No. S244751

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KURT STOETZL, *et al.*

Plaintiffs, Appellants and Petitioners,

v.

STATE OF CALIFORNIA, *et al.*

Defendants and Respondents.

On Review From The Court of Appeal for the First Appellate District, Division Four, No. A142832

After an Appeal From the Superior Court for the State of California, County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

SUPPLEMENTAL BRIEF OF PLAINTIFFS/PETITIONERS

MESSING ADAM & JASMINE LLP
Gary M. Messing, Bar No. 75363
gary@majlabor.com
*Gregg McLean Adam, Bar No. 203436
gregg@majlabor.com
Yonatan L. Moskowitz, Bar No. 306717
yonatan@majlabor.com
235 Montgomery St., Suite 828
San Francisco, California 94104
Telephone: 415.266.1800
Facsimile: 415.266.1128

SQUIRE PATTON BOGGS (US) LLP
David M. Rice, Bar No. 131064
david.rice@squirepb.com
275 Battery St., Suite 2600
San Francisco, CA 94111
Telephone: (415) 954-0200
Facsimile: (415) 393-9887

Lead Class Counsel for Plaintiffs and Petitioners

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Telephone: (415) 954-0200
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Lead Class Counsel for Plaintiffs and Petitioners

I.

INTRODUCTION

Plaintiffs, who include both Petitioners for their own, as well as Respondents to Defendants', concurrently filed Petitions, file this Supplemental Brief in compliance with Rule 8.520(d) to call this Court's attention to new authority not available in time to be included in Plaintiffs' previous merits briefing.

The relevant new authorities are:

- this Court's decision in *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829, filed on July 26, 2018;
- this Court's decision in *Gerard v. Orange Coast Memorial Medical Center* (S241655) __ Cal.5th __, filed on December 10, 2018; and,
- the United States Court of Appeals for the Sixth Circuit's decision in *Amazon.Com, Inc. v. Integrity Staffing Solutions, Inc.* (6th Cir. 2018) 905 F.3d 387 ("*Amazon*"), decided and filed on September 19, 2018, rehearing *en banc* denied November 1, 2018.

Plaintiffs' final brief on the merits was their Reply Brief filed on June 29, 2018.

No *amici* briefs were filed, so Plaintiffs had no opportunity to address these authorities in an Answer or Consolidated Answer to an *amicus* brief.

These decisions, however, reach important conclusions that support Plaintiffs' arguments in both pending Petitions.

II.

TROESTER AND *GERARD* REAFFIRM THAT MUCH DEFERENCE IS OWED TO THE INDUSTRIAL WELFARE COMMISSION'S WAGE ORDERS IN THIS CASE

In *Troester*, this Court held that, under the circumstances presented by the Starbucks employees' working conditions, no *de minimis* exception could apply to the Industrial Welfare Commission's ("IWC") requirement that an employee be compensated for all hours worked. (5 Cal.5th at p. 843.) This stands in contrast with federal law, which recognizes a *de minimis* exception that the Defendant employer argued should apply to the time periods at issue in *Troester.* This Court rejected that argument and reaffirmed its longstanding deference to the IWC's Wage Orders, including when those Wage Orders provide protections above the floor set by federal law.

Specifically, the Court reiterated that Wage Orders are "accorded the same dignity as statutes," and are "'presumptively valid' legislative regulations . . . that must be given 'independent effect' separate and apart from any statutory enactments." (*Id.* at p. 839, citing *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026.)

And just last week, in *Gerard*, this Court considered the relationship between legislative Labor Code enactments and the powers of the IWC. In doing so, this Court upheld the Legislature's "broad delegation" of power to the IWC as "consistent with its recognition that the IWC is constitutionally authorized . . ., and has been long understood to have the power, to adopt rules nearly co-equal to legislative enactments." (*Gerard*, *supra*, Slip Op. at p. 13.)

The IWC's Wage Orders even "take precedence over the common law to the extent they conflict." (*Troester*, *supra*, 5 Cal.5th at p. 839, citing *Martinez v. Combs* (2010) 49 Cal.4th 35, 64-65.)

