S234969

In The Supreme Court

of the

State of California

DOUGLAS TROESTER
Appellant,

v.

STARBUCKS CORPORATION
Defendant.

On Grant of Request by the United States Court of Appeals for the Ninth Circuit (Case No. 14-55530) to Decide Issue Pursuant to California Rules of Court, Rule 8.548

After an Appeal from the United States District Court, Central District of California
Honorable Gary Allen Feess, Judge
Case Number 12-cv-07677-GAF-PJW

APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF STARBUCKS CORPORATION

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APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF STARBUCKS CORPORATION

To the Chief Justice and Associate Justices:

The Chamber of Commerce of the United States of America (the "Chamber"), through its attorneys, respectfully requests leave to file the accompanying brief as amicus curiae in support of Starbucks Corporation. The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California, and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the sound development of employment law in the California courts. The Chamber routinely advocates before state and federal courts in California by filing amicus curiae briefs and letters in cases, like this one, involving issues of concern to the business community. The Chamber has appeared many times before this Court, both at the petition for review stage and on the merits.

The Chamber has a strong interest in the outcome of this case. In recording working time, California employers have long been guided by the *de minimis* rule. This rule provides that insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded as *de minimis*. This case has the potential to significantly disrupt the longstanding and settled expectations among the courts, businesses, and the public, regarding whether the *de mimimis* rule that applies to claims under the federal Fair Labor Standards Act also applies to claims under the California Labor Code. If this Court holds that the *de minimis* rule does not apply to California wage claims, employers in California could face significant liability in the aggregate for seconds or a couple of minutes of work beyond employees' scheduled working hours. Many employers in California are already vulnerable to litigation costs from insubstantial

wage and hour class actions. The Court should not increase this exposure by approving of the Appellant Douglas Troester's rigid and unworkable position.

This Court should grant the Chamber leave to file the accompanying amicus curiae brief because it would aid the full and fair consideration of the question presented in this case. The Chamber's brief explains that the *de minimis* rule is a bedrock principle of California law and that the justifications for applying the rule to federal wage claims apply with equal force to California wage claims. The Chamber's brief also explains the broad repercussions of this issue on businesses throughout California. These issues are relevant to the disposition of this case.

CONCLUSION

For the foregoing reasons, the application should be granted and the accompanying amicus curiae brief filed.

Dated: April 14, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

KARIN DOUGAN VOGEL
Attorneys for Amicus Curiae
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

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AMICUS CURIAE BRIEF

THE *DE MINIMIS* RULE SHOULD CONTINUE TO BE APPLIED TO CALIFORNIA WAGE AND HOUR CLAIMS

The *de minimis* rule is based on the legal maxim that the law does not concern itself with trifles. The rule typically applies when "the harm is small, but measuring it for purposes of calculating a remedy would be difficult, time-consuming, and uncertain, hence not worthwhile given that smallness." (*Mitchell v. JCG Industries, Inc.* (7th Cir. 2014) 745 F.3d 837, 841.) The rule has been applied in many different areas of the law, including wage-and-hour law.

In the seminal case of *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, the U.S. Supreme Court held that the *de minimis* rule applies to wage claims under the Fair Labor Standards Act (FLSA). As the Court explained, "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded." (*Id.* at p. 692.) The Court's decision was based on the "the realities" of the workplace and the difficulty of recording trivial amounts of time. (*Ibid.*) The Court explained that "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." (*Ibid.*) Instead, "[i]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." (*Ibid.*)

The reasoning employed by the U.S. Supreme Court under the FLSA applies with equal force to wage-and-hour claims under the California Labor Code. In many cases, it simply is not feasible to measure the amount of time worked precisely to the minute or the second. Indeed, the issue before this Court should not be whether the *de minimis* rule applies under California wage and hour law (the rule is a practical necessity and already has been applied for many years), but whether the three-part test other courts universally have used to apply the *de minimis* rule is the right test for California. That test requires courts to consider three factors in determining whether otherwise compensable work time is *de minimis*: (1) the administrative difficulty of recording the time; (2) the aggregate amount of compensable time involved; and (3) the regularity of the additional work.

