S244751

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KURT STOETZL, ET AL.

Respondents-Plaintiffs-Appellants,

v.

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

Petitioners-Defendants-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

ANSWER TO PETITION FOR REVIEW

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

Pursuant to Rule 8.500 (a)(2) and (e)(4) of the California Rules of Court, the State of California, California Department of Corrections and Rehabilitation ("CDCR"), California Department of Human Resources ("CalHR," formerly Department of Personnel Administration), and the California Department of State Hospitals ("DSH," formerly Department of Mental Health) (collectively "State Parties") hereby answer the Petition for Review filed by the plaintiff class in this action.

I.

INTRODUCTION

The Petition for Review filed by the plaintiff class[1] mischaracterizes the dispositive issue in this case. The threshold question is not whether there has been a failure to pay the plaintiff class the minimum wage, but rather whether the time for which the plaintiff class claims it was unpaid constitutes "compensable hours of work."[2] By logical necessity, this question must

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1 The class certified by the trial court consists of,

> [a]ll persons who are or who have been employed as Correctional Officers, Correctional Sergeants, Correctional Lieutenants, Medical Technical Assistants, Senior Medical Technical Assistants, Correctional Counselors I, Correctional Counselors II, Youth Correctional Officers, and/or Youth Correctional Counselors to work at adult or youth correctional institutions within the California Department of Corrections and Rehabilitation in the period commencing April 9, 2005 until the notice of pendency of this class action is given.

On January 6, 2012, the trial court approved the parties' stipulation dividing the plaintiff class into two subclasses: Represented Employees, whose employment with the State of California is governed by the Ralph C. Dills Act ("Dills Act," Gov. Code § 3512, et seq.) and Unrepresented Employees, i.e., excluded supervisory employees whose employment with the State of California is governed by the Bill of Rights for State Excluded Employees (Gov. Code § 3525, et seq.). (Appellants' Appendix [AA], Vol. 1, pp. AA 000230.)

2 This class action constitutes what commonly is referred to as a "walk time" case. The plaintiff class alleges it was not paid for pre- and post-work activities (commonly referred to as "PPWA") that consisted of time spent walking from the entrance of state correctional facilities to plaintiffs' posts in those facilities.

precede consideration of whether wages – minimum or otherwise – are owed because if the time for which the plaintiff class seeks to be paid does not constitute compensable hours of work under the controlling legal standard, the class claim for unpaid wages fails as a matter of law.

It is 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.) The Legislature exercises this constitutional authority as to represented employees by enacting Memoranda of Understanding ("MOUs") negotiated between the state and the exclusive bargaining representatives for state employees in various bargaining units pursuant to the Ralph C. Dills Act ["Dills Act"], Gov. Code § 3512, et seq.). As this Court has observed, "it is clear that an MOU, once approved by the Legislature (either directly – see § 3517.5 – or through the appropriation of sufficient funds to pay the agreed-upon employee compensation), governs the wages and hours of the state employees covered by the MOU." (*Professional Engineers, supra,* 50 Cal.4th at 1040.) As the Court of Appeal concluded in its decision in this case, MOUs "are thus not simply agreements between the parties, *but laws specifically governing the terms and conditions of plaintiffs' employment.*" (Slip Opn., p. 15, emphasis added.)

Both the trial court and the Court of Appeal found the Legislature, through its enactment of MOUs between State Parties and the Represented Employee subclass going back to 1998, adopted the definition of hours worked found in the federal Fair Labor Standards Act ["FLSA"], 29 U.S.C. § 201, et seq.) as the applicable standard for determining compensable hours of work.[3] By continuing to proffer the same failed arguments in their Petition for Review as they made at both the trial court and Court of Appeal, the Represented Employee subclass evidences an inability to grasp this reality.

The fact that the legislatively enacted MOUs between the State Parties and the Represented Employee subclass definitively adopt the FLSA as the controlling legal standard for determining compensable hours of work disposes of the Represented Employees' claims in this action. Members of the Represented Employee subclass have not been denied any wages owed to them – minimum or otherwise – because the PPWA for which they seek compensation does not constitute compensable hours of work under the FLSA. Furthermore, the Represented Employee subclass cannot pursue claims for breach of common law (implied) contract or for violation of Labor Code sections 222 and 223 because the legislatively adopted MOUs at issue

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[3] The applicability of the FLSA standard for compensable hours worked to the Unrepresented Employee subclass is the subject of State Parties' separate Petition for Review filed on October 9, 2017. The discussion here will focus on the applicability of that same standard to the Represented Employee subclass.

in this action definitively establish the terms and conditions of their employment and unequivocally impose the FLSA's standard for compensability on employees in that subclass.

