Case No. S248726

IN THE SUPREME COURT OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES; individually, on behalf of others similarly situated, and on behalf of the general public

Plaintiffs and Appellants,

v.

DELTA AIRLINES, INC.,

Defendant and Respondent,

On a Certified Question from the United States Court of Appeals for the Ninth Circuit, Case No. 17-15124

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amici curiae* California Employment Lawyers Association, California Rural Legal Assistance Foundation, Legal Aid at Work, the National Employment Law Project, or the Women's Employment Rights Clinic at Golden Gate University School of Law. I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae*, having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Dated: February 15, 2019 By: Carole Vigne

Carole Vigne

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), the California Employment Lawyers Association (CELA), California Rural Legal Assistance Foundation (CRLAF), Legal Aid at Work (LAAW), the National Employment Law Project (NELP), and the Women's Employment Rights Clinic at Golden Gate University School of Law (WERC) respectfully request permission to file the attached amicus curiae brief in support of Plaintiffs and Appellants Dev Anand Oman, Todd Eichmann, Albert Flores, and Michael Lehr.[1]

Interest of Amici Curiae

California Employment Lawyers Association

The California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws.

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[1] Pursuant to California Rules of Court, Rule 8.520(f)(4), *amici curiae* affirm that no party or counsel for any party in this appeal authored the proposed amicus brief in whole or in part, nor made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than amici curiae, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus curiae briefs and letters and appearing before the California Supreme Court in employment rights cases such as *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, as well as in cases before the Ninth Circuit.

California Rural Legal Assistance Foundation

California Rural Legal Assistance Foundation ("CRLAF") is a nonprofit legal services provider that represents low-income individuals across California and engages in regulatory and legislative advocacy which promote the interests of low-wage workers, particularly farm workers. Since 1986, CRLAF has recovered wages and other compensation for thousands of farm workers, nearly all of whom are seasonal workers. These workers have been subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages, and overtime wages due them; and been forced to endure working conditions which expose

them to pesticides, heat stress, and acute and sustained ergonomic stress. CRLAF has been granted leave to submit briefs as *amicus curiae* in a variety of cases before the California Courts of Appeal and the California Supreme Court on issues relating to PAGA and construction and enforcement of state labor protections including: *Arias v. Superior Court* (2009) 46 Cal.4th 969, *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Fernandez v. California Dept. of Pesticide Regulation* (2008) 164 Cal.App.4th 1214, *Gentry v. Superior Court* (2007) 42 Cal.4th 443, *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, *Smith v. Superior Court* (2006) 39 Cal.4th 77, and *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.

Legal Aid at Work

Legal Aid at Work (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented or disadvantaged communities. LAAW represents low-wage clients in cases involving a broad range of issues, including wage theft, labor trafficking, retaliation, and discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. LAAW frequently

appears in state and federal courts to promote the interests of clients suffering from wage theft both as counsel for plaintiffs and as *amicus curiae*. LAAW has appeared in numerous cases before this Court, including: *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, and *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833. In addition to litigating cases, LAAW assists hundreds of low-wage workers with filing administrative claims at the Department of Labor Standards Enforcement through our Wage Claim Clinics. LAAW has a strong interest in ensuring that workers receive all protections to which they are entitled under California wage and hour law.

National Employment Law Project

The National Employment Law Project (NELP) is a non-profit legal organization with an office in California and 50 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. NELP has litigated and participated as amicus in numerous cases in California state and federal courts, and around the country. In partnership with community groups, unions, and public agencies, NELP seeks to ensure that all working people receive the full protection of

workplace laws, and that law-abiding companies are not undercut by anti-competitive behavior.

Women's Employment Rights Clinic of Golden Gate University School of Law

The Women's Employment Rights Clinic of Golden Gate University School of Law (WERC) is an on-campus non-profit that serves the dual purpose of training law students and providing critical legal services to the community. WERC represents low-wage workers, predominately women, through impact litigation, individual representation, policy advocacy and community education. A majority of WERC's clients are immigrants with limited English proficiency or are monolingual Spanish and Tagalog speakers. WERC, through its attorneys and law students, advises, counsels, and represents clients in a variety of employment-related matters including wage and hour violations, discrimination, workplace harassment, retaliation, unemployment benefits and family/medical leave issues. WERC also represents organizations and coalitions in their workplace organizing campaigns. WERC often appears in an *amicus curiae* capacity on behalf of low-wage advocates, most recently in *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829, urging the Court to follow its own precedent and the clear statutory requirements in California that workers must be paid for all hours worked.

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Reasons Why the Proposed Brief Will Assist the Court

The proposed amicus brief will assist the Court by offering additional perspective on the issues presented in this case and contextualizing the real-world impact of these issues on low-wage workers. The brief provides additional insight into the legislative history behind the statutes at issue, and explains why the "situs" test proposed by Defendant Employer Delta Airlines is unsupported by precedent and would create confusion for workers and employers alike. The brief also sheds light on why pay structures like the one here are unlawful: they leave workers vulnerable to exploitation and create needless unpredictability.

For the reasons stated above, *amici curiae* respectfully request that this Court grant permission to file the proposed amicus brief.

Dated: February 15, 2019

Respectfully submitted,

Carole Vigne

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

California Cases

California Statutes

Other Authorities

I. INTRODUCTION

Amici curiae are legal organizations or organizations of attorneys who represent and advocate for working people throughout California. *Amici* have an interest in ensuring that California laws designed for the protection of workers are correctly applied. *Amici* urge this Court to answer "yes" to all three of the Ninth Circuit's certified questions. A "yes" answer will affirm that California wage and hour law protects all employees when they work in California, including, in particular, that they be paid on time, receive accurate wage statements, and are paid for all hours worked. *Amici* join in Plaintiff Employees' discussion of the reach and meaning of California wage and hour laws and write separately here to provide additional context regarding the effect of those laws on low-wage workers.

California's wage and hour protections are structured as general protections for all employees working in California. Express exclusions from, or modifications of, those protections have been enacted or promulgated based on occupation, or industry, and on rare occasion, the size of the job force. However, those protections have never been conditioned upon an employee working exclusively or principally in California.

An employee enjoys the protections of those California statutes and regulations when working in California, irrespective of whether she spends other parts of her day in the air, on the sea, or in Oregon, Nevada, Arizona or Mexico. To hold otherwise, particularly when applying fundamental protections such as those at issue, would create a perverse incentive for employers to force multi-state assignments on workers to avoid minimum wage liability and timely payment or wage statement requirements. This would strip the foundation from a regulatory scheme that provides California workers with a reasonable and ascertainable expectation of the minimum standards that must be adhered to whenever and for however long they work in California.

