No. S253677

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff and Appellant

v.

AMN SERVICES, LLC,
Defendant and Respondent

After a Published Decision by the Court of Appeal
Fourth Appellate District, Division One, Case No. D071865
San Diego Superior Court Case No. 37-2014-00012605-CU-OE-CTL
Hon. Joel Pressman, Judge

APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT KENNEDY DONOHUE

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CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rule of Court 8.520(f), California Employment Lawyers Association ("CELA") respectfully request leave to file the attached amicus curiae brief in support of plaintiff, appellant and petitioner Kennedy Donohue.

CELA is a statewide organization of over 1,100 California attorneys who devote the major portion of their practices to representing employees in a wide range of employment cases, including wage and hour class action lawsuits similar to this matter. CELA has taken a leading role 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.

CELA has appeared as *amicus curiae* in many cases before this Court focusing on wage and hour issues, including, among others, *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175; *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829; *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542; *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; and *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094.

CELA's members, and their clients, have an abiding interest in the correct development and interpretation of California labor laws, including the requirement that employers compensate employees for all time time worked, as well as provide fully compliant 30-minute meal periods. The proposed amicus curiae brief of CELA will assist the Court in three ways.

First, it will provide a basis, as part of the Court's plenary 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 based on a detailed discussion of the adoption history of California's Wage Order and Labor Code provisions requiring employers to record and pay for "any" and "all" employee time worked. Second, the it will discuss how the practice of rounding meal periods is incompatible with an employer's obligations to provide compliant meal periods. Finally, the proposed brief surveys the body of published state and federal case law discussing the rebuttable prima facie presumption of meal period compliance or non-compliance raised by time records as set forth in the concurring opinion in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*) harmonized with other authorities discussing the veracity and reliability of time records to support a ruling in favor of adopting this presumption.

Pursuant to Rule of Court 8.520(f)(4), CELA affirms 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, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

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

Dated: January 17, 2020. Respectfully submitted,

By: _____
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INTRODUCTION AND SUMMARY OF ARGUMENT

California Employment Lawyers Association ("CELA"), as amicus curiae, submits this brief in support of Appellant. This Court should reverse the decision of the Court of Appeal, which erroneously concluded that an employer's practice of rounding employee meal period time complies with its obligations under California law to provide timely and complete meal periods.

CELA requests the Court reverse the decision below on the following grounds.

First, this Court has not yet comprehensively addressed whether rounding employees' time, a practice derived from federal law typically less protective than California wage and hour laws, is consistent with California's decades-long regulatory and legislative history mandating that every employee be compensated for all time worked, as well as California's long-established pubic policy protecting employee compensation. This case provides the opportunity as part of its plenary Review for the Court to make that assessment and reject the practice as contrary to California law. As will be shown, the hallmark of so-called "neutral" rounding, by which an employer is not liable for wage underpayment to one one set of employees provided it can show overpayment to other employees, runs afoul of California's guarantee that every employee be paid for all increments of time worked. It also runs contrary to acknowledging technological advances enabling employers to measure time worked to the second in favor of an inexact system existing for the convenience of employers and to the detriment of California workers.

Second, the practice of rounding is incompatible with statutory meal period requirements set forth in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*); no de minimis rule can support rounding

of meal periods, and; strict tardiness policies typically accompanying rounding will pressure workers to take shorter meal periods.

Third, time records, which employers are required to maintain, should raise a rebuttable prima facie presumption of meal period compliance or non-compliance, as uniform application of the standard set forth in *Brinker's* concurring opinion will benefit workers, courts, and practitioners; such a construction is supported by the mandatory record keeping requirements established in the Labor Code and applicable Wage Orders; Industrial Welfare Commission historical records support use of meal period records for enforcement; this Court in *Murphy v. Kenneth Cole Production* (2007) 40 Cal.4th 1094 (*Murphy*) recognized time records support a self-enforcing remedy for meal period violations, and; there is no principled reason to differentiate meal period records from other time records employers are required to accurately maintain.

I. DISCUSSION

A. The Practice of Rounding is Inconsistent With Long-Standing California Wage Law Guaranteeing Employees Compensation for Every Increment of Time Worked

1. Rounding Takes Away Compensation Owed to One Set of Employees by Paying it to Another, Violating California Public Policy

This Court has previously refused to depart from the principle that "the core statutory and regulatory purpose that employees be paid for all time worked" to adopt a federal de minimis standard endorsed by the Division of Labor Standards Enforcement (DLSE). *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 847 (*Troester*). In doing so, the Court referenced the employer practice of rounding employee time, that is, rounding employees' time on-the-clock either forward or back to specified time intervals. *Troester* rejected the defendant's argument that failing to pay

for de minimis time was akin to the rounding policy a district court of appeal found may comply with California wage laws in *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907 (*See's Candy I*). This Court noted that *See's Candy I* found that a rounding policy may, "consistent with the core statutory and regulatory purpose that employees be paid for all time worked," be valid if it is "fair and neutral on its face," and "'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.'" *Troester*, 5 Cal.5th at 847, citing *See's Candy I*, 210 Cal.App.4th at 907.

That is, some district courts of appeal have found that an employer may not be liable for undercompensating its workforce if it maintains a rounding system that is neutral on its face and neutral in impact such that it does not systematically undercompensate employees over time for their work. *Id.*

Rounding permits employers to use one set of employees' time that is added during rounding windows to counterbalance another's that is deducted. That is, time on-the-clock deducted from employees' pay [by rounding up pre-shift or rounding back post-shift to the rounding increment] may be offset by time off-the-clock added [by rounding up post-shift and back pre-shift]. In this way, rounding averages employees' time worked over time. It also effectively permits an employer to underpay compensation owed to many employees--whose clocked time is not fully paid--simply by pointing to timekeeping data showing it overpaid a different set of employees. A better example of a system fully inconsistent with the "overarching policy incorporated into California law of fully compensating employees for the work they perform" (*Troester*, 5 Cal.5th at 850 Cuéllar, J., concurring) is unlikely to be found.

