery Co., Inc.,* 42 Cal. 4th 217, 227 (2007); *see also Smith v. Superior Court*, 39 Cal. 4th 77, 82 (2006) ("[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and established."); *accord Pineda v. Bank of America, N.A.,* 50 Cal. 4th 1389, 1400 (2010) ("Public policy favors employees in their efforts to recover overtime compensation."); *Eicher v. Adv. Bus. Integrators, Inc.*, 151 Cal. App. 4th 1363, 1383 (2007), citing *Gould v. Maryland Sound Industries, Inc.* 31 Cal. App. 4th 1137, 1148 (1995) (broad public interest in enforcing overtime laws). This public policy favoring the protection of employees and their right to receive all wages due is rooted in a recognition of "the economic position of the average worker and, in particular, his dependence on wages for the necessities of life, for himself and for his family." *Ex Parte Trombley*, 31 Cal. 2d 801, 809 (1948).

California's strong policy of protecting employees has been clearly stated for more than a century, beginning no later than the enactment of California's original minimum wage statute in 1913. *Martinez v. Combs*, 49 Cal. 4th 35, 52-53 (2010), as modified (June 9, 2010). The enactment was a result of national recognition of "the low wages, long hours, and poor working conditions, under which women and children often labored." *Id.*, at 53. "California's legislation called for a commission to

study and then adopt minimum wage rates and to make it a crime not to pay minimum wage." *Id.* This predated the 1938 passage by Congress of the FLSA. *Id.* The California Legislature subsequently expanded the IWC's jurisdiction to extend to all employees, not just women and children. *Id.,* at 55. Further, the Legislature has "restated the (IWC's) responsibility in even broader terms "with a continuing duty to adopt new wage orders 'if the commission finds that 'wages paid to employees may be inadequate to supply the cost of proper living." *Id.*; Lab. Code § 1178.5(a).

California's meal period requirements, minimum wage laws, and overtime laws are more favorable to employees than federal law, a fact routinely recognized by this Court. According to *Morillion*, "hours worked" which an employee must be paid at least the minimum wage for includes both the time that an employee is "suffered or permitted to work" and the time that an employee is under the employer's control whether or not they are actually working. *Morillion*, 22 Cal. 4th at 582. By contrast, federal law does not require compensation when the employee is subject to the employer's control, but is not "suffered or permitted to work." *Id.*, at 589. California minimum wage law also differs from federal minimum wage law in that it does not allow averaging to determine whether an employee has been paid more than the minimum wage. *Armenta v. Osmose, Inc.,* 135 Cal. App. 4th 314, 324 (2005). In *Armenta*, the Court of Appeal examined the language of the Labor Code and focused on sections 221, 222, and 223, which prohibit an employer from withholding "any part of the wage agreed upon." *Id.*, at 324. As the Court of Appeal explained, these "[Labor Code] statutes reveal a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally." *Id.* The Court of

Appeal also noted California's minimum wage is also higher than the federal minimum wage and does not allow for various exceptions recognized under federal law. *Id.*

The very strong policy of protecting employees with comprehensive and expansive wage, hour, and working condition laws has led to the settled understanding that California wage and hour law, including the Labor Code and Wage Orders, is to be liberally construed so as to protect the rights of ***employees***. *McClean v. State of California,* 1 Cal. 5th 615, 622 (2016) ("In light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours, and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."); *Von Nodurth v. Steck*, 227 Cal. App. 4th 524, 532 (2014) ("The provisions of both the Labor Code and the wage orders are to be liberally construed with an eye to promoting employee protections, and must be interpreted in the manner that best effectuates that protective intent.").

Recently, this Court (quoting itself) repeated the fact that the Labor Code and wage order have, as their primary purpose, the protection of employees:

> When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. [Citations.] Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code. [Citations.] In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees. [Citations.]

Troester, 5 Cal. 5th at 839, *quoting Augustus v. ABM Security Services, Inc.*, 2 Cal.