As demonstrated in this brief, the Defendant Employer's preferred construction would dramatically decrease the security of low-wage workers—such as the farm workers, forestry workers, restaurant workers, janitorial workers, and staffing agency workers represented by *amici*—and would be at odds with the very purpose of these protective laws. For example, the California Rural Legal Assistance Foundation ("CRLA Foundation") represents farm workers throughout California. Some of those workers, like broccoli harvesters in the Imperial Valley, are recruited

for work in California,[1] are hired in California, and board buses in California that are operated by their employer; but they work only part of their workweek, and in some cases only part of their workday, in California. The rest of their day, or workweek, they spend in Arizona, where the minimum wage is lower, there is no daily overtime and there are fewer requirements regarding timely payment of wages due.[2] At some jobsites, the agricultural fields straddle two states, or adjacent fields are in different states. Some of the Arizona locations are closer to where the workers board their employers' buses than some of the California locations.[3] In any given workweek, these workers might not spend the majority of their time in California. To deny these workers, already vulnerable to wage and hour abuses, the strong protections of California law is to eviscerate those protections. *Amici* urge the Court, in line with its

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[1] Many of these jobs are, in fact, advertised through the job service system and are California job orders administered by the State of California Employment Development Department.

[2] (See generally Industrial Commission of Arizona, Frequently Asked Questions About Minimum Wage and Earned Paid Sick Time (Feb. 5, 2018) http://www.azica.gov/sites/default/files/media/FREQUENTLY%20ASKED%20QUESTIONS_MasterwTOC%20FINAL%20020518.pdf> [as of Feb. 14, 2019] [describing labor law protections provided by the State of Arizona].)

[3] Indeed, a worker that boards the bus in Calexico, California might begin their workday in Yuma, Arizona, in a field off of Highway 8 and then board the bus and ride 5 miles on Highway 8 East to the next job site in Winterhaven, Caifornia.

well-established jurisprudence, to liberally construe the Wage Order and Labor Code provisions at issue here to serve their remedial purposes, so that *amici* can continue vindicating the rights of their wronged low-wage worker clients.

II. ARGUMENT

In this brief, *amici* will speak to each of the three questions certified to this court. Each question, however, must be addressed with reference to California's comprehensive scheme of labor protections and "liberally construed in a manner that serves its remedial purposes." (*Dynamex Operations W. v. Superior Court* (2018) 4 Cal. 5th 903, 953 (hereafter *Dynamex*).) Each statute under consideration must be construed in a manner that is in harmony with the legislative scheme and that furthers the legitimate exercise of police power by the State of California.

"[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection[.]" (*Industrial Welfare Com. v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 702.) As this Court has confirmed, these principles "apply equally to the construction of wage orders." (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840.)

This Court has emphatically and repeatedly declared that wages are entitled to special protection under the law. As the Court stated in 1948, "[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." (*In re Trombley* (1948) 31 Cal.2d 801, 809.) Likewise, two decades later, the Court concluded that "[w]ages of workers in California have long been accorded a special status . . . . This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption, and priority of wages. . . . California courts have long recognized the public policy in favor of full and prompt payment of wages due an employee." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325-326; see *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 837.) Accordingly, the "Legislature and our courts have accorded to wages special considerations" in order to protect the "welfare of the wage earner." (*Kerr's Catering Service, supra,* 57 Cal.2d at p. 330.)

As this Court has recognized, states have broad authority to regulate working conditions, including wages, within their borders:

> There is no question that the enactment and enforcement of laws concerning wages, hours, and other terms of employment is within the state's historic police power. (See *Metropolitan*

> *Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 756 ["'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.'"] . . . Moreover, how a state government chooses to structure *its own* law enforcement authority lies at the heart of state sovereignty. (See *Printz v. United States* (1997) 521 U.S. 898, 928, 117 S.Ct. 2365, 138 L.Ed.2d 914.)

(*Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, 388, original italics.)

In *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191 (hereafter *Sullivan*), this Court further recognized this fundamental need to defer to states' rights and interests. "As a matter of federal constitutional law, '[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, *minimum and other wage laws*, laws affecting occupational health and safety, and workmen's compensation laws are only a few examples.' (*De Canas v. Bica* (1976) 424 U.S. 351, 356.)" (*Sullivan, supra*, 51 Cal.4th at p. 1198, italics added.) Respect for state powers is core to the doctrine of extraterritoriality.

It is clear that workers, like Plaintiff Employees here or *amici*'s clients, are within the State of California's proper sphere of authority when they are loading and unloading passengers or picking broccoli. As the Court noted in *Sullivan*, "a preambular section of the wage law (Lab. Code, div. 2, pt. 4, ch. 1, §1171 *et seq.*) confirms that our employment laws apply to '*all individuals*' employed in this state." (*Sullivan, supra*, 51 Cal.4th at

p. 1197, original italics.)[4] That the wage laws "speak broadly" to reach all employment within California is supported by the state's strong public policy protecting workers. (*Id.* at p. 1198; see also *Pressler v. Donald L. Bren Co.*, *supra*, 32 Cal. 3d at p. 837; *Indus. Welfare Comm'n. v. Superior Court*, *supra*, 27 Cal. 3d at p. 702 [Labor Code provisions "are to be liberally construed with an eye to promoting such protection. . . ."].)[5]

California has passed laws protecting employees who work within its boundaries by regulating the timing of pay, the disclosure of information critical to determining whether they are being paid properly, and receive the mandated minimum wage for all hours worked. Each of these laws promotes California's interest in protecting the well-being of workers who perform work in California. Each must be construed in furtherance of their respective remedial purpose, and in a manner that promotes the equal application of those protections.

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[4] That section provides in full that "[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to *all individuals* . . . who have applied for employment, or who are or who have been employed, in this state." (Lab. Code § 1171.5(a), italics added.)

[5] (See, e.g., *Sullivan v. Oracle Corp.* (9th Cir. 2011) 662 F.3d 1265, 1271 ["California has chosen to treat out-of-state residents equally with its own."]; *Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 906 ["[U]nder *Sullivan*, a California employer generally must pay all employees, including nonresident employees working in California, state overtime wages unless the employee is exempt."].)

1. CALIFORNIA LABOR CODE SECTIONS 204 AND 226 DO APPLY TO WORK PERFORMED IN CALIFORNIA FOR AN OUT-OF-STATE EMPLOYER BY AN EMPLOYEE WHO, IN THE RELEVANT PAY PERIOD, WORKS IN CALIFORNIA EPISODICALLY AND FOR LESS THAN A DAY AT A TIME.