In approving rounding systems based on United States Department of Labor (DOL) regulations, 29 C.F.R. § 785.48(b), *See's Candy I* cited federal cases finding that an employer complies with the federal regulation if it "applies a consistent rounding policy that, on average, favors neither overpayment nor underpayment." *See's Candy I*, 210 Cal.App.4th at 901; see also, *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship* (*Corbin*) (9th Cir. 2016) 821 F.3d 1069, 1076, quoting *Alonzo v. Maximus, Inc.* (C.D. Cal. Dec. 5, 2011) 832 F.Supp.2d 1122, 1126. These cases suggest that employers do not owe compensation to workers who are not paid for all clocked-in time where the timekeeping records of the aggregate workforce, over time, show that time deducted in rounding windows is neutralized by time added. In other words, one employee shorted thousands of dollars over time is not owed wages if time records show the system evens out as to the workforce as a whole.

As the Ninth Circuit Court of Appeals recently noted, the practice of rounding employee time among employers operating under federal law has been around for over fifty years. *Corbin,* 821 F.3d at 1075, citing Wage and Hour Division, Department of Labor, 26 Fed. Reg. 190, 195 (January 11, 1961). 29 C.F.R. § 785.48(b) reads in full:

> "Rounding" practices. It has been found 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. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. 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.

As it had with the federal de minimis standard, the DLSE adopted the federal DOL rounding practice as a compliant California practice in its

Enforcement Manual. Beginning with *See's Candy I*, several district courts of appeal have adopted the DLSE rounding standard. This Court referenced *See's Candy I* in *Troester* though the reference fell short of a comprehensive pronouncement that California law fully endorses rounding practices. This case presents the Court with the opportunity to comprehensively undertake the review needed for such a radical departure from California's worker-protective laws and public policies. It should reject the federally-based DLSE rounding law just as it disposed of the de minimis rule in *Troester* and rule that every employee must presumptively be paid for all time worked on the clock.

The California workplace is not the federal workplace. California protects its workers and the complete payment of their wages as a matter of legislative and regulatory provisions, and established public policy, none of which exists under the federal system that birthed rounding, as well as the de minimis standard rejected by this Court.

Permitting such a scheme is wholly inconsistent with California public policy "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation." Labor Code §90.5(a). Following this policy, "[w]ages … are jealously protected by statutes for the benefit of employees." *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595, 1601.

Rounding may have been around for more than fifty years, but for over *seventy* years, California has followed a different mandate, one that guarantees every employee at least minimum wage for "all hours worked."

2. Contrary to Federal Practice, the Regulatory and Legislative History Shows California Employers Must Accurately Record "Any" and "All Hours Worked" and Pay Workers for that Time

Unlike the federal de minimis law and DOL regulations permitting rounding, there has never been an exception in any IWC Wage Order or Labor Code provision allowing workers to go unpaid for some hours worked during rounding windows if an employer can show it all balances out over time considering other employees paid for time they did not work during other rounding windows.

The current Wage Orders and Labor Code require employers to record and pay for "any" and "all" employee time worked. Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3); Labor Code §510.

The wage order history, requiring employers without exception to record and pay for all work time, is instructive. During a period in which federal laws were reducing wage protections, the IWC consistently increased those protections through promulgation of wage orders guaranteeing pay for all hours worked. In response to the federal Portal-to-Portal Act, limiting relief to employees under the federal Fair Labor Standards Act (FLSA) for unpaid time spent on activities occurring before or after the principal activities for which they are employed, the IWC changed its definition of "hours worked" in a "Revised" (or "R") series of Orders issued in 1947. *Martinez v. Combs* (2010) 49 Cal. 4th 35, 59-60 (*Martinez*); *see Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 591 (2000); *e.g.*, Wage Order 5R (Feb. 8, 1947, eff. Jun. 1, 1947). The objective of this revision was to expand employee protections in California beyond those of federal law, and to make California law even more protective. *Martinez*, 49 Cal.4th at 59-60 (IWC's 1947 amendments were "[i]n response to" the

enactment of the federal Portal-to-Portal Act, which dramatically weakened protections of federal law).

Wage Order 5R adopted a new definition of "hours worked": "'Hours worked' means the time during which an employee is subject to the control of an employer …." Wage Order 5R, *supra*, ¶2(h). The definition continued to state that "hours worked" "includes all the time the employee is suffered or permitted to work, whether or not required to do so." *Id*.

The new definition of "hours worked" was integral to several other provisions of Wage Order 5R. Notably, in this Order, the IWC abandoned the concept of minimum weekly pay, which dated back to its earliest Orders. Instead, Order 5R imposed a minimum hourly wage for all employees. *Id.* ¶4(a). Pertinent here, the minimum wage provision was amended to explicitly state, for the first time, that compensation must be paid for "all hours worked." *Id*.

The recordkeeping provision in Order 5R also hinged on the new definition of "hours worked." It required employers to "keep" an "accurate" "[t]ime record showing actual time employment begins and ends each day, and hours worked daily." *Id.* ¶6(a)(3).[1]

Subsequent iterations of the wage orders continued the strict requirement of payment for all hours worked and requiring employers to "keep" "accurate" records of "total hours worked each day." See 1952 Orders (*e.g.*, Wage Order 5-52, ¶3(a)(1), 4(a), ¶7(a)(3) (May 15, 1952, eff. Aug. 1952)) (including same terms in all current wage orders [*e.g.*, Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3) (imposing same definition of "hours worked"; requiring minimum and overtime wages for "all hours worked"; and requiring employers to

[1] The italicized language comports with Labor Code section 1174, which had been codified in 1937, and remains unchanged today.

