No. S248702

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

CHARLES E. WARD, ET AL., *Appellants and Petitioners*,

v.

UNITED AIRLINES, INC., *Defendant and Respondent.*

AFTER DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 16-16415
THE HONORABLE JUDGE WILLIAM ALSUP, CASE NO. 3:15-CV-02309-WHA

DEFENDANT AND RESPONDENT UNITED AIRLINES, INC.'S ANSWER BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Does California Labor Code Section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages but who does not work principally in California or any other state?

2. The Industrial Welfare Commission Wage Order 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement ("CBA") in accordance with the Railway Labor Act ("RLA"). (*See* Cal. Code Regs. tit. 8, § 11090(1)(E).) Does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code Section 226 by an employee who is covered by a CBA?

INTRODUCTION

The first question certified for review asks this Court to determine whether California's wage statement law, California Labor Code Section 226 ("Section 226"), applies to pilot and flight attendant employees of Defendant United Airlines, Inc. ("United") who indisputably spend the vast majority of their work time outside California. The district courts below properly interpreted this Court's precedent in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996), and *Sullivan v. Oracle*, 51 Cal. 4th 1191, 1197 (2011) ("*Sullivan I*"), to hold that Section 226 ***does not apply*** to such employees because they do not perform their work "principally" in California. The test employed by the courts below in arriving at this conclusion, the "job situs test," is well established and should be formally adopted by this Court as the test for determining whether a provision of the Labor Code applies extraterritorially. Appellants Charles Ward, Felicia Vidrio, and Paul Bradley ("Appellants") acknowledge the precedent in favor of the job situs test but nevertheless ask this Court to exempt their Section 226 claims from that test because, they argue, their claims are concerned with "the composition of pay documents," not with the underlying substance of their pay. (Opening Brief ("Op. Br.") at 7-8.) Relying on this artificial distinction, Appellants urge this Court to instead look to an amalgam of factors in determining whether Section 226 applies, such as where the "conduct" that gave rise to the claim occurred, where employees reside and are based, and the strength of the state's interest in passing the statute. Appellants' proposed test is unsupported in law and would cause enormous administrative problems as courts and businesses attempt to determine which provisions of the Labor Code apply to employees who work primarily out of state. This Court should therefore

adhere to the well-established job situs test in determining the application of Section 226 and should answer "no" to the first certified question.[1]

The second question certified for review asks this Court to determine whether the exemption in Wage Order 9, Section 1(E) ("the RLA Exemption")—which exempts "employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act" from virtually all of Wage Order 9's provisions—bars Appellants' claims under Section 226. As an initial matter, United respectfully suggests that this Court need not consider the effect of the RLA Exemption at all because California labor law does not apply to employees who work principally outside the state, for the reasons discussed above. But if this Court determines that California law applies, the RLA Exemption should bar Appellants' claims because California law requires that wage orders and the Labor Code be read as a "single scheme of regulation," *Collins v. Overnite Transp. Co*, 105 Cal. App. 4th 171, 180 (2003), and because substantial practical and policy reasons justify applying the RLA Exemption here. United therefore urges this Court to answer "yes" to the second certified question, but only if it makes the threshold determination that California law applies to Appellants.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

United is a major passenger airlines serving destinations within the United States and around the world, with headquarters in Chicago, Illinois. United pilots and flight attendants are unionized employees. The Air Line

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[1] Although the first question certified for review states that the employees at issue here "receive[] pay in California," as discussed in detail at 35-36, *infra*, there is no evidence in the record to support this. Moreover, given the mobile nature of pilot and flight attendant work, it cannot be assumed that these employees receive their pay in California.

Pilots Association ("ALPA") represents United's U.S.-based pilots, and the Association of Flight Attendants ("AFA") represents United's U.S.-based flight attendants. Ward-3 ER 272; Vidrio-3 ER 310-11. The terms and conditions of employment for all United's U.S.-based pilots and flight attendants are set forth in collective bargaining agreements ("CBAs") negotiated and entered into between ALPA or AFA and United pursuant to the RLA.

Pursuant to the CBAs, pilots and flight attendants may be employed as "Lineholders" or "Reserves." Lineholders bid on a fixed schedule each bid period (a time period that corresponds approximately to each calendar month). Reserves do not receive a schedule and instead bid to be "on-call" to fly segments on particular days during the bid period. Ward-3 ER 272; Vidrio-3 ER 310. Appellant Charles Ward was employed primarily as a Reserve Pilot, although he occasionally flew as a Lineholder Pilot. Ward-3 ER 290. Appellant Felicia Vidrio worked approximately half her time as a Reserve Flight Attendant during the class period. Appellant Paul Bradley worked primarily as a Lineholder Flight Attendant during the class period but worked as a Reserve Flight Attendant during some bid periods. Vidrio-3 ER 310.

A. United Pilots and Flight Attendants Work Principally Outside California.

Few United flights begin and end within California's borders, so the pilots in *Ward* and the flight attendants in *Vidrio* spent minimal time actually working in California during the class periods. Ward-3 ER 278-80; Vidrio-3 ER 357. United is able to determine based on its records the amount of time each pilot and flight attendant spends flying within California's borders on a monthly basis as a percentage of the employee's total work time. Ward-3 ER 276-77; Vidrio-3 ER 357. California time consists of both (1) time spent on flights that begin and end exclusively

within California's borders, and (2) time spent on flights to and from California. *Id.* For flights to and from California, the total amount of time spent within California's borders is calculated by measuring the distance from the California airport to the California border (either north, east, south, or west depending on the direction of flight) and then converting that distance to time. *Id.*

In *Ward*, it was undisputed that the aggregate data for all pilots in the class shows that they spent ***less than twelve percent*** of their flight time within California's borders during the relevant time period. Ward-3 ER 278-79. This number accounts for both intra-California flights (*i.e.*, flights with both an origin and a destination in California), which constituted 3.09 percent in 2014, and flights to and from California, which constituted 8.45 percent in 2014. Ward-3 ER 278. These numbers mask some amount of pilot-specific variability—for example, some pilots logged a small amount of time in California on a regular basis, while others logged time in California only infrequently (going months without flying any time in California). Ward-3 ER 278-81. Still others spent no time flying in California at all during a given year. Ward-3 ER 278-79. Moreover, this twelve percent figure overstates the pilots' "California time," because the airspace above California is not California's but the "exclusive sovereign[] ... airspace of the United States." 49 U.S.C. § 40103(a); *see Hirst v. Skywest, Inc.*, No. 15 C 02036, 2016 WL 2986978, at *8 (N.D. Ill. May 24, 2016) ("*Hirst I*") ("On what basis would work at 35,000 feet constitute work within the state of Illinois? The state has no sovereignty over the skies above it. There is no 'State of Illinois' airspace, only national airspace.").

Similarly, in *Vidrio*, it was undisputed that the aggregate data for all flight attendants in the class shows that they spent ***less than 17.2 percent*** of their flight time within California's borders during the relevant time period.

Vidrio-2 ER 44; 3 ER 256-60. As in *Ward*, this number accounts for both intra-California flights and flights to and from California. Vidrio-3 ER 358; 2 ER 44. These class-wide numbers also mask some amount of variability—for example, some class members logged a small amount of time in California on a regular basis, while others logged time in California only infrequently (going months without flying any time in California). Vidrio-3 ER 358–59. Still others spent no time flying in California at all during a given year. *Id.* Appellant Vidrio spent 80.37% of her flight time outside of California in the year 2015 and 81.74% of her flight time outside of California in the year 2016. Vidrio-2 ER 44–45. Appellant Bradley spent 79% of his flight time outside of California in the year 2015 and 81.17% of his flight time outside of California in the year 2016. Vidrio-3 ER 362.

B. United Pilots and Flight Attendants Are Unionized Employees Whose Terms and Conditions of Employment Are Set by Collective Bargaining Agreements.

1. Pilot Pay

The CBA applicable to United pilots sets forth several methods for calculating a pilot's pay, most of which are not based on hours worked at hourly rates. Pilots receive two different types of payments each month. Ward-3 ER 272.

A pilot's first monthly payment is a "Flight Advance." *Id.* The Flight Advance compensates the pilot for either zero, seventeen-and-a-half, or thirty-five hours, depending on the pilot's anticipated number of hours worked during that bid period. *Id.* The Flight Advance is completely independent of the hours actually flown by the pilot so far that bid period. *Id.* A pilot's second monthly payment amounts to the difference between the Flight Advance and the total compensation owed to the pilot for that bid period. *Id.*

A pilot's total compensation for a given bid period is equal to the highest of three separate calculations: (1) the pilot's time spent flying multiplied by various applicable hourly rates, called Line Pay Value ("LPV"); (2) the Minimum Pay Guarantee ("MPG"); or (3) for Lineholder Pilots, the Protected Time Credit ("PTC"). Ward-3 ER 272-73. Of these three calculations, only LPV is connected with hours worked at hourly rates. It is impossible to tell which of these three calculations would apply to a given pilot in a given bid period until the period closes and all flying has been completed.