Both federal courts and the courts of other states have successfully applied this test for more than 30 years, and it should be applied in California as well. (Cf. *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 903 (construing California law to allow "rounding practices," consistent with the FLSA and with what is "available to employers throughout the rest of the United States").)

A. California Has Long Recognized The *De Minimis* Rule In a Variety of Contexts, Including Wage-and-Hour Law

The *de minimis* rule is a fundamental component of California law. More than a century ago, the Legislature expressly recognized the rule as part of its legal framework by codifying it in the Civil Code: "The law disregards trifles." (Civil Code § 3533.)

Over the years, California courts have applied the rule in myriad circumstances, including: damages claimed by consumers (see *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 79; *Bermudez v. Fulton Auto Depot, LLC* (2009) 179 Cal.App.4th 1318, 1325); consumer class actions (see *Harris v. Time, Inc.* (1987) 191 Cal.App.3d 449, 458-460); contract performance claims (see *Pfaff v. Fair-Hipsley, Inc.* (1965) 232 Cal.App.2d 274, 278; *Nye & Misson v. Weed Lumber Co.* (1928) 92 Cal.App.598, 607-608; *Connell v. Higgins* (1915) 170 Cal. 541, 556; *Wolf v. Prosser* (1887) 73 Cal. 219, 219-220); real property issues (see *McKenzie v. Nichelini* (1919) 43 Cal.App.194, 197); potential juror misconduct in criminal proceedings (see *People v. Armstrong* (2016) 1 Cal.5th 432, 452); community property issues (see *In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1608-1609 & fn. 2; *In re Marriage of Ward* (1975) 50 Cal.App.3d 150, 154, fn. 1, overruled on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838); prejudgment interest (see *Overholser v. Glynn* (1968) 2676 Cal.App.2d 800, 810); lack of substantial evidence (see *People v. Caldwell* (1984) 36 Cal.3d 210, 220-221); and labor working conditions (see *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638-639).

Given this history, it is not surprising that state and federal courts have regularly applied the *de minimis* rule to wage-and-hour claims arising under California law. (See *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 527-528 (applying the *de minimis*

rule to wage claim and finding the time worked was not *de minimis*); *Corbin v. Time Warner Ent't-Advance/Newhouse P'ship* (9th Cir. 2016) 821 F.3d 1069, 1081-1082 & fn. 11 (applying the *de minimis* rule to a California wage-and-hour claim); *Gillings v. Time Warner Cable LLC* (9th Cir. 2014) 583 F.App'x 712, 714 (same); *Cervantez v. Celestica Corp.* (C.D. Cal. 2009) 618 F.Supp.2d 1208, 1216-1217 (same); *Alvarado v. Costco Wholesale Corp.* (N.D. Cal., June 18, 2008, No. C 06-04015 JSW) 2008 WL 2477393, at *3-4 (same); *Cornn v. UPS, Inc.* (N.D.Cal., Aug. 26, 2005, No. C03-2001 THE) 2005 WL 2072091, at *4 (same).)

The California Division of Labor Standards Enforcement (DLSE)—the state agency charged with administering and enforcing the state's labor statutes and wage order regulations—has also applied the *de minimis* rule for almost 30 years in opinion letters it has issued and in its Enforcement Policies and Interpretations Manual.[1] Although DLSE opinion letters are not controlling, this Court routinely is informed and guided by them in exercising its judgment. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11.)

In short, the *de minimis* rule is fully integrated into California law. Appellant Troester's position that the *de minimis* rule does not apply to California wage claims is incorrect and inconsistent with the longstanding and settled expectations among the courts, the DLSE, and businesses throughout California. If this Court eliminates the *de minimis* defense, the decision could result in a wave of litigation against employers who had every reason to believe they were complying with California law.