keep records of "total daily hours worked]); 1957 Orders ¶¶2(h), 3(a)(3), 4(a), 7(a)(3); 1989 Orders (*e.g.*, Wage Order 5-89, *supra*, ¶¶2(H), 3(A), 4(A), 7(A)(3)); 1993 Orders, ¶¶2(H), 4(A), 7(A)(3) (adding that for health care industry employees "hours worked" is to be "interpreted in accordance with the provisions of the Fair Labor Standards Act"); 1993 Amendments to Sections 2, 3, and 11 of IWC Order 5-89, ¶2(H) (Jun. 29, 1993, eff. Aug. 31, 1993); and the current wage orders, the 2000 and 2001 series of Wage Orders (readopting all four protective provisions, dating back to 1947 and 1952, defining "hours worked" to include "all time" during which any work is "suffered or permitted"; requiring payment of minimum wages for "all hours worked"; requiring payment of overtime wages for "all hours worked" above the stated daily and weekly maximums; and requiring employers to track, record and pay for "total daily hours worked"). Wage Order 5-2000, ¶¶2(L), 3(A)(1), 4(A)-(B), 7(A)(3) (eff. Oct. 1, 2000); Wage Order 5-2001 (eff. Jan. 1, 2001), 8 Cal. Code Regs. §§11050, ¶¶2(K), 3(A)(1), 4(A)-(B), 7(A)(3).

The Labor Code overtime provisions echo the Commission's sentiments. Labor Code section 510, subdivision (a), requires compensation for "any work," regardless of increment, as does the definition of "hours worked," which includes "all time."

As this history demonstrates, the IWC has consistently declined to weaken the protective requirements that employers must record and pay for "all" "hours worked." The Legislature has followed suit.

Thus, for over seventy years since 1947, the Wage Orders have required compensation for "all hours worked," which is expressly defined to include "all the time" an employee is suffered or permitted to work or under the control of the employer, regardless of the amount of the time increment. Based on this mandate, and consistent with public policy

guaranteeing every employee compensation for the work they perform, this Court can confirm that "any" and "all" time worked must be tracked, recorded, and paid to *every* employee, rejecting the DLSE and federal rounding standards. *See California School of Culinary Arts v. Lujan*, 112 Cal.App.4th 16, 27 (2003) (affording no deference to DLSE interpretation where "no amendment has been made to the wage order" to adopt such an interpretation and where DLSE's construction of the order was "not supported by … the early records of IWC").

3. Rounding Violates California Law's Guarantee of Full Payment of All Individual Employee Wages

The results of rounding practices taking away hard-earned compensation from workers has been well-documented though ignored because of a supposed "net" neutral impact on the workforce. In *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014 (*AHMC Healthcare*), experts analyzed 1,294,045 total employee shifts at the two facilities. The rounding system added 26,938 hours to the time of 1,568 employees (48 percent of the combined total number of employees) *but took away 21,685 hours from 1,666 employees (51 percent of the combined total number of employees*). *Id*. at 1024. Yet this evidence of "neutrality" supported summary judgment for the employer. *Id.*[2]

[2] Interestingly, AMN's expert report in the instant matter did not actually detail the amount of work time deleted or taken, concluding only that: "AMN's practice of rounding employee punch times to the nearest ten-minute increment produced a net surplus of 1,929 work hours in paid time for the Nurse Recruiter class as a whole. In other words, the Nurse Recruiters as a group were paid more under the timerounding policy than if they had been paid to the minute of the punch-in and punch-out times. Given that the time records reflect more than 500,000 total work-hours performed by the Nurse Recruiter class during the Rounding Period, the amount of this surplus is actually very small and underscores the overall neutrality of AMN's rounding system." 8 Plaintiff's Appendix 2167:16-22.

There can be no true "neutrality" where California workers lose tens of thousands of hours of worktime, regardless of what takes place with other employees, or at other facilities a defendant may control.

Broken down to the individual employee, rounding can easily mean a loss of thousands of dollars in unpaid work time. It is common that an employee may arrive, clock in before the scheduled shift start time, and work five minutes a day during pre-shift rounding windows. This time is "deleted" or "taken" (*Id.*) and not paid. For a registered nurse earning $40 per hour, this would result in 25 unpaid work minutes per week ($16.66), or over $800 per year. Yet rounding law allows the employer to simply withhold this compensation if the underpayment is counterbalanced by other employees who arrive an average of five minutes after shift start times or depart early before the end of their shift and nevertheless receive compensation for the time. A "good" employee devoted to working but who is shorted $800 per year because a "bad" employee arrives late or leaves early is wholly antithetical to California labor laws, geared as they are toward the full payment of every individual employee's earned wages.

This Court in *Troester* recognized the need for compensation for amounts much smaller:

> As the facts here demonstrate, a few extra minutes of work each day can add up. According to the Ninth Circuit, Troester is seeking payment for 12 hours and 50 minutes of compensable work over a 17-month period, which amounts to $102.67 at a wage of $8 per hour. That is enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares. What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages.

Troester, 5 Cal.5th at 847.

Though some district courts of appeal have adopted federal rounding principles, California law often exceeds federal protections. In addition to *Troester's* rejection of the federal de minimis law, a relevant example is

California courts' rejection of the use of averaging hourly time over the pay period to comply with minimum wage obligations in favor of a law requiring all hours be paid separately at least the minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324 (hourly wages); *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 43 (piece rate wages); *Vaquero v. Ashley Furniture Indus.* (9th Cir. 2016) 824 F.3d 1150, 1154 (commission wages). Rejection of rounding should be added to the list.

4. Advances in Technology Make Rounding Obsolete

The modern workplace, with the technological advances spanning the fifty years of rounding practices, is markedly different than the time-clock punching culture that spawned rounding. Cell phone and tablet applications, computer swipes and key-punch log-ins, telephone log-ins and other methodologies enable an employer to measure time worked down to heretofore unthought of fractional constituents.[3] These advances reveal the practice of rounding to be antiquated and unfit for the current workplace. *Troester's* conclusion, rejecting asserted difficulties of capturing time as a rationale for adopting an across-the-board de minimis rule, is equally applicable to rounding:

> many of the problems in recording employee worktime discussed in Anderson 70 years ago, when time was often kept by punching a clock, may be cured or

[3] See also, *Troester*, 5 Cal.5th at 849-50 (Cuéllar, J., concurring), citing Tippett et al., When Timekeeping Software Undermines Compliance (2017) 19 Yale J.L. & Tech. 1, 2–3 ["In place of the old punch-card time clock, employees now log onto a computer or mobile device, swipe a radio frequency identification (RFID) badge, scan a fingerprint, or gaze into an iris recognition device. These and similar systems enable employers easily to record employees' hours worked, breaks taken, and other information used to determine compensation." (fn. omitted)].)