A. CALIFORNIA LABOR CODE 204 REQUIRES BIMONTHLY PAY FOR ALL WORK PERFORMED IN CALIFORNIA.

Labor Code § 204 provides certainty to workers about when they will be paid. For workers who live paycheck to paycheck, like those *amici* represent, certainty about when their paycheck will arrive is critical to ensuring they can pay their bills on time. If they don't receive all that they are owed, when it is due, they may be unable to make their rent or mortgage payment on time, leading to a notice to quit, attendant late fees, or even eviction or foreclosure, which will follow them on their credit report for years. They might miss a credit card payment, incurring late fees, interest charges, and the loss of a lower interest rate available only to those who pay regularly and on time.

California has a strong public policy interest in ensuring that its workers do not suffer the same consequence as the employees of the federal government who went several pay periods without receiving their pay during the recent shutdown.[6] California has a vital interest in ensuring that

[6] (See, e.g., Wire, *Caught in The Shutdown, U.S. Workers in California and Elsewhere Brace for Missing Paychecks,* L.A. Times (Jan.

employees who earn money in California, and spend time in California, are paid their money on time and can meet their financial obligations so that they do not end up in bread lines or financial distress.

Enacted in 1937, section 204 of the Labor Code ensured that "all wages . . . earned by any person in any employment" be paid twice during each calendar month. (Stats. 1937, c. 90, p. 197.)[7] That section has been amended many times to provide different time frames for different employees, but it is and has been an integral element of California labor law protections since California began codifying statutes in the Labor Code.

Even before 1937, the California Legislature and courts recognized the critical importance of receiving timely wage payments. In fact, the forerunner to section 204 was originally included in a 1911 act entitled "An act providing for the payment of wages."[8] In *Moore v. Indian Spring*

8, 2019), <https://www.latimes.com/politics/la-na-pol-shutdown-government-workers-20190108-story.html> [as of Feb. 13, 2019].)

[7] By operation of Labor Code section 205, enacted the same year, certain employees could be paid monthly, including agricultural workers who were lodged by the employer.

[8] "All wages other than those mentioned in section 1 of this act earned by any person during any one month shall become due and payable at least once in each month and no person, firm or corporation for whom such labor has been performed, shall withhold from any such employee any wages so earned or unpaid for a longer period than fifteen days after such wages become due and payable: Provided, however, that nothing herein shall in any way limit or interfere with the right of any such employee to

Channel Gold Mining Co. (1918) 37 Cal.App. 370, 375, 380–81 (hereafter *Moore*), the court rejected the employer's argument that mandating the prompt payment of wages due infringed its constitutional rights. The court in *Moore* summarized the public policy supporting its decision that the law was an exercise of the fundamental police powers of the State. The court began with the important observation that when considering whether the legislation is a proper exercise of police powers, the court must keep in mind that

> [b]y means of [the police power], the Legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern.

(*Moore*, *supra*, 37 Cal.App. at p. 376 [quoting *State v. Clausen* (1911) 65 Wash. 156, 177 [117 P. 1101, 1106]].)

In describing the underlying purpose of the legislation, the *Moore* court related the realities facing workers in 1918:

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accept from any such person, firm or corporation wages earned and unpaid for a shorter period than one month." (Stats. 1911, p. 1268, § 2, as cited in *Moore v. Indian Spring Channel Gold Mining Co.* (1918) 37 Cal. App. 370, 371–73.)

> A very large per cent of [wage earners] are day laborers, the greater part of whose earnings are necessarily paid out to them from day to day or week to week in the support of themselves and their families; their requirements are often obtained on credit, and must be promptly met or the wage-earner loses his credit and sometimes his job; in many cases, he is denied credit and must pay cash. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and, in many cases may make the wage-earner a charge upon the public. It cannot be disputed that the multitudinous and important enterprises which constitute a characteristic feature of the industrial activities around us are absolutely dependent for their successful operation upon the day labor of the wage–earner. Many of these enterprises directly contribute to the welfare of the public and are necessary to the public convenience and safety. It is not to be expected that the laborer upon whose service these industries depend will give his service without assurance of receiving the reward promised for such service, and any law whose object is to give to the laborer some further assurance that he will be promptly paid for his labor, in addition to the employer's promise, would seem to be reasonable, especially as the object is to induce, if not to compel, the employer to keep faith with his employee, and imposes a penalty only when he commits a wrong which not only injures the employee, but is an injury to the public in its tendency to deprive the public of an incidental benefit which comes from the employee's labor.

(*Moore, supra*, 37 Cal.App. at pp. 379–80.) Unfortunately, over a century later, these realities have not changed for most of the low-wage workers represented by *amici.*

The court in *Moore* also acknowledged that determining whether a law is a proper exercise of police power requires asking whether "the act in question appl[ies] equally to all persons embraced within the class to which it is addressed, and [whether] such class [is] made upon some natural,

intrinsic, or constitutional distinction?" (*Id.* at p. 379.) The court went on to observe that the 1911 Act "refers to all wage-earners, designated as employees, as the class referred to, and it unquestionably applies equally to all of the class." (*Ibid.*) Distinguishing between employees who spend only part of their work time in California, and those that are here "principally" (as urged by the Defendant Employer here), would create an unequal application of a worker protection standard that would impede the public policy protections the Act was designed to provide.

Nothing in the 1911 Act suggested the intent to limit its application to employees who worked principally or primarily in California. As codified and amended at Section 204, it states that "[a]ll wages . . . earned by any person . . . shall become due and payable at least once in each month" and "no person, firm or corporation from whom such labor has been performed shall withhold from any such employee any wages so earned or unpaid[.]" (Stats. 1911, ch. 663, § 2.)[9] The statute has been amended and provisions have been added to address specific occupations or circumstances warranting a longer or shorter payment period. But there has been no wholesale exemption of a class of workers from the prompt payment protection that has been part of California law for a century, and which, as the *Moore* court observed, is a concept that dates to ancient

[9] (See Exhibit 1 to *Amici Curiae* Request for Judicial Notice (hereafter "Request for Judicial Notice" at page 22.)

times.[10] There is no cause, nor basis, for the Court to step in and do so now.

B. CALIFORNIA LABOR CODE 226 REQUIRES COMPLIANT WAGE STATEMENTS FOR ALL WORK PERFORMED IN CALIFORNIA.

Labor Code section 226 is a more recent exercise of California's police powers, but it too was a statute designed to provide uniform protections to all individuals who work and receive pay in California. Enacted in 1943 (Stats. 1943, ch. 1027, p. 2965), its legislative history reveals that it was motivated by concerns for railway dining car workers who were subjected to various deductions that they had no way of confirming were correct.[11] Far from suggesting that this law was intended to protect only those workers who spent all or the principal part of their work in California, this law was passed to protect 1943's equivalent of airline workers, who worked on trains in California and received their pay in California and wanted to know exactly what was being taken out of their pay. Despite opposition from a broad base of industries—including the

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[10] " 'Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates. At his day shalt thou give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it; lest he cry against thee unto the Lord and it be sin unto thee.' (Deuteronomy: xxiv, 14, 15.)" (*Moore, supra*, 37 Cal.App. at p. 381.)

