Case No. S277518

IN THE SUPREME COURT OF CALIFORNIA

DELMER CAMP,

Plaintiff and Appellant,

v.

HOME DEPOT U.S.A., Inc.,

Defendant and Respondent.

AFTER A DECISION OF THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H049033

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND RESPONDENT

EIMER STAHL LLP
*Robert E. Dunn (SBN: 275600)
99 South Almaden Boulevard, Suite 600
San Jose, CA 95113
(408) 899-1690
rdunn@eimerstahl.com

Attorney for Amici Curiae

Application to File Amici Curiae Brief

Amici curiae the Chamber of Commerce of the United States of America (the "Chamber"), the National Federation of Independent Business Small Business Legal Center, Inc. (the "NFIB Legal Center"), and the California Chamber of Commerce (the "CalChamber") hereby apply pursuant to California Rule of Court 8.520(f) and this Court's inherent powers for leave of Court to file the attached amici curiae brief in support of Defendant and Respondent. "Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties." (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

As explained below, amici have a significant interest in the outcome of this case and believe that the Court would benefit from additional briefing on the issues addressed in the attached brief.[1]

Interest of Amici Curiae

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus

[1] No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief.

curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (the "NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents the interests of its members in Washington, D.C. and in all 50 state capitals.

CalChamber is a non-profit business association with approximately 14,000 members, both individual and corporate, representing 25% of the state's private sector and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

Many of amici's members that employ California workers use neutral time-rounding policies to calculate time worked. A ruling by this Court holding such policies unlawful would impose onerous compliance costs on these companies and unfairly expose them to crippling litigation. The increased costs of such a rule

would be felt most acutely by small businesses that use neutral time-rounding policies as an efficient means of fairly calculating time. And given that neutral time-keeping policies are permitted under federal law and the laws of nearly every other state, companies that operate both inside and outside California would be forced to create duplicative time-keeping policies for otherwise identical operations. For the reasons set forth in the proposed brief, amici urge the Court to reverse the Court of Appeal's decision and uphold the lawfulness of neutral time-keeping policies.

Accordingly, amici respectfully request that this Court accept and file the attached amici brief.

DATED: October 25, 2023

Respectfully submitted,

EIMER STAHL LLP

By: /s/ *Robert E. Dunn*
Robert E. Dunn

Attorney for Amici Curiae the Chamber of Commerce of the United States of America, the National Federation of Independent Business Small Business Legal Center, Inc., and the California Chamber of Commerce

Case No. S277518

IN THE SUPREME COURT OF CALIFORNIA

DELMER CAMP,

Plaintiff and Appellant,

v.

HOME DEPOT U.S.A., Inc.,

Defendant and Respondent.

AFTER A DECISION OF THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H049033

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND RESPONDENT

EIMER STAHL LLP
*Robert E. Dunn (SBN: 275600)
99 South Almaden Boulevard, Suite 600
San Jose, CA 95113
(408) 899-1690
rdunn@eimerstahl.com

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Statutes

Other Authorities

INTRODUCTION

Neutral time-rounding is a commonplace and efficient timekeeping method used by countless employers throughout California and across the country. For decades, employers have used rounding to efficiently manage their payroll systems and to ensure that their employees are appropriately compensated for all work performed. When applied neutrally—*i.e.,* when time is rounded both up and down—time rounding reduces employers' overhead costs while providing employees with flexibility when clocking in and out. Over the long run, the compensation for each employee will average out, leaving employees with the same total compensation that they would receive under a system that rigidly recorded their time down to the minute or second.

This practice, expressly authorized by federal law and endorsed by California's Division of Labor Standards Enforcement ("DLSE"), had been uniformly affirmed by California courts since the seminal decision in *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889 (*See's Candy*). In *See's Candy*, the court recognized that the Labor Code is silent as to the lawfulness of time rounding and thus looked to federal law for guidance, as have courts and administrative agencies in other states when interpreting similar provisions in those states' labor codes. The decision below rejecting the use of neutral time is thus wildly out of step with both California precedent and the nationwide consensus that neutral time rounding protects both employer and employees.