> ameliorated by technological advances that enable employees to track and register their worktime via smartphones, tablets, or other devices. We are reluctant to adopt a rule purportedly grounded in "the realities of the industrial world" (Anderson, supra, 328 U.S. at p. 692) when those realities have been materially altered in subsequent decades.

Troester, 5 Cal.4th at 846. This Court's advisement that it is reluctant to adopt rules grounded in antiquated realities that have been "cured or ameliorated by technological advances that enable employees to track and register their work time via smartphones, tablets, or other devices," rings particularly true as it relates to rounding. *Id.*

Just as it is time for the Court to review and reject the practice of rounding employee time in the modern workplace, it follows that rounding meal periods should also be found impermissible.

B. The Practice of Rounding Meal Periods Violates California Wage Law[4]

1. Rounding Is Incompatible with Meal Period Requirements

Principles governing rounding are also *fundamentally incompatible* with the minimum meal period requirements set forth in *Brinker*. *Brinker* requires employers to provide meal periods by completely relieving workers from duties for a minimum of 30 uninterrupted minutes not later than five hours into their shift. *Brinker*, 53 Cal.4th at 1041-41, 1049. An employer

[4] AMN Services Inc.'s (AMN) briefing largely overlooks this institutional issue, exclusively focusing instead on whether its own policies complied with its meal period obligations. CELA will not address the specifics of AMN's policies other than to state its support for Plaintiff's position that the Court of Appeal erred in granting summary judgment to AMN on the basis that its rounding practice demonstrated compliance with California's meal period requirements.

cannot atone for providing a short meal period to one employee by giving a longer one to another, or by giving a longer one to the same employee on a different day. The benefit of having a timely and fully-relieved meal period is time specific, and that benefit is lost once denied. It cannot be recovered through extending a meal period by a few minutes on the next day's shift. Nor should an employer be able to escape liability for a late meal period provided five hours and five minutes into a shift by rounding back time to five hours. None of those rounding practices would fulfill the statutory purpose of Labor Code section 226.7, which is to make enforceable the meal and rest period provisions established in applicable Wage Orders by prohibiting employers from requiring an employee to work during their relieved time.

Though currently an employer may offset rounding instances in its favor with instances that favor the employee on the same day or others during the pay period—or even throughout whatever statutory period is challenged in a lawsuit—there can be no such compensatory mathematics to cure a short meal period by adding minutes from earlier or later punch outs during the day, week, or complete statutory period. A short or interrupted meal period given to one employee cannot be made up by a longer one by another worker or on another day. Yet that is what the lower court's analysis allows--an employer may escape liability for short or late meal periods for some employees by relying on the experience of the aggregate workforce if rounded timekeeping records establish "neutrality." This is inconsistent with California's mandate that employees be provided full and timely meal periods. There is no language in the Wage Orders or Labor Code section 226.7 that supports the position that employers may shorten or delay meal periods by rounding time to the complete 30 minutes or

rounding the clock-out time back to comply with the *Brinker* requirement that the meal period must commence within five hours.

2. No De Minimis Rule Should Be Applied to Meal Periods

In ruling California law does not permit application of the de minimis rule where the employer required employees to work "'off the clock,'" this Court in *Troester* left open the question "whether there are wage claims involving employee activities that are so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them." *Troester*, 5 Cal.5th at 835, 848. Meal period compliance does not fit into the narrow potential exception noted in *Troester*.

The Industrial Welfare Commission established a minimum 30-minute meal period requirement in each wage order currently operative and throughout history; nothing shorter complies. Nor would a shorter meal period adequately afford workers sufficient time for the sustenance and recharging necessary in a workday. Addressing the issue, *Carrington v. Starbucks Corp*. refused to adopt a de minimis defense for meal periods because meal period recording requirements in the wage orders place it outside the *Troester* de minimis possibilities involving "the practical administrative difficulty of recording small amounts of time for payroll purposes." *Carrington v. Starbucks Corp*. (2018) 30 Cal. App. 5th 504, 524, quoting *Troester*, 5 Cal.5th at 848.

3. Rounding Meal Periods Should Be Impermissible Because Strict Tardiness Rules That Accompany Rounding Systems Will Result in Non-Complying, Short Meal Periods

It is the experience of CELA practitioners that employers who use rounding schemes typically employ, and more enthusiastically enforce,

tardiness policies. *See, e.g.*, *See's Candy I*, 210 Cal.App.4th at 708 (internal quotations omitted) (noting policy, by employer who also had rounding policy, that tardiness "will not be tolerated," and "may be subject to discipline," including termination).

The reasoning is apparent: while they benefit from time shaved when a worker clocks out late or in early within the rounding windows, employers would prefer not to pay for time added to employees' workdays when they clock in within the rounding windows after the rounding back center point (i.e., entries within seven minutes of the quarter hour mark for 15-minute rounding) or clock out prior to the rounding mark.

Though there is nothing empirically wrong with policies prohibiting tardiness; however, the consequence of such policies as applied to meal periods, in conjunction with rounding policies, is that employees will be pressured to take shorter meal periods to ensure they are not subject to discipline for punching back in after 30 minutes has elapsed. Thus, intentional or not, permitting meal period rounding would endorse a practice that violates *Brinker's* proscription against pressuring, impeding, or discouraging employees from taking "legally protected breaks." *Brinker*, 53 Cal.4th at 1040.

Accordingly, CELA asks the Court to find that rounding of meal periods is fundamentally incompatible with California's meal period requirements, and to prohibit rounding of meal period time.