On the other hand, this Court held that the Enforcement Policies and Interpretations Manual published by the Division of Labor Standards Enforcements ("DLSE Manual") were "not binding on this court" because they were not "subject to the Administrative Procedures Act and do not represent an exercise of quasi-legislative authority by an administrative agency." (*Troester*, *supra*, 5 Cal.5th at p. 841.)

This determination applies equally to the argument by Defendants (the "State") that the CalHR's non-Administrative-Procedures-Act-compliant manual should take precedence over the language of the Wage Order. (State's Opening Br., at pp. 26-28, 35-39; State's Reply Br., at pp. 11-17.) Although language in the CalHR Manual may be considered for its persuasive value (*Troester*, *supra*, 5 Cal.5th at p. 841), to the extent such

language conflicts with the language of an IWC Wage Order, that language must either give way or be harmonized with the Wage Order (as the Court of Appeal here properly did for the Unrepresented Employee Sub-Class). (See *Stoetzl v. State of California* (2017) 14 Cal.App.5th 1256, 1275-1276; Plaintiffs' Ans. Br., at pp. 16-18, 24-31.)

III.

REFERENCES TO THE FLSA IN STATE LABOR LAWS DO NOT AUTOMATICALLY INCORPORATE THE PORTAL-TO-PORTAL ACT

The United States Court of Appeals for the Sixth Circuit recently reaffirmed that reference to a portion of the Fair Labor Standards Act ("FLSA") does not automatically incorporate all of the FLSA's regulations, much less the separate limitations found in the Portal-to-Portal Act. (*Amazon*, *supra*, 905 F.3d at p. 387).[1] This decision answers important questions about how to interpret the United States Supreme Court's decision in *Integrity Staffing Solutions v. Busk* (2014) 135 S.Ct. 513, which the State relied on directly (and, as *Amazon* shows, erroneously). (State's Opening Br., at pp. 44-46; State's Ans. Br., at pp. 36-37.)

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[1] California law is in accord. (*Troester, supra*, 5 Cal.5th at p. 839, citing *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 843 ["Absent convincing evidence of the IWC's intent to adopt the federal standard for determining whether time ... is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication."].)

A. Relevance for Unrepresented Employees

Contrary to the State's claims, (State's Opening Br., at p. 43), even if a portion of CalHR's regulations were meant to comply with or mirror the FLSA, that language does not "inherently include the full range of propositions underlying the FLSA's concept of compensable hours worked, including the applicability of the Portal-to-Portal Act." (*Ibid.*)

As a preliminary matter, *Amazon* pointed out that the definitions of "work" and "workweek," for the purposes of the FLSA, retain the broad meaning they were given before the Portal-to-Portal Act in *Tennessee Coal, Iron & R. Co. v. Muscoda Local 123* (1944) 321 U.S. 590, 598 and *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133. Congress's decision to pass the Portal-to-Portal Act did *not* limit the federal definition of "work" – it merely stated that, under federal law, certain time worked need not be compensated. (*Amazon, supra*, 905 F.3d at pp. 395-397.) Hence, adopting FLSA workweek standards does not by itself incorporate the Portal-to-Portal Act. And the Sixth Circuit, like the Court of Appeal below, held that the state law at issue (there Nevada and Arizona, here California) did not independently incorporate or otherwise have a feature analogous to the Portal-to-Portal Act. (*Stoetzl, supra*, 14 Cal.App.5th at p. 1275-1276 [California]; *Amazon, supra*, 905 F.3d at pp. 402-404 [Nevada], 404-405 [Arizona].)

Amazon therefore helps illustrate why the State is incorrect to claim that the "compensable hours worked" concept in the FLSA "includes the Portal-to-Portal Act," and that this "FLSA-based system inherently excludes from the concept of compensable hours worked time spent in activities that are not integral and indispensable to the principal activities for which the employe[e] [*sic.*] is employed, including preliminary and postliminary activities that are excluded from the ambit of compensable hours worked under the Portal-to-Portal Act." (State's Opening Br., at p. 46; contra *Amazon*, *supra*, 905 F.3d at pp. 397-400.) The Sixth Circuit did not find either argument convincing, and neither should this Court.