Both Lineholder and Reserve Pilots are paid LPV at a wide variety of hourly rates, depending on their position (Captain or First Officer), seniority, and the type of aircraft flown or pay activity performed. 3 ER 273, 316-21, 324-27. The CBA sets forth complex rate formulas for various pay activities, including vacation time, training time, and deadheading[2] time. For example, the CBA provides that the pay rate for deadheading is a blended rate, recalculated at the beginning of each bid period by "prorating the Pilot's pay rate for each aircraft type applicable to the Pilot's equipment type .... The proration will be made using the ratios of the number of each applicable aircraft type to the total number of aircraft applicable to the Pilot's Equipment type." Ward-3 ER 322. Sometimes, pilots fly different types of aircraft during a bid period. In this situation, the pilot receives multiple hourly rates for his flying hours. Ward-3 ER 273.

MPG is a minimum amount of pay to which a pilot is guaranteed for each day the pilot is scheduled to work. *Id.* MPG is designed to ensure that pilots are not penalized for, among other things, flying short segments or being scheduled to work on a flight that is canceled. *Id.* Accordingly,

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[2] Deadheading is when a pilot travels as a passenger on a flight in order to reach his or her origin destination for a particular route.

MPG does not correspond to hours worked. As explained above, a pilot will only earn MPG if it is greater than LPV for a particular bid period—or, for Lineholder Pilots, if MPG is greater than both LPV and PTC. MPG is calculated differently for Lineholder and Reserve Pilots. *Id.* For Lineholder Pilots, the CBA provides that "the MPG is equal to two hours and twenty minutes (2:20) for each day in his awarded schedule that is not a vacation day and is not an unpaid absence, but shall in no case be more than seventy (70) hours." Ward-3 ER 323. For Reserve Pilots, the CBA provides that "the MPG, rounded to the nearest minute, shall be four hours, three minutes, and twenty seconds (4:03:20) for each reserve day." *Id.*

PTC applies only to Lineholder Pilots, and like MPG, it protects pilots if their schedule changes in a way that negatively affects their pay. *Id.* The CBA provides that PTC "shall be the Line Pay Value of his schedule after Monthly Schedule Preferencing is completed." Ward-3 ER 324. Thus, PTC allows pilots to earn LPV as if they flew every flight for which they were scheduled during a bid period, even if the pilot for some reason (other than a voluntary schedule adjustment) does not fly those scheduled segments. Ward-3 ER 273. If a pilot receives an assignment that alters his or her schedule, the CBA provides that "if the new pay value of the transaction is positive, his PTC shall increase by the net pay value of the transaction." Ward-3 ER 324. But if the "net pay value of the transaction is negative, his PTC is unaffected." *Id.* Thus, PTC enables Lineholder Pilots to benefit from favorable schedule adjustments but to remain unaffected if a schedule adjustment would negatively affect their pay. As with MPG, PTC does not correspond to, and is not based on, the number of hours a pilot actually worked.

2. Pilot Wage Statements

United pays pilots twice monthly, on the first and sixteenth day of each month. Ward-3 ER 286. Concurrently with the payment of wages,

United issues a pay advice to each pilot. *Id.* The pay advice details the pilot's total wages for that pay period, as well as deductions, net wages, and other items. *Id.* If the pilot is paid through direct deposit, his or her pay advice is accessible electronically through United's intranet system, and it may also be received through the mail at the pilot's election. *Id.* Pilots who receive a paper check receive a paper copy of their pay advice attached to the paycheck. *Id.*

All pilots also have access to a Pilot Pay Register ("pay register") through United's intranet, which allows them to view their collected activities for the bid period, the number of hours worked at each activity, and the amount of potential compensation associated with each activity. Ward-3 ER 274. The top of the pay register lists the pilot's blended rate, so called because the rate "blends" pay rates pursuant to a calculation in the CBA. Ward-3 ER 322. For example, Appellant Ward's pay registers from 2014 consistently display a blended rate of $202.00, while his pay registers from 2015 consistently display a blended rate of $208.06. Ward-3 ER 358-67; 3 ER 386-92. The blended rate is used to determine the pilot's earnings for non-flying activities, such as sick pay, vacation pay, and deadheading. Pay registers are updated in real time and are accessible online at any time. Ward-3 ER 274. Once a bid period ends, archived pay registers remain available to pilots. *Id.*

The hourly rates for flying are set forth in charts in the CBA, and the rates vary widely based on a pilot's seniority and type of aircraft flown. Between the pay advice, the pay register, and the CBA, pilots are able to review all of the hourly rates that apply to them during a particular pay period, the number of hours they worked at each rate, and their total amount of wages.

C. *Vidrio*

During the class period, the terms and conditions of employment for United flight attendants were governed by either of two CBAs, depending on whether the flight attendant was a heritage United flight attendant (the "UAL CBA") or a heritage Continental Airlines ("Continental") flight attendant (the "CAL CBA"; collectively, "the CBAs"). Vidrio-3 ER 310–11. The CBAs were negotiated and entered into between AFA and either United or Continental pursuant to the RLA. *Id.*

1. Flight Attendant Pay

As with pilots, flight attendants receive two different types of payments each month. Vidrio-3 ER 311.

The first monthly payment is called a "Flight Advance," just as it is for pilots. *Id.* For heritage United flight attendants, the Flight Advance consists of either a "half Flight Advance"—equivalent to 24.85 hours of pay at the applicable rate—or a "full Flight Advance"—equivalent to 49.70 hours of pay at the applicable rate—depending on how many hours the flight attendant is expected to work during the bid period. Vidrio-3 ER 311-12. For heritage Continental flight attendants, the Flight Advance consists of forty hours of pay at the applicable rate or twenty hours for jobshare flight attendants, provided that the flight attendant was on active duty during the previous two weeks. Vidrio-3 ER 312; 3 ER 342.

A flight attendant's second monthly payment also differs based on whether the flight attendant is heritage United or heritage Continental. Heritage United flight attendants receive a second monthly payment that is the higher of (1) the flight attendant's time spent flying multiplied by an hourly rate, or (2) the MPG. Vidrio-3 ER 312. Because of this pay structure, heritage United flight attendants are only compensated by the hour if the amount they would earn for flight time is greater than MPG. *See*

id. Heritage Continental flight attendants receive a second monthly payment that consists of twenty-five hours at the flight attendant's applicable base pay, plus hourly pay earned in excess of sixty-five hours for the previous month and any other pay claims. Vidrio-3 ER 312-13; 3 ER 342-43. Heritage Continental flight attendants are also entitled to MPG. Vidrio-3 ER 314-15. Thus, heritage Continental flight attendants are only compensated by the hour for hours worked in excess of sixty-five per month, and even then only if that hourly pay value exceeds MPG.

Like pilots, flight attendants are entitled to MPG. The UAL CBA provides for MPG as a minimum amount of pay to which the flight attendant is entitled each month, which varies according to flight attendant longevity and whether the flight attendant was assigned to domestic or international flight lines. *Id.* For example, a tenth-year flight attendant assigned to domestic lines of flying is entitled to a minimum of $3,066 per month under the UAL CBA. *Id.* Heritage United Reserve Flight Attendants are entitled to a minimum of seventy-eight hours per bid period, paid at the applicable hourly rate that corresponds to the flight attendant's longevity. *Id.* The CAL CBA provides for MPG by ensuring that flight attendants "will be paid a salary based upon the monetary value of their bid line after adjustment procedures have been completed or all compensation actually earned, whichever is greater." *Id.*; 3 ER 347. In other words, heritage Continental Lineholder Flight Attendants are entitled to at least the amount the flight attendant would have earned based on his or her schedule for that month. Heritage Continental Reserve Flight Attendants are entitled to receive at least eighty-three hours of MPG, paid at the applicable base hourly rate. Vidrio-3 ER 315; 3 ER 343. In all scenarios, MPG does not correspond to—and is not based on—hours worked. Vidrio-3 ER 314-15.

When flight attendants do receive hourly rates, those rates vary widely according to the flight attendant's position and seniority. Vidrio-3

ER 313-14. Hourly rates also vary from month to month depending on a variety of factors, such as which type of aircraft the flight attendant worked on, whether the flight attendant worked overnight, and whether the flight attendant worked on a flight that was understaffed. *Id.*

2. Flight Attendant Wage Statements

United pays flight attendants and issues pay advices to them in accordance with the procedures described above for pilots. Flight attendants also receive a document each month that summarizes their activities and pay for the bid period, called either a Monthly Statement of Earnings for heritage United flight attendants or a Flight Attendant Pay Register ("pay register") for heritage Continental flight attendants. Vidrio-3 ER 315-16. Once a bid period ends, archived Monthly Statements of Earnings and pay registers remain available to flight attendants. *Id.*

The hourly rates for flying are set forth in charts in the CBAs, and the rates vary widely based on a flight attendant's seniority and the type of aircraft on which the flight attendant is staffed. Vidrio-3 ER 319-22; 3 ER 335-42. Between the pay advice, the Monthly Statement of Earnings or pay register, and the CBA, flight attendants are able to review all of the hourly rates that apply to them during a particular pay period, the number of hours they worked at each rate, and their total amount of wages.

