S244751

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

KURT STOETZL, ET AL.

Plaintiffs and Appellants

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET AL.

Defendants and Respondents.

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California, County of San Francisco, Case Number CJC11004661, The Honorable John E. Munter

RESPONDENTS' STATE OF CALIFORNIA, ET AL. REPLY BRIEF ON THE MERITS

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I.

INTRODUCTION

There are two issues of statewide importance presented in this action that require require review by this Court to reverse that portion of the Court of Appeal's decision relating to the Unrepresented Employee subclass. First, the Court of Appeal's decision that California's definition of "hours worked" found in the Industrial Welfare Commission's (IWC's) wage orders (and specifically Wage Order No. 4), applies to employees in the Unrepresented Employee subclass, rather than the definition of that term in the federal Fair Labor Standards Act ("FLSA," 29 U.S.C. § 201, et seq.), undermines the Legislature's exercise of its prerogative to set the terms and conditions of state employment for employees in that subclass. Second, the Court of Appeal's decision that the Unrepresented Employee subclass can state a claim for breach of common law contract for payment of overtime wages threatens to morph nearly every policy adopted by state regulatory agencies into a source of contractual obligations. Neither of these findings is supported by the law or the record in this action and, therefore, this Court should reverse that portion of the opinion of the court below relating to the Unrepresented Employee subclass.

The Legislature plainly has delegated its constitutional authority over the terms and conditions of state employment to CalHR through a series of Government Code sections. None of the statutes delegating authority to

CalHR limit that authority, much less require rigid adherence to the IWC wage orders. Indeed, one of the key Government Code sections at issue, section 19845, expressly authorizes CalHR to adopt regulations governing the payment of overtime for state employees that are consistent with the Fair Labor Standards Act ("FLSA," 29 U.S.C. § 201, et seq.)

Using this delegation of authority, CalHR adopted a series of regulations establishing a "pay plan" for unrepresented employees. (See generally, Cal. Code Regs., tit. 2, § 599.666.1) To administer this pay plan, and in specific response to the authority delegated to it in Government Code section 19843, CalHR established workweek groups for state employees and further developed the California Pay Scales Manual for administering those pay plans. (See, Cal. Code Regs., tit. 2, § 599.701.) In further response to the Legislature's delegation of authority, CalHR adopted the California Pay Scales Manual to develop a system for compensating unrepresented employees. (Reporter's Transcript [RT], Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.* [Defendants' Exhibit 79].) The pay plan adopted by CalHR, as set forth in the Pay Scales Manual, establishes the FLSA as the legal standard governing the compensation of Unrepresented Employees. (See Appellants' Appendix ["AA"], Vol. 11, pp. AA002996-2999.) In fact, for employees within the Unrepresented Employee subclass, the section of the Pay Scale Manual applicable to them is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (*Ibid.*)

Appellants either ignore, or dismiss without explanation, this evidence in their Answer Brief on the Merits. Instead, Appellants raise several flawed arguments in support of their contention that the compensable hours worked for the Unrepresented Employee subclass should be determined by the definitions in the IWC wage orders. First, Appellants argue CalHR's regulations should not be given the same deference as the IWC wage orders. Yet, there is no logical reason for this. Both the IWC wage orders and CalHR's regulations emanate from the same source: the Legislature's delegation of its constitutional authority to regulate the terms and conditions of employment in the State of California. Furthermore, because CalHR's regulations are more specific in nature, in that they are directed at the terms and conditions of state employment for employees not otherwise covered by a Memorandum of Understanding, including employees in the Unrepresented Employee subclass, those regulations should control the outcome here.

Appellants next contend that CalHR's regulations do not address the subject of compensable hours of work and, therefore, resort should be made to the IWC wage orders. This argument simply ignores the ubiquitous references in CalHR's regulations and the Pay Scales Manual to the FLSA as the method for compensating the Unrepresented Employee subclass. This FLSA-based compensation system includes by necessary implication the FLSA's definition of hours worked. As Respondents previously have

pointed out, defining "compensable hours worked" is the most basic, threshold concept in any compensation system. The compensation system at issue here includes the express legislative authorization to pay overtime pursuant to the FLSA. (See Government Code section 19845.) Accordingly, that compensation includes the FLSA standard for compensable hours of work because before employees' entitlement to overtime can be determined, their compensable hours of work must first be calculated. Put another way, a compensation system applying the IWC wage order's definition of compensable hours of work is incompatible with FLSA since the IWC's definition is contrary to that contained in the FLSA.