The Legislature's constitutional and statutory authority to enact terms and conditions of state employment through the approval of MOUs presented to it under the Dills Act is a clearly established principle of law. The MOUs in question here unequivocally adopted the FLSA's standard for determining compensable hours of work for the Represented Employee subclass, which is dispositive of the claims asserted by that subclass. Review of that portion of the Court of Appeal's decision in favor of State Parties and against the Represented Employee subclass is unwarranted, therefore, because this case does not involve unsettled questions of law for which uniformity of decision is required. For these reasons, State Parties assert that this Petition for Review should be denied.

II.

BACKGROUND

A. General Overview Of Labor Relations Between The State And Represented Employees

Labor relations between the State Parties and the Represented Employee subclass are governed by the Dills Act. (AA, Vol. 3, p. AA 000604 [Stip. No. 7].) Pursuant to Government Code section 3517, the Governor or his or her designee (i.e., CalHR) and recognized state employee

bargaining representatives (the California Correctional Peace Officers' Association ["CCPOA"] in the case of the Represented Employee subclass) are required to meet and confer in good faith to address wages, hours, and other terms and conditions of employment. When an agreement is reached between the parties, they are required to prepare a joint written MOU that is submitted to the Legislature for approval. (Gov. Code § 3517.5; see also (AA, Vol. 3, pp. AA 000604-605 [Stip. Nos. 7, 8].) The MOU, like any other law, is introduced in the Legislature as a proposed bill, adopted by both houses of the Legislature, and forwarded to the Governor for signature, before being chaptered into law by the Secretary of State. (*Id.*)

B. The MOUs Between The State Parties And The Represented Employee Subclass

1. 1998-1999 MOU Between The State And CCPOA (AA, Vol. 8, pp. AA002037, *et seq.*)

Beginning in approximately March 1998, the State and CCPOA began negotiating a successor MOU for employees in State Bargaining Unit 6 ["BU6"], the bargaining unit represented by CCPOA. (Reporter's Transcript [RT], Vol. 3, 289:4-9.) At the time these negotiations began, BU6 employees were subject to a standard 40-hour, seven-day workweek. (RT, Vol. 3, 296:16-24.)

In the negotiations for a successor MOU, the State sought agreement from CCPOA regarding the use of a work schedule based on section 7(k) of

the FLSA, 29 U.S.C. section 207, subdivision (k),[4] what came to be known as the 7k schedule. The undisputed evidence at trial established that the State defined compensable PPWA to be included in the 7k schedule as the time from an employee picking up his or her tools (e.g., keys, pepper spray, etc.)

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[4] 29 U.S.C. section 207, subdivision (k) provides:

> **Employment by public agency engaged in fire protection or law enforcement activities.** No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
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> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
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> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
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> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Pursuant to regulations adopted under this code section, the number of permissible work hours under a 28-day work period for law enforcement, including correctional officers, is 171. (See 29 C.F.R. §§ 553.201, subd. (a) and 553.211, subd. (f).)

to the time when the employee arrived at his or her assigned post in the correctional institution. (RT, Vol. 4, 498:20-499:11.) The State based this definition of compensable PPWA on its position that the FLSA only requires compensation from the employee's first principal activity, *i.e.,* picking up tools. (RT, Vol. 4, 501:8-23.) CCPOA at all times understood this was how PPWA was being defined. (See RT, Vol. 3, 308:5-18, 321:11-17, 353:16-20.)

Not only did the parties to the 1998 negotiations understand PPWA was intended to provide compensation from tool pickup to post, they also understood federal, not California, law applied to the 7k schedule. At no time during the 1998 negotiations was there any discussion about applying California state law to the 7k schedule. (RT, Vol. 3, 310:13-18.)

The 1998 negotiations resulted in an agreement between the State and CCPOA regarding the 7k schedule, which was embodied in section 11.12 of the 1998 MOU. The 7k schedule in the 1998 MOU assigned employees in posted positions to 168 hours in a 28-day work period. (AA, Vol. 8, pp. 2037, 2087.) Section 11.12 of the 1998 MOU included a prefatory statement as follows:

> CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein.