Affirming that decision would place enormous and unnecessary burdens on California businesses. Small businesses, many of which continue to use manual time cards and process paychecks without the assistance of a payroll service company or accountant, will be especially hard hit by a rigid "count every second" rule. Plaintiff suggests that time rounding need not *always* be illegal, but he offers no workable standard that employers could implement without fear of litigation. And given the significant penalties that can be imposed under the Private Attorneys General Act ("PAGA") for even minor technical violations of the Labor Code, employers would have little choice but to abandon any form of time rounding if the decision below is affirmed. Because there is no basis in the text of the Labor Code for requiring California employers to incur such costs, this Court should reverse and hold that neutral time-rounding—when administered using the standard developed under federal law and adopted in *See's Candy*—is consistent with California law.

ARGUMENT

I. This Court Should Follow the Well-Reasoned Decision in *See's Candy*, Which Is Based on Decades of Federal Precedent and Consistent with the Approach Taken by Other States.

Section 204 of the Labor Code provides that employers are required to pay their employees "all wages" twice during a calendar month and sets the payment schedule for any overtime wages. (Lab. Code § 204.) But while § 204 specifies that "all wages" must be paid, the statute says nothing about how those wages are to be calculated. (See *ibid.*) Relatedly, Section 510(a) of the Labor

Code specifies that "[e]ight hours of labor constitutes a day's work" and provides that "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek" constitutes overtime that must be paid at the overtime rate. (See Lab. Code § 510(a).) But like Section 204, Section 510 makes no reference to how an employee's time must be calculated. (See *ibid.*) Nor does either statute address the lawfulness of neutral time-rounding policies.

For more than a decade, courts have addressed that issue by following the unanimous and well-reasoned opinion in *See's Candy*, which held that because neither Sections 204 nor 510 of the Labor Code mandates a particular method for calculating employee time, companies may round their employees' time so long as the policy is neutral on its face—meaning that it rounds employee time both up and down depending on the relevant interval—and neutral as applied, such that it does not "systematically undercompensate" employees in the aggregate over time. (*See's Candy*, *supra*, 210 Cal.App.4th at p. 902.) To reach this conclusion, the *See's Candy* panel conducted an exhaustive analysis of federal and California labor laws to determine "the appropriate legal standard" to apply to the practice of time rounding. (*Id.* at p. 901.) This Court should adopt the "thorough and thoughtful treatment" in *See's Candy* and hold that neutral time-rounding policies are permissible under California law. (*Corbin v. Time Warner Ent-Advance/Newhouse P'ship* (9th Cir. 2016) 821 F.3d 1069, 1076 (*Corbin*).)

A. Neutral time-rounding policies comply with federal law.

For more than 60 years, the United States Department of Labor ("DOL") has maintained that neutral time-rounding policies comply with the time-keeping provisions in the Fair Labor Standards Act of 1938 ("FLSA"). (See Wage and Hour Division, Department of Labor (January 11, 1961) 26 Fed. Reg. 190, 195.) The DOL explained that "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." (29 C.F.R. § 785.48(b).) The DOL "presum[ed]" that "this arrangement averages out so that the employees are fully compensated for all the time they actually work." (*Ibid.*) The DOL recognized, however, that time rounding could be misused, such as where an employer systematically rounds time down to the nearest time interval and thereby deprives employees of compensation for the hours they worked.

The DOL thus declined to give employers *carte blanche* in administering their time rounding systems. Instead, the agency determined that the practice is permissible only if the employer rounds its employees' time both up and down, so that, "over a period of time," the rounding averages out and employees are not deprived of meaningful compensation for the hours they worked. (*Ibid.*) This neutrality requirement ensures that employees' paychecks reflect the hours they worked and provides employers with an efficient method of calculating those hours. To be sure,

"sometimes, in any given pay period, employees come out ahead and sometimes they come out behind, but the policy is meant to average out *in the long-term*." (*Corbin*, *supra*, 821 F.3d at p. 1077, emphasis in original.)