This leads to Appellants' third flawed argument: that CalHR's regulations and the IWC wage order's definition of hours worked can be harmonized. This obviously is not the case. Appellants' position is an effort to pound the "square peg" of the IWC wage orders' definition of compensable hours of work into the "round hole" of an FLSA-based compensation system. Appellants' argument creates disharmony rather than harmony.

Finally, Appellants argue that applying the FLSA standard for compensable hours worked found in CalHR's regulations and Pay Scale Manual would affect a repeal of the IWC wage orders. This is easily refuted by noting that CalHR's regulations and the Pay Scale Manual date back to the mid-1980's, while the IWC wage orders were not adopted until 1998.

CalHR's regulations and Pay Scale Manual could not "repeal" something that did not exist as of the time of their adoption.

Appellants' arguments in support of their breach of common law contract claim are equally meritless and are internally contradictory. Appellants argue that the regulations adopted by CalHR – regulations that unequivocally establish the FLSA as the legal standard for determining the compensable hours of work for the Unrepresented Employee subclass – are entitled to no, or merely limited, deference by this Court. (See Appellants' Answer Brief on the Merits, p. 18.) Yet, Appellants simultaneously argue these same regulations, although not entitled to any deference, are nonetheless legally significant enough to establish a binding common law contract for the payment of overtime. According to Appellants' theory, not only do these regulations give rise to a common law contract for the payment of overtime, but the terms of this alleged regulation-based common law contract establish California state law as the standard for calculating compensable hours of work despite the fact that the regulations only reference the FLSA as the controlling legal standard for compensating the Unrepresented Employee subclass.

Appellants cannot have it both ways. They cannot argue that CalHR's regulations are irrelevant for purposes of establishing the legal standard for measuring compensable hours of work, and at the same time argue those same regulations establish a common law contract for overtime based on

California law despite the exclusive reference to the FLSA in those regulations. There is no basis in fact or law for finding that CalHR's regulations give rise to contract rights on the part of the Unrepresented Employee subclass and the Court of Appeal's decision to the contrary is in error.

For all these reasons, Respondents respectfully submit that the Court of Appeal's opinion in this matter should be reversed, and this Court should reinstate the trial court's judgment in favor of Respondents on all claims asserted by the Unrepresented Employee subclass.

II.

LEGAL ANALYSIS

A. Contrary To The Court Of Appeal's Decision, The Definition of "Hours Worked" Found In the FLSA, Rather Than The IWC Wage Orders, Governs The Unrepresented Employee Subclass.

Appellants raise four arguments in their Answer Brief on the Merits in support of their overall contention that the Unrepresented Employee subclass' compensable hours worked should be calculated based on the standard contained in the IWC wage orders rather than the FLSA. Appellants argue (1) CalHR's regulations and Pay Scales Manual are not entitled to deference from this Court (Appellants' Answer Brief on the Merits, pp. 16-19); (2) CalHR's regulations and Pay Scales Manual do not reference a standard for measuring hours worked (Appellants' Answer Brief on the

Merits, pp. 19-22); (3) applying the FLSA standard contained in CalHR's regulations and Pay Scales Manual would effect a repeal of the IWC wage orders (Appellants' Answer Brief on the Merits, pp. 22-24); and (4) CalHR's regulations and the Pay Scales Manual can be harmonized with the IWC wage orders. (Appellants' Answer Brief on the Merits, pp. 24-26.) Each of these arguments is flawed and none serve to overcome the error committed by the Court of Appeal in reversing the trial court's judgment in favor of Respondents.

1. CalHR's Regulations And The Pay Scales Manual Are Entitled To At Least Equal, If Not Greater, Deference From This Court Than The IWC Wage Orders In The Context Of This Case.