[11] (See Request for Judicial Notice, Exhibit 2, pp. 5–6, 10–11, 14–23.)

railways—that the law would be burdensome, the Legislature passed it and Governor Earl Warren signed it. (*Ibid.*)

Labor Code section 226 has been amended sixteen times since its enactment, generally extending protections in recognition of the public interest in having workers know what they are owed and for what. In 1963, the Legislature added the requirement that the wage statement include the inclusive dates for which payment of wages is made and the name of the employer. (Stats. 1963, ch. 1080, § 1.) The Legislature stated that this would be of benefit to the employee in resolving wage disputes and in proving eligibility for unemployment insurance benefits. (Request for Judicial Notice, Exhibit 3, pp. 2, 5, 9). In 1976, the Legislature expanded the itemization to include net wages earned. (Stats. 1976, ch. 832, § 1.) Recognizing the importance of these requirements, the Legislature also added a provision that allowed an employee to recover damages arising from a failure to provide the mandated information. (*Ibid.*)

In 1984, the statute was amended again to require reporting the total hours worked. It also exempted cities, counties and other governmental entities from the provision. (Stats. 1984, ch. 486, § 1.) The statute was amended in 1988 again to ensure that workers could obtain access to the records maintained by their employers. (Stats. 1988, ch. 827.) It was amended again in 2000 to require disclosure of the number of piece-rate units and the applicable piece rate for employees paid on that basis, and all

applicable hourly rates and the number of hours worked by the employee at each rate. (Stats. 2000, ch. 876.) These amendments were included in A.B. 2509, a bill adding several new protections to the Labor Code designed to help address California's "large and growing 'underground economy' of employers who are chronic violators of wage and hour, safety, and tax laws." (Sen. Analysis of Assem. Bill No. 2509 (2000 Reg. Sess.) Aug. 25, 2000.)[12] The Legislature recognized that the underground economy harmed workers and eroded the tax base. According to the bill analysis, "California's underground economy supplants an estimated $60 billion in legal business transactions . . . the state's loss of income taxes alone increased from $2 billion in 1986 to $3 billion in 1993." (Assem. Analysis of Assem. Bill 2509 (2000 Reg. Sess.) Apr. 12, 2000.)[13] Again, the 2000 amendments provided generalized protections to California workers, irrespective of how much time they worked in the State, and in doing so promoted not only the interests of the workers, but advanced the interests of the State of California and the stability of its economy.

Exceptions were also made to the reporting provisions. The former Labor Code section 226.1 exempted individuals employed in private households to provide maintenance or child care. This section was repealed

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[12] See Request for Judicial Notice, Exhibit 4, pp. 7–8.

[13] See Request for Judicial Notice, Exhibit 4, p. 5.

and its language added to section 226 in 1987. (Stats. 1987, ch. 976.) As specific needs for employees of specific industries were identified, the Legislature reacted and exempted certain salaried employees from the requirement that total hours be reported. (Stats. 2016, ch. 77.)

The Legislature knew how to address the unique needs of particular industries and did so repeatedly. But nowhere in the statutory scheme is there any exemption based on the amount of time that a worker works in California. An employee who works an hour, a day, a week, or years on end is entitled to receive wage statements that accurately report how much time she is credited with and what she is being paid for that time. The State of California has an equivalent interest in establishing a record-keeping system that will provide a basis for resolving wage disputes, determining unemployment insurance eligibility, and collecting payroll taxes and contributions. Defendant Employer cannot point to a countervailing interest of any other state that would be burdened by the application of these laws to workers who work in multiple states.[14]

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[14] Defendant Employer suggests, without evidence, that differing wage reporting requirements would create confusion or administrative burden. California employers have raised that complaint with every revision to employer record keeping requirements. But each time, they have successfully adjusted. For example, *amici* have reviewed wage statements from California and out of state companies that choose to pay different piece and hourly rates of pay to workers depending on whether they work in Arizona or California. They could choose to conform all of their practices to California law, paying the higher California rate for all hours and pieces. But they choose not to, and instead issue wage

2. CALIFORNIA'S MINIMUM WAGE LAW APPLIES TO ALL WORK PERFORMED IN CALIFORNIA FOR AN OUT-OF-STATE EMPLOYER BY AN EMPLOYEE WHO WORKS IN CALIFORNIA IRRESPECTIVE OF THE DURATION OR FREQUENCY.

Defendant Employer's "situs" test has no precedent in California law. As Plaintiff Employees point out, Defendant Employer mischaracterizes the holding in *Tidewater Marine W., Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 566 (*Tidewater*). Defendant Employer invents a "situs" test that does not appear anywhere in *Tidewater* and ignores the court's own limitation on the scope of the decision, which could not be more clear: "We express no opinion as to whether the trial court can enjoin the application of IWC wage orders to crew members who work primarily outside California's state law boundaries because the Court of Appeal did not address that question." (*Id.* at p. 579.) Defendant Employer then ignores *Tidewater*'s express holding that "regardless of its boundaries, California can govern employment of its residents on the high seas, provided there is no conflict with federal law." (*Id.* at p. 566.)

It is that holding that provides instruction in this case. Here, the question is whether there is any conflict with another state's laws that

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statements that conform to California law and report the hours, pieces and each applicable rate, depending on the state where the work is performed. Clearly, whatever "burden" this multi-state recording keeping imposes is not great enough to dissuade these companies from taking advantage of our sister state's lower labor standards.

would call into play the extraterritoriality analysis urged by Defendant Employer. There is no such conflict, and the fundamental principle that "California's overtime laws apply by their terms to all employment in the state" is controlling. (*Sullivan*, *supra*, 51 Cal.4th at p. 1197.)

Defendant Employer does not seriously suggest that any other state may impose its lesser standards for the wages, hours or working conditions on workers employed in California. Nor does it articulate any interest that another state may have in preventing California from applying its laws to workers in California, who also happen to work at times in another state.

The "situs" test invented by Defendant Employer would result in less uniformity and greater uncertainty for employees. Take, for example, the broccoli harvester in the Imperial Valley. She starts and ends her day in California, where she lives and was hired by the company and is picked up by the employer provided buses. Depending on her crew, she might work a full week in Arizona in her first week. The following week she might work six days in Arizona and an extra seventh consecutive day in California. The third week she might work two 12-hour days in California and work six hours a day in each of the four remaining days of her six-day work week in Arizona. The fourth week she might work all six days in California.