D. Facts Common to Both Cases

1. United's Address on Pay Advices

United currently lists a Houston, Texas, P.O. Box address on the pay advices it issues to pilots and flight attendants. Ward-3 ER 266; Vidrio-2 ER 41. This address is dedicated solely to United's payroll department and is checked at least once daily. *Id.* Before January 2015, the pay advices listed a Chicago, Illinois, P.O. Box. *Id.* This P.O. box also corresponded to

United's payroll department, which later moved to Houston as a result of United's merger with Continental. *Id.*

2. United's California Contacts

United's contacts in California are minimal relative to its overall business. United is headquartered in Chicago, Illinois, with additional management and administrative operations in Houston, Texas. Vidrio-2 ER 47. Only 18.5% of United's domestic workforce (and only 16.18% of its worldwide workforce) is located in California. *Id.*

Similarly, in terms of flights and passengers, the volume of United's traffic in California is small relative to its overall business. United schedules regular operations out of eight mainline airports in California. Vidrio-2 ER 49. These eight mainline airports comprise 8.4% of United's mainline airports in the United States. Measured by both flights and passengers, United has larger operations at each (individually) of Chicago O'Hare International Airport (ORD), George Bush Intercontinental Airport (IAH), and Newark Liberty International Airport (EWR) than any airport in California. Vidrio-2 ER 49-50. Overall, only 18.34% of United's domestic flights and only 15.96% of its worldwide flights fly into or out of a California airport. Vidrio-2 ER 49.

II. PROCEDURAL BACKGROUND

A. *Ward*

Appellant Ward filed a complaint on April 3, 2015 in California state court alleging that United had violated two provisions of Section 226: (1) Section 226(a)(8), by listing a P.O. Box rather than a physical address on the pay advices it issued to pilots; and (2) Section 226(a)(9), by failing to list on pay advices the hourly rates that applied to each pilot and the total number of hours worked at each rate. Ward-4 ER 618-40. United removed

the action to the district court on May 22, 2015, and the district court certified the following class on March 23, 2016:

> All persons who are or were employed by United Airlines, Inc. as pilots for whom United applied California income tax laws pursuant to 49 U.S.C. § 40116(f)(2) at any time from April 3, 2014, up to April 3, 2015.[3]

Ward-4 ER 595. In May and June 2016, the parties briefed cross-motions for summary judgment. After argument, the district court granted United's motion and denied Appellant Ward's. The district court held that the job situs test determined whether Section 226 applied to the class, and that because the pilots performed less than twelve percent of their work in California, they did not work "principally" in the state and Section 226 did not apply to them. Ward-1 ER 5-8. The district court also concluded that requiring United to comply with Section 226 and other states' wage statement laws would cause substantial administrative burdens on United that would unduly burden interstate commerce. Ward-1 ER 8-11.

Because the court determined California law did not apply to the class, it did not reach United's remaining arguments, *i.e.*, that Section 226 is preempted as applied, and that United in fact complied with Section 226.

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[3] The court defined the class this way because United uses a pilot's state of residence to determine the tax withholding status of pilots who fly in more than one state, in accordance with federal law. Federal law provides that the wages of an air carrier employee "regularly assigned duties on aircraft in at least 2 States" are subject to the income tax laws of the state in which the employee resides or the state where the employee performs over fifty percent of his or her scheduled flight time. 49 U.S.C. § 40116(f)(2). Because United pilots generally do not spend fifty percent of their flight time in any particular state, United withholds based on a pilot's state of residence. Importantly, the fact that a given pilot is subject to a given state's withholdings does not mean that he or she spends the majority of his or her time in that state.

B. *Vidrio*

On August 6, 2015, Appellant Vidrio filed a complaint in California state court alleging that United had violated three provisions of Section 226: (1) Section 226(a)(2), by failing to list on pay advices the total hours worked; (2) Section 226(a)(8), by listing a P.O. Box rather than a physical address; and (3) Section 226(a)(9), by failing to list all hourly rates and the number of hours worked at each rate. Vidrio-3 ER 452-460. On that same day, Appellant Bradley brought an identical action against Continental (which, as a result of United's 2010 acquisition, no longer existed) in California state court. United removed both actions to the district court on October 9, 2015. On February 22, 2016, the district court consolidated the two actions under the *Vidrio* caption. Vidrio-USER 1.

Appellants filed an amended consolidated complaint on March 22, 2016, which brought the same claims against United under Section 226(a)(2), (a)(8), and (a)(9), as well as a related PAGA claim. On August 23, 2016, the *Vidrio* court certified the following class:

> All persons who are or were employed by United Airlines, Inc., as flight attendants for whom United applied California income tax laws pursuant to 49 U.S.C. § 40116(f)(2) at any time from July 6, 2014 up to the present.

Between November 2016 and March 2017, the parties briefed cross-motions for summary judgment. On March 15, 2017, the district court granted United's motion and denied Appellants'. Noting that the few decisions to have considered the extraterritorial application of California's wage and hour laws "tend to focus on 'job situs,'" Vidrio-1 ER 5, the court held that Section 226 did not apply because it was undisputed that class members performed less than eighteen percent of their work within California's borders and therefore did not work "principally" in California. The court also concluded that even under the multi-factor approach created

by another California district court, *Bernstein v. Virgin America, Inc.*, 227 F. Supp. 3d 1049 (N.D. Cal. 2017), United was still entitled to summary judgment because it had "minimal" ties to California in light of its overall business. Vidrio-1 ER 7-9.

Because the court determined Section 226 did not apply to the class, it did not reach United's remaining arguments, *i.e.*, that applying Section 226 would violate the dormant Commerce Clause, that Section 226 was preempted as applied, and that United in fact complied with Section 226.

C. The Ninth Circuit Court of Appeals Certifies Two Questions of State Law to This Court

After briefing in the appeals concluded, the Ninth Circuit Court of Appeals heard oral argument in both matters on March 16, 2018. The Ninth Circuit panel requested supplemental briefing on the issue of whether the RLA Exemption in Wage Order 9 Section 1(E) barred Appellants' claims under Section 226. The parties submitted those briefs on April 10, 2018. The Ninth Circuit Court of Appeals then certified two questions of California law for this Court's review on May 9, 2018. United timely submitted a letter to this Court urging it to deny the certification request because this Court's precedent already established that, pursuant to the job situs test, Appellants could not bring their claims under Section 226. On July 11, 2018, this Court granted certification of the two questions listed above.

SUMMARY OF ARGUMENT

Appellants bring their Section 226 claims on behalf of classes of United pilots and flight attendants who are California residents but who indisputably spent less than ***12 and 17.2 percent*** (respectively) of their time working in California during the class period. The district courts properly granted United's motions for summary judgment on the ground that Section 226 does not apply to the classes because class members do not work

principally in California (indeed, some do not work in California at all).

First, this Court should answer "no" to the first certified question because applying Section 226 to employees who work principally outside California would cause Section 226 to impermissibly operate outside California's borders. Employee job situs—that is, where a person works—determines whether an employee can bring a claim under the California Labor Code without violating the presumption against extraterritoriality. *Tidewater*, 14 Cal. 4th at 578; *Sarviss v. Gen. Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d 883, 900 (C.D. Cal. 2009). Appellants do not dispute the relevance of these authorities or that nearly every court to have considered the extraterritorial application of California wage and hour law has used the job situs test. Rather, Appellants seek to distinguish this authority by pointing out that their claims involve wage statements, not wages. Op. Br. at 7-8, 31. Seizing on this artificial distinction, Appellants urge this Court to ignore the fact that the class members work primarily—and, in some cases, entirely—outside California and instead look to where the "conduct" giving rise to Appellants' claims allegedly occurred and the alleged state interests behind Section 226. *Id.* at 25-27. This position is flawed for several reasons. For one, there is no support in California or anywhere else for applying the job situs test to some provisions of the Labor Code and not others. Rather, as courts in California and other states consistently hold, the job situs test determines the applicability of the full range of a state's labor and employment laws, including wage statement laws, *Ward v. United Airlines*, No. C15-02309-WHA, 2016 WL 3906077 (N.D. Cal. July 19, 2016); overtime laws, *Priyanto v. M/S Amsterdam*, No. CV 07-3811AHM(JTLx), 2009 WL 175739 (C.D. Cal. Jan. 23, 2009); minimum wage laws, *Hirst I*, 2016 WL 2986978; and anti-discrimination laws, *Peikin v. Kimmel & Silverman, P.C.*, 576 F. Supp. 2d 654 (D.N.J. 2008). The only California case to reject the job situs test, *Bernstein*, 227 F. Supp. 3d 1049,

reached its conclusion based on a fundamental misreading of California law and should be rejected by this Court.

Even under Appellants' proposed "conduct" test, however, Appellants did not, and cannot, show that United issues its wage statements in California or that the class members received their pay and wage statements there. To the contrary, United issues wage statements from its offices in Illinois and Texas, and pilots and flight attendants, who due to the mobile nature of their work may have bank accounts in any state and who may view their wage statements online at any time, do not necessarily receive their wages and wage statements in California. Therefore, in addition to the fact that the district court correctly applied the job situs test, Appellants' alternative conduct-based approach is legally incorrect, factually unsupported, and unsound as a matter of policy.