Critically, "[i]f an employer's rounding practice does not permit both upward and downward rounding, then the system is not neutral and will . . . result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (*Ibid.,* quotation marks omitted.) For that reason, federal courts have not hesitated to invalidate rounding policies that fail to conform to the neutrality standard and have the effect of "systematic[ally] undercompensat[ing]" employees. (*Houston v. Saint Luke's Health System, Inc.* (8th Cir. 2023) 76 F.4th 1145, 1149–51 [finding that while the defendant's rounding policy was facially neutral, there was a genuine issue of material fact as to whether the rounding policy actually rounded out over time]; see also *Eyles v. Uline, Inc.* (N.D. Tex., Sept. 4, 2009, No. 4:08-CV-577-A) 2009 WL 2868447, at *4, *aff'd* (5th Cir. 2010) 381 Fed. Appx. 384 [finding that the employer's practice of only rounding down was not consistent with the requirements of 29 C.F.R. § 785.48(b)]; *Gonzalez v. Farmington Foods, Inc.* (N.D. Ill. 2003) 296 F. Supp. 2d 912, 933 [finding a genuine dispute of material fact as to whether the employer's rounding policy was permissible because the employer allowed supervisors to edit employee swipe-in and swipe-out times].)

Conversely, federal courts regularly uphold time-rounding policies when addressing wage and hour claims under the FLSA

when the policies are "neutral on [their] face and as applied." (*Corbin*, *supra*, 821 F.3d at p. 1078–79 [upholding defendant's neutral time-rounding policy because "comport[ed] with the federal rounding regulation"]; *Utne v. Home Depot U.S.A., Inc.* (N.D. Cal. Dec. 4, 2017, No. 16-cv-01854-RS) 2017 WL 5991863, at *3 [finding that the defendant's "rounding policy rounds both up and down, and is thus facially neutral" and further, that there was "no evidence that the rounding policy is applied differently" among the plaintiffs].)

B. California courts and agencies, like the courts and agencies of other states, have followed federal law and upheld neutral time-rounding policies.

As the *See's Candy* panel observed, although California employers "have long engaged in employee time-rounding," there is "no California statute or case law [from this Court] specifically authorizing or prohibiting this practice." (*See's Candy*, *supra*, 210 Cal.App.4th at p. 901.) The court explained that "[i]n the absence of controlling or conflicting California law," "California courts generally look to federal regulations" for guidance. (*Id.* at p. 903; see also *Alonzo v. Maximus, Inc.* (C.D. Cal. 2011) 832 F. Supp. 2d 1122, 1127, fn. 3 [observing that the "practice of California courts [is] to look to Department of Labor regulations as guidance for interpreting analogous provisions of California law"].) The recourse to federal law in the absence of on-point state authority makes sense because "California's wage laws are patterned on federal statutes." (*Monzon v. Schaefer Ambulance Serv., Inc.* (1990) 224 Cal.App.3d 16, 31 [noting that "authorities construing those federal statutes provide persuasive guidance to state courts"].)

Accordingly, the *See's Candy* panel turned to the federal regulations and held that the federal standard was "the appropriate standard" for neutral time-rounding. (*See's Candy*, *supra*, 210 Cal.App.4th at p. 901.)

California's DLSE has similarly adopted the federal standard for addressing time-rounding in its Enforcement Policies and Interpretation Manual. (See DLSE Enforcement Policies and Interpretations Manual (2002 rev.), updated Aug. 2019 ("DLSE Manual"); *AHMC Healthcare, Inc. v. Super. Ct.* (2018) 24 Cal.App.5th 1014, 1023, fn. 9 [recognizing that the DLSE adopted federal regulations and reasoning that "[b]ecause California's wage laws are patterned on federal statutes, in determining employee wage claims, California courts may look to federal authorities for guidance in interpreting state labor provisions"].) Like the DOL, the DLSE has conditioned the legality of time rounding on the neutrality of the policy. (See DLSE Manual §§ 47.3–47.3.1, *Calculating Hours Worked: Rounding Practices*.) And California courts have relied on the "informed judgment" of the DLSE in upholding neutral time-rounding practices.[1] (*Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1253, revd. on other grounds (2021) 11 Cal.5th 858 [explaining that in California, "the rule" is that neutral time-rounding is legal so long as the policy is neutral on its face and as applied]; *David v. Queen*

[1] The DLSE's guidance is not binding on courts, but it "may be a source of informed judgment to which courts and litigants may resort for guidance." (*Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, 841, as modified on denial of reh'g (Aug. 29, 2018) (*Troester*).)

of Valley Medical Ctr. (2020) 51 Cal.App.5th 653, 664 [acknowledging that neutral time-rounding is permissible under California so long as it is neutral both on its face and as applied].)