(*Ibid.*)

This same section of the 1998 MOU specifically addressed PPWA and provided as follows:

> All institutional-based staff shall be scheduled to [f]our (4) hours per work period to allow for pre and post work activities. *CCPOA agrees that generally this is sufficient time for all pre and post work activities during each work period, and that the compensation allotted for these activities under this provision is full compensation for all of these activities.*

(*Ibid.*, emphasis added.)

Finally, section 11.12 of the 1998 MOU stated:

> The State and CCPOA agree that they have made a good faith attempt to comply with all requirements of the FLSA in negotiating this provision. ... CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA.

Following agreement on all terms of the 1998 MOU, and consistent with the requirements of the Dills Act, the MOU was submitted to the California Legislature for adoption. The Legislature, pursuant to its constitutional authority over the terms and conditions of state employment, approved the 1998 MOU as AB 2472. The bill was then signed by the Governor and chaptered into law by the Secretary of State. (Stats. 1998, ch. 820, § 2, p. 93.)

2. Successor MOUs: 1999-2011

In 1999, the State and CCPOA negotiated a successor agreement to the 1998 MOU. In the 1999 MOU, the 7k schedule was renumbered as section 11.11. (AA, Vol. 8, pp. AA002197, 2258.) Other than this

renumbering, the 7k schedule was "rolled over" from the 1998 MOU into the 1999 MOU in its entirety, including all sections quoted above. (RT, Vol. 3, 330:19-331:3.) The 1999 MOU was approved by the Legislature as SB 615. It was then signed by the Governor and chaptered into law. (Stats. 1999, ch. 778, § 6(b), p. 96.)

In 2001, the State and CCPOA once again rolled over the 7k schedule into a successor MOU. (RT, Vol. 3, 430:20-23.) On this occasion, however, the 7k schedule was reduced from 168 hours in a 28-day work period to 164 hours effective July 1, 2004. (AA, Vol. 9, pp. AA002371, 2446.) In all other respects, however, section 11.11 in the 2001 MOU was identical to the language contained in both the 1998 and 1999 MOUs. (*Ibid.*) The 2001 MOU was passed by the Legislature as SB 65. It was then signed by the Governor and chaptered into law. (Stats. 2002, ch. 1, § 2, p. 94.)

The State and CCPOA negotiated a new MOU in 2011. By that time, the present action had been filed. The 2011-13 MOU maintained the same 7k work schedule from prior MOUs. (AA, Vol. 10, pp. AA002583, 2659.) While the 2011 MOU contained some modification to the contractual language regarding PPWA, the parties agreed to a "sideletter" to the MOU, which provided that no change in the language of the 2011 MOU "shall have prejudicial effect to either side's argument in *Stoetzl v. State of California*." (AA, Vol. 8, p. AA002036.) The 2011 MOU was adopted by the Legislature

as SB 151. It was thereupon signed by the Governor and chaptered into law. (Stats. 2011, ch. 25, § 2(b), p. 95.)

3. The State's Implemented Last, Best, And Final Offer, 2007-2011 (AA, Vol. 6, p. AA001380, *et seq.*)

Before the 2001 MOU expired, the State and CCPOA began negotiating for a successor MOU. Those negotiations took place throughout 2006 and 2007 but were unsuccessful in achieving a successor MOU. (RT, Vol. 4, 491:18-20.) As a result, the State declared an impasse and implemented the terms of its last, best, and final offer. (*Id.*, at 492:9-493:16.) The 7k schedule which had been part of the 2001 MOU was continued, without change, as part of the State's implementation of its last, best, and final offer. (RT, Vol. 4, 513:20-516:6; AA, Vol. 6, p. AA001380.)

C. Procedural History

The relevant procedural history already has been set forth in the State Parties' October 9, 2017 Petition for Review and, therefore, is not repeated here at length. The following additional discussion is provided as it relates specifically to the Represented Employees' claims.

1. Trial Court Judgment

In its Final Statement of Decision, the trial court concluded that the legal standard for determining what constituted compensable hours worked was the "first principal activity" test of the FLSA rather than California's "control test." This ruling was based on the language of the MOUs, which

"unambiguously establish that the parties agreed that the FLSA's first principal activity test is the controlling legal standard; evidence that the parties understood they were negotiating under federal law and agreed to adopt the FLSA's test; and the fact that the MOUs were approved by the Legislature and chaptered into law." (See Court of Appeal Slip Opn., p. 9.)