B. California Has Long Applied The *Lindow* Test In Determining Whether Time Worked Is *De Minimis*

Following the Court's decision in *Anderson*, the Ninth Circuit adopted a three-factor test for determining when otherwise compensable time is *de minimis*. (See *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057.) The Court explained that it would consider: "(1) the practical administrative difficulty of recording the additional time;

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[1] See DLSE Op. Letter 1995.06.02; DLSE Op. Letter 1994.02.03-3; DLSE Op. Letter 1988.05.16; DLSE Manual (2002) § 47.2.1.

(2) the aggregate amount of compensable time; and (3) the regularity of the additional work." (*Id.* at p. 1063.) The decision in *Lindow* balances fairness to employees with "just plain everyday practicality." (*Id.* at pp. 1062-1063.)[2]

The DLSE's first opinion letter applying the *de minimis* rule to California wage and hour claims was written just four years after *Lindow*, and in it the DLSE applied the *Lindow* factors. (See DLSE Op. Letter 1988.05.16 at pp. 1-2 (adopting the *Lindow* test, the DLSE stated that *de minimis* "determinations will have to be made on a case-by-case basis").) Over the next several years, the DLSE wrote two additional opinion letters applying the *Lindow* factors to wage-and-hour issues. (See DLSE Op. Letter 1994.02.03-3 (DLSE found *de minimis* rule and *Lindow* factors applied even though otherwise the "broader reach" of federal law did not); DLSE Op. Letter 1995.06.02 (DLSE indicated *de minimis* rule and *Lindow* factors may apply, but more facts would have to be provided by the employer).) Again, this Court should take into account employers' reasonable reliance on DLSE's consistent application of the *Lindow* factors to California wage claims.

C. Other States Apply the *De Minimis* Rule to Wage and Hour Claims.

California is not the only state that has applied the *de minimis* rule to wage-and-hour claims. For example, the Illinois Appellate Court applied the *de minimis* rule in *Porter v. Kraft Foods Global, Inc.* (Ill.Ct.App. Dec. 10, 2012) 2012 WL 7051311 at *9, to find that a period of one to five minutes at the beginning of each shift putting on gear, swiping work cards, and walking from the entrance of the facility to the time terminal was *de minimis* and therefore not compensable. The court noted that it would be administratively burdensome to record the time it took up to 1,200 employees to put on different gear and proceed to one of over 30 different time terminals, "especially given that the time expended would amount to mere seconds or minutes." (*Ibid.*)

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[2] Many other federal courts of appeal have since adopted *Lindow*'s three-factor test for determining when time worked is *de minimis*. (See, e.g., *Carlsen v. U.S.* (Fed. Cir. 2008) 521 F.3d 1371, 1380-1381; *De Asencio v. Tyson Foods, Inc.* (3d Cir. 2007) 500 F.3d 361, 374-375; *Reich v. Monfort, Inc.* (10th Cir. 1998) 144 F.3d 1329, 1333-1334; *Reich v. New York City Transit Authority* (2d Cir. 1995) 45 F.3d 646, 653.)

Similarly, the Wisconsin Court of Appeals applied the *de minimis* rule in *Fox v. General Telephone Co.* (Wis.Ct.App. 1978) 85 Wis.2d 698, where employee truck drivers were tasked with transporting the employer's trucks from one location to another. Occasionally, employees would perform other tasks, such as removing waste from the trucks after transporting them, for which the employees were not paid. (*Id.* at p. 704.) The Court ruled that the time spent performing these tasks was *de minimis* and therefore not compensable. (*Ibid.*) Florida and South Carolina also apply the *de minimis* rule to wage claims arising under state law. (See *Martins v. MRG of South Florida, Inc.* (Fla. App. Ct. 2013) 112 So.3d 705 (applying *de minimis* rule to wage-and-hour claim); *Miller v. Blumenthal Mills, Inc.* (2005) 365 S.C. 204 (same).)

