No. S156555

IN THE
SUPREME COURT OF CALIFORNIA

FRANCES HARRIS et al.,
Petitioners,
vs.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
LIBERTY MUTUAL INSURANCE COMPANY et al.,
Real Parties in Interest.

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Petitioners,
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
FRANCES HARRIS et al.,
Real Parties in Interest.

Second District Nos. B195121 and B195370 (Consolidated)
Los Angeles Superior Court Nos. BC 246139 and BC 246140
JCCP No. 4234 (*Liberty Mutual Overtime Cases*)
The Honorable Carolyn B. Kuhl

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Service on Attorney General and District Attorney
Required by Bus. & Prof. Code, § 17209

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I. INTRODUCTION

In so many words, defendants Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation seek a broad judicial interpretation of California's administrative exemption. This strained outcome would be contrary to the important role California's overtime laws have long played in protecting employees and leveling the playing field in the workplace. The broad exemption that defendants request would also flout all pertinent rules of construction governing an employee's right to overtime pay. Indeed, to get to their preferred destination, defendants must ask this Court to upend existing California jurisprudence. But, defendants fail to show that the Courts of Appeal, in consistent decisions, have somehow been consistently applying the wrong legal standard. Of broader concern, the change of course that defendants propose would take California's overtime laws in a new direction hostile to workers. For these and other reasons elaborated below, the judgment of the Second District Court of Appeal should be affirmed.

At the outset, it is important to be precise on what is before this Court. Plaintiffs Frances Harris, Marion Brenish-Smith, Steven Brickman, Kelly Gray, Dwayne Garner, Adell Butler-Mitchell and Lisa McCauley represent a class of current or former claims handlers employed by the defendant insurance companies. In 2001, these workers sued Liberty Mutual and Golden Eagle under the Labor Code and the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.) to recover unpaid overtime. Despite what the opening brief might imply, plaintiffs do not seek relief under the federal overtime rules. The causes of action turn on the proper interpretation of Industrial Welfare Commission (IWC) Wage Order 4 (governing overtime claims arising before October 1, 2000) and Wage Order 4-2001 (applicable to subsequent overtime claims).

Under both wage orders, the administrative exemption has multiple prerequisites. If the employer fails to prove any single one, then the

exemption does not apply and the employee must be compensated for overtime. Among the distinct requirements, the employee must perform work of substantial importance and also exercise discretion and independent judgment in the daily tasks. To streamline the liability inquiry, however, the parties to date have confined the litigation to a different element of the exemption. Specifically, the issue for this Court is whether plaintiffs work in an "administrative capacity." (4 Exhibits in Support of Petition for Writ of Mandate in B195121 (Exs.) 982 [Wage Order 4]; 4 Exs. 997 [Wage Order 4-2001, codified at Cal. Code Regs., tit. 8, § 11040.) If not, then plaintiffs cannot be classified as exempt and the other exemption requirements need not be addressed.

Although purporting to address the question accepted for review, the opening brief ignores formidable California Supreme Court precedent bearing on how the question should be answered. In one of many key labor law decisions not acknowledged, this Court distilled the "basic principles" controlling "the scope of an exemption from the state's overtime laws." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 (*Ramirez*).) The legal ground rules include: (1) unless clearly covered by an exemption, "employees in the State of California who work more than 40 hours per week and 8 hours per day" enjoy "the right to receive premium pay for the hours worked over this limit"; (2) "the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption"; (3) because the overtime rules were enacted "'for the protection and benefit of employees,'" these laws "'are to be liberally construed with an eye to promoting such protection'"; (4) to advance this overriding objective, "exemptions from statutory mandatory overtime provisions are narrowly construed"; and (5) "although at times patterned after federal regulations," IWC wage orders

"sometimes provide greater protection than is provided under federal law." (*Id.* at pp. 789, 794-795.)

Consistent with these bedrock tenets, the Court of Appeal majority correctly stated the applicable test for determining whether an employee works in an "administrative capacity." The opinion held that "only work performed at the level of ***policy*** or ***general*** operations can qualify as 'directly related to management policies or general business operations.'" (*Harris v. Superior Court* (2007) 154 Cal.App.4th 164, 177 (*Harris*), quoting 29 C.F.R. part 541.205(a).) "In contrast, work that merely carries out the particular, day-to-day operations of the business is production, not administrative, work. That is the administrative/production worker dichotomy, properly understood." (*Ibid.*) On the administrative capacity prong of Wage Orders 4 and 4-2001, the panel decided the issue in favor of plaintiffs because the record showed they are essentially line workers in the enterprise. The class members do not make the policies governing its operation or even the policies governing claims handling. Nor do class members play any role in hiring and firing, determining pay levels, discipline or accounting, among typical administrative functions. In no sense are they administrators. Rather, the class members carry out the daily tasks necessary to process claims for the insurance companies, who closely monitor and control their work.

The opening brief ultimately fails to explain what is erroneous about this analysis. Instead, although carefully avoiding the terminology, defendants emphasize the discretion and authority supposedly vested in their claims handlers, and the purported substantial importance of what they do. In addition to misstating the record, these assertions are non-responsive because they go to other elements of the exemption simply not at issue now.

As for the proper legal standard governing "administrative capacity," defendants fail to offer any coherent framework or test for this Court to adopt. Nor do defendants grapple with the problematic consequences of the vast

interpretation they appear to suggest. As the majority below observed: "In one sense, ***every*** type of work directly relates to management policy, because every employee does work that carries out, or is governed by, management policy." (*Harris*, *supra*, 154 Cal.App.4th at p. 176.) But, if every employee who has some nexus to management policy works in an administrative capacity – as defendants seem to assume – then the exemption would become the norm. This notion of the exemption has no discernable practical limits. The presumptive legal right to overtime pay would be eviscerated.