State interests and the purposes behind Section 226 are also irrelevant in determining whether the law is being applied extraterritorially. Appellants cite to the Ninth Circuit panel's certification request in support of this state interest requirement, but the panel confused extraterritoriality and dormant Commerce Clause standards in arriving at this conclusion and its analysis should be rejected by this Court. In any event, Appellants incorrectly claim that the purpose of Section 226 is to "see whether he or she is being fully paid no matter what law applies." Op. Br. at 29. To the contrary, Section 226's legislative history confirms that the law's purpose is to "strengthen enforcement of existing wage and hour standards." United's Req. for Jud. Notice ("RJN") Ex. A at 7; *Morgan v. United Retail, Inc.*, 186 Cal. App. 4th 1136, 1148 (2010). That purpose is not served by applying Section 226 here, where Appellants are indisputably exempt from California's substantive laws governing the payment of wages, including overtime.

Exempting Section 226 from the job situs test would also lead to confusing results. Under Appellants' formulation, Section 226 would apply to employees who live in California and receive their wages and wage statements in California, but the underlying Labor Code provisions that would determine the accuracy of their wage statements would not apply. Conversely, employees who work principally in California but reside in and receive their wages in a state that has no wage statement law would not be entitled to the protections of Section 226. This outcome would lead only to employee confusion in direct contravention of the purpose behind Section 226. *Morgan*, 186 Cal. App. 4th at 1149.

Finally, even if this Court were to determine there is no extraterritoriality problem with applying Section 226 here, this Court should still hold that Section 226 does not apply to airline employees who regularly cross state lines because doing so would impose a "clearly excessive burden" on interstate commerce that violates the dormant Commerce Clause. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Requiring United to comply with Section 226 would, by extension, also require it to comply with the wage statement laws of the fifty states. Contrary to Appellants' assertion, it is not true that compliance with Section 226 will ensure compliance with every other state's law. For example, the contents of a Section 226-compliant wage statement would be out of compliance in at least New York, Oregon, and Texas. *Compare* Cal. Lab. Code § 226 (requiring neither employer phone number nor employer signature) *with* N.Y. Lab. Law § 195(3) (requiring wage statement to include employer phone number), Or. Admin. R. 839-020-0012(1)(e) (same), *and* Tex. Lab. Code § 62.003(b) (requiring wage statement to include employer signature). Under the job situs test, to comply with the laws of the thirty-seven states, and the District of Columbia, that have wage statement laws, United would have to monitor the states where each of its

flight crew members flew to ensure that they either worked "principally" in only one state, or that they received a wage statement that complied with multiple states' laws. This exact type of administrative burden has been found to unduly burden interstate commerce in the airline industry, *Hirst I*, 2016 WL 2986978, at *10; *Hirst v. SkyWest, Inc.*, 283 F. Supp. 3d 684, 698-99 (N.D. Ill. 2017) ("*Hirst II*"), and the same is true here.

Second, if this Court determines that California law applies, it should apply the RLA Exemption in Wage Order 9 to bar Appellants' claims because California law requires that wage orders and the Labor Code be read "as a single scheme of regulation." *Collins*, 105 Cal. App. 4th at 180. "To the extent a wage order and a statute overlap, [courts] will seek to harmonize them, as [they] would with any two statutes." *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1027 (2012); *see also Angeles v. US Airways*, No. C 12-05860 CRB, 2017 WL 565006, at *3 (N.D. Cal. Feb. 13, 2017). In conformity with this principle, California courts have applied exemptions in the wage orders to claims under the Labor Code. *Collins*, 105 Cal. App. 4th at 180-81; *Angeles*, 2017 WL 565006, at *3-4; *Dailey v. Just Energy Mktg. Corp.*, No. 14-cv-02012-HSG, 2015 WL 4498430, at *5 (N.D. Cal. July 23, 2015). This Court should do the same, as confining the RLA Exemption to Wage Order 9 would impermissibly create separate and conflicting spheres of wage statement regulation. *See Collins*, 105 Cal. App. 4th at 180 n.4.

Additionally, substantial practical and policy reasons justify applying the RLA Exemption here. As Appellants acknowledge, "Wage Order 9 and Section 226 operate harmoniously together," and the wage statement requirements of Wage Order 9 Section 7(B) parallel those of Section 226. Op. Br. at 44-45. The similarity between the two laws reinforces the wisdom of treating them as a single scheme. In passing the RLA Exemption and specifically including wage statement requirements

within the scope of that exemption, the Industrial Welfare Commission ("IWC") made a sound determination that it would ease burdens on interstate transportation carriers—and be more beneficial to those carriers' employees—to deal with wage statement requirements through the collective bargaining process, rather than through state law. This reasoning is no less applicable to Section 226 than it is to Wage Order 9. It would make no sense to require United to comply with the clerical requirements of Section 226, particularly Sections 226(a)(2) and (a)(9), where it is undoubtedly exempt from the substantive overtime and other wage and hour requirements those provisions are designed to reinforce. RJN Ex. A at 7 (Section 226 "strengthen[s] enforcement of existing wage and hour standards"); *Morgan*, 186 Cal. App. 4th at 1148. Thus, should this Court determine that California law applies to Appellants, it should hold that the RLA Exemption bars their Section 226 claims.

ARGUMENT

I. THE COURT SHOULD ANSWER "NO" TO THE FIRST CERTIFIED QUESTION

A. Employee Job Situs Determines Whether the California Labor Code, Including Section 226, May Apply to an Employee.

The overarching purpose of the California Labor Code is to promote the welfare of individuals who work in California. *See Tidewater*, 14 Cal. 4th at 577; *see also* Cal. Lab. Code § 1173 (tasking the Industrial Welfare Commission with ascertaining wages, hours, and conditions of employment for all employees "***in this state***") (emphasis added); Cal. Lab. Code § 1193.5 (authorizing the Division of Labor Standards Enforcement to investigate the wages, hours, and working conditions "of all employees employed in any occupation ***in the state***") (emphasis added). Thus, employee residence has no bearing on whether California law applies,

Sullivan v. Oracle Corp., 662 F.3d 1265, 1271 (9th Cir. 2011) ("*Sullivan II*") ("California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents"), nor does the state where a company is headquartered or where it makes decisions about the terms and conditions of employment. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1062 (N.D. Cal. 2014) (relying on *Sullivan I*, 51 Cal. 4th 1191, to reject idea that the location of a company's headquarters or the state where decisions about the workers' employment status were made influenced application of California law). Rather, because the California Labor Code is concerned with the welfare of those who work in this state, California applies its labor code only to those employees who work exclusively, or principally, in the state. *Tidewater*, 14 Cal. 4th at 578 (explaining that a person must work "exclusively, or principally" in California in order to be considered a "wage earner of California"); *Sarviss*, 663 F. Supp. 2d at 900 ("[T]he determinative issue is whether an employee principally works in California.").

Relatively few decisions have addressed the extraterritorial application of California's wage and hour laws to employees who work primarily out of state. *See Vidrio v. United Airlines, Inc.*, No. CV15-7985 PSG (MRWx), 2017 WL 1034200, at *3 (C.D. Cal. Mar. 15, 2017) (noting "the jurisprudence on the issue is sparse"). Those cases that have confronted the issue, however, have consistently focused on employee job situs as the determinative factor, as opposed to the parties' residence or the location of certain events giving rise to the alleged violation. *Priyanto*, 2009 WL 175739, at *8 ("To summarize, since Plaintiffs' work is performed at sea, it is not within California, and is thus not protected by California wage law."); *Sarviss*, 663 F. Supp. 2d at 900-01 ("[B]ecause Sarviss indisputably spent the vast majority of his employment working

outside of California ...[,] the presumption against extraterritorial application of the wage orders has been left unrebutted.") (emphasis in original);*Cotter*, 60 F. Supp. 3d at 1062 ("California's wage and hour laws do not apply to work performed primarily outside of California."); *Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988, at *12 (N.D. Cal. Aug. 27, 2014) ("[T]he critical factor is where the work at issue is performed by the plaintiff.") (citations omitted). Since the district court's opinions in these cases, at least two other district courts in the Ninth Circuit have relied on employee job situs to determine that Section 226 did not apply to the claims of employees who regularly cross state lines. *Oman v. Delta Airlines, Inc.*, No. 15-cv-00131-WHO, 2017 WL 66838, at *6 (N.D. Cal. Jan. 6, 2017); *Shook v. Indian River Transp. Co.*, No. CV 1:14-1415 WBS BAM, 2017 WL 633895, at *6 (E.D. Cal. Feb. 15, 2017).

That result follows from this Court's decision in *Tidewater*, 14 Cal. 4th 557. *Tidewater* presented the question whether California's Industrial Welfare Commission ("IWC") Orders applied to California residents who worked for California employers on boats in the Santa Barbara channel. *Id.* at 561. After concluding, as a preliminary matter, that "California's territorial boundaries are relevant" to the scope of California wage and hour law, this Court determined that California law presumptively applies if

> an employee resides in California, receives pay in California, ***and*** works exclusively, or principally, in California[.]

Id. at 578 (emphasis added). It was not disputed in *Tidewater* that the workers were California residents or received their pay in California. Thus, the *Tidewater* decision turned on whether the employees worked "exclusively, or principally, in California." Based on the facts of that case, this Court determined that the employees were entitled to the protections of the IWC Wage Orders because they worked exclusively "in California." *Id.* at 579.