Under the construction urged by Plaintiff Employees, she would know that while in California, she will be paid at least the higher California

minimum wage and daily overtime, which are determined on a daily basis under the Wage Orders and Labor Code sections 510 and 862; she would know that she would be paid on a weekly basis as required by Labor Code section 205, and she would receive her itemized pay statement reflecting all her California hours worked and applicable hourly rates of pay as required by Labor Code section 226.

But what is her principal "situs" of work under Defendant Employer's test? Is she an Arizona employee the first two weeks because the majority of her time is worked there, even though she is picked up in California every morning and returns to California every night on employer-provided buses? Does she then become a California employee in her fourth week, when she works exclusively in California? What happens in her third week, when she spends an equal number of hours in each state? In California, she would be eligible for the higher minimum wage and daily overtime due. Is she paid that for her California hours? Or does she remain an Arizona employee, because Arizona allows payment every two weeks and (depending on which weeks are added together) her combined total for those two weeks shows more time in Arizona? Or, as Defendant Employer proposes, since she doesn't work predominantly in either state during that week, do her wage and hour rights revert to coverage under the Fair Labor Standards Act, which has a lower minimum wage than either state and no overtime for agricultural workers?

Defendant Employer urges a construction of California wage-and-hour protections that fits their business model and saves them the most money. This unsupportable construction does not protect workers or provide workers with any clarity about what they are entitled to be paid. Rather, it undermines the public policy interests of California by subjecting workers in California to sub-minimum wages and less protective standards. It also harms businesses that operate exclusively in California, by allowing competitors to evade higher minimum wages and overtime liability by conducting part of their work in another state. It does not promote the other state's legitimate interests either, as they have no police power interest in deflating the wages paid to individuals working in California.

3. CALIFORNIA'S BAR ON AVERAGING WAGES PROHIBITS PAY FORMULAS THAT FAIL TO AWARD CREDIT FOR ALL HOURS ON DUTY, REGARDLESS OF WHETHER THE FORMULA MAY RESULT IN HIGHER PAY.

Since 1916, California has had a minimum wage that "[e]very employer shall pay to each employee . . . *per hour for all hours worked.*"[15]

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[15] Back in 1916, the state minimum wage was $0.16/hour; today, it is $12.00/hour for those working for an employer with 26 or more employees. (Cal. Dept. of Industrial Relations, History of California Minimum Wage, <https://www.dir.ca.gov/iwc/MinimumWageHistory.htm.> [as of Feb. 13, 2019].) More information on the history of the minimum wage and the Industrial Welfare Commission, which has been responsible for regulating it for almost a century, can be found at the California Department of Industrial Relations' website. (Cal. Dept. of Industrial Relations, *History of the State of California Industrial Welfare Commission*

(Cal. Dept. of Industrial Relations, General Minimum Wage Order, MW-2019, section 2, italics added.) Each of the seventeen Wage Orders promulgated by the Industrial Welfare Commission affirms this most basic principle of California wage and hour law: that employers must pay "not less than the applicable minimum wage *for all hours worked* . . . whether the remuneration is measured by time, piece, commission, or otherwise." (Cal. Code Regs., tit. 8, §§ 11010–11170, subd. 4(B).) While employers might have flexibility in the method of compensation, there is no flexibility over the compensation for every hour worked. As most recently recognized by this Court in *Dynamex*, *supra*, 4 Cal.5th at p. 953, "[the] wage orders are the type of remedial legislation that must be liberally construed in a manner that serves its remedial purposes."

The pay structure at issue in this case is effectively a four-part pay "formula" [16] which considers both piece—here, flights—and time, not unlike the pay structures commonly used in the low-wage industries in which *amici*'s clients work. For example, *amici* regularly advise and

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https://www.dir.ca.gov/iwc/archives/iwc.archives.index.pdf [as of Feb. 13, 2019].)

[16] Respondent calls its method of calculating pay a "formula" and denies that is based either on an hourly or piece rate. (Answer Br. at 56.) Precisely because the Wage Orders reach all methods of calculating pay—whether on a "time, piece-rate, commission, or other basis"—it makes no difference what Respondent calls its method. (Cal. Code Regs. tit. 8, § 11090(1).) Pay by any other name is still pay.

represent agricultural workers paid by the pound; housecleaners paid by the house; roofers by the square-feet laid; garment workers by the shirtsleeves sewn. When these pay structures comply with California law, they—at least in theory—may incentivize productivity and efficiency. But when they fail to comply with California law, they can and often are used to exploit and take advantage of workers, and encouraging them to work longer hours at no additional pay—in effect, reducing their hourly rates and making their pay unpredictable.

A. CALIFORNIA'S WAGE ORDERS AND CASE LAW PROHIBIT PAY STRUCTURES THAT DO NOT PAY FOR ALL HOURS WORKED.

California has "a strong public policy in favor of full payment of wages *for all hours worked*." (*Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 324, italics added (hereafter *Armenta*).) Pay schemes that do not in fact pay for all hours worked—even if they are designed to ensure that *on average* the worker ultimately receives at least the minimum wage for every hour worked—violate California's Wage Orders and are flatly inconsistent with *Gonzalez v. Downtown L.A. Motors* (2013) 215 Cal.App.4th 36 (hereafter *Gonzalez*) and *Armenta, supra,* 135 Cal.App.4th 314. (See Cal. Code Regs., tit. 8, § 11000, subd. 2 [requiring compensation for "all hours worked"]; Labor Code § 226.2(4) [approving of and codifying *Gonzalez, supra*, and requiring compensation for nonproductive time under the employer's control].)

The *Armenta* court explained that the Wage Orders require employers to pay employees at or above the minimum wage for "each hour worked," and therefore forbid employers from using time compensated above the minimum wage to make up for time compensated below the minimum wage. (*Armenta, supra,* 135 Cal.App.4th at p. 323.) More significantly, *Gonzalez* held that any method of calculating pay that *in fact* awards credit for some hours but not for others violates the law, whether or not some alternative method would have guaranteed a minimum average hourly rate over a pay period. (*Gonzalez, supra*, 215 Cal.App.4th at pp. 41–42). Put differently, the requirement that employers pay for each and every hour worked "on an incremental basis" means that employers must ensure that "an employee's take home pay increases by at least the minimum wage for every additional hour worked." (*Ontiveros v. Safelite Fulfillment, Inc.* (C.D. Cal. Oct. 12, 2017) No. CV 15–7118–DMG, 2017 WL 6261476 at *5, italics omitted). The Wage Orders, statutes, and precedent make clear that California law forbids employers from demanding additional work time for no additional compensation. (See *Gonzalez, supra*, 215 Cal.App.4th at p. 50 [comparing two employees paid the same amount for the day despite one working several hours longer, and concluding that the employee who stays later is not paid for the additional time in violation of the law].)