C. Time Records Should Raise a Rebuttable Presumption of Meal Period Compliance or Non-Compliance

1. Uniformity Regarding Application of the *Brinker* Concurring Opinion Would Benefit Workers

Since the issuance of *Brinker* in 2012, there has been confusion in the lower courts as to the import of Justice Werdegar's concurring opinion.

In particular, the concurrence, after discussing the IWC history of the meal period recording requirement, states that "[i]f an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Brinker*, 53 Cal.4th at 1052-53 (Werdegar, J., concurring). The burden to establish the assertion an employee voluntarily gave up the right to a compliant meal period, the concurrence continues, "is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. … [but] is on the employer, as the party asserting waiver, to plead and prove it." *Id.*, 53 Cal.4th at 1053. Since the concurrence found proof of non-waiver not a prima facie element of liability, it concluded proof of waiver constitutes an affirmative defense. *Id.*

Dozens of published post-*Brinker* decisions discuss what has come to be known as the "Werdegar presumption." These decisions include California Court of Appeal and federal appellate and district court decisions involving both class certification and summary judgment, some applying the presumption and others not doing so.

Court of Appeal examples include *Carrington v. Starbucks Corp*., *supra*, 30 Cal.App.5th 504 (noting the concurrence, though not binding precedent, could nevertheless be persuasive, but declining to address its effect because plaintiff had established meal period policy violations); *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 781 (summary judgment for employer, rejecting the presumption *sub silento* in dismissing plaintiff's contention that time records showing late and missed meal periods created a presumption of violations); *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 311 (certifying meal period class and noting the employer's violation of its duty to record meal periods raises rebuttable presumption sufficient for damages to be estimated statistically);

Lubin v. The Wackenhut Corp. (2016) 5 Cal.App.5th 926, 951 (certifying meal period class, finding the class ascertainable from the timekeeping records based on the *Brinker* concurrence presumption); *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, 253-254 (*See's Candy II*) (summary judgment proceeding distinguishing the presumption's applicability to class certification); *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138, 1160-61 (certifying class where time punch data and records were capable of raising a rebuttable presumption and establishing the facts necessary to establish liability with common proof that a significant portion of the missed, shortened, and delayed meal breaks reflected meal break violations under section 226.7); *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 230-231 (certifying meal period class and mentioning without applying the presumption language from the *Brinker* concurrence); *Bradley v. Networkers Internat. LLC* (2012) 211 Cal.App.4th 1129, 1144-45 (same); *See's Candy I*, 210 Cal.App.4th at 889, 907 (referencing with approval and applying to the extent necessary principles from *Brinker*, including employer obligation to keep accurate time records noted in footnote 1 to concurrence). The panel below also addressed the presumption, finding erroneously it applied, if at all, only in the class certification context. *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1088.

Federal appellate and district court decisions include *Cole v. CRST Van Expedited, Inc.* (9th Cir. 2019) 932 F.3d 871,877 (certifying to this Court the question of concurrence's applicability in light of conflicting Court of Appeal decisions); *Gomez v. J. Jacobo Farm Labor Contr., Inc.* (E.D. Cal. Nov. 6, 2019) 2019 U.S. Dist. LEXIS 193214, *46 (denying certification but quoting the rebuttable presumption); *Antemate v. Estenson Logistics, LLC* (C.D. Cal. Sept. 25, 2019) 2019 U.S. Dist. LEXIS 164694,

*15-16 (stating that application of the presumption would result in employers being required to police breaks in violation of *Brinker*); *Rojas-Cifuentes v. ACX Pac. Northwest Inc.* (E.D. Cal. May 17, 2018) 2018 U.S. Dist. LEXIS 83583, *16, 26-27 (granting meal period class certification for subclass alleging time for meal periods was automatically deducted irrespective of whether employees took meal periods and applying the rebuttable presumption over defendant's objection); *Hubbs v. Big Lots Stores, Inc.* (C.D. Cal July 18, 2018) 2018 U.S. Dist. LEXIS 226096, *31 (summary judgment for employer applying the rebuttable presumption and finding employer's rebuttal sufficient); *Morales v. Leggett & Platt, Inc.* (E.D. Cal. April 5, 2018) 2018 U.S. Dist. LEXIS 58480 (granting meal period certification and citing the rebuttable presumption as operative law); *Romano v. Sci Direct, Inc.* (C.D. Cal. Nov. 27, 2017) 2017 U.S. Dist. LEXIS 222354, *19, 22 (noting rebuttable presumption, but granting motion to dismiss, finding plaintiffs had not made sufficient allegations of breaks violations); *Aguirre v. Genesis Logistics* (C.D. Cal. July 20, 2016) 2016 U.S. Dist. LEXIS 189303, *17-20 (denying meal period class certification, stating "a rebuttable presumption is not a substitute for class-wide evidence; i.e., a survey"); *Van v. Language Line Servs.* (C.D. Cal. June 6, 2016) 2016 U.S. Dist. LEXIS 73510. *43-44 (summary judgment for plaintiff, applying the rebuttable presumption); *Brewer v. General Nutrition Corp.* (N.D. Cal. August 27, 2015) 2015 U.S. Dist. LEXIS 114860, *9 (summary judgment for defendant, discussing federal district court decisions adopting and rejecting the rebuttable presumption and finding defendant rebutted the presumption even if it applied); *Brewer v. General Nutrition Corp.* (N.D. Cal. Nov. 12, 2014) 2014 U.S. Dist. LEXIS 159380, *24-25 (granting meal period class certification and quoting the rebuttable presumption with approval); *Gonzalez v. Officemax North Am.*,