5th 257, 262 (2016). Distilling the logical tension in rounding decisions to their bare essence, how can it be the case that California law mandates that an employee must be paid for every minute or even second of work capable of ascertainment, but an employer can impose a rounding rule that shaves ten *or even fifteen* minutes of time of an employee's daily wages? *See's Candy* did not resolve, let alone address, the potential misuse of its holding. It is axiomatic that conscientious employees who regularly start work a few minutes early and leave a few minutes late with their supervisors' knowledge, will lose money over their tenure with their employer under Respondent's rounding system in this case, so long as there are less diligent employees who, roughly as often, come in late and leave early. *Troester* teaches that this result is untenable.

As this issue will continue to arise in California, this Court should clearly state that California's wage and hour protections are for the benefit of *each separate employee*, which necessarily means that rounding cannot be used to underpay any employee over time just because other employees were overpaid, or deny any employee a compliant meal period because time worked was rounded. The ***results*** of rounding should be examined in the same way that any other cause of an underpayment or meal period compliance issue is addressed. While *Troester* should be viewed as imposing a natural limitation on *See's Candy* by virtue of its strong statement regarding the obligation to pay an employee for *all* time worked, it appears that a more explicit statement of that limitation is required to put an end to the encroachment of weaker federal timekeeping standards into the strong protections offered by California's employee pay requirements and meal period rights.

III. THIS COURT HAS REPEATEDLY REJECTED THE APPLICATION OF FEDERAL WAGE AND HOUR STANDARDS WHERE THE FEDERAL STANDARDS ARE NOT ALSO DULY AND PROPERLY ADOPTED INTO CALIFORNIA LAW

The DLSE issued guidance approving of an employment practice that complied with a federal regulation. The practice was not authorized by the Labor Code or expressly approved in the relevant IWC Wage Order. A lower Court noted the DLSE position and concluded that the employer's conduct was lawful based, in part, upon the federal regulation. While this procedural summary could be said to describe this matter – rounding made its way into California law through the DLSE Enforcement Manual – it also describes *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833 (2015) (where the DLSE's apparent approval of the federal practice of excluding sleep time from paid on-call time was rejected), and *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018) (where the application of the federal *de minimis* doctrine, approved by the DLSE, was rejected). The next verse is the same as the first.

Absent the DLSE's involvement in a matter, employers have routinely argued that their compliance with *federal* employment regulations should be accepted as compliance with California wage and hour requirements where nothing within California law suggests any intention to import federal law to supplant the State's greater protections. In the examples discussed below, whether the arise from DLSE underground regulations or simply employers arguing for laxer federal standards, the result is always the same: California does not import habitually less protective federal wage and hour standards except in those instances where the Legislature or the IWC

declared an express intention to do so.

A. This Court's Historical Treatment of Efforts to Import Federal Standards into California Wage and Hour Law Uniformly Display an Intent to Safeguard the Employee-Protective Policies Embodied in California's Labor Code and Wage Orders

Defendants have repeatedly asked California Courts to shield them from liability for violations of California's wage and hour laws, using protections set forth in federal law and applicable only to the FLSA. This Court has rightly and repeatedly rejected those attempts to use federal law to undermine the protections that California law affords to employees.

In *Ramirez v. Yosemite Water Company, Inc.*, 20 Cal. 4th 785 (1999), this Court rejected an argument that federal authorities should be used to determine definition of an outside sales person for purposes of the outside sales person overtime exemption in Wage Order No. 7-80. As the Court explained:

> The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations . . . . The FLSA explicitly permits greater employee protection under state law.

Ramirez, at 795.

In *Morillion v. Royal Packing Company*, 22 Cal. 4th 575 (2000), in deciding when employees should be compensated for travel time on employer owned buses, this Court declined to adopt the federal definition of the term "hours worked." *Id.*, 22 Cal. 4th at 592. The Court explained that California law can and often does offer greater protection to employees than federal law does: "Our departure from the federal authority is entirely consistent with the recognized principle that state law may

provide employees with greater protection than the FLSA." *Id.* The Court refused to import federal standards that would weaken state law protections absent convincing evidence that the IWC had intended this in drafting the applicable Wage Order:

> Absent convincing evidence of the IWC's intent to adopt the federal standard . . . we decline to import any federal standard, which expressly eliminates substantial protections for employees, by implication.

