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

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Pursuant to California Rule of Court 8.520(d), the State of California, the California Department of Human Resources (CalHR), the California Department of Corrections and Rehabilitation (CDCR), and the California Department of State Hospitals (DSH) (collectively, "the State") submits this supplemental brief addressing the following authorities: (1) *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829 ("*Troester*"); (2) *Gerard v. Orange Coast Memorial Medical Center* (2018) 6 Cal.5th 443 ("*Gerard*"); and (3) *Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc.)* (6th Cir. 2018) 905 F.3d 387, petition for cert. pending ("*Amazon*").

I.

INTRODUCTION

Fundamental to the issues under review by this Court, is the recognition of both the Legislature's delegation to CalHR of authority to set the terms and conditions of state employment for the Unrepresented Employee subclass, and its express enactment into law of Memoranda of Understanding ("MOUs") for Represented Employees, both of which incorporate FLSA standards for defining compensable hours of work. The cases addressed in this Supplemental Brief do not address, much less explain, how Plaintiffs can overcome this express legislative adoption of the FLSA's standard for determining compensable hours of work.

II.

LEGAL ANALYSIS

A. The California Supreme Court's Recent Decisions In *Troester* And *Gerard* Have No Bearing On This Matter As They Present Distinct Legal Issues And Factual Circumstances.

In *Troester v. Starbucks Corporation, supra,* 5 Cal.5th 829 ("*Troester*") and *Gerard v. Orange Coast Memorial Medical Center, supra,* 6 Cal.5th 443 ("*Gerard*"), this Court reaffirmed the authority of the Industrial Welfare Commission ("IWC") to adopt wage and hour requirements as contained in the wage orders. Yet, neither of these cases suggests the wage orders adopted by the IWC, whose authority derives solely from the Legislature's constitutional authority to create commissions to "provide for minimum wages and for the general welfare of employees" (see Cal. Const., art XIV, § 1), can override the Legislature's own authority to set the terms and conditions of employment for Unrepresented Employees as expressly delegated to CalHR, or its enactment and funding of MOUs governing the employment of the Represented Employees.

In *Troester*, the plaintiff brought an action against Starbucks on behalf of himself and a putative class of non-managerial employees for unpaid wages based on closing tasks (e.g., activating an alarm, locking doors, walking co-workers to their cars, etc.) performed after clocking out. (*Troester, supra,* 5 Cal.5th at pp. 835-836.) The federal district court granted

summary judgment in favor of Starbucks on the grounds that such time was *de minimis*. (*Id.* at p. 835.) On appeal, the Ninth Circuit posed the question to this Court whether the FLSA's *de minimis* doctrine applies to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197. (*Troester*, *supra*, 5 Cal.5th pp. 834-835.)

After an analysis of the relevant Labor Code sections and the applicable IWC wage order, this Court concluded (1) California's wage and hour statutes and regulations have not adopted the federal *de minimis* doctrine; and (2) the *de minimis* principle, which has operated in California in certain contexts, is not permitted by the wage order and statutes, where the employer required the employee to work off the clock several minutes per shift. (*Id.* at p. 835.)

This Court's decision in *Troester* is distinguishable from this case. First, *Troester* was not concerned with the compensability of preliminary and postliminary activities in compensation schemes that expressly adopt FLSA standards of compensability. Rather, this Court considered in *Troester* whether the FLSA *de minimis* standard had been adopted into the California wage and hour statutes and regulations, or might otherwise be applicable to the circumstances of that case.

Second, *Troester* did not consider whether an IWC order can override either the Legislature's constitutional authority over the terms and conditions of the Unrepresented Employee's employment as expressly delegated to

CalHR or the Legislature's enactment and funding of labor agreements with the Represented Employees. This Court concluded in *Troester* only that California has not adopted the federal *de minimis* rule because there is nothing in the language of the applicable statutes or regulations specifically adopting it. (*Troester*, *supra*, 5 Cal.5th at pp. 840-841.)

Here, by contrast, the California Legislature delegated its constitutional authority over the terms and conditions of state employment for Unrepresented Employees to CalHR through a series of Government Code sections, none of which 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 standards for paying overtime to state employees *as prescribed by the Fair Labor Standards Act*. Thus, unlike *Troester*, there is a specific legislative pronouncement allowing CalHR to implement regulations based on the FLSA. Where in *Troester* this Court found silence in the California statutory and regulatory authorities with respect to the federal *de minimis* doctrine, here, there is express statutory delegation to CalHR to utilize the FLSA.

Troester also is distinguishable when applied to the issue of the standard for determining compensable hours of work for the Represented Employees. The MOUs at issue in this case expressly provided for a FLSA 7(k) schedule, which inherently includes the FLSA standard for hours worked. (See 29 C.F.R. § 553.221, subd. (a).) Indeed, as is undisputed based

on the record in this case, the Legislature appropriated funding for the payment of the Represented Employees based on a costing analysis that assumed that the MOU would provide full compensation for all ordinary pre- and post-work activities. (AA, Vol. 8, pp. 2038, 2087 [Defendants' Trial Exhibit 199]; AA, vol. 18, pp. AA005001, 5003 (Defendants' Trial Exhibit 211; RT, Vol. 4, 595:12-17 (Gilb).) Thus, the rationale in *Troester* for declining to apply the federal *de minimis* rule is not applicable in this case because there has been a clear adoption and/or delegation by the Legislature allowing the utilization of FLSA-based standards for determining hours of work.