The trial court ruled that the comprehensive and exclusive nature and statutory scheme of the MOUs foreclosed the Represented Employees from asserting claims outside the MOUs, such as statutory claims or common law (implied) contract claims. (AA, Vol. 20, p. AA, 005409.) Notwithstanding, even if Petitioners could assert such claim, the trial court found Petitioners failed to establish at trial the existence of a contract between the Represented Employees and the State extraneous to the MOUs to support the breach of common law contract claim for overtime. Accordingly, the trial court entered judgment for the State. (*Ibid.*)[5]

2. The Court Of Appeal Decision

The plaintiff class appealed to the First District Court of Appeal, arguing the protections of California minimum wage law may never be "waived" and that the Represented Employee subclass should be allowed to proceed with their claims for contractual overtime. In a published decision

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[5] The trial court adjudicated the plaintiff class' Labor Code section 222 and 223 claim in favor of State Parties by granting their motion for judgment on the pleadings made prior to trial. (AA, Vol. 3, p. AA 000573.)

dated August 31, 2017, the Court of Appeal affirmed the trial court judgment as to the Represented Employee subclass. The Court of Appeal held, "The flaw in plaintiffs' argument is that the MOU's were not only negotiated by CCPOA and the State, but they were also approved by the Legislature, signed by the Governor, and chaptered into law." (Slip Opn., p. 15.)

> They [the MOUs] are thus not simply agreements between the parties, but laws specifically governing the terms and conditions of plaintiffs' employment. And, it is well established, 'the more specific provision [citation] takes precedence over the more general one [citation]. [Citations.] To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute. [Citations.]' (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857.) It is clear to us that the MOU's are more specific than the wage orders of general application promulgated by the IWC.

In addition, the Court of Appeal affirmed the trial court's finding that the subclass of Represented Employees did not adduce evidence of a contract to support their breach of common law contract claim. (Slip. Opn., p. 24.) Relying on *Sonoma County Association. of Retired Employees v. Sonoma County.* (9th Cir. 2013) 708 F.3d 1109 ("*Retired Employees*"), the Court of Appeal held, "[t]here is no basis to conclude that either the parties or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's." (*Ibid.*)

As to the cause of action for failure to pay contractual overtime in violation of Labor Code sections 222 and 223, the Court of Appeal held that because the Represented Employee subclass agreed to have their hours worked measured by federal law, and the Legislature approved that agreement, the cause of action for violation of sections 222 and 223 necessarily failed. (Slip Opn., p. 25-26.)

The Court of Appeal's decision became final on September 30, 2017.

3. Petition for Rehearing

On or about September 15, 2017, Petitioners filed a Petition for Rehearing, arguing the Court of Appeal failed to address whether state law applied during the three-and-a-half year period "when there was no legislatively approved MOU" and whether the Represented Class should be permitted to present breach of contract claims for the period "when no MOU applied." (See Slip Opn., p. 17, fn. 11 [noting Petitioners failed to raise these issues on appeal].) On September 21, 2017, the Court of Appeal denied the Petition for Rehearing.

On October 10, 2017, Petitioners filed this Petition for Review.

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III.

ARGUMENT

A. The Petition For Review Filed By The Employee Subclass Should Be Denied Because It Does Not Present Unsettled Questions of Law The Resolution Of Which Is Necessary To Ensure Uniformity of Decision

This Court should deny review of that portion of the Court of Appeal's decision affirming the trial court's judgment in favor of the State Parties and against the Represented Employee subclass. The issue of the constitutional and statutory authority of the California Legislature to adopt the terms and conditions of state employment through the approval of MOUs is one this Court already has addressed in cases such as *Professional Engineers, supra,* 50 Cal.4th 989, 1015-1016. The noncompenability of PPWA under the FLSA also is well-established principle under the controlling statutes and regulations. (See 29 U.S.C. § 254.) Accordingly, review should not be granted because the Petition for Review filed by the Represented Employee subclass fails to present issues involving unsettled questions of law the resolution of which is necessary to ensure uniformity of decision on issues of statewide importance. (Cal. Rules of Court, rule 8.500 (b)(1).)