California courts are not alone in looking to federal law for guidance on the validity of neutral time-rounding practices—courts in other states also rely on federal law to interpret their states' labor laws. (See, e.g., *Neor v. Acacia Network, Inc.* (S.D.N.Y. Feb. 7, 2023, No. 22-cv-4814) 2023 WL 1797267, at *3 ["Although no New York statute or regulation addresses the permissibility of rounding policies, New York's Department of Labor generally follows the FLSA and related regulations," and it permits rounding]; *Boone v. PrimeFlight Aviation Servs., Inc.* (E.D.N.Y. Feb. 20, 2018, No. 15-cv-6077 (JMA) (ARL)) 2018 WL 1189338, at *5 [noting the "longstanding policy" of New York courts "to follow the principles set forth" under federal rounding law when interpreting New York law]; *East v. Bullock's Inc.* (D. Ariz. 1998) 34 F. Supp. 2d 1176, 1184 [finding that "it is reasonable for the court to construe the requirements of the Arizona wage law in a manner consistent with" the federal regulations, and that the defendant's rounding policy complied with those regulations]; *Kerbes v. Raceway Assocs., LLC*, 2011 IL App (1st) 110318, ¶ 25 [noting that when construing the Illinois Minimum Wage Law, Illinois courts look to the regulations and decisions interpreting the analogous provisions of the Fair Labor Standards Act].)

Several state labor and workforce departments have also officially adopted or endorsed the DOL's neutral time-rounding standard. For example, Nevada law, like California law, does not

explicitly address time rounding. Thus, the Nevada Office of the Labor Commissioner looked to federal law and concluded that "time clock rounding is appropriate so long as the rounding policy is used in a manner that does not result, over a period of time, in a failure to compensate employees properly for all the time actually worked." (State of Nevada Office of the Labor Commissioner, *Advisory Opinion of the Nevada Labor Commissioner – Use of Time Clock Rounding to Calculate Employee Pay*, at 1–2 (June 21, 2013), *available at* https://tinyurl.com/yc8y2zbp.) North Carolina's Department of Labor has similarly endorsed the use of neutral rounding policies "as long as the rounding is consistent 'up and down.'" (N.C. Dep't of Labor, *Recording Time and Rounding of Hours Worked*, *available at* https://tinyurl.com/3j3p5vw6 (last visited Oct. 25, 2023).) Other states' regulatory agencies have similarly adopted the federal standard. (See e.g., N.J. Admin. Code § 12:56-5.8 [state regulation on time rounding mirrors the federal regulation]; Ark. Admin Code 235.01.1-102 [same]; Mont. Admin. R. 24.16.1012 [same]; N.D. Admin. Code § 46-02-07-02 ["If [time clocks are] used, the employer may round the time to the nearest five minutes or quarter hour using the total minutes for the day as long as the employee over a period of time is paid for all the time the employee has actually worked."].)

The *See's Candy* panel's conclusion that California employers are "entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face," and in "such a manner" that it "compensate[s] the[ir] employees properly for all

the time they have actually worked" is thus consistent with the position taken by the DOL and federal courts interpreting federal law, courts interpreting the parallel laws of other states, and other states' regulatory agencies interpreting their own states' laws. (*See's Candy*, *supra*, 210 Cal.App.4th at p. 907, internal citation omitted.) The California Legislature has had more than a decade to chart a different course if it wanted to overrule *See's Candy* and forbid neutral time-rounding policies, but it has not done so. And there is no reason for this Court to interpret California law inconsistently with federal law.

C. *Troester* and *Donohue* did not suggest that neutral time rounding is incompatible with California law.

Plaintiff, like the court below, asserts that this Court's decisions in *Troester* and *Donohue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58 (*Donohue*) have somehow called into question the legality of neutral time-rounding under California law. (See Pl's Ans. Br. at 42, 45, 48–49; *Camp v. Home Depot U.S.A., Inc.* (2022) 84 Cal.App.5th 638, 660.) Not so. This Court made clear in both *Troester* and *Donohue* that it has "never decided the validity of the rounding standard articulated in *See's Candy*." (*Donohue*, *supra*, 11 Cal. 5th at p. 73), but that "it may be possible to reasonably estimate worktime" through "a fair rounding policy." (*Troester*, *supra*, 5 Cal. 5th at 848). Indeed, in *Donohue*, this Court observed that *See's Candy* had obtained near canonical status, noting that "state and federal courts have applied [*See's Candy's*] standard to determine whether various rounding policies are valid under

California law." (*Donohue*, *supra*, 11 Cal. 5th at p. 72 [collecting cases].)