Inc. (C.D. Cal. Jan. 26, 2014) 2014 U.S. Dist. LEXIS 197731, *14 (partial summary judgment for defendant, applying the rebuttable presumption and finding it negated by defendant's evidence); *Ambriz v. Coca Cola Co.* (N.D. Cal. Nov. 5, 2013) 2013 U.S. Dist. LEXIS 158513, *9-10 (denying motion to dismiss meal period claim in light of the *Brinker* majority and concurring opinions); *Medlock v. Host Int'l, Inc.* (E.D. Cal. May 21, 2013) 2013 U.S. Dist. LEXIS 72740, *8-9 (denying motion in limine to preclude representative evidence, agreeing with the rebuttable presumption); *Seckler v. Kindred Healthcare Operating Group, Inc.* (C.D. Cal. March 5, 2013) 2013 U.S. Dist. LEXIS 29940, *23-24 and *Escano v. Kindred Healthcare Operating Co.* (C.D. Cal. March 5, 2013) 2013 U.S. Dist. LEXIS 29899, *23-24 (finding the rebuttable presumption operable for an individual claim but not appropriate for class certification); *Ordonez v. Radio Shack, Inc.* (C.D. Cal. Jan. 7, 2013) 2013 U.S. Dist. LEXIS 7868, *20, n.9 (denying class certification where plaintiff met the rebuttable presumption which was successfully rebutted by defendant); *Gonzalez v. OfficeMax N. Am.* (C.D. Cal. Nov. 5, 2012) 2012 U.S. Dist. LEXIS 163853, *8-9, 20-21 (applying the rebuttable presumption as equally applicable to rest periods and denying class certification on the basis that defendant rebutted the presumption); *Paniagua v. Medical Mgmt. Int'l.* (C.D. Cal. Aug. 8, 2012) 2012 U.S. Dist. LEXIS 201295, *16-17 (denying class certification and rejecting plaintiff's argument that the rebuttable presumption established sufficient evidence for predominance); *Alcantar v. Hobart Serv.* (C.D. Cal. Jan. 15, 2013) 2013 U.S. Dist. LEXIS 6752, *13-14 (denying motion in limine to exclude expert survey evidence on liability and damages and approving the rebuttable presumption); *Gonzalez v. OfficeMax N. Am.* (C.D. Cal. Nov. 5, 2012) 2012 U.S. Dist. LEXIS 163853, *8-9 (denying class certification, finding defendant rebutted presumption from time records); *Ricaldai v. US*

Investigations Servs. LLC (C.D. Cal. May 25, 2012) 878 F.Supp.2d 1038, 1044 (denying summary judgment to employer, noting that without the rebuttable presumption, employers would have "incentive to ignore their recording duty, leaving employees the difficult task of proving that the employer either failed to advise them of their meal period rights, or unlawfully pressured them to waive those rights").

In the face of these conflicting decisions, this Court should definitively resolve the issue, and should do so by finding that valid records of missed, short, late, or interrupted meal periods raise a rebuttable presumption that the employee was not relieved of duty and no meal period was provided, for the reasons that follow.

2. IWC Historical Records Support Use of Meal Period Records for Enforcement

All wage orders contain a provision requiring that employers accurately record meal periods. See, e.g., Wage Order 5-2001, Sec. (7):

> 7. Records
> (A) Every employer shall keep accurate information with respect to each employee including the following:
> …
> (3) 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.

The IWC has repeatedly acknowledged that the meal period recording requirement's prime purpose is to enable easy *enforcement*. For example, in 1966, the mercantile industry Wage Board refused to eliminate the recording requirement, noting that "without the recording of all in-and-out time, *including meal periods, the enforcement staff would be unable to investigate and enforce the provisions of the order*." *See* Report of the IWC

Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 4-5 (emphasis added). The manufacturing industry Wage Board rejected a proposal to weaken the meal period recording requirement in 1979. One Board member noted that "[i]f the time of that meal period were not recorded, we would have problems enforcing that section. …. Instead of *looking at time cards*, we would have to talk to employees and ask them what time they usually got a meal period." Excerpt from Wage Board Report and Recommendations, 1978-1979, at 15 (emphasis added). "Recording meal periods makes it possible to enforce meal periods *by looking at records*." *Id.* at 16 (emphasis added).

This historical record compels the conclusion that the IWC intended that records of missed, short, or late meal periods would constitute prima facie evidence of meal period violations for purposes of citations by the Labor Commissioner or individual *Berman* hearings. The same should be true for private litigation and claims brought under the Private Attorneys General Act.

3. This Court's Decision in *Murphy v. Kenneth Cole* Supports the Use of Time Records in Proving Meal Period Violations in Conjunction with a Self-Executing Remedy

In *Murphy*, this Court addressed the applicable statute of limitations for claims under Labor Code section 226.7 for the hour of pay owed for rest or meal periods not complying with wage order requirements. In analyzing the legislative history, *Murphy* noted one reason the remedy triggers the longer statute of limitations for wages and not the shorter one for penalties is that an employer is obligated to self-enforce violations by compensating employees in their next paycheck. According to the Court, Labor Code section 226.7 imposes:

> [A]n affirmative obligation on the employer to pay the employee one hour of pay. (§ 226.7, subd. (b)[5].) Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. (See *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 326 [19 Cal. Rptr. 492, 369 P.2d 20].)

Murphy, 40 Cal.4th at 1108.

Murphy goes on to further stress the importance of time records, not only for establishing liability but also for employers to defend claims:

> Because employers are required to keep all time records, including records of meal periods, for a minimum of three years (Cal. Code Regs., tit. 8, § 11070, subd. 7(A)(3), (C)), employers should have the evidence necessary to defend against plaintiffs' claims. (See *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961 [35 Cal. Rptr. 3d 243].)

Murphy, 40 Cal.4th at 1114.