B. The 7k Schedule Contained In The Legislatively Approved MOUs Between The State Parties And The Represented Employee Subclass Includes The FLSA Standard For Compensable Hours Worked

A central premise to the Represented Employees' challenge to the Court of Appeal's decision is "the 7k exemption ... has nothing to do with the federal or state minimum wage." (Petition for Review, p. 18.) By mischaracterizing the relevant analysis as beginning with the minimum wage, the Represented Employee subclass leaps over the logical antecedent question, namely, whether the disputed time at issue is *compensable* under the applicable legal standard.

In the case of the Represented Employee subclass, the MOUs negotiated with State Parties pursuant to the Dills Act and enacted into law by the Legislature unequivocally establish the FLSA as the controlling legal standard for determining compensable hours worked. Because the Legislature determined the PPWA for which the Represented Employees seek compensation is governed exclusively by the FLSA, claims based on California state law necessarily fail as a matter of law.

Every MOU between the State Parties and the Represented Employee subclass since 1998 has contained a 7k schedule. Furthermore, those MOUs included language by which

> CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that

> the employer is declaring a specific exemption for these employees under the provisions specified herein.

(See (AA, Vol. 8, pp. 2037, 2087.)

The MOUs further provided,

> The State and CCPOA agree that they have made a good faith attempt to comply with all requirements of the FLSA in negotiating this provision. ... CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA.

(*Ibid.*)

The Legislature approved this language by enacting the subject MOUs and the 7k schedule contained within them. In so doing, the Legislature implicitly applied the FLSA standard for measuring compensable hours of work inherent in the 7k schedule to the Represented Employee subclass, a conclusion underscored by the fact that there is no analog to the 7k schedule found in California law.

The FLSA concept of hours worked is inherent in the 7k schedule. 29 Code of Federal Regulations § 553.221, subdivision (a) specifically provides: "The general rules on compensable hours of work are set forth in 29 C.F.R. part 785, *which is applicable to employees for whom the 7(k) exemption is claimed.*" (Emphasis added.) While "[i]t is axiomatic, under the FLSA, that employers must pay employees for all 'hours worked'" (*Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 903, *aff'd on other grounds sub nom. IBP v. Alvarez* (2005) 546 U.S. 21.), whether a particular activity meets the FLSA's

definition of work "as a threshold matter does not mean without more that the activity is necessarily compensable." (*Ibid.*) This is because the FLSA, as amended by the Portal-to-Portal Act (29 U.S.C. §§ 251-262), "relieves an employer of responsibility for compensating employees for activities which are preliminary or postliminary to the principal activity or activities of a given job." (*Bamonte v. City of Mesa* (9th Cir. 2010) 598 F.3d 1217, 1221.) Specifically, 29 U.S.C. § 254, subsections (a)(1) and (2) provides in relevant part:

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee ...
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> > (1) 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, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. ...

The Supreme Court has interpreted this section to apply when an activity before the commencement of, or after the completion of, the principal work activity is not an "integral and indispensable part of [an

employee's] principal activities." (*Steiner v. Mitchell* (1956) 300 U.S. 247, 256.)

The Supreme Court explained these FLSA compensability standards in *Integrity Staffing Solutions, Inc. v. Busk* (2015) 135 S.Ct. 513. In that case, the Supreme Court held that 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. In so ruling, the Court specifically held as follows:

> We hold that an activity is integral and indispensable to the principal activities that an employee is employed to perform – and thus compensable under the FLSA – if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.

(*Id.*, at 519.)

These FLSA compensability standards are inseparable from the 7k schedule to which the State Parties and Represented Employees consistently have agreed since 1998. And these are the compensability standards the Legislature consistently has applied to the Represented Employees since 1998 by enacting the various MOUs negotiated by the State Parties and the Represented Employees under the Dills Act. At both the trial court and Court of Appeal, the Represented Employee subclass made the same arguments they make here to escape the impact of the Legislature's adoption of the 7k schedule and the FLSA compensability standards inherent with that schedule. Represented Employees fail to make the case in their Petition for

Review why the result should be any different before this Court. Accordingly, their Petition for Review should be denied.