As Plaintiff Employees correctly state, "*Gonzalez* directly answers the third certified question." (Opening Br. 49). In *Gonzalez,* the court held unlawful an employer's pay structure that generally paid its mechanics only for time spent working on cars, but which supplemented that pay to ensure that, on average, no worker fell below minimum wage for all hours worked. (*Gonzalez*, *supra*, 215 Cal.App.4th at pp. 41–42.) In other words, the *Gonzalez* employer paid an hourly wage for all hours worked only if its usual piece-rate method resulted in *lower* pay. (*Ibid.)* Defendant Employer nonetheless attempts to distinguish its pay structure as one that calculates pay by comparing several approaches and then paying based on whichever approach generates the highest wage amount (which is rarely the hourly wage approach). But Defendant Employer's pay structure is in fact indistinguishable from *Gonzalez*: paying the higher amount (flight pay) effectively means *not* paying the lesser amount (hourly pay). There is no practical difference between saying the "floor" amount will be paid if the other formula fails to pay enough, as was the case in *Gonzalez*, and saying that the higher of the two formulas—or in this case, four formulas—will be paid.

As *Gonzalez* made clear, the mere fact that the employer "expressly consider[s] all hours worked in the first instance" (Answer Br. at 15), does not make its pay formula valid. (See *Gonzalez, supra*, 215 Cal.App.4th at p. 41 [noting the employer "also keeps track of all the time a technician

spends at the work site whether or not the technician is working on a repair order"].) The presence of a minimum wage "floor" does not save an invalid pay structure that otherwise averages a higher rate of pay and only compensates some hours worked, and not all. (*Ibid.*)

The problem in *Gonzalez* was exactly the same as it is here: one of the pay formulas used by Defendant Employer—the higher one, and the one that is usually in fact paid—does not award credit for *all* hours worked. Because *Gonzalez* addressed precisely this situation, this Court should reaffirm that the Wage Orders require payment for *each and every* hour worked and reject the implied empty distinction between this case and *Gonzalez*.[17] Whether paying employees an hourly rate or a piece rate or "pursuant to a formula-based compensation system,"[18] (Opening Br. at 20), no employer should be allowed to avoid the Wage Orders' guarantee that workers be in fact compensated for *all hours worked.* (Cal. Code Regs., tit. 8, §§ 11010–11170, subd. 4(B).)

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[17] The fact that Defendant Employer's pay structure is "fully-disclosed" (Answer Br. at 67) cannot distinguish it from *Gonzalez* either. There was no allegation in *Gonzalez* that the employer had failed to disclose its pay structure. (See *Gonzalez*, *supra*, 215 Cal.App.4th at p. 40.) Again, the problem is not about knowing what time is compensated; it is that *not all* time is compensated.

[18] (See *Gonzalez*, *supra*, 215 Cal.App.4th at p. 49 [stating that "a piece-rate *formula* that does not compensate directly for all time worked does not comply with [the] California Labor Code[]"] [quoting *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1252], italics added.)

B. THE WAGE ORDERS' REQUIREMENT THAT ALL HOURS WORKED BE PAID IS NECESSARY TO PROTECT LOW-WAGE WORKERS FROM WORKING ADDITIONAL HOURS AT NO ADDITIONAL PAY, EFFECTIVELY UNDERCUTTING THEIR HOURLY RATE, AND FROM UNPREDICTABLE PAY.

Nearly five million Californians are low-wage workers.[19] These workers are disproportionately likely to be people of color, to be immigrants, and not to have a college degree.[20] The Wage Orders' requirement that all hours worked be compensated—or, put a different way, the Wage Order's prohibition against pay being averaged over all hours worked—protects workers' expectations, allowing them to effectively plan their precarious financial lives.

Allowing either-or "formulas" or pay-averaging would devastate workers' expectations of pay, because averaging means that factors beyond the worker's control determine whether or not the worker is paid for his or her time. In *amici*'s experience, workers are often surprised and incredibly frustrated to learn that their long hours do not necessarily translate to more

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[19] (UC Berkeley Labor Center, *Low-Wage Work in California: The Numbers* <http://laborcenter.berkeley.edu/low-wage-work-in-california/#the-numbers> [as of Feb. 1, 2019] [defining "low-wage worker" as workers earning less than two-thirds of the median income].)

[20] (UC Berkeley Labor Center, *Low-Wage Work in California: Worker Profile* <http://laborcenter.berkeley.edu/low-wage-work-in-california/#worker-profile> [as of Feb. 1, 2019].) But note that the fraction of low-wage workers *with* a college degree is rising, with nearly half having attended college and 12% having graduated. (*Ibid.*)

pay, given how much of their time turns out to be "non-productive" despite the employer's representation at time of hire that their work would always be busy.[21] Failing to compensate for all hours worked—including this "non-productive time"—is especially pernicious because, in most cases, the worker has no influence over how much time will be productive or non-productive. Rather, productive time is determined either by the employer or by market uncertainties—as in *Gonzalez*, where mechanics' pay was determined primarily by how many customers came into the shop. (See *Gonzalez*, *supra,* 215 Cal.App.4th at p. 42 [explaining that "[p]laintiffs regularly did not have repair work to do because there were not enough vehicles to service"].) *Amici* see such examples regularly. A massage therapist who is paid by the massage given cannot control how many customers are scheduled, just like a food prep cook paid by the dim sum hand-filled cannot control how many orders are placed. None of these workers have the ability to affect how much of their time is productive and, therefore, compensated. Although a piece rate is theoretically supposed to incentivize productivity, it cannot do so under every situation. Rather, it operates largely to reduce the employer's labor costs at less productive

[21] Language barriers, often present in low-wage industries, tend to exacerbate the miscommunication around expectation of pay. (Cf., e.g., Cote, *Wage Theft a Scourge for Low-Income Workers*, S.F. Gate (Jul. 18, 2011) <https://www.sfgate.com/news/article/Wage-theft-a-sccurge-for-low-income-workers-2354262.php> [as of Feb. 1, 2019].)

times. This kind of market risk-taking can be entirely appropriate for employers to bear. By promulgating the Wage Orders and enacting the Labor Code, however, the Industrial Welfare Commission and the California Legislature have expressed the judgment that employees are entitled to a greater degree of pay protection.