Indeed, most striking about defendants' grudging view of California's overtime rules is that every source of California authority rejects a sweeping application of the exemption that would encompass the current class of claims handlers. The Second District followed the First District's precedents, finding claims adjusters non-exempt under indistinguishable facts, in *Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805 (*Bell II*) and *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715 (*Bell III*). The First District's analysis of the administrative capacity prong was recently followed in a Third District decision cited by the Second District majority. (See *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1372-1373 (*Eicher*).) To the same end, the Division of Labor Standards Enforcement (DLSE) – the administrative agency charged with enforcing IWC wage orders – has repeatedly concluded that California law follows the standards applied by the First, Second and Third Districts. (4 Exs. 1037 [1998 opinion letter]; 12 Exs. 3333, 3352-3353 [2002 update to DLSE Manual]; 12 Exs. 3367, 3374 [2003 opinion letter].)

Consequently, although the insurance companies chide the Court of Appeal for issuing a supposedly "unprecedented" opinion, it is defendants who seek a new precedent for California. The road map for the proposed U-turn is recent federal cases, many of them unreported. Defendants' purported clash between state and federal law breaks down under careful analysis.

By express instruction, the IWC incorporated certain federal regulations into Wage Order 4-2001 "as of the date of this order," which was January 2001. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f).) The IWC thereby sought to adopt certain aspects of federal law, but, critically, only as federal law stood at that time. The opening brief tries to paper over significant changes at the federal level after January 2001 under a new presidential administration. Defendants' federal decisions almost entirely post-date, and are animated by, the new federal administrative exemption and United States Department of Labor (DOL) opinion letters issued after Wage Order 4-2001. Especially where the IWC unequivocally intended to follow certain federal regulations as of a certain date only, California law should not march in lockstep with recent federal doctrine charting a new course less favorable to workers.

More fundamentally, the very existence of state overtime rules assumes a certain independence from federal law. California is free, of course, to extend workers stronger wage protections. As a legal vanguard on many things, this state often has. Unremarkably, this is an instance, neither the first nor the last, in which California law accords different rights.

II. RELEVANT FACTUAL BACKGROUND

The issue on review is principally legal, but whether an employer has proved an exemption presents "a mixed question of law and fact." (*Ramirez*, *supra*, 20 Cal.4th at p. 794.) On the factual component of this inquiry, the opening brief inflates plaintiffs' role in the business enterprise.[1]

---

[1] Although the certified class consists of both current and former claims handlers, the present verb tense is used consistently for clarity's sake when discussing the facts.

A. The Claims Handlers' Role

By defendants' own description, the consistent role that class members play is "to examine and adjudicate claims made against the company." (4 Exs. 1163.) Numerous high-level officers, executives and managers from both Liberty Mutual and Golden Eagle acknowledged as much. (4 Exs. 1163, 1177-1180, 1199-1200; 5 Exs. 1201-1202.) Internal business records also reflect the scope of claims adjusters' responsibilities. For example, as Golden Eagle's workers' compensation department put it, a claims adjuster "manages, investigates and resolves non complex claims assigned and assists in providing service to policyholders/customers." (7 Exs. 1994.)

Just as clearly, the record reveals that class members have no say in how the insurers' business should be run. Class members do not perform genuinely administrative tasks such as accounting or human resource functions, employment or budgetary decisions, or assessing the performance of other company employees. (2 Exs. 303-304, 330-331.) Moreover, claims handlers at Liberty Mutual and Golden Eagle do not determine the policies or guidelines governing claims handling functions. (2 Exs. 303-304, 331, 335.)

B. The Insurers Closely Monitor and Tightly Control the Daily Work of Their Claims Handlers

According to the opening brief, the claims handlers are free agents with leeway to negotiate and settle high-dollar claims on their own, virtually without supervision. The evidence is otherwise.

The insurers, in fact, methodically police all aspects of what their claims handlers do. Management at Liberty Mutual and Golden Eagle review all claim files shortly after they are opened. (2 Exs. 330, 335; 5 Exs. 1260-1261, 1355.) Through a combination of hard copies and electronic means, managers can access, and in fact routinely review, the claims files while the adjusters are working on them. (5 Exs. 1214-1216, 1258-1261, 1292, 1295-1296, 1330-1331, 1362-1364, 1369.) For example, Golden Eagle claims

manager Mark DeMeuse testified that he reviews claim files "[a]s often as possible" – meaning "[a]s often as my time and other responsibilities allow." (4 Exs. 1146.)

Golden Eagle claims handlers follow a lengthy manual providing detailed instructions for each stage of the claims handling process. (2 Exs. 306; 7 Exs. 1872-1977.) Liberty Mutual claims handlers are similarly guided by "Best Practices." (2 Exs. 330, 335.) To increase productivity and expedite claims processing, defendants provide claims adjusters with an array of interview forms and hundreds of form letters on which adjusters can fill in certain blanks with the pertinent information. The comprehensive forms cover the claims handling process from beginning to end. (2 Exs. 305-306, 336; 5 Exs. 1452-1500; 6 Exs. 1501-1800; 7 Exs. 1801-1864.)

As for power to settle claims, class members are constrained by authority levels and cannot, without seeking approval from management, settle a claim that exceeds their authority level. (2 Exs. 330; 4 Exs. 1150-1151, 1181; 5 Exs. 1203-1206.) Apart from claim size, payments cannot be made and files cannot be closed at Golden Eagle without a supervisor's signature. (2 Exs. 305; 5 Exs. 1232-1233.) A similar procedure is followed at Liberty Mutual. (2 Exs. 333.) On the few large claims that arise at Golden Eagle (those exceeding $100,000 and, after January 2005, claims exceeding $200,000), the adjuster merely gathers and transmits pertinent information to upper management, which then evaluates and approves any payout. (2 Exs. 306-307.) So too at Liberty Mutual. (2 Exs. 334, 337.)