And although the Court declined to enforce a rounding policy for meal periods in *Donohue*, the Court based its decision on underlying policy concerns associated with the need to provide employees with "full and timely meal periods" every day. (See *Donohue*, *supra*, 11 Cal. 5th at 72–73 [reasoning that unlike rounding an employee's time when clocking in and out for the day, "failing to provide employees with full and timely meal periods burdens their health, safety, and well-being by aggravating risks associated with stress or fatigue."].) Those concerns have little relevance to neutral time-rounding policies that ensure employees are compensated for all time worked over a sufficient period of time.

II. Upending the *See's Candy* Standard Would Impose Substantial Costs on California Employers Without Any Countervailing Benefit to Employees.

Replacing the workable standard in *See's Candy* with Plaintiff's inflexible rule would impose significant costs on businesses with employees in California and other states and would harm the hundreds of thousands of small businesses in California that use time rounding to efficiently manage their payroll. Indeed, Plaintiff has failed to suggest any workable alternative to neutral time-rounding. Nor is there any guarantee that a timekeeping system that measures all time down to the minute or second would even benefit employees. As Justice Cuéllar has suggested, rather than "forcing employers to monitor every fraction of every second of

employee time," employers and employees alike are better served by a timekeeping system that can be assessed under a "rule of reason," which is precisely the type of rule the *See's Candy* panel adopted. (*Troester*, *supra*, 5 Cal.5th at p. 849 (conc. opn. of Cuéllar, J.).) The Court should preserve the status quo for several reasons.

First, given the ubiquity of neutral time-rounding policies across the country, employers that operate in multiple states have been able to implement consistent time-rounding practices for their operations in various jurisdictions. If this Court were to replace the *See's Candy* standard with a rigid "count every second" standard, multi-state employers would be forced to devise and implement bespoke payroll systems specifically for California. As the *See's Candy* panel recognized, holding neutral time-rounding unlawful "would preclude [California] employers from adopting and maintaining rounding practices that are available to employers throughout the rest of the United States." (210 Cal.App.4th at p. 903.) That would increase costs on companies with operations in California and, all else being equal, make California an unattractive place to do business.

Second, upsetting the status quo would harm California's small businesses—many of which are already struggling due to inflation, regulation, labor shortages and the lingering effects of the pandemic. Small businesses are the backbone of the California economy, employing nearly half of California's private workforce.[2]

[2] CalChamber, *California Celebrates National Small Business Week* (May 3, 2022), CalChamber Advocacy, *available at:*

Small businesses create nearly 200,000 net new jobs every year in California.[3] The small business economy also reflects the diversity inherent in California's population, as women operate 22 percent of small businesses in California, and 35 percent of small businesses are owned or co-owned by ethnic minorities or persons of mixed ethnicities.[4]

Plaintiff casually suggests that "digital timekeeping and computerized payroll [is] now pervasive in the workplace," and that "[r]ounding does not make the processing of payroll any easier when a computer is performing the calculations." (Pl's Answering Br. at 51.) The court below also assumed that "advances in technology have enabled employers to more easily and more precisely capture time worked by employees." (*Camp*, *supra*, 84 Cal.App.5th at p. 658.) But roughly 88 percent of small businesses have fewer than 20 employees, and many of these small businesses process payroll in-house. [5] A 2017 study by the National Federation of Independent Business, Inc. ("NFIB") found that over half of the small business employers process their payroll in-house.[6] That same study found that only 19 percent use an outside accountant or bookkeeper while 18 percent use a payroll service

---

https://tinyurl.com/3hpnxbc8 (hereinafter, "*California Celebrates*").

[3] *Ibid.*

[4] *Ibid.*

[5] *California Celebrates*, *supra* fn. 2.