Nothing in *Troester* changes the existing law with respect to the ability of the Legislature 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."] (internal citations omitted).) The record is clear the Legislature has adopted the FLSA for determining compensable hours worked for both the Represented and Unrepresented Employees as found in the FLSA, either as a result of the MOUs enacted into law by the Legislature or the Legislature's delegation of

its constitutional authority over the terms and conditions of state employment to CalHR.

Another basis on which *Troester* is distinguishable concerns the reliability of the Enforcement Policies and Interpretations Manual published by the Division of Labor Standards Enforcement, or DLSE manual addressed in that case. In *Troester*, this Court searched state authorities to determine if the federal *de minimis* doctrine had been adopted by state law and noted the principle was found only in the DLSE manual and opinion letters. However, such authorities, alone, were not sufficient to conclude that California had adopted the federal *de minimis* principle in the *absence* of any statutory or regulatory adoption of the federal doctrine. (*Troester*, *supra*, 5 Cal.5th at p. 841.) That finding in *Troester*, however, does not serve as authority for rejecting reliance on CalHR's Pay Scale Manual.

As noted above, the Legislature delegated its constitutional authority over the terms and conditions of state employment for Unrepresented Employees to CalHR through a series of Government Code sections, including section 19845, which expressly authorizes CalHR to provide for the payment of overtime for state employees *as prescribed by the FLSA*. Pursuant to the authority delegated it under the Government Code, CalHR adopted various regulations and the Pay Scales Manual, which identifies the FLSA as the controlling legal standard for determining the compensability of Unrepresented Employees' hours worked. Therefore, the reasoning of

Troester, based on legislative silence, is inapplicable here. As such, and for the reasons discussed in detail in the State's briefs, CalHR's regulations and the Pay Scales Manual, which are predicated on the Legislature's delegation of authority to CalHR, are entitled to equal, if not greater, deference than the IWC wage orders when applied to the Unrepresented Employee subclass. (See State Opening Brief, pp. 35-39; State Reply Brief, pp. 10-17.)

The decision in *Gerard* is equally inapposite. In *Gerard, supra,* this Court considered whether Wage Order No. 5 violated Labor Code section 512 by allowing certain employees working longer than 12 hours to waive a second meal period. (*Gerard*, *supra*, 6 Cal.5th at pp. 446-447.) Far from suggesting that an IWC wage order can override a legislative enactment or legislatively delegated authority, this Court stated that, "because the Legislature is the source of the IWC's authority, a provision of the Labor Code *will prevail over a wage order if there is a conflict.*" (*Id.* at p. 448, emphasis added.) Based on an analysis of the statutory framework, the applicable wage order, and their historical development, this Court concluded the wage order did not violate Labor Code section 512. (*Id.* at p. 456.)

While this Court reiterated in *Gerard* the existing law regarding the authority of the IWC Wage Orders as they relate to statutes, the Court did not alter any of the substantive law underlying the issues relevant to this case. Additionally, the specific legal issues and factual circumstances in *Gerard*

are entirely different from this case. *Gerard* involved a dispute over meal period waivers under the IWC wage order and Labor Code section 512, while this case involves a dispute about the controlling legal standard for determining compensable hours of work. *Gerard* offers no insights on this issue. For these reasons, *Gerard* has no bearing on the present matter.

Thus, while *Troester* and *Gerard* involved IWC orders, neither decision suggest that such orders may override the legislative authority delegated to CalHR, much less a MOU that the Legislature expressly has enacted and funded.[1]

B. The Sixth Circuit Decision In *Amazon* Does Not Render The Portal-To-Portal Act Inapplicable In This Case.

The Sixth Circuit's recent decision in *Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc.)* (6th Cir. 2018) 905 F.3d 387 ("*Amazon*") also fails to provide any insight into the issues in this case. *Amazon* is, of course, not binding on this Court and is, at best, only persuasive authority. (See *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 [California Supreme Court is not bound by the decisions of lower federal courts, even on federal questions]; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175 [decisions from lower federal courts are not binding or controlling on

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1 *Troester* and *Gerard* have less relevance to Plaintiffs' common law breach of contract or Labor Code sections 222 and 223 claims. While the State does not discuss those issues in this brief, it does not waive or concede the applicability of these cases to those issues.

matters of state law].) Far from offering persuasive support, *Amazon* underscores Plaintiff's inability to overcome the fact the State has adopted, both directly through legislation and indirectly through legislative delegation, the FLSA standard for determining the compensable hours of work for the Plaintiff class.

In *Amazon*, the Plaintiffs worked for Integrity Staffing Solutions, which provided warehouse labor services in Amazon warehouses. (*Id.* at pp. 391-392.) At the end of each shift, after clocking out, the employees had to wait in a security line intended to discover and/or deter employee theft of the employer's property. (*Id.* at p. 392.) Plaintiffs claimed the time spent at the security check was compensable.