Id. This Court concluded that there is no confusion as to the intent behind the IWC's Wage Order provisions, or whether any federal law standards are incorporated therein. The IWC demonstrated that it was fully capable of referring to federal law standards in Wage Orders when it affirmatively intended to do so. As this Court observed, because the IWC knows how to incorporate federal law, and expressly indicates when it is doing so, the absence of an express incorporation reflected its intent *not* to incorporate federal standards:

> Finally, we note that where the IWC intended the FLSA to apply to wage orders, it has specifically so stated.

Morillion, at 592.

And, in *Mendiola v. CPS Sec. Solutions, Inc.*, 60 Cal. 4th 833 (2015), this Court refused to apply the sleep exemption that exists under the FLSA to California wage claims, thereby excluding "sleep time" from 24-hour shifts. *Id.*, 60 Cal. 4th at 843-49. As it has many times, this Court held that when the IWC intends to incorporate federal law into California's wage and hour regulatory framework, it *expressly* says so:

> The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference.

Id., 60 Cal. 4th at 843. *Mendiola* again declined to incorporate a federal regulation

regarding compensation for employees who reside part time at the employers' premises into a Wage Order, holding as follows:

> Federal regulations provide a level of employee protection that a state may not derogate. Nevertheless, California is free to offer ***greater protection***.

Mendiola, 60 Cal. 4th at 842-843 (emphasis added). As in *Morillion*, this Court said that the absence of an express adoption by the IWC of the federal standard was dispositive:

> Other language in Wage Order No. 4 indicates that the IWC knew how to explicitly incorporate federal law and regulations when it wished to do so. . . . The IWC intended to import federal rules only in those circumstances to which the IWC made specific reference.

Id. at 843. But this Court went further in *Mendiola*, holding that intent to incorporate federal law by the IWC would only be found where express exemption language analogous to federal law was utilized by the IWC:

> The relevant issue in deciding whether the federal standard had been implicitly incorporated was whether state law and the wage order contained an *express exemption* similar to that found in federal law.

Id. at 846. *See also*, *Alvarado v. Dart*, 4 Cal. 5th 542 (2018).

B. Extending the Decisions Rebuffing Weaker Federal Wage and Hour Standards, *Troester* Rejected the Federal *De Minimis* Test as a Valid Basis for Calculating Wage Obligations, Which Analysis Is Logically Consistent with a Rule That Precludes Any Rounding That Results in Underpayment of an Employee's Earned Wages

In *Troester*, 5 Cal. 5th 829, this Court confirmed that any underpayments to an employee that are capable of detection or even estimation are, by definition, violations of California laws requiring payment of all wages for *all* hours worked.

This obligation is consistent with the employee-protective policies that underlie California's wage and hour laws:

> When construing the Labor Code and wage orders, we adopt the construction that best gives effect to the purpose of the Legislature and the IWC. [Citations.] Time and again, we have characterized that purpose as the protection of employees—particularly given the extent of legislative concern about working conditions, wages, and hours when the Legislature enacted key portions of the Labor Code. [Citations.] In furtherance of that purpose, we liberally construe the Labor Code and wage orders to favor the protection of employees. [Citations.]

Troester, 5 Cal. 5th at 839, *quoting Augustus v. ABM Security Services, Inc.*, 2 Cal. 5th 257, 262 (2016). These protections apply to the payment of all wages owed, even in tiny amounts, as confirmed by this Court.