After a claim file is closed, defendants review the file and retrace the adjuster's steps to confirm the claim was satisfactorily handled. (2 Exs. 336; 4 Exs. 1128, 1145-1146; 5 Exs. 1216, 1225-1226, 1275-1276, 1281-1282, 1284, 1314-1318.) In addition to these audits, defendants review class members' work to minimize "loss leakage" – meaning money spent above the apparent claim value. (2 Exs. 302, 329, 332; 5 Exs. 1217-1218, 1306-1307.)

In sum, then, the record shows that the adjusters are, from start to finish in processing a claim, comprehensively directed, monitored and controlled by the defendant insurance companies.

III. PROCEDURAL HISTORY

The underlying action is a JCCP proceeding grouping four related suits filed in 2001. (1 Exs. 1, 49, 62, 75.) In April 2002, the cases were coordinated in Los Angeles Superior Court before the Honorable Charles McCoy. (1 Exs. 32, 96.) In May 2004, the trial court certified a class of "'all non-management California employees classified as exempt by Liberty Mutual and Golden Eagle who were employed as claims handlers and/or performed claims-handling activities.'" (1 Exs. 132.)

A. Plaintiffs Move for Summary Adjudication on Liability and, After Withdrawing Their Summary Judgment Motion, Defendants Seek Only Class Decertification

In the fall of 2005, after notice to the class, plaintiffs moved for summary adjudication on liability. Focusing their motion on just one exemption prong – the administrative capacity requirement – plaintiffs argued that defendants' liability for unpaid overtime was conclusively established based on the First District's twin *Bell* decisions. (1 Exs. 257-288; see also 11 Exs. 3240-3241.) Although not mentioned in the opening brief, defendants concurrently moved for summary judgment on all the exemption requirements or, alternatively, summary adjudication. (1 Exs. 149, 187.) Also in the fall of 2005, defendants moved for class decertification. (1 Exs. 249.)

In March 2006, the trial court (by this time, the Honorable Carolyn Kuhl) issued a tentative ruling denying both plaintiffs' summary adjudication motion and defendants' summary judgment motion. (11 Exs. 3249-3250.) Importantly for the present purposes, the insurers then withdrew their summary judgment motion, and it was never ruled on. (11 Exs. 3279; 13 Exs. 3800.) Although the dissent below asserted that the claims adjusters here are

"exempt" (*Harris*, *supra*, 154 Cal.App.4th at p. 190 (dis. opn. of Vogel, J.)) – a theme defendants are pushing now – this overstates the issues presented for decision. On defendants' liability, the only question on this record is whether plaintiffs are ***non-exempt***, and therefore entitled to overtime pay, because they do not work in an administrative capacity. (1 Exs. 257 [plaintiffs' summary adjudication motion].) The other exemption requirements are not at issue, in light of defendants' strategic choice to pull their summary judgment motion. The other prongs would need to be addressed, if at all, in further proceedings on remand.

B. The Trial Court Denies Plaintiffs' Motion for Summary Adjudication and Partially Decertifies the Class

In October 2006, the trial court issued its final order. In so many words, the court found that for purposes of applying the *Bell* opinions, there were no material fact disputes. (13 Exs. 3801, 3812.) The court concluded the *Bell* line was indistinguishable from the present case. (13 Exs. 3811.) On this basis, the court ruled that the *Bell* precedents governed overtime claims arising under Wage Order 4. (13 Exs. 3812.) However, the court denied plaintiffs' summary adjudication motion because the order further concluded that the *Bell* line did not control overtime claims governed by Wage Order 4-2001. (13 Exs. 3818-3830.) The court granted defendants' motion for class decertification as to latter part of the class period governed by Wage Order 4-2001 and otherwise denied the motion. (13 Exs. 3830-3831.)

C. The Court of Appeal Grants Plaintiffs Writ Relief

After receiving extensive briefing and hearing oral argument, the Court of Appeal resolved the dueling writ petitions in its August 2007 published opinion. The majority directed the trial court to issue a new order granting plaintiffs' summary adjudication motion and denying defendants' motion to decertify the class. (See *Harris*, *supra*, 154 Cal.App.4th at pp. 189-190.) The dissent would have granted defendants' writ petition and denied plaintiffs'

writ petition. (*Id.* at p. 197.) The respective Court of Appeal opinions, which speak for themselves, are discussed further below as relevant.

IV. DISCUSSION

Defendants criticize the analytical approach California courts have followed to date because it does not support a broad interpretation of the administrative exemption enabling employers to skirt the legal duty to pay overtime. Plaintiffs explain below why the existing jurisprudence is on the right track and should not be cast aside.

A. In Its Twin *Bell* Decisions, the First District Interpreted Wage Order 4 to Adopt the Administrative/Production Worker Dichotomy from 29 C.F.R. Part 541.205(a) and Established Case Law

By way of background, "[t]he IWC is the state agency empowered to formulate regulations (known as wage orders) governing minimum wages, maximum hours, and overtime pay in the State of California." (*Ramirez, supra*, 20 Cal.4th at p. 795.) An IWC wage order "is a quasi-legislative regulation subject to normal principles of statutory interpretation." (*Bell II, supra*, 87 Cal.App.4th at p. 810.) It was undisputed that Wage Order 4 governs overtime claims arising before October 1, 2000 and, from that date forward, Wage Order 4-2001 controls. (See *Harris, supra*, 154 Cal.App.4th at p. 168.) Because the class period runs from 1997 to the present, it is necessary to address the meaning of both wage orders. (13 Exs. 3801-3802.)