B. Relevance for Represented Employees

The Sixth Circuit's decision also undermines the State's argument relating to the Represented Employees. The State's briefing relied heavily on the argument that a reference to the FLSA in the portion of the MOU discussing the FLSA 7(k) exemption brought along with it other limitations in the FLSA and the Portal-to-Portal Act.

The State claims that a state's adoption of the FLSA's 7(k) partial overtime exemption necessarily also incorporates the limitations on "compensable work" found in the Portal-to-Portal Act. (State's Ans. Br., at pp. 33-35.) It erroneously contends that "FLSA *compensability* standards are inseparable from the 7(k) schedule," (*id.* at p. 37 [emphasis added]). To the contrary, as *Amazon* explained, the FLSA's provisions governing work

weeks are distinct from the Portal-to-Portal Act's provisions governing when such work is not compensable. As *Amazon* makes clear – the compensability standards of the Portal-to-Portal Act do not automatically attach to other FLSA provisions unless, unlike here, state law makes very clear that they do. (See 905 F.3d at pp. 397-400.)

C. Harmony between *Amazon* and *Morillion v. Royal Packing Co.*

Lastly, there is good reason to believe that *Amazon*'s reasoning is consistent with California law. The Sixth Circuit expressly cited this Court's decision in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 and explained that, among other things, *Morillion* demonstrates that a state's labor market can function even when, like California, it lacks any state regulation mirroring the Portal-to-Portal Act. (*Amazon*, *supra*, 905 F.3d at p. 450.)

IV.
CONCLUSION

For the reasons stated above, Plaintiffs urge this Court to consider *Troester v. Starbucks, Inc.* (2018) 5 Cal.5th 829, *Gerard v. Orange Coast Memorial Medical Center* (Dec. 10, 2018, S241655) __ Cal.5th __, and *Amazon.Com, Inc. v. Integrity Staffing Solutions, Inc.* (6th Cir. 2018) 905

F.3d 387, recent authority that fully supports Plaintiffs' arguments in both their own and the State's Petitions pending before the Court.

DATED: December 19, 2018 MESSING ADAM & JASMINE LLP

By: _____
Gary M. Messing
Gregg McLean Adam
Yonatan L. Moskowitz

SQUIRE PATTON BOGGS (US) LLP
David M. Rice

Lead Class Counsel for Plaintiffs
and Petitioners

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 1,564 words.

DATED: December 19, 2018 MESSING ADAM & JASMINE, LLP

By: _____
Yonatan L. Moskowitz

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PROOF OF SERVICE

Stoetzl, et al. v. State of California, Dept. of Human Resources, et al.
Case No. S244751

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

On December 19, 2018, I served true copies of the following document(s) described as **SUPPLEMENTAL BRIEF OF PLAINTIFFS/PETITIONERS** on the interested parties in this action as follows:

David William Tyra, Esq.
Susan P. Solano, Esq.
Kronick Moskovitz Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Ph: 916-321-4500
Fax: 916-321-4555
E-Mail: dtyra@kmtg.com
ssolano@kmtg.com

Attorneys for Defendants and Respondents State of California, Department of Human Resources, California Department of Corrections and Rehabilitation and California Department of State Hospitals

Frolan R. Aguiling, Chief Counsel
Christopher E. Thomas,
Labor Relations Counsel
David D. King, Labor Relations Counsel
California Dept. of Human Resources
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
Ph: (916) 324-0512
Fax: (916) 323-4723
E-Mail: Frolan.Aguiling@calhr.ca.gov

Attorneys for Defendants and Respondents State of California, Department of Human Resources, California Department of Corrections and Rehabilitation and California Department of State Hospitals

Gary G. Goyette Esq. Goyette & Associates, Inc. 2366 Gold Meadow Way, Suite 200 Gold River, CA 95670 Ph: 916-851-1900 Fax: 916-851-1995 E-Mail: goyetteg@goyette-assoc.com	*Attorneys for Plaintiffs and Appellants in Shaw, et al. and Kuhn et al.*
1st District Court of Appeal 350 McAllister Street San Francisco, CA 94102	*Via Hand Delivery*
San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102-4515	*Via U.S. Mail Only*

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Kelli R. Bremer