The Chamber is not aware of *any* state that has held that the *de minimis* rule does *not* apply to wage claims. If the Court eliminates the *de minimis* defense, California employers alone would be precluded from recording time in the manner "available to employers throughout the rest of the United States." (See *See's Candy Shops*, *supra*, 210 Cal.App.4th at p. 903.) Many employers in California are already vulnerable to litigation costs from insubstantial wage and hour class actions. The Court should not increase this exposure by approving of Troester's rigid and unworkable position.

D. Federal Courts Have Applied the *De Minimis* Rule in a Variety of Factual Contexts

The facts in this case provide a good example of when otherwise compensable time is *de minimis*. Troester alleges that Starbucks failed to pay him for the minutes he spent closing up the store after he clocked out, including the time he spent closing out of the store's computer system, activating the alarm, exiting the store, and locking the door. But Starbucks' timekeeping system required employees to clock out before running the "close store" function on the computer, and employees must necessarily clock out before leaving the store. (See Respondent's Answer Brief at 12.) The difficulty of recording precisely the trivial amount of time that Troester spent closing the store weighs in favor of applying the *de minimis* defense.

The body of federal case law applying the *de minimis* rule provides other examples of the practical necessity for the rule. For example, courts have found the following time worked *de minimis*:

- Time spent by in-home service technicians logging into handheld computers, carrying them to their vans, plugging them into their vans, and then carrying them back and plugging them in at home, which would take, in aggregate, more than a "minute or so" over what the employees' walks to and from their vans otherwise would take, was *de minimis*. (*Chambers v. Sears Roebuck & Co.* (S.D.Tex. 2010) 793 F.Supp.2d 938.)
- Time spent by technicians carrying their PDAs, work orders, payments, and/or laptops to and from their vehicles, and inspecting the vehicles and placing/removing cones around the vehicles, was *de minimis*. (*Donatti v. Charter Communs., L.L.C.* (W.D.Mo. 2013) 950 F.Supp.2d 1038.)
- Time spent by restaurant worker straightening chairs and picking up trash between the time he walked in the door and the time he clocked in, which took a couple of minutes, was *de minimis*. (*Fast v. Applebee's Int'l, Inc.* (W.D.Mo. 2007) 502 F.Supp.2d 996.)
- Time spent putting on glasses and a hard hat and putting in ear plugs took a matter of seconds and therefore was *de minimis*. (*Sandifer v. United States Steel Corp.* (7th Cir. 2012) 678 F.3d 590, aff'd (2014) 134 S.Ct. 870 ("the roots of the *de minimis* doctrine stretch to ancient soil").)
- Time spent by corrections officers to transport canine unit dogs to and from work each day required "some degree of time and effort, [but] this effort is so negligible as to be *de minimis* and therefore not compensable." (*Andrews v. Dubois* (D.Mass. 1995) 888 F.Supp. 213, 219.)
- Additional time spent by fire alarm inspectors on their commutes as a result of the City's policy requiring them to carry inspection documents with them in their vehicles was *de minimis*. (*Singh v. City of New York* (2d Cir. 2008) 524 F.3d 361.)

- Time spent by dog handlers caring for dogs during their commute was *de minimis*, even when the dog-care duties were significant, such as when the dogs vomited or soiled their handlers' cars, as those instances were few and far between. Even stops for water, which were more frequent in the heat of summer, consumed only a few minutes and were *de minimis*. (*Reich v. New York City Transit Auth., supra,* 45 F.3d at p. 652.)
- Time spent by police officers stopping to feed their canines, letting the dogs out of their cars, and cleaning up after them while traveling to work was *de minimis*. In addition, the amount of work involved in monitoring a police radio during a commute was *de minimis*. (*Aiken v. City of Memphis* (6th Cir. 1999) 190 F.3d 753.)
- Time spent by officers cleaning their radios, wiping their safety vests, and oiling their handcuffs was *de minimis* because the tasks took less than one minute and were not performed frequently. (*Musticchi v. City of Little Rock* (E.D.Ark. 2010) 734 F.Supp.2d 621.)