Originally brought under the FLSA, the case was appealed to the U.S. Supreme Court where the Court held that, under the FLSA as amended by the Portal-to-Portal Act (29 U.S.C. §§ 251-262), time spent by employees waiting in a security line upon exiting from work at the end of their shifts did not constitute compensable time worked under the FLSA. (*Amazon*, *supra*, 905 F.3d at pp. 393-394; see *Integrity Staffing Solutions, Inc. v. Busk* (2015) 135 S.Ct. 513.)

On remand, Plaintiffs brought amended claims under the laws of Nevada and Arizona. On subsequent appeal, the Sixth Circuit held the time spent waiting in the security line was compensable under the state wage and

hour laws of Arizona and Nevada. (*Amazon*, *supra*, 905 F.3d at pp. 395-397.)

First, because Nevada and Arizona law did not define "work," the court looked to federal law "for guidance." (*Id.* at p. 399.) The court relied on the U.S. Supreme Court's definition of "work" as stated in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123* (1944) 321 U.S. 590 and noted that neither the Portal-to-Portal Act nor the Supreme Court's decision in *Integrity Staffing Solutions, Inc. v. Busk* (2015) 135 S.Ct. 513 changed the Court's prior definition of "work," but rather excluded certain activities from the concept of "compensable" hours of work. (*Amazon*, *supra*, 905 F.3d at p. 400.)

Next, the *Amazon* court turned to the question of whether Nevada and Arizona had adopted the federal Portal-to-Portal Act such that time spent waiting at the security check was not compensable. In an analysis similar to this Court's in *Troester*, the court found that neither Nevada or Arizona expressly had adopted the Portal-to-Portal Act and declined to read the act into the state wage and hour laws. (*Amazon*, *supra*, 905 F.3d at pp. 402-405.)

There is nothing remarkable about the *Amazon* court's holding. This Court has come to similar conclusions in considering federal and state wage law issues. (See e.g., *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592 [declining to import federal standard absent convincing evidence of an intent to import that federal standard.]; see *Troester, supra,* 5 Cal.5th at pp.

840-841.) Unlike *Amazon*, however, in this case there is convincing evidence of an intent to apply exclusively a federal standard for compensability. Here, the California Legislature delegated its constitutional authority over the terms and conditions of state employment to CalHR through a series of Government Code sections, including section 19845, which expressly authorizes CalHR to provide for the payment of overtime for state employees as prescribed by the FLSA. Applying this authority, CalHR issued implementing regulations and adopted the Pay Scales Manual, which has consistently applied the FLSA standard of compensability to the Unrepresented Employees during the entire time period relevant to this case. With regard to the Represented Employees, the Legislature enacted into law the MOUs expressly utilizing a FLSA 7(k) schedule. *Amazon* offers no guidance in a case, such as this, in which there is a clear intent on the part of the Legislature to apply the FLSA standard for determining what constitutes compensable hours of work.

Furthermore, the holding in *Amazon* cannot be read to as finding that even when a state expressly adopts a FLSA overtime schedule, as occurred here by statute (Gov. Code § 19845) or by legislatively enacted and appropriated MOUs, the state must expressly adopt the Portal-to-Portal Act for those provisions to be applicable. Any assertion that a FLSA overtime schedule can be employed without incorporating into that schedule, the federal "hours worked" standard and the Portal-to-Portal Act, runs counter

to this Court's caution against conflating state and federal law. (See e.g., *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575, 588 [noting the court of appeal "confounded" federal and state law, which differ substantially, in coming to an erroneous conclusion with respect to the wage order at issue].) The express adoption and application of a FLSA schedule for the Plaintiff class necessarily includes the federal standards for hours worked and the Portal-to-Portal Act. (See State Opening Brief, pp. 39-44; State Reply Brief, pp. 17-20.) To hold the state definition of hours worked applies under a FLSA schedule would be to "confound" the two bodies of law, something which this Court has expressly cautioned against. (See State Opening Brief, pp. 44-47; State Reply Brief, pp. 21-23 [discussing why the IWC Wage Order and FLSA compensation system cannot be harmonized].) Nothing in *Amazon* suggests otherwise.

III.

CONCLUSION

For the reasons discussed above, *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829, *Gerard v. Orange Coast Memorial Medical Center* (2018) 6 Cal.5th 443, and *Busk v. Integrity Staffing Sols., Inc. (In re Amazon.com, Inc.)* (6th Cir. 2018) 905 F.3d 387 do not change the law underlying the present case or otherwise provide any meaningful guidance

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with regard to the legal issues to be decided in the case.

DATED: March 21, 2019

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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 2,741 words.

DATED: March 21, 2019

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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 March 21, 2019, I served true copies of the following document(s) described as **RESPONDENTS STATE OF CALIFORNINA ET AL.'S REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

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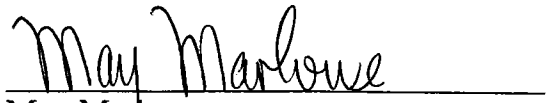
Executed on March 21, 2019, at Sacramento, California.



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