It is now well established that "[u]nder the California Constitution it is *the Legislature* ... that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments...." (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015-1016 ("*Professional Engineers*") ["[T]he authority to set salaries [of public employees] has traditionally been viewed as a legislative function, with ultimate authority residing in the legislative body."] (emphasis in original; internal citations omitted).) "[A]ny authority that the Governor or an executive branch entity ... is entitled to exercise in this area emanates from

the Legislature's delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments." (*Ibid.*)

The relevant delegation of the Legislature's constitutional authority in this case emanates from a series of Government Code sections. To summarize, those code sections include Government Code section 19826, subdivision (a) [directing CalHR to "establish and adjust salary ranges" for employees in the state civil service], Government Code section 19843 [authorizing CalHR to establish workweek groups and to assign classifications to workweek groups for purposes of calculating overtime pay], Government Code section 19844 [directing CalHR to establish rules by which ordered overtime and overtime worked in times of critical emergency shall be compensated], Government Code section 19845 [permitting CalHR "to provide for overtime payments as prescribed by the federal Fair Labor Standards Act to state employees"], and Government Code section 19849 [mandating CalHR "to adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records"]. Taken together, these statutes constitute a broad delegation of authority by the Legislature to CalHR to establish the method by which excluded employees are compensated, which includes the express authorization to CalHR "to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees."

Compare this delegation, with the authority possessed by the IWC. Article 14, section 1 of the California Constitution states: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers." Accordingly, the IWC's authority to adopt wage orders derives solely from the Legislature's delegation of its constitutional authority to the IWC, a delegation that is conceptually no different than that granted to CalHR over the terms and conditions of state employment. In fact, this Court has recognized that the IWC's authority to regulate the terms and conditions of employment in California stem directly from the Legislature's delegation of authority to it. (See *Martinez v. Combs* (2010) 49 Cal.4th 35, 55, citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701.) Further, any deference to which the IWC wage orders are entitled is precisely because those wage orders are "presumptively valid' legislative regulations of the employment relationship" adopted in response to the Legislature's delegation of its constitutional authority to the IWC. (*Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1027.)

Far from "flouting" this Court's precedents regarding the deference to which regulatory enactments over wage and hour matters are entitled (see Appellants' Answer Brief on the Merits, p. 18), Respondents faithfully apply this Court's reasoning in arguing that CalHR's regulations and the Pay Scales Manual are entitled to equal, if not greater, deference than the IWC wage

orders when applied to the Unrepresented Employee subclass. Like the IWC wage orders, CalHR's regulations and the Pay Scales Manual are "presumptively valid' legislative regulations of the employment relationship" adopted in response to the Legislature's delegation of its constitutional authority and, therefore, are entitled to every bit the same deference as the wage orders. In fact, because CalHR's regulations and the Pay Scales Manual address the more specific topic of the terms and conditions of state employment, they are entitled to greater deference than the IWC wage orders in the context of this case. It is well-settled that "[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577, citing *Rose v. State of California* (1942) 19 Cal.2d 713, 723–724].)

Appellants argue that the Pay Scales Manual is entitled to only limited, if any, deference because it is merely a "manual," citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 and *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 7. (Appellants' Answer Brief on the Merits, p. 19.) Neither *Tidewater* nor *Yamaha* stand for the proposition for which Appellants cite them, namely

that "manuals of this sort relied on by the State receive limited, if any, deference by this Court.

To begin with, *Tidewater* is inapposite. In that case, this Court held that the Department of Labor Standards Enforcement's "interpretive policies" relating to the IWC's wage orders were void because they were not adopted pursuant to the Administrative Procedures Act ("APA," Gov. Code § 11340, et seq.) At no time in this action have Appellants challenged CalHR's regulations or the Pay Scales Manual based on the APA. Such an argument was neither raised in the trial court, nor in the Court of Appeal. As such, *Tidewater* has no application here. (See *Jimenez v. Superior Court (T.M. Cobb Co.)* (2002) 29 Cal.4th 473, 481 [this Court "normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"]; see also, CRC 8.500(c)(1).)

Yamaha, the other case cited by Appellants, actually supports Respondents' position. In *Yamaha*, this Court found that,

> An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.

(*Yamaha Corp. of America v. State Board of Equalization, supra,* 19 Cal.4th 1, 7.) This Court further noted that "[a]n administrative interpretation ... will be accorded great respect by the courts and will be followed if not clearly erroneous," citing *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325-326. Thus, far from supporting the notion that the Pay Scales Manual is not entitled to any deference by this Court, *Yamaha* stands for the proposition that CalHR's regulations are binding because they were "adopted by an agency [CalHR] to which the Legislature [pursuant to the cited Government Code sections] has confided the power to "make law." Furthermore, to the extent the Pay Scales Manual constitutes an "interpretation" of those regulations, such an interpretation is also is entitled to "great respect" by this Court because it is not "clearly erroneous" and, in fact, is entirely consistent with the Legislature's express authorization to utilize the FLSA as a legal standard for, among other things, compensating overtime. (See Gov. Code § 19845.)