The legislature's enactment of Labor Code section 226.7 through AB2509, effective January 2, 2001 followed the promulgation of an identical provision in the wage orders a few months prior, effective October 1, 2000. The IWC contemplated how to address the problem of non-compliance with rest and meal period requirements for which an employee

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[5] The legislature has amended Labor Code section 226.7, and the hour of pay remedy is currently provided under subsection (c), which states: "(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for

or the labor commissioner could at that time only pursue injunctive relief to compel prospective compliance. The remedy the Commission proposed was for the employer to pay the employee an hour of "premium pay" as a "self-enforcing" remedy, i.e., compensation an employer pays directly to the employee without an enforcement proceeding through the DLSE. The following exchange on these points between IWC commissioner Barry Broad and DLSE staff counsel Miles Locker is highly instructive:

> COMMISSIONER BROAD: Now, I was surprised to learn -- and I'd like you to confirm this -- that there is no Fair Labor Standards Act enforcement in this area, there's nothing in the Fair Labor Standards Act governing breaks or meal periods.
>
> MR. LOCKER: That's my understanding, that under the FLSA there are no requirements as to meal periods or rest periods.
>
> COMMISSIONER BROAD: So, we have a situation, then, where this may be a statute that, when it's breached, there's no real effective remedy or regulation when it's breached. There's no effective remedy.
>
> MR. LOCKER: The remedy, as I say, would be -- it's an expensive thing to bring about that remedy. And then, of course, the remedy, if we were to get the injunctive relief, the remedy would be basically a court order telling the employer, "You can't do this ever again." It's prospective.
>
> COMMISSIONER BROAD: Well, I guess what we could do – I'm not asking you to comment on this -- but as a general comment to my fellow commissioners, I guess what we could do is require the payment of premium pay for the time that was not given, or require that any employer that doesn't give rest periods or a meal period in accordance with our rules would have to,

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each workday that the meal or rest or recovery period is not provided."

> say, pay the employee one hour at their regular rate of pay, in addition to all hours worked on that day, or something so that there would be an economic disincentive to violate the rule, and that it would be more self-enforced.
>
> MR. LOCKER: That's -- you know, I mean, I -- I don't want to comment much on that, other than to say that given our -- given our limited enforcement [capabilities], we like self-enforcement. We do like self-enforcement.

IWC Hearing Transcript, May 5, 2000, pp. 75-76, available at https://www.dir.ca.gov/IWC/PUBMTG05052000.pdf.

The import of the hour of compensation operating as a self-executing remedy is that it reveals an intention by the legislature, the IWC, and this Court that the time records function as prima facie evidence of violations. Implicit in self-enforcement, which contemplates that compensation for violations will be included the next paycheck, is that an employer will implement a system of record review that will auto-assess premiums owed.

It makes sense that an employer is required to make immediate payment of wages pursuant to Labor Code section 226.7 for wage order violations evidenced in an employer's meal period records, which they are required by law to accurately maintain. It follows that the Court accord the same weight to these records by declaring them to constitute prima facie evidence of compliance or non-compliance, subject to employer rebuttal.

4. There Is No Principled Reason to Differentiate Meal Period Records from Other Records Employers Are Required to Accurately Maintain

Meal period records should be accorded the same presumption of accuracy as all other mandated employer recordkeeping. California labor laws impose a burden on employers to maintain precise and correct records; meal period records should not be different. See, e.g., Lab. Code §1174;

Wage Orders Section 7. Yet while other records draw a presumption of accuracy sufficient for a multitude of significant functions, including establishing prima facie liability for wage violations[6], meal period records have not consistently received equal treatment. The result, then, is that meal period records in many cases are treated as prima facie *unreliable*, essentially proof of nothing, as if there were no purpose in generating them in the first place.

While this Court in *Brinker* stated that proof that an employer knows employees are working through meal periods will not "alone" establish liability, 53 Cal.4th at 1040, it does not follow that valid time records should not confer a rebuttable presumption of an employer's compliance or non-compliance. To the contrary, the language of the Wage Orders and the Labor Code demonstrate the importance placed upon the employer's obligation to maintain accurate time records. In addition to the Wage Order 7 requirement to maintain accurate records of the beginning and end of all work periods and meal periods, Labor Code section 1174 mandates employers keep accurate records and permit the Labor Commissioner and any employee full access to the information:

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[6] *E.g.,* time records showing overtime worked but no premiums paid can establish a prima facie case of wage underpayment; district court of appeal decisions applying rounding have affirmed summary judgment based on timekeeping data as presumptively determinative: *See's Candy II*, 7 Cal.App.5th 235 (summary judgment for employer where aggregate time records showed net surplus for employees); *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1024 (AHMC Healthcare) (summary judgment for employer due to no overall loss in compensation because of net positive effect of rounding policy); and the instant matter, *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1085-86 (summary judgment for employer where plaintiff did not meet responsive burden to raise triable issue as to expert finding of a net surplus of hours favoring employees).

> 1174. Every person employing labor in this state shall:
>
> …
>
> (b) Allow any member of the commission or the employees of the Division of Labor Standards Enforcement free access to the place of business or employment of the person to secure any information or make any investigation that they are authorized by this chapter to ascertain or make. The commission may inspect or make excerpts, relating to the employment of employees, from the books, reports, contracts, payrolls, documents, or papers of the person.
>
> …
>
> (d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.[7]

[7] The Fair Labor Standards Act contains analogous provisions in 29 U.S.C. § 211(c): "Records. Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [Secretary] as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 7(p)(3) [29 USCS § 207(p)(3)] may not be required under this subsection to keep a record of the hours of the substitute work." Criminal misdemeanor penalties for willful violations of 29 U.S.C.§ 215 are provided under 29 U.S.C 216(a).

Thus, like the IWC, the Legislature has mandated that employers generate and preserve accurate payroll records for the purposes of investigation and enforcement of violations by the Labor Commissioner and employees. The presumption of accuracy of these records for their many uses is implicit. That they are presumptively reliable suggests that they could, also, create a rebuttable presumption that an employer did – or did not – provide lawfully mandated breaks.

This Court's concern articulated in *Brinker* that employees may attempt to "manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability," 53 Cal.4th at 1040, is not heightened by the existence of a rebuttable presumption. An employer is still free to proffer evidence to rebut any presumption that, for example, time records show a high degree of late or shortened meal periods. For example, deposition testimony of the employee may reveal that the employee repeatedly chose not to take timely or complete breaks and thus "waived" her meal periods. Indeed, several lower courts employing the presumption found that the employer prevailed by rebutting it. *See, e.g.*, Section II(C)(1), citing cases.