The First District took up Wage Order 4 in its seminal 2001 decision in *Bell II*. The relevant text provides:

> **1. APPLICABILITY OF ORDER**
>
> This Order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, unless such occupation is performed in an industry covered by an industry order of this Commission, except that:

> (A) Provisions of sections 3 through 12 shall not apply to persons employed in ***administrative***, executive, or professional ***capacities***. No person shall be considered to be employed in an ***administrative***, executive, or professional ***capacity*** unless one of the following conditions prevails:
>
> > (1) The employee is engaged in work which is primarily intellectual, managerial, or creative, and which requires exercise of discretion and independent judgment, and for which the remuneration is not less than $1150.00 per month . . . .

(4 Exs. 982, emphasis added.)

The First District gave meaning to the undefined term "administrative capacity," by looking to federal regulations governing the administrative exemption in 2001 under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201 et seq.). "To the extent that the language of [Wage Order 4] is patterned after federal statutes and regulations, federal law becomes relevant to interpretation." (*Bell II, supra,* 87 Cal.App.4th at 815.) The court noted, however, an "important qualification" when drawing on federal doctrine. (*Id.* at p. 817.) California "is empowered to go beyond the federal regulations in adopting protective regulations for the benefit of workers." (*Id.* at pp. 817-818.) Although defendants do not acknowledge the point, the FLSA is a floor of protection for employees, not a ceiling. (See 29 U.S.C. § 218(a); 29 C.F.R. part 541.4.) The federal statute "'explicitly permits states to set more stringent overtime provisions than the FLSA.'" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567 (*Tidewater*).)

With these principles in mind, the First District adopted what is known as the "administrative/production worker dichotomy" from federal law. Although defendants suggest this framework is wholly a judicial invention, it comes verbatim from a federal regulation as written in 2001, when *Bell II* was decided. "Drawing on 29 C.F.R. parts 541.2 and 541.205(a)," the First

District explained, "federal authorities draw a distinction between administrative employees, who are usually described as employees performing work '***directly related to management policies or general business operations of his employer or his employer's customers***,' and production employees, who have been described as those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce." (*Bell II*, *supra*, 87 Cal.App.4th at p. 820, footnotes, internal quotation marks and citation omitted, and emphasis added.) The pertinent text from 29 C.F.R. part 541.205(a) provides: "The phrase 'directly related to management policies or general business operations of his employer or his employer's customers' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work." (10 Exs. 2857.)

The First District surveyed the ample federal decisional law interpreting this language to call for the dichotomy analysis. (See *Bell II*, *supra*, 87 Cal.App.4th at pp. 820-823.) For instance, in *Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220 (*Dalheim*), television news producers did not work in an administrative capacity because they generated the product the enterprise existed to create. (*Id.* at pp. 1229-1231.) In *Reich v. American Internat. Adjustment Co.* (D.Conn. 1994) 902 F.Supp. 321, automobile damage appraisers employed by a business that resolved damage claims were also "production" employees entitled to overtime pay. (*Id.* at pp. 322, 325.) Similarly, in *Gusdonovich v. Business Information Co.* (W.D.Pa. 1985) 705 F.Supp. 262, the court found that the investigators there were not covered by the administrative exemption. (*Id.* at p. 265.)

The *Bell* court also referenced cases holding that government employees do not work in an administrative capacity if they provide the agency's services on a daily basis. This line includes *Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066 (*Bratt*), which held that deputy

probation officers and child treatment counselors were not administrative employees despite the importance and discretion involved in counseling clients. (*Id.* at p. 1070.) In fact, the federal regulation distinguishing between administrative workers, on the one hand, and employees performing day-to-day functions, on the other hand, had been on the books for decades. (See, e.g., *Mitchell v. Branch Motor Express Co.* (E.D.Pa. 1958) 168 F.Supp. 72, 76.)

Accordingly, rather than judicially contriving a new mode of analysis on a blank slate, the First District borrowed from federal law as it stood in 2001. Rejecting an attack on its reasoning, the First District reaffirmed its analysis in 2004. As the court explained, when the IWC was considering what became Wage Order 4-2001, the dichotomy framework was "a core concept appearing in the federal interpretive regulations and decisional law." (*Bell III*, *supra*, 115 Cal.App.4th at p. 728.) The First District also discussed at length, and rejected, Farmers' reliance on intervening federal authorities – some of which are now cited in defendants' opening brief. (*Id.* at pp. 728-735.)

Defendants dismiss the *Bell* litigation as an aberration, but its multiple appellate rulings occupy a comfortable place in California wage and hour jurisprudence. This Court denied review and depublication in *Bell II*, and also denied review in *Bell III*. (*Bell v. Farmers Insurance Exchange* (June 20, 2001, S096772) 2001 Cal. Lexis 4231; *Bell v. Farmers Insurance Exchange* (May 12, 2004, S123477) 2004 Cal. Lexis 4135.) Like the Second District, the Third District has followed the First District's analysis of the administrative capacity prong. (See *Eicher*, *supra*, 151 Cal.App.4th at pp. 1372-1373.) Review was also denied in that case. (*Eicher v. Advanced Business Integrators, Inc.* (Aug. 29, 2007, S154732) 2007 Cal. Lexis 9488.) This Court too has cited both *Bell II* and *Bell III* with approval. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455-464 (*Gentry*); *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333 (*Sav-On*).) In light of this

consistent backdrop, defendants, not the Second District majority, are the ones out of step here.