[6] NFIB, *National Small Business Poll: Tax Complexity and the IRS*, Vol. 13, Issue 5 (2017), *available at*: https://tinyurl.com/55x3wcx2.

company.[7] When assessed four years later, the NFIB's 2021 Tax Survey again found that 53 percent of small business employers did not use a third-party payroll provider.[8]

Contrary to Plaintiff's assertion, many small businesses in California cannot afford electronic timekeeping systems and thus rely on employees to complete manual timecards. These small business owners must process those timecards manually. If neutral time-rounding is held unlawful, these employers would need to manually calculate each employee's total time worked up to the very second and would be foreclosed from relying on neutral rounding to simply their calculations. This would be an onerous burden on most small business owners, who have many priorities and limited resources. This Court should hesitate before replacing the widely accepted, fair, and efficient *See's Candy* standard—which has been explicitly adopted by the California DLSE—with Plaintiff's costly approach.

Plaintiff also overlooks the benefits of neutral time-rounding policies *for employees*. For example, time rounding helps ensure that employees get a "full" paycheck and qualify for benefits each pay period. Under California law, 40 hours per week is considered "full-time employment" (Lab. Code, § 515(c)), and many private employers provide benefits only to full time employees. If an employer is not permitted to round an employee's time, there may

---

[7] *Ibid.*

[8] NFIB, *NFIB 2021 Tax Survey*, at 16, *available at:* https://tinyurl.com/53zy7a43.

be instances where the employee's time fall short of the requisite 40 hours to be eligible for full time employment. For example, if an employer is required to track the employee's time to the minute, and the employee clocks in two minutes late, two days during the pay period, their hours for the week will be counted as 39 hours, and 56 minutes. If, however, the employer is permitted to round their employee's time to the nearest interval, then the two days that the employee clocked in late would have been rounded up, resulting in a total of 40 hours of work recorded in that pay period and no discrepancy in their status as a full-time employee. Neutral time-rounding policies thus benefit employees by allowing them to clock in and out a few minutes early or late without worrying that they are going to receive less than their expected wages, lose their benefits eligibility, or work unauthorized overtime.

Third, Plaintiff fails to provide a workable alternative. Plaintiff concedes that not "all rounding is unlawful" and suggests that "[i]t may be possible to devise other rounding systems that avoid violation of obligations to each employee . . . ." (Pl's Answering Br. at 50–51.) But Plaintiff's solution is riddled with caveats and exceptions that would make it impossible for small businesses to implement. For example, Plaintiff contends that the Court should strike down neutral time-rounding "where an employer has a robust timeclock system" and operates in a "conventional workplace environment." (*Id.* at 14.) But Plaintiff fails to provide any test for deciding what constitutes a "robust timeclock system" much less what constitutes a "conventional workplace environment." (*Ibid.*) Adopting the Plaintiff's rule would force

California courts to engage in highly inefficient fact finding to determine whether, for example, a family-owned restaurant constitutes a "conventional workplace environment" or whether the punch clock used by a local grocery store is a "robust timeclock system." Just as the courts would find the Plaintiff's rule difficult to administer, so too would small businesses, which would be unable to discern whether their practices complied with such an ambiguous standard. As a result, many small businesses would likely choose to abandon the practice entirely, rather than risk the repercussions of non-compliance. The *See's Candy* standard, by contrast, strikes a pragmatic and fair balance for employees and employers alike.

The only beneficiary of this uncertainty would be plaintiffs' attorneys. Given the draconian penalties imposed under PAGA for even minor violations of the Labor Code, Plaintiff's proposed rule would likely produce a new cottage industry of PAGA suits alleging underpayment of a few seconds or minutes. After all, an employer subjected to a rigid "every second counts" rule could be on the hook for $100 fine per employee per pay period for failing to pay for a few seconds of time. (See Lab. Code, § 2699, subd. (f)(2); *Oswald v. Murray Plumbing and Heating Corp.*, 82 Cal.App.5th 938, 946 (noting that "PAGA encourages" "significant legal abuse" "by allowing 'class action type lawsuits over minor employment issues.'" [quoting Assembly Com. on Labor and Employment, Analysis of Assem. Bill No. 1654 (2017–2018 Reg. Sess.) as amended Aug. 24, 2018, at p. 2]; *Munoz v. Chipotle Mexican Grill, Inc.*, (2015) 238 Cal.App.4th 291, 310–11 [explaining that where

"the purported violator has had many employees with earnings over many pay periods, the recovery could be quite substantial"].)