Fifteen years later, in *Sullivan I*, this Court affirmed the importance of employee job situs in determining application of California wage and hour law by holding that California's overtime law applied to out-of-state residents who worked in California for days and weeks at a time. 51 Cal. 4th at 1205. Although the *Sullivan I* court confined its holding to the overtime context, *id.* at 1198-1200, the decision reaffirms that employee job situs—not the employee's state of residence or any other factors—determines whether an individual is entitled to the protections of California wage and hour law.

Tidewater and *Sullivan I*, moreover, apply a principle that has been generally accepted around the country for decades. Over forty years ago, the United States Supreme Court held that the "employees' predominant job situs," and not a "generalized weighing of factors," determined whether a Texas right-to-work law applied to employees who worked primarily outside Texas's borders. *Oil, Chem., & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 414 (1976). And numerous other states look to where an employee performs work to determine the scope of their wage and hour laws. *Klig v. Deloitte LLP*, 36 A.3d 785, 797-90 (Del. Ch. 2011); *Panos v. Timco Engine Ctr., Inc.*, 197 N.C. App. 510, 517 (2009); *O'Neill v. Mermaid Touring Inc.*, 968 F. Supp. 2d 572, 579 (S.D.N.Y. 2013).

Appellants do not dispute these principles as a general matter, but say that the rules that apply to most of the California Labor Code do ***not*** apply to wage statement claims, and instead argue that the Court should adopt for Section 226 a test that looks to the "focus" or "conduct" allegedly giving rise to Appellants' claims. Op. Br. at 25-27. None of the cases cited above has drawn this made-up distinction, and Appellants' argument is entirely meritless. Appellants instead rely on two cases involving the extraterritorial application of laws that have nothing to do with state labor

and employment law: *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948 (9th Cir. 2008), which held that the federal General Aviation Revitalization Act did not apply to an airplane crash in Bosnia; and *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal. 4th 1036 (1999), which held that California Government Code Section 25400's prohibition on making misleading statements about securities "in this state" did not prevent an out-of-state purchaser from suing. But there is no case—certainly, Appellants cite none—applying the "focus" or "conduct" test to a question of the extraterritorial application of California wage and hour law.

This lack of precedent is not surprising, because rejecting the job situs test would be inconsistent with the purpose of the California Labor Code, which is to protect the welfare of any person ***who works within the state's borders***. *Tidewater*, 14 Cal. 4th at 577 (citing Cal. Lab. Code §§ 1173, 1193.5); *Sullivan II*, 662 F.3d at 1271 ("California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents."). The job situs test gives effect to that purpose, because it applies California labor laws to employees that principally work in the state, and does not apply those laws to employees that principally work outside it. Appellants' preferred "conduct" test, in contrast, is completely agnostic to where the relevant employee works—the test is concerned only with where the ***employer's*** conduct giving rise to the claim occurred—and is thus inconsistent with the Labor Code's purpose.

Applying the job situs test to the question presented here, it is undisputed that Section 226 does not apply to Appellants. Appellants and the plaintiff classes they represent worked, on average, just twelve percent (for pilots) and 17.2 percent (for flight attendants) of their time in California. As United has noted throughout its briefing in these matters, even twelve and 17.2 percent are generous assumptions, given that the

airspace about a state does not necessarily qualify as the territory of that state. *See* 49 U.S.C. § 40103(a) ("The United States Government has exclusive sovereignty of airspace of the United States."); *see also Hirst I*, 2016 WL 2986978, at *8. On these facts, Section 226 does not and cannot apply to Appellants, and this Court should therefore answer "no" to the first certified question.

B. Appellants' "Conduct" Test Is Entirely Lacking in Legal and Factual Support.

As discussed immediately above, there is ***no*** support for Appellants' argument that a "conduct" test determines the applicability of any provision of the California Labor Code, including Section 226. Lacking any authority for their position, Appellants rely on the Ninth Circuit's certification request for their contention that the location of certain "conduct" should determine the scope of Section 226. The Ninth Circuit panel misinterpreted this Court's extraterritoriality jurisprudence, however, and should not guide this Court's analysis.

As support for their claim that the location of "conduct" determines the applicability of Section 226, Appellants and the Ninth Circuit panel cite to this Court's statement in *Sullivan I* that "[i]f the conduct that 'creates liability' occurs in California, California law properly governs that conduct." Op. Br. at 24 (citing *Sullivan I*, 51 Cal. 4th at 1208.) This citation to the "conduct that creates liability" standard is pulled out of context, however. This Court discussed the "conduct that creates liability" standard in addressing whether California's Unfair Competition Law, Business and Professions Code § 17200 *et seq.*, could apply extraterritorially—not the California Labor Code. *Sullivan I*, 51 Cal. 4th at 1208. Notably, under the UCL it was appropriate to examine where the relevant conduct occurred because that statute by its terms "reaches any unlawful business act or practice in California." *Id.* (citing Cal. Bus. &

Prof. Code § 17200.) Nothing in the *Sullivan I* Court's reasoning, however, supports applying a similar conduct-based standard in assessing the extraterritorial application of the California Labor Code. To the contrary, this Court's decision in *Sullivan I* establishes that the key extraterritoriality inquiry vis-à-vis the Labor Code is where the employee works—not where business decisions were made, the employee's state of residence, or any other factor.

Even assuming that the location where certain "conduct" giving rise to a plaintiff's claims is relevant, Appellants have not shown that the relevant "conduct" here occurred in California. Appellants repeatedly make the unsupported claims that "the issuance of wage statements" occurred in California, Op. Br. at 27, and that pilots and flight attendants "are paid their wages in California," "receive their wage statements in California," and "suffered their injuries in California," *id.* at 30, 38, & 23. Each of these contentions is either directly contradicted by evidence in the record, or without support.

First, Appellants cannot credibly claim that United "issues" wage statements in California. United is headquartered in Chicago, Illinois, and maintains payroll offices in Houston, Texas. United therefore "issues" wage statements from its payroll offices in Houston. To the extent any administrative or management decisions regarding the contents of wage statements are relevant to the extraterritoriality analysis, those decisions thus occur exclusively in Illinois and/or Texas. This fact also distinguishes this case from *Bernstein*, discussed at 39-41, *infra*, where the court relied in part on Virgin's Burlingame, California, headquarters and large volume of business in California to hold that Virgin's "deep ties" to the state justified the application of California law. *Bernstein*, 227 F. Supp. 3d at 1066. As noted by the *Vidrio* court, unlike Virgin, United has no management or

administrative offices in California and conducts less than sixteen percent of its total business in California. *Vidrio*, 2017 WL 1034200, at *5.

Second, there is absolutely no evidence in the record that Appellants or any other class members were paid in California, received their wage statements in California, or suffered any alleged injury in California. Appellants assume that the pilots' and flight attendants' California residency establishes these facts, but that assumption is wrong. Indeed, due to the multi-state nature of flight crew work, it is not uncommon for pilots and flight attendants who live in California to have bank accounts in multiple states. Additionally, pilots and flight attendants can and do access their wage statements via United's intranet system, which they can do from anywhere. Given the vast national and international nature of flight crew work, then, pilots and flight attendants may "receive" their wage statements and suffer any alleged injury in reviewing them anywhere in the world. Appellants' proposed "conduct" test is therefore legally unsupported and factually wrong in any event.

C. State Interests Also Do Not Factor into the Extraterritoriality Analysis.

Appellants also claim that the Legislature's purpose in passing Section 226 supports applying the statute here. Appellants again rely on the Ninth Circuit panel's certification request for the principle that "the proper reach of Labor Code provisions can differ because the provisions regulate different conduct and implicate different state interests." Op. Br. at 24. This is also wrong. As evidence for this statement, the panel cited to this Court's statement in *Sullivan I* that "California's interest in the content of an out-of-state business's pay stubs" may be weaker than its interest in the payment of overtime. *Id.* But the Ninth Circuit's analysis confuses the state extraterritoriality and federal constitutional inquiries. The quoted portion from *Sullivan I* addressed the defendant's argument that applying

California overtime law to the employees there would unduly burden interstate commerce in violation of the United States Constitution's dormant Commerce Clause.[4] This is a constitutional inquiry distinct from the state law question of whether California law is being applied extraterritorially. *See Sullivan I*, 51 Cal. 4th at 1200-01. State interests, however, do ***not*** factor into the threshold question of whether a California wage and hour law may apply outside the state's borders. *Sullivan I* thus does not support the addition of a "state interest" requirement to the extraterritoriality calculus.[5]

In any event, in discussing the supposed state interests at issue here, Appellants misstate the purpose behind Section 226. Appellants claim that the district court in *Ward* erred in concluding that "Section 226 is in place to enable employees to verify that they have received the protections of California's wage-and-hour laws that all agree are subject to the job situs test," and therefore that "Section 226 must be subject to the same jurisdictional limits as the wage-and-hour statutes and regulations to which

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[4] As discussed below, the test for whether application of a state statute would violate the dormant Commerce Clause is whether the law's burden on interstate commerce clearly exceeds its local benefits. *Pike*, 397 U.S. at 142. To conduct this balancing test, courts identify the state's interests in the legislation, "and then determine whether the state law imposes an excessive burden on interstate commerce in relation to those legitimate interests." *Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1194 (9th Cir. 1990).