C. The Legislature's Adoption Of A Specific FLSA-Based Method For Compensating Represented Employees Disposes Of Their Minimum Wage Claim

1. Represented Employees Cannot Rely On General Minimum Wage Statutes Or The IWC's Wage Orders To Overcome The Specificity Of The Legislatively Adopted MOUs

The Legislature's approval of a specific, FLSA-based method for compensating Represented Employees disposes of their reliance on the general minimum wage provisions found in the Labor Code and the IWC wage orders, including but not limited to, the requirement in Labor Code section 1194 that employers must pay their employees the state minimum wage "[n]otwithstanding any agreement to work for a lesser wage." (See Petition for Review, p. 16.) Application of the FLSA's compensability standard to the Represented Employee does not emanate from "any agreement." Rather, it is the result of legislative fiat manifested through the Legislature's adoption of a specific standard for measuring Represented Employees' compensable hours of work through its enactment of the subject MOUs.

Neither the general minimum wage statutes found in the Labor Code, nor the IWC's wage orders, can be read as a limitation on the Legislature's constitutional and statutory authority to establish a more specifically

applicable method for measuring the compensable hours of a particular group of state employees, such as the Represented Employee subclass. The language of the legislatively approved MOUs in this case specifically provides that the Represented Employees "are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA)." The 7k schedule to which the Represented Employees were assigned pursuant to these MOUs specifically includes the FLSA's standards regarding compensable hours of work. (See 29 C.F.R. §553.221, subd. (a).) Accordingly, the action taken by the Legislature approving a specific, FLSA-based schedule that includes a method for measuring Represented Employees' compensable hours of work overrides application of the more general provisions of the Labor Code or IWC wage orders. As the Court of Appeal concluded, "the more specific provision takes precedent over the more general one. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 857, internal citations omitted. See Slip Opn., p. 15.) There is nothing novel in this conclusion that warrants review and, therefore, the present Petition for Review should be denied.

2. The Legislature's Adoption Of A Specific FLSA-Based Method For Compensating Represented Employees Also Disposes Of Their Waiver Argument

Represented Employees repeat the same argument in their Petition for Review as they unsuccessfully made in the both the Court of Appeal and trial court, namely, that statutory wage rights cannot be waived through the collective bargaining process. Represented Employees make the

unsupportable claim that because statutory rights cannot be waived through the collective bargaining process, the Legislature cannot affect such rights through its adoption of an MOU. (Petition for Review, pp. 15-16.) By ignoring the Legislature's well established constitutional authority over state employment, Represented Employees' argument, if adopted, would effectively sideline the Legislature and impermissibly restrict its prerogatives when it comes to determining the terms and conditions of state employment. As the Court of Appeal found, Represented Employees' waiver argument is flawed, because it ignores the fact that the MOUs in this case were enacted by the Legislature, signed by the Governor, and chaptered into law by the Secretary of State like any other statutory enactment adopted by the Legislature. (AA, Vol. 20, p. AA005429.) Thus, the applicability of the FLSA here does not involve a question of waiver, but a recognition of legislative fiat over the terms and conditions of state employment.

Represented Employees' reliance on *Gentry v. Superior Court (Circuit City Stores, Inc.)* (2007) 42 Cal.4th 443 as support for their wavier argument is misplaced because the case is inapposite. (See Petition for Review, p. 16.) *Gentry* involved the issue of whether class arbitration waivers in employment agreements could be enforced to preclude class arbitration of statutory overtime claims. (See *Gentry, supra,* 42 Cal.4th at 450.) *Gentry* did not involve the question of the scope of, or any limitations upon, the Legislature's authority to adopt the FLSA as the controlling legal

standard for determining compensable hours of work. In fact, none of the cases on which Represented Employees rely involve the question whether the California State Legislature's authority to set the terms and conditions of state employment by enacting specific provisions contained in an MOU is somehow limited by the California Labor Code IWC wage order. (Petition for Review, p. 17.) (See *Retired Employees Assn. of Orange County v. County of Orange* (2 011) 52 Cal.4th 1171, 1179 [response to certified question from Ninth Circuit whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees]; *Glendale City Employees' Assn, Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 331 [a local agency labor contract becomes binding on the local agency once ratified].)[6]

Moreover, Represented Employees' reliance on *Gentry* is notably misplaced as a result of this Court's determination that its holding in that case

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[6] In fact, *City of Glendale* supports State Parties' position here. It is well established that labor agreements entered into pursuant to the Dills Act that "once approved by the Legislature (either directly – see § 3517.5 – or through the appropriation of sufficient funds to pay the agreed-upon employee compensation), governs the wages and hours of the state employees covered by the MOU." (*Professional Engineers, supra,* 50 Cal.4th at 1040.) In the same way, *City of Glendale* holds that under the Meyers-Milias-Brown Act [Gov. Code § 3500, et seq.], "'the courts have uniformly held that a memorandum of understanding, once adopted by the governing body of a public agency, becomes a binding agreement.'" (15 Cal.3d at 337.)