A wage "floor," as the employer used in *Gonzalez* and in the case at hand, does little to assuage the concerns of a worker who reasonably budgeted their personal finances based on a number higher than the floor the minimum wage provides. This is especially true when the statutory minimum wage barely provides for the necessities of life.[22]

Further, the prohibition on pay-averaging combats the exploitation of low-wage workers by preventing employers from demanding additional work time at no additional cost. It is not uncommon for *amici*'s clients to be asked to work additional hours—or risk termination, making them especially susceptible to employer pressure to work additional hours. In the

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[22] As an example, taking into account the rule of thumb that renters should spend one-third of income on rent, the minimum wage is on its own wholly insufficient to maintain a rented apartment. The California Housing Partnership Corporation reported that in 2018, renters in Los Angeles County needed to earn more than *four times* the minimum wage to afford the median rent; in Alameda County, nearly four times. (Cal. Housing P'ship Corp., *Housing Need Reports 2018* (May 2018) <https://chpc.net/?sfid=181&_sft_resources_type=housing-need> [as of Feb. 1, 2019].) The problem is not confined to coastal cities. In Stanislaus and San Joaquin counties, full-time workers still needed to make over twice the minimum wage to afford the median apartment, and in Kern County they needed to make over one and a half times the minimum wage. (*Ibid.*)

construction industry, for example, it is fairly typical for a foreman to demand longer hours of his workers to meet a property owner's deadline; similarly, it is expected in the service industry to attend to a client who walks into the nail salon at closing. Workers, especially those in low-wage industries, can feel immense pressure to accede to such demands. Refusing can mean incurring the wrath of the manager, fracturing work relationships, and the loss of steady income if the employment ends. Complying, however, can mean sacrificing caregiving obligations, arriving late to a second job or school—but it should not under any circumstances sacrifice a worker's hourly rate of pay.

Schedule changes are not necessarily pernicious. In some industries, like the airline industry, weather can lead to delays and unforeseen scheduling changes. The Wage Orders certainly do not bar schedule changes, but they do ensure that all additional time spent on the job—for whatever reason—is time spent toward earning additional pay, rather than forcing the worker to bear the burden of this unpredictability. Otherwise, the additional work actually devalues the worker's hourly rate, and is completely counter to what the law intends.[23]

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[23] In another case pending before this Court, an employer incorrectly argues that it complies with the wage order by *retroactively* determining a worker's hourly pay, based on an *ad hoc* calculation that essentially divides the pay period's total piece-rate pay ("production dollars") by the total number of hours worked. (*In re Certified Tire & Service Ctrs. Wage & Hour Cases* (*Certified Tire*) (2018) 28 Cal.App.5th 1, 4, review granted

The enactment of Labor Code section 515(d) arguably best captures the legislative intent that a worker's long hours not undercut her take-home pay. In 2011, a court incorrectly held that although workers could not "waive" the protection of overtime laws, they could expressly agree that a weekly salary satisfied those laws' requirements even if the worker worked far longer than the standard workweek of 40 hours. (*Arechiga v. Dolores Press* (2011) 192 Cal.App.4th 567, 572 (overturned by Stats. 2012, c. 820 [amending Lab. Code § 515(d)]).) The California Legislature disagreed and quickly clarified that a weekly salary can only compensate for the forty regular hours in a workweek, "notwithstanding any private agreement to the contrary." (Lab. Code § 515(d)(2).) Any other result would in effect diminish the worker's rate of pay, allowing the incongruous result of allowing an employer to not only avoid overtime obligations but also to

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Jan. 16, 2019, S252517). *Certified Tire*, which this Court should ultimately reverse, provides an excellent example of the kind of exploitative practices that the Wage Orders and Labor Code are designed to prohibit. Although the Court of Appeal acknowledged that "the hourly rate differs from pay period to pay period," it said this was only "because technicians have the opportunity to *increase* their guaranteed minimum hourly rate based on the generation of production dollars." (*Id.* at p. 13, original italics.) The Court of Appeal failed to address the fact that if a technician does *not* generate sufficient production dollars, their hourly rate *decreases* with each additional hour worked. Decreasing the hourly rate of pay as an employee works longer hours is unfair and violates California law. (See, e.g., Lab. Code § 223 ["Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract."].)

enjoy the benefit of the additional work performed without incurring any additional cost.[24]

This principle was most recently reaffirmed by this Court in *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, which held that an employer, in determining the regular rate on a flat sum bonus, must divide the bonus by only the straight-time hours worked during the period, not by all hours.[25] (*Id.* at p. 562.) In doing so, this Court emphasized California's longstanding policy of discouraging employers from imposing overtime work—and certainly not without an additional premium. (*Id.* at pp. 552–554, 570–572.)

Here, the consequence of long flight delays is lower pay—which cannot be what the Legislature intended. Defendant Employer's Work Rules explain:

> You are scheduled for a turnaround worth 6:00 block time with a scheduled duty period length of 10:00. Due to an operational delay, your duty period is lengthened to 14:00. You will be paid 7:00 for the turnaround, comprised of 6:00 block time and 1:00 of 1 for 2 duty credit (14:00 divided by 2).

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[24] The legislative history shows that this was intended as a clarification, restoring the status quo before *Arechiga*. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 2103 (2011–2012 Reg. Sess.) as amended Apr. 10, 2012, p. 2.)

[25] (See also *Skyline Homes, Inc. v. Dep't of Indus. Relations* (1985) 165 Cal.App.3d 239, 246, disapproved on another ground in *Tidewater*, *supra*, 14 Cal.4th at p. 573 [invalidating a method of calculating overtime where "the 'regular rate of pay' is reduced as the number of overtime hours is increased in a given workweek."].)

(Oman v. Delta Airlines (N.D. Cal. 2015) 153 F.Supp.3d 1094, 1098.) In Defendant Employer's *own* example, the flight attendant, despite working four hours *longer* than expected, may only be paid for one additional hour. It gets worse. Defendant Employer might instead have used the example of a flight attendant who works only two hours longer than expected (12 hours instead of 10). That flight attendant receives *zero* additional pay for those two additional hours, because s/he still receives only the six hours of Flight Pay originally promised.[26] Alternatively, even if Defendant Employer (incorrectly) insists that the six hours of Flight Pay should be deemed to cover the full twelve-hour shift, that worker ends up making less per hour than s/he would have made without the delay. These different scenarios illustrate how Defendant Employer's "formula" can force employees to work at least some additional time for no additional compensation.