Troester rejected the application of any *de minimis* rule when the law at issue is focused on small amounts: "We have said that application of a de minimis rule is inappropriate when 'the law under which this action is prosecuted does care for small things.'" *Troester*, 5 Cal. 5th at 844, quoting *Francais v. Somps*, 92 Cal. 503, 506 (1891). With relevance to the rounding in this action, *Troester* then observed that "the regulatory scheme of which the relevant statutes and wage order provisions are a part is indeed concerned with 'small things.'" *Troester*, 5 Cal. 5th at 544. Examining the decision in *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 265 (2016), *as modified on denial of reh'g* (Mar. 15, 2017) as a source of guidance, *Troester* recognized that "the strict construction of a law prohibiting any interference with or reduction of a 10-minute rest break is difficult to reconcile with a rule that would regard a few minutes of compensable time per day as a trifle not requiring compensation if too inconvenient to record." *Troester*, 5 Cal. 5th at 844-45.

To contend that (1) a payment of a minute or two a day cannot be avoided by application of a *de minimis* excuse, but (2) a payment of seven, ten, or even 15 minutes a day can be avoided through the application of time rounding is to disconnect the discussion from all logic. California's wage and hour requirements apply to all employees or they do not. There is no basis in the law for shaving minutes of actual work time off an employee's recorded time for pay purposes.

C. Consistent with its Rejection of a Federal Standard to Resolve Wage Payment Issues in California, *Troester* Held That All Time Worked Must Be Compensated, Placing the Burden on Employers to Capture or Pay for All Time Worked and Never Suggesting That Underpayment of That Time Was an Acceptable Solution

Here, Respondent rounded work time to the nearest 10-minute increment. Because *Troester* arose in a case where several minutes of unpaid time was at issue, this Court necessarily discussed "minutes" in its opinion. But *Troester* did not specify a floor below which employees need not be compensated. Instead, *Troester* analyzed where the burden to capture should lie, holding that it lies with the employer. Justice Cuéllar said about the majority opinion:

> [I]t observes that employers have the burden of tracking potential work time occurring on a "regular basis" or that is "a regular feature of the job," and in doing so, rightly focuses on reasonable solutions such as smartphone apps or rounding strategies for tracking these regular amounts of time.

Troester, 5 Cal. 5th at 852. With direct application here, Justice Cuéllar summarized the intent of the majority's opinion:

> California law still protects workers from being forced to undertake work that won't be paid. That protection is not diluted if it remains possible for employers to argue against liability ***for moments so***

> ***fleeting that they are all but imperceptible***. Courts may sometimes find employers' arguments to have merit in light of a context-dependent inquiry focused on the extent to which the time in question can be meaningfully perceived, the quantity and regularity of the uncompensated work over time, as well as the nature of the employee's job responsibilities and related factors. What we know is that ***regular minutes worked by employees off the clock do not come close to being treatable essentially as rounding errors under a sensible application of a rule of reason.***

Troester, 5 Cal. 5th at 853 (emphasis added).

Here, absent reversal, employees who regularly work off the clock with the knowledge of their supervisors, even if as a "regular feature of their job" will necessarily not be paid for all their work time if others are paid for time they did not work. Such a result is contrary to the letter and lesson of *Troester* and the entirety of California's wage and hour laws and regulations.

D. *Troester* Does Not Endorse Aggregate Rounding Merely by Discussing Disparate Constructions of *See's Candy*

It would also be legal error to conclude that *Troester* approves of aggregate rounding. In *Troester*, this Court took note of the parties' disparate interpretations of *See's Candy Shops, Inc. v. Superior Court*, 210 Cal.App.4th 889 (2012), a decision which addressed the *theoretical* legality of the rounding of employee time punch entries. As did *Troester* with respect to the federal de minimis doctrine, *See's Candy* addressed whether rounding, as a matter of first impression in California state courts, could ever be legal in California. After observing that the *See's Candy* Court found nothing that expressly *prohibits* rounding under California law, *Troester* identified the ***essential*** aspect of *See's Candy*, stating that *See's Candy* accepted "the validity of the rounding policy only 'if the rounding policy is fair and neutral on its face and "it

is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." ' "
Applying that construction of *See's Candy* to reject an argument advanced by Starbucks, *Troester* said, "*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." By focusing on the obligation to ensure that, over time, employees will be compensated for all time they actually worked, *Troester* confirms that aggregate rounding (where some employees gain while others lose) cannot be lawful, since no law or regulation in California suggests that wage payments obligations are evaluated as lawful or unlawful *on average* as to an entire workforce.