Further, to the extent that the Court in *Brinker* suggested that legally mandated records are unreliable due to the possibility that "bad" employees will seize the opportunity to fabricate liability in order to receive an extra hour's pay, no such widespread practice has materialized. CELA can find no published decision even mentioning such an allegation.

The weight given the possibility of employee misconduct in assessing the validity of meal period records must also be viewed within the framework of mandatory record keeping originated for purposes of enforcement of labor laws. Overemphasizing the likelihood of "waiver" of meal period rights contemplated in *Brinker* —that a worker may willingly

choose to take a short, late, or interrupted meal period or take none at all—oddly places the burden on the *employee* to prove a negative, that records showing missed, late, or short meal periods do not accurately reflect an employer's failure to properly relieve them of duties. This burden should instead be placed on the *employer* attempting to disprove a violation by showing that the records it is mandated to maintain correctly are in this instance incorrect.

The concerns over employee manipulation of the system or voluntarily waiving meal period rights do not warrant the departure from reliability given employer records for most or all other purposes. These are the very records which the law requires employers to maintain for purposes of enforcement of workplace violations, accurate payment of wages, payroll taxes, workers compensation premiums, and more.

It has long been held, for example, that if an employer fails to maintain accurate records, an employee's testimony establishes prima facie entitlement to damages.

> [W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages.

Hernandez v. Mendoza (1988) 199 Cal.App.3d 721, 727.

> '[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court

> may then award damages to the employee, even though the result be only approximate.

Ibid., citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687–688 [90 L.Ed. 1515, 66 S. Ct. 1187] (*Anderson*).

In its most recent reference to *Anderson*, the United States Supreme Court has extended the application of these principles to permit a statistical analysis of records to establish prima facie liability in a class action seeking wages for unpaid time donning and doffing protective clothing. *Tyson Foods, Inc. v. Bouaphakeo* (2016) 136 S.Ct. 1036, 1047 (expert study showed 18 or 21.25 minutes for donning and doffing depending on department, which combined with records from previous timekeeping system enable second expert to estimate whether employer was liable for unpaid time in excess of 40 hours per week).[8]

Relying on *Anderson*, California courts have shifted the burden of proof to employers when inadequate records prevent employees from proving their claims for unpaid meal and rest breaks. *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961–963.

There is also a presumption that time off the clock is not paid. "[T]hat employees are clocked out creates a presumption they are doing no work." *Brinker*, 53 Cal.4th at 1051. The converse should also be true—that employees' time on the clock creates a presumption that they are working. It follows that meal period records showing missed, short, or late meals be entitled to a presumption of prima facie liability for premium pay, subject to rebuttal by the employer.

Yet meal periods are anomalously considered presumptively

[8] The court was careful to note that "Whether a representative sample may be used to establish classwide liability will depend on the purpose for which

incorrect. In order to receive compensation for violations, employees are required to make an affirmative showing beyond the records by approaching supervisors for approval of premium pay (a coercively challenging condition for payment many employees will choose to avoid rather than be duly compensated), addressing drop-down computer menus to provide additional proof of violations such as those employees are required by defendant AMN to utilize, or overcoming penalty of perjury sign-off sheets employees often coercively require employees to sign in order to receive their paychecks. This is true even as to second meal periods for shifts in excess of 12 hours, which Labor Code section 512[9] expressly states may not be waived.

Why place this burden unique to meal periods on the employee when it is the employer who is required under law to accurately maintain time records? Why treat records of missed, short, or late meal periods differently than overtime records when the IWC expressly included the meal period record keeping requirement in the same paragraph as that requiring clock time for the beginning and end of each work period, and its original intent

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the sample is being introduced and on the underlying cause of action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. at 1049.

[9] Labor Code section 512 provides, in pertinent part:

> (a) An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

was to provide a self-executing remedy such that an employer must pay automatically without employee confirmation in the next pay check? See 8 Cal. Code Regs §11150(7)(a)(3). And why else would this Court in *Murphy* have pointed to the time records to address employer concerns regarding a longer statute of limitations?

These questions point for their answer to the time records as establishing the baseline proof without further burden on the employee, placing any contest as to the veracity of the employer's own records on the entity responsible for their accurate maintenance.

> Otherwise, employers would have an incentive to ignore their recording duty, leaving employees the difficult task of proving that the employer either failed to advise them of their meal period rights, or unlawfully pressured them to waive those rights.

Ricaldai v. US Investigations Servs., LLC, 878 F.Supp.2d at 1044, citing *Brinker*, 139 Cal.Rptr.3d at 353 & n.1 (Werdegar, J., concurring) (citing *Cicairos*, 133 Cal.App.4th at 961 ("[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee." (internal quotation marks omitted)).

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II. CONCLUSION

Based on the foregoing, CELA respectfully requests that this Court reverse the decision of the Court of Appeal, find rounding an impermissible practice, or alternatively, find rounding of meal periods improper, and rule that records of missed, short, late, or interrupted meal periods raise a rebuttable presumption that the employee was not properly relieved of duties.

Respectfully submitted,

Dated: January 17, 2020 COHELAN KHOURY & SINGER

By: _____
Michael D. Singer
Attorney for Attorney for Amicus Curiae California Employment Lawyers Association

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMIT

The undersigned hereby certifies that the computer program used to generate this amicus brief indicates that the text contains 9,252 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(c)(1).

Dated: January 17, 2020

_____

Michael D. Singer

PROOF OF SERVICE
Donohue v. AMN Services
Supreme Court Case No. S253677

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Cohelan Khoury & Singer, 605 C Street, Suite 200, San Diego, California 92101.

On January 17, 2020, I served the foregoing document(s) described as **APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT KENNEDY DONOHUE** on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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I then served each document in the manner described below:

[XX] BY MAIL: I placed each for deposit in the United States Postal Service this same day, at my business address shown above, following ordinary business practices.

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

Executed January 17, 2020 at San Diego, California.

_____
Matthew Atlas

SERVICE LIST
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