In sum, granting CalHR's regulations and the Pay Scales Manual the same, if not greater, deference as this Court previously has granted the IWC wage orders is entirely consistent with this Court's precedents. As will be shown in the next section, because those regulations and the Pay Scales Manual unequivocally establish an FLSA-based compensation system, and such a system is entirely consistent with the Legislature's specific delegation of authority to CalHR, the Court of Appeal clearly erred in finding the IWC

wage orders controlled the determination of the Unrepresented Employees' hours worked rather than the FLSA.

2. The Applicable CalHR Regulations And Pay Scale Manual Establish An FLSA-Governed Method For Compensating Unrepresented Employees.

Contrary to Appellants' contention, the relevant CalHR regulations and Pay Scale Manual address the concept of hours worked by exclusively applying the FLSA as the legal standard for compensating employees in the Unrepresented Employee subclass.

Title 2, California Code of Regulations, section 599.666.1 provides:

> The pay plan for state civil service employees designated supervisory under Government Code section 3513(g) or excluded from the definition of state employee under Government Code section 3513(c) or managerial under Government Code section 3513(e) (Ralph C. Dills Act) consists of the salary ranges and rates established by the Department and the regulations contained in this article.

Title 2, California Code of Regulations, section 599.671 provides that "[u]nless otherwise indicated in the pay plan, the rates of pay set forth represent the total compensation in every form except for overtime compensation."

Pursuant to the express authority granted it in Government Code section 19843, CalHR established workweek groups for state employees. (Cal. Code Regs., tit. 2, § 599.701.) In 1983, CalHR divided state employees into two Work Week Groups (WWGs): WWGs 1 and 4. (*Ibid.*) In order to effectuate and implement these regulations – regulations established

pursuant to the Legislature's express delegation of authority to it – CalHR adopted the California Pay Scales Manual, which identifies the FLSA as the controlling legal standard for determining the compensability of Unrepresented Employees' hours worked. (RT, Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.* [Defendants' Exhibit 79].)

The Pay Scales Manual establishes an FLSA-based method for compensating employees designated WWG 2, which includes the Unrepresented Employees here. Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) That section states, in part, "[t]he provisions of [WWG 2] are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions *subject to the FLSA*." (*Ibid.*, emphasis added.) Section 10 of the Pay Scales Manual further provides that "[t]he beginning of a work week may be changed if the change is intended to be permanent and it is not intended to evade the overtime provisions *of the FLSA*." (*Ibid.*, emphasis added.) Subsection (f) of Section 10 of the Pay Scale Manual specifically provides that "[t]he provisions of Work Week Group 2 are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions *subject to the FLSA*." (*Id.*, at AA002997, emphasis added.) David Gilb, the former CalHR Director, testified that both he and his predecessors have determined that the positions

in the Unrepresented Employees subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.) Thus, the Pay Scales Manual repeatedly and comprehensively applies the FLSA to employees, such as those in the Unrepresented Employee subclass, as the basis for determining hours worked and overtime compensation.

Despite these clear and unequivocal references to the FLSA as the governing legal standard for compensating the Unrepresented Employee subclass, Appellants argue that CalHR's regulations and the Pay Scales Manual do not actually address the subject of hours worked. (Appellants' Answer Brief on the Merits, pp. 19-22.) Such an argument, however, overlooks the reality that "[t]he amount of money an employee should receive cannot be determined without knowing the number of hours worked." (29 C.F.R. § 785.1) In other words, the beginning point of any calculation of wages owed – whether those wages are straight time or overtime – is whether the time spent by the employee constitutes compensable hours of work. Intrinsic, therefore, to the FLSA-based compensation system contained in CalHR's regulations and Pay Scales Manual, is the FLSA standard for hours worked. By way of example, Government Code section 19845 expressly authorizes CalHR "to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees." Overtime payments "as prescribed the Federal Fair Labor Standards Act" includes the concept of hours worked contained in the FLSA. The two

concepts – payment of overtime and determining compensable hours of work – cannot be decoupled. The former flows from the latter. It is sheer sophistry then to argue that CalHR's regulations and the Pay Scales Manual do not reference the FLSA standard of hours of work. That reference is inherent at every point the FLSA is invoked in those regulations and the Pay Scales Manual as the legal standard for compensating employees in the Unrepresented Employee subclass.