B. Wage Order 4-2001 Also Distinguishes Between Employees Who Work at a Policy Level and Those Who Perform Particular Daily Tasks for the Business

Like its predecessor, Wage Order 4-2001 imposes multiple prerequisites for the administrative exemption. More textually elaborate than Wage Order 4, the current wage order provides in relevant part:

> 1. Applicability of Order. This order shall apply to all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis, except that:
>
> (A) Provisions of sections 3 through 12 shall not apply to persons employed in ***administrative***, executive, or professional ***capacities***. The following requirements shall apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:
>
> * * *
>
> (2) Administrative Exemption. A person employed in an ***administrative capacity*** means any employee:
>
> (a) Whose duties and responsibilities involve either:
>
> (I) The performance of office or non-manual work ***directly related to management policies or general business operations*** of his/her employer or his employer's customers; or
>
> (II) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
>
> (b) Who customarily and regularly exercises discretion and independent judgment; and
>
> (c) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section); or

(d) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or

(e) Who executes under only general supervision special assignments and tasks; and

(f) Who is primarily engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective ***as of the date of this order***: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.

(g) Such employee must also earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment. Full-time employment is defined in California Labor Code Section 515(c) as 40 hours per week.

(Cal. Code Regs., tit. 8, § 11040, emphasis added; see 4 Exs. 997-998 [copy in record].)

The bolded language is of particular interest. In contrast to its predecessor, Wage Order 4-2001 expressly defines administrative capacity, but to the same end as *Bell II* and *Bell III* did for Wage Order 4. As discussed above, the *Bell* court also relied on the "directly related" phrase now codified in Wage Order 4-2001. (See *Bell II*, *supra*, 87 Cal.App.4th at p. 820 and fn. 16; *Bell III*, *supra*, 115 Cal.App.4th at pp. 729-731.) Importantly, moreover, the specified federal regulations were incorporated only as written on "the date of this order," which was January 2001. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f).) Wage Order 4-2001 thereby refers to the same federal regulation, 29 C.F.R. part 541.205, that was central in *Bell*. (10 Exs. 2857-

2858.) On the issue for review here, Wage Order 4, the *Bell* decisions construing it and Wage Order 4-2001 are parallel and completely consistent with one another.

In applying Wage Orders 4 and 4-2001, the Second District majority soundly built on this landscape. The panel held that "only work performed at the level of ***policy*** or ***general*** operations can qualify as 'directly related to management policies or general business operations.'" (*Harris*, *supra*, 154 Cal. App. 4th at p. 177.) Borrowing from the very federal authority that defendants say was disregarded, the panel drew the line in the right place: "An employee doing exempt administrative work is 'engage[d] in "running the business itself or determining its overall course or policies," not just in the day-to-day carrying out of the business' affairs.'" (*Ibid.*, quoting *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1125 (*Bothell*), in turn quoting *Bratt*, *supra*, 912 F.2d at p. 1070.)

The opening brief condemns this test as "unreasonably narrow." (Opening Brief on the Merits (OBM) 21.) But, defendants never acknowledge the most "basic" rule of interpretation. (*Ramirez*, *supra*, 20 Cal.4th at p. 794.) Exemptions to the overtime laws "are narrowly construed against the employer and their application is limited to those employees plainly and unmistakably within their terms." (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 562 [cited in both *Ramirez* and *Sav-On*].) The Court of Appeal majority was faithful to this principle, while defendants are not.

C. The DLSE Has Interpreted Wage Orders 4 and 4-2001 in the Same Manner as the First, Second and Third Appellate Districts

Underscoring the consistent judicial interpretations is the view of the IWC's enforcement arm. The DLSE is "the state agency empowered to enforce California's labor laws, including IWC wage orders . . . with the primary objective of protecting workers." (*Bell II*, *supra*, 87 Cal.App.4th at p.

815, internal quotation marks omitted.) Although "not binding," DLSE interpretations of IWC wage orders are entitled to "consideration and respect." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, fn. 7 (*Murphy*).) This is because "'the agency possesses expertise in the subject area.'" (*Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 958 (*Cicairos*), citation omitted.)

The DLSE's interpretations echo the case law summarized above. Addressing the requirements of Wage Order 4 in October 1998, the DLSE issued an extensive opinion letter concluding that claims adjusters working for an insurance company did not work in an administrative capacity. (4 Exs. 1037-1052.) As defendants observe, counsel for the *Bell* plaintiffs requested the letter. (4 Exs. 1037.) Although the DLSE no longer provides such letters in connection with pending litigation, the link is noteworthy given *Bell*'s factual similarity to the present case. A "case-specific adjudication" by the DLSE "may be persuasive as precedents in similar subsequent cases." (*Tidewater*, *supra*, 14 Cal.4th at p. 571.)

The 1998 opinion letter relied on the same key language from the federal regulation. The DLSE reasoned that "if an employee is primarily engaged in 'production' or 'sales' work, rather than in activities 'directly related to management policies or general business operations,' the employee does not fall within the administrative exemption from IWC Order 4's overtime requirements." (4 Exs. 1044.) Concluding that the dichotomy framework is the "touchstone" for "judicial determinations of exempt administrative status," the DLSE surveyed the ample federal decisional law applying it. (4 Exs. 1044-1047.)

The timing of the letter is significant for purposes of interpreting not just Wage Order 4, but also Wage Order 4-2001. When the IWC adopted the current order, it was on notice of how its enforcement arm had read the predecessor order. Yet, the IWC did not repudiate the DLSE's 1998 analysis.

To the contrary, the IWC expressly adopted in Wage Order 4-2001 the same "directly related" language the DLSE previously cited and interpreted in 1998. (Compare Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(a)(I) ["directly related" language in Wage Order 4-2001] with 4 Exs. 1043-1044 [1998 DLSE letter concluding same language embraces dichotomy test].) The IWC's enactment "of a provision which has a meaning well established by administrative construction," as here, "is persuasive that the intent was to continue the same construction previously recognized and applied." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 708-709 (*IWC*).)