[5] Although Appellants do not discuss this principle in detail, United notes that the Ninth Circuit panel also incorrectly concluded that "courts must balance California's interest in applying its law with considerations of 'interstate comity,' in order to avoid unnecessary conflicts of state law." Op. Br. at 24 (citing *Sullivan I*, 51 Cal. 4th at 1201.) To the extent the panel and Appellants claim that state interests factor into the extraterritoriality analysis, as explained immediately above, that claim is incorrectly premised on Commerce Clause principles, not state law extraterritoriality principles.

it relates." Op. Br. at 28 (citing *Ward*, 2016 WL 3906077, at *4.) Instead, Appellants argue, the purpose of Section 226 is "to allow employees to determine whether they have been paid what they are owed, whether required under California law or not." *Id.* at 29. This self-serving interpretation is unsupported by law. Section 226 is not just concerned with the categories of information listed in Section 226(a), but also with the ***accuracy*** of the information provided under each category—accuracy that is determined according to California wage and hour law. *See Raines v. Coastal Pac. Food Distribs., Inc.*, 23 Cal. App. 5th 667, 676 (2018) (stating a plaintiff is "injured" under Section 226 "if the accuracy of any of the items enumerated in § 226(a)" cannot be ascertained) (citation and internal quotation omitted).[6] A review of Section 226's legislative history also shows that the *Ward* court, not Appellants, is correct in this regard. The Legislature has noted that Section 226 is designed to "strengthen enforcement of existing wage and hour standards," and the history of its amendments reinforces this purpose. Section 226(a)(9), for example, was added to the statute in 2000 in response to the California Legislature's passage of Labor Code Section 510, regarding overtime, in 2000.[7] After

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[6] Because Section 226 is concerned with the accuracy of employees' compensation, not just the categories of information listed in Section 226(a), plaintiffs routinely add claims under Section 226 in cases alleging violations of substantive California wage and hour provisions such as overtime and meal and rest requirements. Plaintiffs in such cases reason that if their pay was inaccurate because it did not satisfy California wage and hour requirements, their wage statements reflecting this inaccurate pay also violated Section 226.

[7] As discussed at 49, *infra*, overtime in California had historically been governed exclusively by Industrial Welfare Commission Wage Orders, which provided for daily overtime (subject to a number of exemptions). In 1997, the IWC amended the Wage Orders to eliminate the daily overtime rule. *Collins*, 105 Cal. App. 4th at 175. The Legislature responded by enacting Section 510, which declared the amended Wage Orders null and

Section 226(a)(9) went into effect, employers were required "to list both the total regular hours worked and the total overtime hours worked, along with the corresponding hourly rates." *Morgan*, 186 Cal. App. 4th at 1148. Section 226(a)(9) was thus designed to ensure that employees are aware of the number of ***overtime*** hours they have worked and that the overtime rate is accurate under California law. If, as all agree, California's substantive wage laws are subject to the job situs test, it makes no sense to exempt California's wage statement requirements—which "strengthen and reinforce" the substantive requirements—from the same test. Moreover, to the extent Appellants argue that Section 226(a)(9) entitles them to know whether they were paid properly under the CBA, that argument is unavailing because whether they were paid properly under the CBA is a matter of contract and federal labor law, not a state employment law issue. Because state interests do not factor into the extraterritoriality analysis, and Appellants misstate those state interests in any event, this Court should not determine whether Section 226 may apply to employees who work principally outside California based on state interests.

D. *Bernstein* Misinterpreted California Law and Should Not Guide This Court's Analysis.

Apparently as an alternative to their proposed "conduct" and state interests tests, Appellants also urge this Court to follow the multi-factor approach invented by the district court in *Bernstein*, 227 F. Supp. 3d 1049. Appellants argue that *Bernstein* should guide this Court's analysis because it contains the "fullest and the most accurate" explanation of when a provision of the California Labor Code operates extraterritorially. Op. Br. at 33-34. To the contrary, *Bernstein* is unsupported in law or logic, misinterprets the cases it relies on, and should be rejected by this Court.

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void and reinstated the earlier wage orders—including their exemptions. *Id.*

Bernstein involved a class of Virgin flight attendants who spent about twenty-five percent of their time working in California. The plaintiffs alleged a variety of California Labor Code violations against Virgin, including claims for unpaid wages. 227 F. Supp. 3d at 1055. In denying Virgin's motion for summary judgment, the *Bernstein* court rejected the well-established job situs test in favor of a "multi-faceted" approach to determining whether California law applied. That test considered the following five factors, with no single factor being dispositive: (1) California residency of the employee; (2) receipt of pay in California; (3) exclusive or principal "job situs" in California; (4) California residency of the employer; and (5) whether the employee's absence from California was temporary. *Id.* at 1060. *Bernstein* not only rejected decades of precedent applying the job situs test, but also profoundly misread California law.

Bernstein first erroneously concluded that *Tidewater*'s "California wage earner" presumption "compet[ed]" with the job situs test and could override it. *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2016 WL 6576621, at *7 (N.D. Cal. Nov. 7, 2016). But the passage from *Tidewater* on which *Bernstein* relied demonstrates why *Bernstein* is wrong: "If an employee resides in California, receives pay in California, ***and works exclusively, or principally, in California,*** then that employee is a 'wage earner of California' and presumptively enjoys the protection of [Industrial Welfare Commission] regulations." *Id.* (quoting *Tidewater*, 14 Cal. 4th at 578) (emphasis added). Whatever else can be said about *Tidewater*, that decision made clear that exclusive or principal job situs in California was a necessary component of the "wage earner" presumption.

The *Bernstein* court also incorrectly claimed that its multi-factor approach had been "endorsed" by the California Supreme Court in a post-*Tidewater* case, *Sullivan I*, 51 Cal. 4th 1191. The question in *Sullivan I* was

whether California's overtime laws apply to non-residents, and the Court was careful to limit its decision to the overtime laws specifically. *Id.* at 1201 ("[T]he case before us presents no issue concerning the applicability of any provision of California wage law other than the provisions governing overtime compensation."). But even if that decision applied more broadly, it would ***support*** rather than undermine the job situs test adopted below. *Sullivan I* held that California overtime laws apply to non-resident employees *so long as* they spend full days or weeks performing work exclusively in California. *Id.* at 1198-1200. *Sullivan I* thus makes clear that what is important to determining whether the California overtime laws apply is ***where the employee works***, regardless of where the employee resides. That conclusion is fully consistent with the decisions below, and precludes Appellants' contention that California law applies to employees who spend less than eighteen percent of their time working within California's borders.

Bernstein is an outlier decision entirely inconsistent with California law. This Court should decline to follow the *Bernstein* court's misguided analysis.

E. Carving Out Section 226 from the Job Situs Test Would Lead to Employee Confusion and Absurd Results.

As noted above, Appellants acknowledge that the weight of authority supports applying the job situs test to cases involving what they term "wage and hour" statutes. But according to Appellants, the job situs test should only be relevant where claims for actual unpaid wages are involved, and Section 226 is a "wage statement" law, not a "wage and hour" law. As explained above, this position has no support in law, as state and federal courts in California and nationwide apply the job situs test to determine the scope of the entirety of a state's wage and hour law. Unsurprisingly, then, Appellants' proposed distinction makes no sense.

After all, as the *Ward* court recognized and as the California Legislature has stated, Section 226 is just one part of the broader California Labor Code and works in tandem with other Labor Code provisions to provide employees with necessary protections. While Section 226 regulates the form of wage statements, other Code provisions govern the accuracy of the information contained on the wage statement. *See, e.g.*, Cal. Lab. Code § 510 (governing calculation of overtime). But in Appellants' implausible view, Section 226 wage statement regulations would apply to California residents who work principally outside California, but not the underlying provisions that dictate the accuracy of the information contained on the wage statement. That senseless result would only cause employee confusion in direct contravention of the purpose of Section 226. *See Morgan*, 186 Cal. App. 4th at 1149 ("The purpose of the wage statement requirement is to provide transparency as to the calculation of wages.") (citation omitted).

An example illuminates the absurdity of Appellants' position. California law, unlike the majority of states, has a daily overtime requirement—that is, employers must pay overtime not only for hours worked in excess of forty in one week, but also in excess of eight in one day. Cal. Lab. Code § 510. Oregon does not have a daily overtime requirement. *See* Or. Rev. Stat. § 653.261; *see also* OR Bureau of Labor and Industry, *FAQ: Overtime*, http://www.oregon.gov/boli/TA/pages/t_faq_taovrtim.aspx (last visited Nov. 7, 2018). Under Appellant's theory, Section 226—but not California's daily overtime requirement—would apply to a group of employees who reside in California and work for a California employer, but perform the majority of their work in Oregon. It would certainly cause confusion for those employees to have California law dictate the contents of their wage statement, which includes a requirement that all overtime

hours worked and the applicable rates be listed, but not California's substantive provision regarding overtime.