"has been abrogated by recent United States Supreme Court precedent." (*Iskanian v. CLS Transportation, LLC* (2014) 59 Cal.4th 348, 359.) The fact that Represented Employees rely on a holding this Court has determined to be abrogated further underscores the lack of merit to their request for review of that portion of the Court of Appeal's decision affirming the trial court's judgment in favor of State Parties.

3. The Legislature's Constitutional And Statutory Authority To Set The Terms And Conditions Of State Employment Is Not Subordinate To The IWC Wage Orders

Represented Employees also cite to this Court's decision in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, 1027, and the "extraordinary deference" to which the IWC Wage Orders are entitled as a basis for arguing the FLSA standard for compensable hours worked enacted by the Legislature through its enactment of the parties' MOUs should not be controlling. This argument ignores a different aspect of the Legislature's express constitutional authority from that of establishing the terms and conditions of state employment.

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." Based on this provision of the state constitution, any authority the IWC has to establish and impose a minimum wage in California derives solely from the delegation of authority granted to

it by the Legislature. (See Lab. Code § 1182.11.) There is neither evidence nor legal authority to support the proposition the Legislature intended to cede its own authority to the IWC or to give the IWC authority over it with respect to establishing the terms and conditions of state employment.

As the trial court ruled and the Court of Appeal affirmed, the MOUs approved by the Legislature establishing the Represented Employees' terms and conditions of employment means those "terms and conditions of employment are governed by specific statutory provisions. It defies logic and law to suggest that the IWC could lawfully issue a general regulation inconsistent with specific statutory law and thereby supersede that law." (AA, Vol. 20, pp. AA005431-5432.) Accordingly, the "extraordinary deference" to which the IWC wage orders normally are entitled has no application here in the face of an expression of contrary intent by the Legislature through its enactment of more specific MOU language imposing the FLSA standard for compensable hours worked on Represented Employees.

4. The Court of Appeal's Decision Neither Places Other State Employees "At Risk" Nor "Emasculates" The Minimum Wage

Finally, in what can only be characterized as overblown rhetoric, Represented Employees argue the Court of Appeal's decision threatens to leave other state employees without the benefit of the state minimum wage and "emasculates" state employees' right to receive wages for all hours

worked. Neither proposition is true. As both the trial court and Court of Appeal concluded, the Represented Employee subclass cannot state claims for unpaid wages under California state law because the Legislature has established the FLSA as the controlling legal standard for determining compensable hours worked through adoption of the parties' MOUs. Nothing about either the Legislature's action approving those MOUs or the Court of Appeal's decision recognizing the legal import of that legislative action impede future labor negotiations or future legislative actions that may result in a different outcome. Hyperbolic rhetoric does not establish a sound basis for obtaining review from this Court.

D. The Represented Employee Subclass Cannot State A Claim For Breach Of Common Law (Implied) Contract

Represented Employees also seek review of the Court of Appeal's holding they are not entitled to pursue a breach of a common law contract claim for the State's alleged failure to pay them overtime for compensable hours worked beyond their regular work schedules. The Court of Appeal agreed with the trial court that the Represented Employee subclass failed to establish a contract that would support its claim. (Slip Opn., p. 24.) This decision is fully supported by both the applicable law and substantial evidence in the record before this Court, and, therefore, review is not warranted.

As the Court of Appeal found, each of the parties' MOUs contained a provision stating that it "set forth the full and entire understanding of the parties regarding the matters contained therein." (Slip Opn., p. 24.) Represented Employees have failed to present any legal or evidentiary basis for concluding they possessed extra, implied contractual rights beyond what was contained in their MOUs with the State Parties. As such, they have failed to present grounds for this Court's review on that issue.

E. The Petition For Review Does Not Present Grounds For Reviewing The Court Of Appeal's Decision Finding Labor Code Sections 222 And 223 Inapplicable To This Case

Finally, Represented Employees have not established grounds for reviewing the Court of Appeal's decision affirming the trial court's judgment in favor of State Parties on the plaintiff class' Labor Code section 222 and 223 claim.