In May 2003, the DLSE issued another opinion letter concluding that "the analysis set forth in *Bell [II]* applies with equal force" to Wage Order 4-2001. (12 Exs. 3374.) The DLSE agreed with a point plaintiffs have consistently emphasized. Although *Bell* arose under Wage Order 4, the First District's "analysis is founded upon the same federal regulations, including 29 CFR § 541.205, that the IWC has now expressly made applicable to the current wage orders." (12 Exs. 3374.)

The DLSE plays a critical role, of course, in California labor law. Its "'primary responsibility is to interpret the intent of the IWC.'" (*Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 30 (*Monzon*).) Nonetheless, defendants say the 1998 and 2003 opinion letters should be brushed aside. The argument is that "the DLSE's views for determining how to apply IWC Wage Orders are 'void for failure to comply with the [Administrative Procedure Act]," or APA. (OBM 54, quoting *Tidewater*, *supra*, 14 Cal.4th at p. 576.) Defendants, however, overstate the impact of *Tidewater*. In fact, DLSE "advice letters . . . are not subject to the rulemaking provisions of the APA." (*Tidewater*, *supra*, 14 Cal.4th at p. 571.) In *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*) – another significant California precedent ignored in the opening brief – this Court

reiterated that there was no intent to subject the DLSE to the APA in all circumstances. "In *Tidewater*, we determined that the DLSE interpretative policies contained in its ***manual*** were regulations. As regulations, the interpretive policies were void because they were not promulgated in accordance with the APA." (*Id.* at p. 581, emphasis added.) By contrast, an "administrative interpretation" in a DLSE "opinion letter" is "persuasive." (*Id.* at p. 590.)

On this record, the only conceivable *Tidewater* issue is the persuasive force of the 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (2002 Manual). (12 Exs. 3333.) After *Tidewater* in 1996, the DLSE revised the manual to address the APA concerns this Court identified. (12 Exs. 3346-3348.) On the issue for review in this case, the 2002 Manual observes that the dichotomy framework continues to apply under Wage Order 4-2001. (12 Exs. 3352-3353.) "[A] policy manual that is no more than a restatement or summary, without commentary," as here, does not run afoul of the APA. (*Tidewater*, *supra*, 14 Cal.4th at p. 571.) Recognizing as much, the dissenting justice below recently relied on the DLSE's 2002 Manual, and several agency opinion letters. (See *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 23 (Vogel, J.).)

More often than not, courts agree with the DLSE's reading of IWC wage orders. (See also *Morillion*, *supra*, 22 Cal.4th at p. 584; *Koehl v. Verio, Inc.* (2006) 142 Cal.App.4th 1313, 1334-1335; *Cicairos*, *supra*, 133 Cal.App.4th at pp. 958-959; *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902-903.) This judicial respect for the DLSE is consistent with general guidance from this Court on the appropriate judicial deference to administrative agencies on matters of statutory interpretation. "Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation." (*Yamaha*

Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7.) Or, as this Court stated recently as to the Bureau of Labor Statistics, the agency predecessor to the DLSE: "[A]lthough not necessarily controlling, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 87 (*Smith*); accord, *Monzon, supra*, 224 Cal.App.3d at p. 30.)

In the present case, the Second District took into account the DLSE's views but reserved for itself the task of interpreting the IWC wage orders. As the panel explained, "we find the DLSE letters to be well reasoned and therefore persuasive." (*Harris, supra*, 154 Cal.App.4th at p. 185.) Defendants' request for a broad interpretation of the administrative capacity prong is simply at loggerheads with the language of Wage Orders 4 and 4-2001, the consistent case law construing them and the DLSE's considered assessment of what those orders mean.

D. The Courts Below Correctly Found that This Case and *Bell* Are Factually Indistinguishable

Defendants seek to distinguish *Bell* as a case involving "unique facts." (OBM 43.) Fundamentally, this stance ignores that "[t]he law does not consist in particular cases, but in general principles, which run through the cases, and govern the decision of them." (*Rust v. Cooper* (K.B. 1777) 2 Cowp. 629, 632, 98 Eng. Rep. 1277, 1279.) As discussed above, the First District explored at length, in two published decisions, the legal principles relevant to California's administrative exemption. In any event, defendants have never convincingly explained how the relevant facts here differ materially from *Bell*. As the trial court found after comprehensively examining the record, "even if *Bell II* and *Bell III* are limited to their facts, they squarely govern the result in this case. The undisputed facts in this case concerning the duties of the claims handler

Plaintiffs are nearly identical to the stated duties of the claims representative plaintiffs in *Bell II* and *Bell III*." (13 Exs. 3812.)

Specifically, the *Bell* litigation involved the following circumstances: "In addition to settling claims, Claims Representatives must also perform other duties as part of their job, including determining liability, setting and/or recommending reserves, recommending coverage, estimating damage or loss, providing risk advice, identifying subrogation rights, detecting potential fraud, determining whether reservation of rights letters should be sent, and representing the company at mediations, arbitrations and settlement conferences." (*Bell II*, *supra*, 87 Cal.App.4th at pp. 825-826.) Here, defendants introduced a "mountain of evidence" similarly showing that "plaintiffs are primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating settlements." (*Harris*, *supra*, 154 Cal.App.4th at p. 179.) As in *Bell*, this "is all part of the day-to-day operation of defendants' business." (*Id.* at p. 178.) Even if "defendants did introduce evidence that ***some*** plaintiffs might do ***some*** work at the level of policy or general operations . . . no evidence shows that even a single plaintiff ***primarily*** engages in such work." (*Ibid.*)

Seeking to imply that the class members have authority to resolve large claims, defendants toss around certain numbers. For example, without explaining what the term means, defendants assert that "[t]he average 'Cost Estimate' on claims adjusted by the Liberty Mutual class members is $19,783." (OBM 5.) In fact, the vast majority of claims actually resolved by the adjusters – not an "estimate" – are for modest monetary amounts. From October 1997 to March 2005, the average auto physical damage claim handled by class members at Golden Eagle was $3,372. (7 Exs. 2089-2091.) The average claim for other insurance lines ranged between approximately $12,000 and $18,000. (2 Exs. 306.) For the same period at Liberty Mutual, the

average claim size for property, auto and liability policies was between just $2,000 and $4,000. (2 Exs. 334.) Workers' compensation claims averaged approximately $15,000. (2 Exs. 334.)