It would likewise make no sense for a person who works primarily in California but resides in a state that has no wage statement law (a not uncommon scenario in the airline industry) to be denied the protections of Section 226. Thus, the crux of the extraterritoriality issue is not whether it is possible for United to comply with Section 226, *see* Op. Br. at 28, but rather whether it makes sense and would advance the purpose of Section 226 to do so. As the courts below and other courts have recognized, it makes no sense to exempt Section 226 from the job situs test while applying that same test to the rest of the Labor Code. *See Vidrio*, 2017 WL 1034200, at *5 n.4 ("Nor is the Court persuaded by Plaintiffs' argument that job situs is only relevant when claims for actual unpaid wages are concerned, as opposed to claims for improper wage statements.").

F. Applying Section 226 to Employees Who Work Principally Outside California Would Unduly Burden Interstate Commerce.[8]

In addition, applying Section 226 to employees like Appellants who work principally outside California and in a number of states would impose an undue burden on interstate commerce in violation of the dormant Commerce Clause. The district court in *Ward* properly applied this standard in concluding that requiring United to comply with Section 226—and by extension, the wage statement laws across the country—would slow interstate commerce to a degree incommensurate with the statute's local benefits.

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[8] United notes that the dormant Commerce Clause argument presents questions of federal law outside the scope of the questions certified for review. Appellants' opening brief, however, discussed this argument, so United responds to it here.

Appellants' principal argument for why Section 226 does not impose a "clearly excessive burden" on interstate commerce is that United could theoretically comply with Section 226 and every other state's wage statement law. Op. Br. at 41. But that is not the relevant question. Consider *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). There, the state regulation at issue was an Illinois law that required trucks within the state to have curved mudflaps to prevent splatter and enhance road safety. *Id.* at 522. Of course, it was ***possible*** for trucks to stop at the Illinois border and change mudflaps to comply with the law, but the Supreme Court still determined that the law constituted an undue burden on interstate commerce because it would require trucks to either avoid driving in Illinois, or stop at the state border to change mudflaps. *Id.* at 527. The Court concluded this outcome would "caus[e] a significant delay in an operation where prompt movement may be of the essence" and declared the law unconstitutional as applied. *Id.* Hypothetical ability to comply with a state law, therefore, is not the standard for undue burden.

Appellants' argument is also based on the flawed premise that the job situs test does not determine the scope of Section 226. Appellants' contention is wrong for the reasons explained above. But even if this Court were to agree with Appellants, it is undisputed that job situs is at least a relevant factor in determining which state's law applies. And once it is established that job situs is a relevant factor, the "clearly excessive burden" that compliance with Section 226 would impose on interstate commerce becomes clear. For one, because flight crews are constantly moving across state lines, United (and other similarly situated carriers) would have to monitor how much time its flight crew members spend in California and each of the thirty-seven states (and the District of Columbia) that have wage statement laws, and then would have to guess how much time in any one state is enough to justify the application of that state's wage statement

law. This exact type of monitoring and tracking has been recognized as creating an undue burden on interstate commerce in the airline industry. *See Hirst I*, 2016 WL 2986978, at *10 n.14; *Hirst II*, 283 F. Supp. 3d at 699; *see also United Air Lines, Inc. v. Indus. Welfare Comm'n*, 211 Cal. App. 2d 729 (1963), *disapproved of on other grounds by Indus. Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690 (1980) (holding that requiring airline to comply with California regulation regarding reimbursement of uniform expenses created an undue burden on interstate commerce). Moreover, United would also have to ensure that it actually complied with the requirements of each of the states' wage statement laws. This is hardly a straightforward proposition. Indeed, the fact that Appellants offer six pages of applicable state regulations belies their contention that there is no burden in requiring United to comply with the wage statement laws of the fifty states. Appellants also ignore that United would have to comply not only with the letter of each state's laws, but also with its case law and agency interpretations regarding, for example, what constitutes a "deduction." Because of the differences in how each state defines such terms, there is simply no guarantee that United could issue wage statements that actually comply with the requirements of all the states that regulate in this area.

Appellants' argument that "compliance with California's wage statement law will ensure that United is in compliance with the laws of the 37 other states that have laws regulating the contents of wage statements" also is non-responsive to the point that applying Section 226 would impose an undue burden on commerce. *See* Op. Br. at 41. It is clear from the face of Appellants' chart that a California-compliant wage statement would be out of compliance in at least Alaska, where wage statements are required to list board and lodging costs; Texas, where wage statements must bear the employer's signature; and New York, where wage statements must list the

employer's phone number. Still more complications would arise with the frequency and timing of wage statements, which Appellants' chart omits. *Compare* Cal. Lab. Code § 226 (requiring wage statements to be issued semimonthly) *with* Or. Rev. Stat. §§ 652.120, 652.610 (requiring issuance once every 35 days); Mass. Gen. Laws ch. 149, §§ 148, 150A (requiring issuance biweekly). Appellants therefore cannot argue that United need only comply with Section 226 to ensure compliance with the rest of the states' wage statement laws.

Essentially, Appellants' position would have United do one of two things: (1) determine where all of its pilots are flying and issue state-specific wage statements based on its guess as to how much time in one state is sufficient to give rise to that state's wage statement law, or (2) devise a wage statement that complies with all thirty-seven states' and the District of Columbia's wage statement laws. Either of these options presents an undue burden on interstate commerce that exceeds California's interest in ensuring that its citizens are "adequately informed of compensation received." Assem. Com. on Labor and Employment, Analysis of Sen. Bill No. 1255 (2011-2012 Reg. Sess.).

Indeed, there is virtually ***no*** countervailing state interest where, as here, the work performed by the employees at issue occurs almost entirely outside of California. Option 1 presents an undue burden because it would require United to monitor its flight crew members' time to ensure they spent a safe majority of time in only one state. It would also require United to guess how much time within a state was sufficient to give rise to that state's law. Option 2 presents an undue burden because there is no guarantee that United can comply with the substance of each of the states' wage statement laws. As explained above, compliance with Section 226 does not ensure compliance with the rest of the states' wage statement laws. Even if it did, requiring United to issue a Section 226-compliant wage

statement to each of its U.S.-based flight crew members would mean that California law controlled United's wage statements across the nation, an outcome that would directly violate the dormant Commerce Clause's limitation on the scope of a state's power. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid."); *Mitchell v. Abercrombie & Fitch*, No. C2-04-306, 2005 WL 1159412, at *4 (S.D. Ohio May 17, 2005). Either way, then, requiring United to comply with Section 226 and the patchwork of state regulations in this area presents a burden on interstate commerce that "clearly exce[eds]" its local benefits.

II. THE COURT SHOULD ANSWER "YES" TO THE SECOND CERTIFIED QUESTION.

United contends that this Court need not address the second certified question because, under the job situs principles discussed above, Section 226 does not apply to Appellants because they do not work principally in this state. If, however, this Court were to determine that Section 226 applies to Appellants, it should answer "yes" to the second certified question and hold that Wage Order 9's RLA Exemption bars Appellants' Section 226 claims. Appellants do not dispute that Wage Order 9 Section 7(B) contains wage statement provisions that partially overlap with those in Section 226. Op. Br. at 44. Nor do Appellants dispute that the RLA Exemption would exempt United's pilots and flight attendants from Wage Order 9 Section 7(B)'s provisions. *Id.* Accordingly, if this Court were to determine that California law applies to these employee groups in the first instance, then the RLA Exemption should be dispositive as to Appellants' Section 226 claims because it would be inconsistent to exempt United from Wage Order 9 Section 7(B)'s provisions but not the more onerous provisions of Section 226. This result follows from case law and

interpretive guidance that require the Labor Code to be "harmonize[d]" with Wage Order 9, *Brinker*, 53 Cal. 4th at 1027, and has significant support in public policy.

A. California Law Requires Wage Orders and the Labor Code to Be Read Together.

Employment relationships in California are governed by overlapping sources of authority: first, the Labor Code enacted by the California Legislature and, second, a series of wage orders adopted by the IWC. *Brinker*, 53 Cal. 4th at 1026-27; *see Collins*, 105 Cal. App. 4th at 174 ("[i]n the exercise of [its] quasi-legislative endeavor, the IWC has promulgated 15 wage orders" regulating the wages, hours, and working conditions of employees in California). Although wage orders are not legislative enactments, California law deems them "presumptively valid" sources of regulation that are "to be accorded the same dignity as statutes." *Brinker*, 53 Cal. 4th at 1027 (citation omitted). Accordingly, where a wage order and the Labor Code overlap, California law requires a court to "harmonize" the two, "as [it] would with any two statutes." *Id.* (citation omitted); *see also State Dep't of Pub. Health v. Superior Court*, 60 Cal. 4th 940, 955 (2015).

In some cases, the Labor Code and the wage orders have common requirements and exemptions. *Compare* Cal. Lab. Code § 510 *with* Wage Order 9-2001 § 3(A)(1); Cal. Lab. Code § 514 *with* Wage Order 9-2001 § 3(H). Other exemptions, such as the RLA Exemption, are only found in the wage orders and may control over Labor Code requirements. *See Collins*, 105 Cal. App. 4th at 181 (concluding that motor carrier exemption, found in numerous wage orders but not the Labor Code, exempted motor carriers from the overtime requirements of both Wage Order 9 and the Labor Code). As an initial matter, it cannot be disputed that the RLA Exemption applies to Appellants and the classes they represent. The unions

representing Appellants have entered into CBAs with United under and in accordance with the provisions of the RLA. As explained below, the RLA Exemption should exempt covered employees not only from the wage statement and recordkeeping requirements in Wage Order 9, but also from the requirements of Section 226.