3. Applying The FLSA Standard For Calculating The Unrepresented Employees' Compensable Hours Worked Would Not Effect A Repeal Of The IWC Wage Orders.

Appellants argue that applying the FLSA standard for calculating the Unrepresented Employees' compensable hours of work effects a repeal of the IWC wage orders by implication. This simply is not the case.

The Government Code sections delegating authority to CalHR over the terms and conditions of the Unrepresented Employees employment were enacted in 1981. (See Stats. 1981, ch. 230, sec. 55.) In response, CalHR adopted its regulations and the California Pay Scales Manual in the mid-1980's. (See RT, 402:10-405:3 [Gilb].) The IWC wage orders, on the other hand, were not adopted until 1998. For over a decade, unrepresented employees in the State of California were subject to a FLSA-based compensation system before the IWC wage orders came into existence. Accordingly, the continued application of a FLSA-based compensation that

long pre-dated the IWC wage orders cannot be deemed an implied repeal of those wage orders.

4. Imposing The Definition Of "Hours Worked" Contained In The Wage Orders On An Otherwise FLSA-Based Compensation System Does Not Harmonize The Competing Provisions.

Finally, Appellants, like the Court of Appeal, purport to "harmonize" the IWC wage orders with the CalHR regulations and Pay Scales Manual. It only creates disharmony.

It is readily apparent why, in this "walk time" case, Appellants strive to avoid application of the FLSA's definition of hours worked: based on the Portal-to-Portal Act (29 U.S.C. § 251, et seq.) time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not compensable. (29 U.S.C. § 254, subd. (a); see also, *Integrity Staffing Solutions, Inc. v. Busk* (*Busk*) (2015) 135 S.Ct. 513, 519.) Thus, in an FLSA-based compensation system, such as the one applicable here, "walk time" is not compensable. Application of California law, and specifically the definition of "hours worked" contained in the IWC wage orders, could lead to a different result. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 578.)

Despite this clear conflict, Appellants nonetheless claim CalHR's regulations and the Pay Scales Manual can be harmonized with the IWC

wage orders by "comply[ing] with the FLSA, which sets the overtime threshold, and to apply the FLSA standard for hours worked "when necessary to comply with federal overtime requirements," while simultaneously applying the IWC standard for "hours worked" for purposes of meeting California's minimum wage requirements. (See Appellants' Answer Brief on the Merits, p. 30.) This position defies logic. According to Appellants, time spent by members of the Unrepresented Employee subclass walking to and from the location of their principal work activity would be considered hours worked for purposes of determining Respondents' compliance with state minimum wage obligations, but when it comes to determining the hours these same employees worked for purposes of calculating their purported contractual overtime pay, their walk time suddenly would not be considered hours worked. That is anything but a harmonious application of the competing statutory and regulatory schemes. It would create confusion for employees and it would create a nearly unworkable process for calculating payroll obligations.

Maintaining the integrity of the two methodologies for compensating employees is achieved by continuing to maintain the FLSA-based system in the specific context expressly authorized by the Legislature, that is, the compensation of unrepresented state employees, while leaving intact the more generally applicable standard for hours worked contained in the IWC wage orders in all other contexts. This has stood as the process for

compensating unrepresented state employees since the mid-1980's when CalHR adopted its regulations and Pay Scales Manual in response to the Legislature's delegation of authority to it. This system has co-existed harmoniously with the IWC wage orders since 1998. None of Appellants' arguments, nor the Court of Appeal's erroneous conclusions, warrant a different conclusion.

B. Appellants Have Failed To Establish A Breach Of Common Law Contract Claim Either In Law Or In Fact.

In their Answer Brief on the Merits, Appellants make several arguments in support of their contention they are entitled to pursue a breach of common law contract claim for payment of overtime. None of these arguments serve to establish such contractual rights either as a result of law or fact.