Relevant to this matter, the passage from *See's Candy* cited in *Troester* is accurate to a point. An employer in California *does* have to compensate employees so that, over a period of time, it does not fail to compensate its employees properly for all the time they have actually worked. Just so. That is an alternative phrasing of the requirement, emphasized in *Troester*, that all time worked must be compensated. *Troester*, 5 Cal. 5th at 848 ("The relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off the clock without compensation.") However, an additional provision has been grafted onto what would otherwise be the accurate statement in *See's Candy* of the obligation to pay an employee for all the time they have worked. It is the assertion that the requirement for payment of all time worked can be averaged across numerous employees. *See's Candy* was right to state that all time worked must, over time, be fully compensated

(which allows for systems, like rounding up to capture small amounts of off-the-clock time, that, over a period of time end up fully compensating an employee), as *Troester* noted. What has been done by other Courts with that observation from *See's Candy* is not right.

Recognizing that the effect of rounding on an employee can either be lawful or unlawful does not, in any way, suggest that *all* rounding scenarios are unlawful. Several types of rounding do not run afoul of California's employee-protective wage and hour framework. For example, as suggested by *Troester*, an employer could round employee time up by some increment as a solution to capturing small amounts of off-the-clock work time that are hard to quantify in any less burdensome method. In that scenario, an employer could round employee end times up to, for example, the next five-minute interval to effectively capture a minute or two of daily off-the-clock work. Another form of rounding with a lawful end result, assuming all else compliant, is rounding coupled with work policies where an employer gives employees the option to clock in early and clock out late, ***so long as they are also prohibited under the policy from working until their shift starts, and prohibited from working once their shift ends***. *Silva v. See's Candy Shops, Inc.*, 7 Cal. App. 5th 235 (2016) (in the absence of any evidence showing that class members worked during a grace period, court of appeal affirmed a summary judgment ruling that a 10-minute grace period, coupled with a strict policy that no work could occur until the scheduled shift start time, demonstrated that no class members worked during the grace period). It may be possible to devise other rounding systems that avoid violation of obligations to each employee; in all instances, it is the legality of the

result as to each employee that should be dispositive. Rounding should never insulate unlawful conduct by an employer towards any employee.

IV. BECAUSE DIGITAL TIMEKEEPING DEVICES AND COMPUTERIZED PAYROLL NOW DOMINATE THE WORKPLACE, ROUNDING OF TIME PUNCHES NO LONGER PROVIDES THE EFFICIENCIES THAT EXISTED WHEN TIME AND PAY CALCULATIONS WERE MANUALLY PERFORMED

"Modern technology allows society not only to measure time, but—ever more—to master the knowledge of precisely how it is used, by whom, and for what purpose." *Troester*, 5 Cal. 5th at 849 (concurring opinion of J. Cuéllar). With digital timekeeping and computerized payroll now pervasive in the workplace, it is impossible to identify the utility of a two-way rounding system that results, over time, in payments to an employee for less time than the time really worked by the employee. Or, rather, it is impossible to identify the utility of such a system to the *employee*. Rounding does not make the processing of payroll any easier when a computer is performing the calculations. To the computer, 7:58 a.m. is as easy to work with as 8:00 a.m.

Thus, it seems particularly odd that Defendant views arguments against rounding (meal period rounding, in this instance) as violative of the "no policing" requirement in *Brinker*, which observed, "On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed." *Brinker*, 53 Cal. 4th at 1040. The employer is required to "provide" the meal period. *Brinker*, 53 Cal. 4th at 1040; *see also* Lab. Code § 512(a) and Wage Orders.