These numbers are on par with those in *Bell*. There, as here, the adjusters were "ordinarily occupied in the routine of processing a large number of small claims." (*Bell II*, *supra*, 87 Cal.App.4th at pp. 827-828.) There, as here, "[o]n matters of relatively greater importance, the claims representatives acted as investigators or as conduits of information to supervisors." (*Id.* at p. 828.) Apart from average claim size, defendants point to no evidence that the claims adjusters' role is anything other than the daily work on the front lines of the enterprise – all closely supervised and monitored by others playing the actual administrative role.

Straining to distinguish *Bell*, the opening brief further contends that "defendants' 'product' is the transfer of risk, not claims adjusting." (OBM 50.) Therefore, the reasoning goes, class members cannot be, in the parlance here, "production" workers. The Second District majority soundly rejected this argument. "[A]s defendants' own evidence shows, adjusting claims is an important and essential part of transferring risk." (*Harris*, *supra*, 154 Cal.App.4th at p. 181.) As the trial court similarly observed, "it is undisputed that defendants tout the quality and efficiency of their claims handling services as being of substantial value to policyholders." (13 Exs. 3801.)

Liberty Mutual and Golden Eagle each devote entire sections of their respective websites to advertising their claims handling services. (1 Exs. 297; 2 Exs. 326.) Customers are advised, among other things, that "Liberty Mutual is committed to handling your claim quickly and efficiently. We will get you back on track with our quick and easy claims process." (2 Exs. 326.) Similarly, Golden Eagle tells customers: "We offer a variety of programs designed to help you through the claim process. Each reflects our commitment to responsiveness, quality and cost containment." (1 Exs. 297.)

Visitors to Golden Eagle's website homepage are further instructed: "Check out our comprehensive business insurance products. Read about our exceptional claims handling services." (1 Exs. 297.) These warm sales pitches clash with defendants' cold stance in this Court that servicing claims from consumers is merely a "'cost of doing business.'" (OBM 51.)

Defendants' internal documents further demonstrate that claims handling is central to what these insurers do. Liberty Mutual's claim handling guidelines instruct their claims handlers, the class here, that "Liberty Mutual is a service company. Our product is the insurance contract and the servicing of that contract." (2 Exs. 522.) A standardized Liberty Mutual insurance policy expressly provides that claims handling, not just indemnity, is what policyholders have paid for. Insureds are promised that "[w]e will adjust all losses with you." (9 Exs. 2479, 2491.) This is unsurprising, for "defendants cannot pay any claims without first adjusting those claims." (*Harris*, *supra*, 154 Cal.App.4th at p. 181.) Defense witnesses testified to like effect. For example, Linda VanKuran, a Liberty Mutual Claims Manager, admitted that "part of what is involved in risk transfer is claim service handling." (2 Exs. 326.) At Golden Eagle, the results of internal audits of claim files are collected in, aptly titled for this case, "Claims Production" reports. (4 Exs. 1054-1111.)

As in *Bell*, then, claims handling is an "'important component'" of what Liberty Mutual and Golden Eagle are in business to do. (*Bell III*, *supra*, 115 Cal.App.4th at p. 738, quoting *Bell II*, *supra*, 87 Cal.App.4th at p. 828.) "It is not difficult to find judicial recognition of claims adjusting as an important component of the insurance business." (*Bell III*, *supra*, 115 Cal.App.4th at p. 737, fn. 10 [collecting cases].) The DLSE reached similar conclusions in its 1998 opinion letter: "[T]he processing and resolution of claims constitutes the principal product of an insurance company, so that an insurance company

claims adjustor is nothing more than a line worker, engaged in the 'production' of his or her employer's principal product." (4 Exs. 1048-1049.)

In a related vein, defendants argue that the dichotomy framework "is of little or no relevance when applied to modern-day service oriented businesses." (OBM 36.) "To the contrary, the analogy has repeatedly proven useful to courts in a variety of non-manufacturing settings." (*Reich v. State of N.Y.* (2d Cir. 1993) 3 F.3d 581, 588 [collecting examples].) The dichotomy "is not to be understood as covering only work involving the manufacture of tangibles." (4 Exs. 1044 [1998 DLSE opinion letter].) As the Court of Appeal majority observed, "insurance companies and their claims adjusters existed when the federal regulations were promulgated in the 1940s." (*Harris*, *supra*, 154 Cal.App.4th at p. 188, fn. 12.) "The point of the dichotomy has always been to distinguish between ***kinds*** of office or nonmanual work, not to classify ***all*** office work as administrative." (*Id.* at p. 181.)

This is not to say (and the majority did not hold) that the dichotomy framework is a litmus test for every case implicating California's administrative exemption. Here, "[t]he undisputed facts show that plaintiffs are primarily engaged in work that falls squarely on the production side of the administrative/production worker dichotomy." (*Harris*, *supra*, 154 Cal.App.4th at p. 178.) As even defendants recognize, under these circumstances, the dichotomy is "determinative." (OBM 38.)