Similar to the "formula" at issue here is a massage therapist represented by Legal Aid at Work who was paid by an either-or formula: either the minimum wage for every hour she worked, which at the time was $8.00 an hour, or $20.00 for each massage she provided, whichever was greater. She was scheduled to work a certain number of shifts a week, as determined by the employer, and her employer scheduled clients for her

[26] The actual pay is the same whether calculated under Flight Pay or Duty Period Credit: it is six hours of Flight Pay, or half a dozen hours of Duty Period Credit.

and required her to clean between appointments and attend regular meetings. Even when not engaged in cleaning, she was required to stay on premises in case an unexpected walk-in arrived; the presence of a ready worker is unquestionably an indispensable part of any service industry business. While cleaning or waiting for the walk-in, this massage therapist was, in effect, not earning any wages—week after week, her paycheck amounted to the wages she had earned only while actively performing massages. Whether she attended a mandatory staff meeting or stayed after hours to clean up after a late-arriving client, there was no difference to her pay. Her massage hours were relatively well-compensated—and what had drawn her to the job—but that was ultimately all the work her employer paid her for; the additional responsibilities of the job, which sometimes took up half her working hours, were uncompensated under the payment scheme.[27]

The consequence of such pay schemes on workers, especially low-wage workers, cannot be overstated. The prohibition on averaging pay exists to protect the low-wage workers that *amici* represent, just as it

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[27] Her wage claim calculation, like most workers earning piece-rate or a piece-rate-based formula, was complicated and time-consuming for Legal Aid at Work's most experienced wage-and-hour attorney, as her hourly rate of pay was calculated for each day worked, making the ability to determine what wages—if any—are owed an investment of time and resources, without any possible benefit (other than a worker knowing wages were paid in full, despite expecting to have been paid more for the work actually performed).

protected the higher-paid auto mechanics in *Gonzalez* and protects the flight attendants in this case.

Amici's clients structure and plan their entire lives around their job—or, often, their multiple jobs. Workers choose which jobs and how many jobs based on their expectations about those jobs' ability to pay for life's basic necessities. Money, of course, is tight in low-income households, and workers are often one surprise away from financial catastrophe.[28] Receiving expected pay can be a matter of financial survival for the 40 percent of adults (nationwide) with less than $400 saved.[29] The significant variation in wages paid, typical in these either-or formula pay schemes—and compounded over weeks, months, and even years of work—creates unneeded and unwelcome financial unpredictability in the lives of low-wage workers. Earning predictable incomes that correspond to the expectations they had when they agreed to take their jobs is critical for low-wage workers. Californians depend on pay transparency and pay predictability to keep a roof over their head, to put food on the table, and to keep up with their own financial commitments.

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[28] (See Paquette, *Living Paycheck to Paycheck is Disturbingly Common*, Wash. Post (Dec. 29, 2018) <https://www.washingtonpost.com/business/2018/12/28/living-paycheck-paycheck-is-disturbingly-common-i-see-no-way-out/> [as of Jan. 31, 2019].)

[29] (*Ibid.*)

The California Legislature has repeatedly recognized the importance of transparency and predictability in pay.[30] Numerous sections of the Labor Code are designed to ensure that workers understand how they are paid as well as how they are to be paid. (See, e.g., Lab. Code § 226 [requiring itemized, written wage statements explaining the basis for calculating a worker's pay]; Lab. Code § 2810.5, as amended by Wage Theft Prevention Act of 2011, Stats. 2011, c. 655, § 12, 5 [requiring written notice to employee, at time of hiring, of pay rate among other information].) Likewise, in enacting Labor Code § 226.2 and approving *Gonzalez*, the California Legislature intended to require that nonproductive time be compensated "*separately*" and to forbid pay structures like the "formula" at issue here that pays only for productive time, as long as the minimum wage threshold is reached. (Sen. Com. on Lab. & Indus. Rel'ns, Rep.on Assem.

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[30] The other variable in the pay equation is that of hours worked, or scheduled. It is, therefore, not surprising that legislative efforts around predictable scheduling have begun in California. Unpredictability in scheduling led the City and County of San Francisco, when it enacted Ordinance 241-14 in 2015, to provide additional protections against erratic scheduling, to find that "last-minute work schedule changes cause workers who are already struggling with low wages to live in a constant state of insecurity about when they will work *or how much they will earn* on any given day." (S.F. Police Code, § 3300G.2(e), italics added.) San Francisco found the problem so pervasive and important that it now requires covered employers to pay *supplemental* compensation, in addition to the regular hourly wage, when schedules are changed on short notice. (*Id.* § 3300G.4(c).)

Bill 1513 (2015–2016 Reg. Sess.) Sep. 10, 2015, p. 5, italics added.)[31]

California has exercised its authority again and again to prohibit these exploitative pay structures which do not translate to additional pay for additional work. The protections afforded should again be enforced so as to serve the remedial purposes they were enacted to serve.

III. CONCLUSION

The California Wage Orders and Labor Code protect all people who labor in California. These employees are entitled to be paid on time, to be issued an itemized pay statement, and to earn the minimum wage. Furthermore, the Wage Orders and case law require payment for each and every hour worked in order to prevent exploitation of low-wage workers. For the foregoing reasons, *amici* urge this Court to answer all three certified questions in the affirmative.

Dated: February 15, 2019

Respectfully submitted,

Carole Vigne

CAROLE VIGNE
Legal Aid at Work

[31] The Legislature is not required to expressly provide, in every single protective law that it passes, that employers may not contract themselves out of the law's requirements.

MONIQUE OLIVIER
California Employment Lawyers Association

CYNTHIA L. RICE
California Rural Legal Assistance Foundation

ANNA KIRSCH
Women's Employment Rights Clinic

NAYANTARA MEHTA
National Employment Law Project

CERTIFICATE OF WORD COUNT

I hereby certify pursuant to Rule 8.204(c)(1) of the California Rules of Court that the attached PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS is proportionally spaced, has a typeface of 13 points or more, and contains 9,123 words, excluding the cover, the tables, the signature block, and this certificate. Counsel relies on the word count of the word-processing program used to prepare this brief.

Dated: February 15, 2019

By: Carole Vigne
Carole Vigne

PROOF OF SERVICE

Case: *Oman v. Delta Airlines, Inc.,*

California Supreme Court No. S248726

(U.S. Court of Appeals for the 9th Circuit, No. 17-15124)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 180 Montgomery Street, Suite 600, San Francisco, California 94104. On, February 19, 2019, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS

REQUEST FOR JUDICIAL NOTICE OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, LEGAL AID AT WORK, NATIONAL EMPLOYMENT LAW PROJECT, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS ; DECLARATION IN SUPPORT; PROPOSED ORDER

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Legal Aid at Work for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. 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 Mail Postal Service in San Francisco,

California, for collection and mailing to the office of the addressee the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this February 19, 2019, at San Francisco, California.

Valerie Sprague