However, providing the meal period is not the only obligation placed upon the

employer. The employer must also record work periods and meal periods: "Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded." *See,* e.g., Cal. Code Regs. tit. 8, § 11050, at Section 7(A). The employer, then, satisfies its obligations by both providing the meal period to an employee *and* recording the start and end of the meal period (and assuming no other misconduct, such as pressure to forego a full meal period or to take it late).

Rounding of the start and end times of the meal period are not associated with the compliance steps of providing the meal period and recording the start and end time. It is fallacious to then argue that rounding, or not rounding, has anything to do with the "no policing" observation in *Brinker*. If anything, rounding of the start and end times places the employer more fully on notice when a recorded meal period does not comply with the timing or duration requirements for meal periods. The "no policing" language merely states that, so long as the employer has provided the meal period with no strings attached, it does not have to then check to see if an employee performs any work during the meal period. Whether the employer rounds or not, the "no policing" of work observation is not implicated.

On the other hand, an employer that sees an entire shift in a warehouse area clock out for lunch five hours and five minutes after the start of the shift should not be surprised when, at certification, a Court accepts evidence of such time clock events as creating a rebuttable presumption that the meal period in question was not provided as required by law. If the employer then rounds that time to mask the violation, it is not

the "no policing" requirement that is implicated. Rather, the employer is masking its violation of the law *and* thwarting the record-keeping requirements in the Wage Orders.

Rounding of time punches related to meal periods is unrelated to *Brinker*'s recognition that an employer is not required to follow its employees around to see if they really stopped performing all work after clocking out for a meal period.[5]

V. CONCLUSION

Federal rounding practices have intruded upon California law with nothing more to support them than an underground regulation that deviates from the employee-protective public policy embodied by California's wage and hour laws. That spreading intrusion – as this matter illustrates with rounding having jumped from paid time shaving to meal period manipulations – is likely to find few natural barriers. This is why this Court should decisively rejects the undermining of California law by Federal regulations never expressly or implicitly adopted by the Legislature or the IWC. Adverse results from rounding are not consistent with California law and are therefore not properly approved by any Court. The failure of this Court to take this opportunity to address rounding in ***all*** contexts would create a schism between rounding in the wage calculation and meal period contexts, when the law and logic that demonstrates unlawful employment practices applies to both contexts.

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[5] Naturally, if the employer directed that any sort of work should occur during a meal period, the "no policing" provision would not be implicated; the employer would be responsible for failing to provide the compliant meal period in the first instance.

Based on the foregoing, we respectfully requests that this Court reverse the decision of the Court of Appeal and find that any instance of rounding causes an unlawful act where it permits an employer to reduce the extent of its compliance with an obligation to an employee imposed by California law. Alternatively, and at the very least, we request that this Court find that any instance of rounding of meal periods is an impermissible practice where that rounding permits an employer to reduce the extent of its compliance with meal period obligations imposed by California law.

Dated: February 5, 2020

Respectfully submitted,

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CERTIFICATIONS

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Dated: February 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 9495 Wilshire Blvd., Suite 907, Beverly Hills, CA 90212.

2. That on February 5, 2020, declarant served the **APPLICATION FOR LEAVE TO FILE BRIEF AND [PROPOSED] BRIEF OF AMICUS CURIAE MOON & YANG, APC AND CLIENTS OF MOON & YANG, APC AND MOSS BOLLINGER LLP IN SUPPORT OF PETITIONER KENNEDY DONOHUE** by depositing a true copy thereof in a United States mail box at Beverly Hills, California in a sealed envelope with postage fully prepaid and addressed to the parties listed as follows:

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California Labor Commissioner: Pub/Depublication Requestor (Courtesy Copy)

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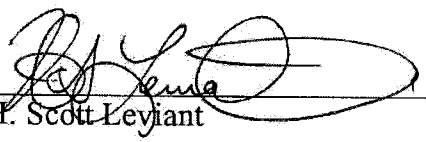
3. That there is a regular communication by mail between the place of mailing and the places so addressed.

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

Executed this 5th day of February 2020, at Los Angeles, California.

By: 
H. Scott Leviant