As both the trial court and Court of Appeal found, Labor Code sections 222 and 223 are inapplicable here. First, sections 222 and 223 are inapplicable to the State Parties because general statues contained in the Labor Code that do not contain specific language rendering them applicable to public employers are presumptively inapplicable. "[A]bsent express words to the contrary, governmental agencies are not included within the general words of [a] statute." (*Wells v. One2One Learning Foundation* (2006) 39 Cal. 4th 1164, 1192; see also *Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 536; *Kubach Co. v. McGuire* (1926)

199 Cal. 215, 217 ["In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication"].)

Consistent with the above presumption, in *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 330 quoting the Senate Committee on Industrial Relations, this Court held "the provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees." As the court in *Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729, 736 noted, the "Legislature's iteration of this rule [as quoted in *Campbell*] is an indication that the Legislature follows it."

There is nothing in the language of Labor Code sections 222 and 223 statutes that expressly applies them to public agencies, including the State of California and its subdivisions. As a consequence, these code sections are inapplicable to State Parties.

Not only are Labor Code sections 222 and 223 inapplicable here as a matter of law, they also are inapplicable as a matter of fact. These code sections were "enacted to address the problem of employers taking secret deductions or 'kickbacks' from their employees." (*Amaral v. Cintas Corporation* (2008) 163 Cal.App.4th 1157, 1205; see also, *Kerr's Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 328-329 [an

undisclosed accounting method utilized by the employer to charge back cash shortages to employees driving catering trucks constituted an impermissible "secret deduction" in violation of section 223] and *Sublett v. Henry's, etc. Lunch* (1942) 21 Cal.2d 273, 274, [addressing impermissible "kickback schemes" to defeat payment of union wages].)

More recently, the First District Court of Appeal interpreted section 223 in the context of one of the many appellate challenges to the State of California's 2009-2011 furloughs of state employees. In *Brown v. Superior Court (California Correctional Peace Officers' Ass'n)* (2011) 199 Cal.App.4th 971, 991, the appellate court addressed whether furloughs of state employees violated section 223. In holding they did not, the Court of Appeal held:

> As our colleagues in Division Three aptly described it, this statute "was enacted to address the problem of employers taking secret deductions or 'kickbacks' from their employees. [Citations.] In such cases, the employer nominally pays employees the wage required by statute or collective bargaining agreement but then secretly deducts amounts or requires employees to pay back a portion of the wages, so that in reality the employees are earning less than was required. [Citations.] However, in all of the cases the underpayment of wages is a secret being *kept from applicable enforcement authorities*—i.e., the Labor Commissioner, the employee's union [citation], or a contracting party [citation]—not from the employees themselves, who presumably are well aware of how much they are paid. [¶] ... [T]he statute punishes secret underpayment." (Citing, *Amaral v. Cintas Corp., supra,* 163 Cal.App.4th 1157, 1205.)

Just as in *Brown v. Superior Court*, section 223, as well as section 222, are inapplicable to the Represented Employees' claims here, *i.e.*, allegedly unpaid compensable pre and post-work activities. Those claims are not based on the type of secret deduction or kickback the statutes were designed to prevent.

IV.

CONCLUSION

That portion of the Court of Appeal's decision finding in favor of State Parties and against the Represented Employee subclass does not present unsettled question of law review of which is necessary to secure uniformity of decision. The issue of the Legislature's authority to set the terms and condition of state employment and the impact of applying the FLSA compensability standard to the Represented Employees' claims both involve

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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 7,765 words.

DATED: October 30, 2017

KRONICK, MOSKOVITZ,
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A Professional Corporation

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PROOF OF SERVICE

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 October 30, 2017, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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BY CALIFORNIA SUPREME COURT TRUEFILING SYSTEM: I electronically filed the document(s) with the Clerk of the Court by using the California Supreme Court TrueFiling system. Participants in the case who are registered California Supreme Court TrueFiling system users will be served by the California Supreme Court TrueFiling system. Participants in the case who are not registered California Supreme Court TrueFiling system users will be served by mail or by other means permitted by the court rules.

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 October 30, 2017, at Sacramento, California.

/s/ May Marlowe

May Marlowe

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **STOETZL v. STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES**
Case Number: **S244751**
Lower Court Case Number: **A142832**

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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.

10-30-2017

Date

/s/David Tyra

Signature

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