Instead of adopting the costly and inefficient rule Plaintiff proposes, this Court should follow Justice Cuéllar's and Justice Kruger's sound advice in their concurring opinions in *Troester*. Justice Cuéllar warned against rigid interpretations of California's labor laws and instead urged courts to take a pragmatic approach. He reasoned that timekeeping systems should "protect[] workers from being denied compensation for minutes they regularly spend on work-related tasks," while not requiring "employers or their workers to measure every last morsel of employees' time." (*Troester*, *supra*, 5 Cal. 5th at p. 849 (conc. opn. of Cuéllar, J.).) Similarly, Justice Kruger reasoned that "California law . . . make[s] some allowances based on considerations of practicality and reasonableness," because "the law also recognizes that there may be some periods of time that are so brief, irregular of occurrence, or difficult to accurately measure or estimate, that it would neither be reasonable to require the employer to account for them nor sensible to devote judicial resources to litigating over them." (*Id.* at 855 (conc. opn. of Kruger, J.).)

This approach makes sense "because advances in technology and changes in behavioral norms are constantly shaping our understanding of what fractions of time can be reliably measured, and what counts as too trifling a moment to measure in the wage and hour context." (*Id.* at p. 849 (conc. opn. of Cuéllar, J.).) Both Justice Cuéllar and Justice Kruger thus encouraged the Court to adopt a "rule of reason" that will accommodate advances in

technology without punishing employers that currently lack such technology. (*Ibid.; id.* at 855 (conc. opn. of Kruger, J.).) Although *Troester* concerned the de minimis doctrine—and did not involve time-rounding—Justice Cuéllar's and Justice Kruger's reasoning is equally forceful in the context of time rounding. And a "rule of reason" is precisely what the *See's Candy* panel adopted in following the federal neutrality standard for time rounding.

CONCLUSION

For these reasons, this Court should reverse the decision of the court below.

Dated: October 25, 2023 Respectfully submitted,

/s/Robert E. Dunn
Robert E. Dunn
EIMER STAHL LLP

Attorney for Amici Curiae The Chamber of Commerce of the United States of America and the National Federation of Independent Business Small Business Legal Center, Inc.

CERTIFICATE OF WORD COUNT

I hereby certify that the attached amici curiae brief consists of 4,355 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: October 25 2023 *<u>/s/Robert E. Dunn</u>*
Robert E. Dunn

DECLARATION OF SERVICE

I, Robert E. Dunn, declare:

1. I am a resident of the State of California and over the age of eighteen years and not a party to the within action. My business address is 99 S. Almaden Blvd., Suite 600, San Jose, CA 95113.

2. On October 25, 2023, I served the following document(s), **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF** and **AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND RESPONDENT**, via electronic transmission through TrueFiling, on the court's electronic filing system to the email(s) on file:

H. Scott Leviant
Kane Moon
Mariam Ghazaryan
MOON LAW GROUP, PC
1055 W. Seventh St., Suite 1880
Los Angeles, CA 90017
hsleviant@moonlawgroup.com
kmoon@moonlawgroup.com
mghazaryan@moonlawgroup.com

Attorneys for Plaintiffs and Appellants

Donna M. Mezias
Aileen M. McGrath
AKIN GUMP STRAUSS HAUER & FELD LLP
100 Pine Street, Suite 3200
San Francisco, CA 94111
amcgrath@akingump.com
dmezias@akingump.com

Attorneys for Defendant and Respondent

3. On October 25, 2023, I served the following document(s), **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF** and **AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND RESPONDENT**, on the Attorney General of the State of California through the designated electronic service portal as follows:

Attorney General
Appellate Coordinator
Office of the Attorney General
Consumer Protection Section
300 S. Spring Street
Los Angeles, CA 90013-1230
https://oag.ca.gov/services-info/17209-brief/add

4. On October 26, 2023, I served the following document(s), **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF** and **AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND RESPONDENT**, via U.S. Mail. I am "readily familiar" with the firm's practice of collection 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. The envelopes were addressed as follows:

Santa Clara County Superior Court
Hon. Patricia M. Lucas, Dept. 3
191 N. First Street
San Jose, CA 95113

Santa Clara County District Attorney
Consumer Protection Unit
70 W. Hedding St.
West Wing 4th Floor

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

Executed on October 25, 2023 at San Jose, California.

/s/Robert E. Dunn
Robert E. Dunn