The need for "everyday practicality" is reflected by the variety of factual circumstances in which the federal courts have applied the *de minimis* rule. If this Court holds that the *de minimis* rule does not apply to California wage-and-hour claims, employers in these types of cases would face substantial liability for seconds or a few minutes of work time that cannot easily be recorded. That absurd result cannot be what the Legislature intended.

E. Troester's Argument That Employees Must Be Compensated For "All Time" Worked Is Incorrect and Unworkable

Troester claims that California law has a "bright-line requirement" that "all time" worked by employees must be compensated by wages. (See Petitioner's Opening Brief at 1-2.) But California law does not use the term "all time," and nothing in California law mandates the bright-line requirement that Troester advocates. Instead, the relevant Wage Orders speak in terms of "all hours" and leave the word "hours" undefined. (See, e.g., Wage Order 5, subd. 4(A).) Further, the Ninth Circuit in *Lindow* correctly recognized the

fatal shortcoming of a bright-line requirement like the one Troester advocates: such a "rigid rule" cannot be applied with "mathematical certainty." (*Lindow, supra*, 738 F.2d at p. 1062.) Thus, the Ninth Circuit mapped out a common-sense test that takes into account the administrative difficulties of measuring small amounts of time. (*Id.* at pp. 1062-1063.)

Troester tacitly recognizes that his position is unworkable when he argues that there is no need for "another layer of employer protection" because some *de minimis* circumstances can be resolved by applying California's "control" test (the employee was not entitled to compensation because he was not working under the employer's control). (See Petitioner's Reply on the Merits at 25-26.) But this argument misses the point of the *de minimis* rule altogether. The *de minimis* rule presumes that the time at issue is otherwise compensable. It addresses minutes or seconds of otherwise compensable time that *are administratively difficult to calculate*. (See *Mitchell, supra*, 745 F.3d at p. 845 (noting the "pertinence of 'practical administrative difficulties' in calculating the duration of an activity for 'payroll purposes.'").) The rule "reflects a balance between requiring an employer to pay for activities it requires of its employees and the need to avoid 'split-second absurdities' that 'are not justified by the actuality of the working conditions.'" (*Rutti v. Lojack Corp.* (9th Cir. 2010) 596 F.3d 1046, 1057 (quoting *Lindow, supra*, 738 F.2d at p. 1062, quoting *Anderson, supra*, 328 U.S. at p. 692).)

Contrary to Troester's arguments, application of the *de minimis* rule does not foster abuse by employers. Indeed, the one California Court of Appeal case that has applied the rule found for the *employee*, and ruled that the time worked was not *de minimis*. (*Gomez, supra,* 173 Cal.App.4th at pp. 527-528.) But if this Court were to denounce continued application of the *de minimis* rule using the *Lindow* factors, and were to adopt the bright-line requirement advanced by Troester, other plaintiffs would be emboldened to bring claims seeking compensation for "trifling absurdities" that are not justified under California law.

CONCLUSION

The *de minimis* rule is one of everyday practicality that has been applied for decades in wage-and-hour cases by courts across the country, including in California. For all of the foregoing reasons, in addition to those discussed in Starbucks' brief on the merits and the briefs of other amici in support thereof, this Court should hold that the *de minimis* rule applies to wage claims arising under California law.

Dated: April 14, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

KARIN DOUGAN VOGEL
Attorneys for Amicus Curiae

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(1)(d))

The text of this petition consists of 2,950 words, including all footnotes, as counted by the computer program used to generate this petition.

Dated: April 14, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
KARIN DOUGAN VOGEL
Attorneys for Amicus Curiae

PROOF OF SERVICE

Douglas Troester v. Starbucks Corporation
S234969

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On April 14, 2017, I served true copies of the following document(s) described as **APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF STARBUCKS CORPORATION** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

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

Executed on April 14, 2017, at San Diego, California.

Pamela Parker

PAMELA PARKER