B. State and Federal Courts Have Applied Wage Order Exemptions to the California Labor Code.

California courts have applied exemptions in the IWC's wage orders to claims under the Labor Code on multiple occasions, recognizing the need to create a single regulatory scheme in the face of two overlapping sources of employment regulation. *See Collins*, 105 Cal. App. 4th at 180-81; *Brinker*, 53 Cal. 4th at 1027.

Collins, which dealt with the "motor carrier exemption" of Wage Order 9, is the lead case explaining that certain exemptions in the wage orders control over the Labor Code's requirements. In *Collins*, plaintiff truck drivers brought a class action against their employer seeking compensation for allegedly unpaid overtime premised on violations of Labor Code Section 510. *Id.* at 173. The *Collins* court held that Wage Order 9's motor carrier exemption was a valid exemption to the Labor Code's overtime requirements ***even though the Labor Code itself did not provide a similar exemption***. *Id.* at 180-81. The trial court granted the employer's demurrer pursuant to Wage Order 9's motor carrier exemption. *Id.* On appeal, plaintiffs argued that Labor Code § 510 impliedly repealed Wage Order 9.[9] *Id.* at 177. However, in affirming the trial court, the court

[9] Overtime in California had historically been governed exclusively by the wage orders, which provided for daily overtime (subject to a number of exemptions, including the RLA Exemption). In 1997, the IWC amended the wage orders to eliminate the daily overtime rule. *Collins*, 105 Cal. App. 4th at 176. The Legislature responded by enacting Section 510, which

of appeal reasoned that the plaintiffs' interpretation would be "an absurd result." *Id.* at 180. The court of appeal explained that there was no evidence that the Labor Code's statutory requirements were intended to eliminate the wage orders' historical exemptions. The court found that "[s]uch an interpretation would create separate and conflicting spheres of regulation by the IWC and the Legislature." *Id.* If the wage orders and Labor Code are to be read together as *Collins* instructs, then the RLA Exemption must apply to Appellants' Section 226 claims—otherwise, United would be subject to the "conflicting" regulations that *Collins* sought to avoid.

More recently, a United States district court applied the reasoning of *Collins* to hold that the RLA Exemption exempted an airline from complying with Section 510's overtime requirements. *Angeles*, 2017 WL 565006, at *3. Citing *Collins* and Section 515(b), the *Angeles* court noted that "[e]xemptions found in a valid 1997 wage order apply to regulations in the California Labor Code" and thus held that US Airways was exempt from ***both*** Wage Order 9 and Section 510's overtime requirements. *Id.* The *Angeles* court did not restrict its holding to the overtime context, and indeed, other courts have applied wage order exemptions to non-overtime claims. *See Dailey*, 2015 WL 4498340, at *5 (granting summary judgment on Section 226 claim due to Wage Order 4's outside sales exemption).

Appellants argue *Collins* and *Angeles* are inapplicable because those cases were unique to the overtime context, where the Legislature has specifically granted "deference" to Wage Order 9's exemptions. *See* Opp. Br. at 47; Cal. Lab. Code § 515(b). No court, however, has interpreted the *Collins* principle as applying only to overtime or where the legislature

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declared the amended wage orders null and void and reinstated the earlier wage orders—including their exemptions. *Id.* (citations omitted).

explicitly incorporated a wage order exemption by reference. Appellants rely on *Cicairos v. Summit Logistics, Inc.*, 133 Cal. App. 4th 949 (2005), but that case is unavailing. *Cicairos* dealt with the scope of the motor carrier exemption, which only pertains to hours and days of work. Cal. Code Regs. tit. 8, § 11090, subd. 3(L); *Godfrey v. Oakland Port Servs. Corp.*, 230 Cal. App. 4th 1267, 1287-88 (2014). Given this narrow scope, the *Cicairos* court held the exemption did not apply to wage statement and meal/rest period claims. 133 Cal. App. 4th at 956-57. The IWC did not so confine the scope of the RLA Exemption, however. The RLA Exemption exempts employees covered by a valid CBA from ***all*** the provisions of Wage Order 9—including the wage statement provisions of Section 7(B)—except for a handful of enumerated provisions not at issue here. Accordingly, *Cicairos* is irrelevant to the question at hand.

California courts have refused to limit wage order exemptions to the wage orders themselves, as doing so "would create separate and conflicting spheres of regulation"— the exact opposite of the "harmony" between the two that courts are supposed to achieve. *Collins*, 105 Cal. App. 4th at 180 n.4; *Brinker*, 53 Cal. 4th at 1027. If this Court determines that California law applies, it should therefore hold that the RLA Exemption bars Appellants' claims.

C. Applying the RLA Exemption Here Makes Sense as a Matter of Public Policy and as a Practical Matter.

Additionally, substantial practical and policy reasons justify applying the RLA Exemption to both Wage Order 9 Section 7(B) and Section 226. For one, the two laws parallel each other and in no way conflict, reinforcing the notion that they should be interpreted as a single scheme. *See State Dep't of Pub. Health*, 60 Cal. 4th at 955 (even when "one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject," the two laws "must

be regarded as blending into each other and forming a single statute"). By contrast, if this Court were to find that Section 226 applies to Appellants, this Court would essentially be reading away the RLA Exemption vis-à-vis wage statements, because airlines with employees covered by valid CBAs would have to comply with Section 226, which contains all of the Wage Order 9 Section 7(B) requirements. Given that California has determined through the RLA Exemption that airlines do not have to comply with the baseline, less-specific requirements of Wage Order 9 Section 7(B), it would make no sense to require airlines to comply with the ***more*** specific and onerous requirements of Section 226.

Applying Section 226 here would also negate the IWC's sound reasoning in enacting the RLA Exemption and would frustrate the purpose of the RLA itself. The IWC adopted the RLA Exemption because it determined "it would be difficult to enforce standards for employees crossing state lines" and because "the exempted employees were better protected by their collective bargaining agreements pursuant to the Railway Labor Act." RJN Ex. B at 6. The IWC's reasoning advanced the stated goals of the RLA, which are to promote the independence of the airline industry and to forbid limitations placed on the collective bargaining process. *See* 45 U.S.C. § 151a.

Moreover, it would make no sense for airlines with employees covered by valid CBAs to be exempt from substantive provisions of California law like daily overtime—as all agree California law dictates—but to nevertheless require those airlines to comply with Section 226's clerical requirements, which reinforce an employer's substantive wage and hour obligations. *See Morgan*, 186 Cal. App. 4th at 1148 (Section 226(a)(9) requires employers to "list both the total regular hours worked and the total overtime hours worked, along with the corresponding hourly rates"); RJN Ex. A at 7 (Section 226 "strengthen[s] enforcement of existing

wage and hour standards"). If, as here, the employer has no substantive obligation to compensate employees in a certain way—e.g., on an overtime basis—then requiring the employer to comply with Section 226 does nothing to advance the statute's purpose. This is especially true of Appellants' claim under Section 226(a)(9), which was added to the statute in 2000 to ensure that employees were aware of the number of overtime hours they had worked and that the overtime rate was accurate. *Morgan*, 186 Cal. App. 4th at 1148. This requirement is meaningless when applied to employers who, like United, are unquestionably exempt from paying employees overtime. And to the extent Appellants may argue Section 226(a)(9) entitles them to know whether they were paid properly under the CBA, that argument is unavailing because whether they were paid properly under the CBA is a matter of contract and federal labor law, not a state employment law issue.

In sum, applying the RLA Exemption here makes practical sense, advances the purposes of the RLA, and ensures that airlines are not burdened by compliance where the underlying purpose of the statute is absent. The RLA Exemption should therefore apply to bar Appellants' Section 226 claims.

CONCLUSION

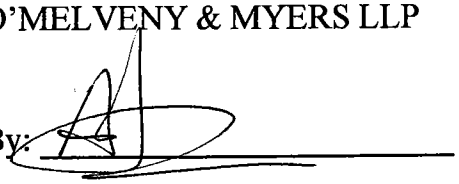
For the foregoing, reasons, United respectfully requests that this Court conclude:

(1) California Labor Code Section 226, like the rest of California wage and hour law, does not apply to employees who do not work principally in California; and

(2) The RLA Exemption in Wage Order 9 bars a claim brought under Section 226 by employees who are covered by a valid CBA entered into pursuant to the RLA.

Dated: November 9, 2018

O'MELVENY & MYERS LLP

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.520(c), Untied certifies that this brief contains approximately 13,924 words, counted using the Microsoft Word 2016 program used to prepare this brief.

Dated: November 9, 2018

O'MELVENY & MYERS LLP

By: 

Adam P. KohSweeney
Attorneys for Defendant/Respondent
United Airlines, Inc.

PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. On November 9, 2018, I served the following:

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☒ **BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS:** Based on a court order, I caused the above-entitled document(s) to be served through File & ServeXpress at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the File & ServeXpress Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

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☒ **BY US MAIL**: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below, I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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United States Court of Appeals for the Ninth Circuit
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Hon. Philip S. Gutierrez
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Trial Court (via U.S. Mail)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 9, 2018, at San Francisco, California.

Marlin El Fondevilla