Appellants continue to rely, almost exclusively, on *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403 for their contention that CalHR's "policies" give rise to common law contract rights. (See Appellants' Answer Brief on the Merits, pp. 32-33.) As Respondents pointed out in its Opening Brief on the Merits, this Court held in *Madera* that the contract rights found to exist in that case were based on enactments by the legislative body of the city that mandated payment of overtime in particular situations. (*Madera Police Officers Assn v. City of Madera, supra,* 36 Cal.3d 403, 412-13.) Consistent with the holding in *Madera* this Court held in

Retired Employees Association of Orange County, Inc. v. County of Orange (2011) 52 Cal.4th 1171, 1189 that in order for an enactment by a public entity to create a contract right, "the legislation's text or the 'circumstances accompanying its passage' [must] clearly evince an intent to contract, *as opposed to an intent to make policy.*" (Emphasis added.) In the *Retired Employees* case, this Court stated that a public entity's intent to create a contract must be clear and must be the result of either legislative ratification of an already existing contract or a situation involving "an unambiguous element of exchange of consideration by a private party for consideration offered by the state."

Appellants argue *Retired Employees* should not apply here because that case involved vested pension rights and the holding in that case should be limited to that context. (Appellants' Answer Brief on the Merits, pp. 34-35.) The Court's opinion in *Retired Employees*, however, does not contain language suggesting that the requirements for establishing that policies adopted by a public entity give rise to contract rights is limited to the pension context. There is no evidence in the record establishing that CalHR's regulations or the Pay Scales Manual, the alleged sources of Appellants' putative contract rights evince an intent to create such rights as opposed to creating policy.

Appellants next argue they have demonstrated the existence of policies and regulations giving rise to contract rights. (Appellants' Answer

Brief on the Merits, pp. 35-36.) Yet, nowhere in this section of their brief do Appellants identify a single policy allegedly creating such contract rights. To the contrary, Appellants merely cite to the allegations of their pleadings – hardly evidence of the existence of a common law contract for overtime.

Beyond the obvious inconsistency in Appellants arguing, on the one hand, that CalHR's regulations and policies, as embodied in the Pay Scales Manual, are not entitled to any deference by this Court, while simultaneously claiming those same regulations and policies are legally sufficient to create a contract, it is clear that even if contract rights arise from those regulations and policies, the terms of that contract would be overtime rights based on the FLSA. As repeatedly shown, CalHR's regulations and the Pay Scales Manual exclusively utilize the FLSA as the legal standard for compensating employees in the Unrepresented Employee subclass. And, as also pointed out, this FLSA-based method for compensating employees in the Unrepresented Employee subclass includes the FLSA standard for hours worked. In the end, all roads in the case lead back to the FLSA. For Appellants to argue otherwise, or for the Court of Appeal to come to a different conclusion, fails to take into account the overwhelming and uncontradicted evidence in the record establishing the FLSA as the legal standard by which employees in the Unrepresented Employee subclass are compensated.

III.

CONCLUSION

That portion of the Court of Appeal's decision relating to the Unrepresented Employees subclass should be reversed by this Court. Both the applicable law and the record in this action establish that the Unrepresented Employees are subject to compensation based on the FLSA, which by necessary implication includes the FLSA's definition of hours worked. This is evident from the repeated and exclusive reference in CalHR's regulations and Pay Scales Manual, regulations adopted by CalHR in response to the Legislature's delegation of its constitutional authority over the terms and conditions of state employment. The Court of Appeal's holding to the contrary is in error and should be reversed.

Similarly, the Court of Appeal's ruling that the Unrepresented Employee subclass can pursue a breach of common law contract claims based on CalHR's policies and regulations also constitutes error. There is no evidence that these policies and regulations evince an intent by CalHR to bind itself contractually.

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Based on all of the above, as well as all other briefs submitted in this action, Respondents respectfully request that this Court reverse the decision of the Court of Appeal and affirm the trial court's judgment in Respondents' favor.

DATED: June 29, 2018

KRONICK, MOSKOVITZ,
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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 5,041words.

DATED: June 29, 2018

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
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By: _____
David W. Tyra
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PROOF OF SERVICE

California Correctional Employees Wage and Hour Cases
Supreme Court Case No. S244751

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On June 29, 2018, I served true copies of the following document(s) described as **RESPONDENTS' STATE OF CALIFORNINA ET AL. REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 29, 2018, at Sacramento, California.

May Marlowe

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