E. Liability Here Is Faithful to the Protective Force of California's Overtime Laws

Summary adjudication in plaintiffs' favor on liability is also fully consistent with the salutary goals that have long animated California's wage and hour laws.

For decades, "both the Legislature and our courts have accorded to wages special considerations," and "the purpose in doing so is based on the welfare of the wage earner." (*Kerr's Catering Service v. Department of*

Industrial Relations (1962) 57 Cal.2d 319, 330.) As this Court observed recently: "The duty to pay overtime wages is a duty imposed by the state; it is not a matter left to the private discretion of the employer. [Citations.] California courts have long recognized [that] wage and hours laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare." (*Gentry*, *supra*, 42 Cal.4th at p. 456, internal quotation marks omitted.) In fact, "it is a crime for an employer to fail to pay overtime wages as fixed by the [IWC]." (*Ibid.*) Yet, the insurance companies here have enjoyed an illegal windfall by forcing their adjusters to work long hours for years without overtime pay. Liability under the Labor Code thus honors the "public policy in favor of full and prompt payment of an employee's earned wages." (*Smith*, *supra*, 39 Cal.4th at p. 82.) Beyond violating the Labor Code, defendants' "[f]ailure to promptly pay those wages was unlawful and thus an unfair business practice" violating the UCL. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168.)

In our society, a "regimen requiring excessive hours or continuous, substantial overtime . . . generally should be considered extraordinary." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 236.) Here, however, a Liberty Mutual orientation document tells claims handlers that "THIS IS NOT A NINE TO FIVE JOB" and further commands:

> You will NEVER be "done" in this job. You could work 24 hours a day, 7 days a week and still have work to do. Therefore, do not look to be "done." Identify YOUR "acceptable level of discomfort" that still allows you to provide superior customer service. And work to <u>that</u> level.

(4 Exs. 1035.) This admonition powerfully illustrates who, in defendants' business, is making policy and who is carrying out the enterprise's daily functions. And, it illustrates the "'evil of overwork,'" shouldered by "'employees in a relatively weak bargaining position,'" that robust overtime laws are designed to prevent. (*Gentry*, *supra*, 42 Cal.4th at p. 456.)

Because employers generally have the upper hand in the workplace, a legal standard for the administrative exemption that is not just clear, but protective of employees, is vital. Employers have alluring economic incentives to avoid paying overtime. Misclassification is even more tempting for complicated exemptions whose nuances only the employer may grasp. Short of a lawsuit certain to make waves in the workplace, the overtime claimant has little power to do anything in response. "'[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.'" (*Gentry*, *supra*, 42 Cal.4th at p. 460.)

Even where this Court has divided on an issue under the Labor Code, there has been agreement on the central precept. "Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide." (*Prachasaisoradej v. Ralphs Grocery Co., Inc.* (2007) 42 Cal.4th 217, 227, citing *Ramirez*, *supra*, 20 Cal.4th at p. 794; see also *id.* at p. 246 (dis. opn. of Werdegar, J.) [collecting cases].) To distract from this core principle, the opening brief floats various theories aimed at reshaping California's administrative exemption, but these contentions lack merit.

F. Defendants' Contentions, Grounded Primarily on Federal Law, Do Not Support a Contrary Result

Unable to prevail based on California law, the insurance companies take aim at the Court of Appeal decision from multiple angles under federal law. According to defendants, the Second District majority (and for that matter, the First District in *Bell II* and *Bell III*) misinterpreted certain provisions of 29 C.F.R. part 541.205. Defendants also assert that recent federal treatment of claims handlers is inconsistent with compensating the

class here for overtime under the IWC wage orders. These and defendants' other objections to the Court of Appeal opinion do not withstand scrutiny.

1. 29 C.F.R. Part 541.205(a) Contains Two Separate Prerequisites and, Unless They Are Distinguished, the Entire Regulation Is Read Incorrectly

The opening brief follows a pattern of quoting bits and pieces of the federal regulations, rather than setting forth the relevant provision in full. As a result of this selective approach, defendants fail to grapple with what the regulatory text actually says.

As discussed above, under both Wage Orders 4 and 4-2001, the administrative capacity requirement emanates from 29 C.F.R. part 541.205(a) as written in 2001. Subsection (a) provides in full: "The phrase 'directly related to management policies or general business operations of his employer or his employer's customers' describes those types of activities relating to the administrative operations of a business as distinguished from 'production' or, in a retail or service establishment, 'sales' work. ***In addition*** to describing the types of activities, the [directly related] phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business of his employer or his employer's customers." (10 Exs. 2857, emphasis added.)

As the Second District majority understood, a significant threshold question in construing all of 29 C.F.R. part 541.205 is whether its launching point, subsection (a), imposes one or two exemption prongs. As appears from the bolded text ("***In addition***"), the answer is that "the regulatory language 'directly related to management policies or general business operations' encompasses two distinct requirements: (1) The work must be of a particular ***type*** (i.e., administrative, as opposed to production, work), and (2) the work must be of substantial importance to the management or operation of the business. For an employee to be exempt, the employee's primary duty must

meet ***both*** of those requirements." (*Harris*, *supra*, 154 Cal.App.4th at p. 174, latter emphasis added.) This disciplined reading is confirmed by the overall structure of 29 C.F.R. part 541.205. Subsection (b) elaborates "administrative operations of the business" and subsection (c) elaborates the additional requirement that the work be of "substantial importance." (10 Exs. 2857-2858.) These distinct prerequisites are discussed in turn below.

2. 29 C.F.R. Part 541.205(b) Applies Only to Employees Who Work at the Level of Policy or General Business Operations

29 C.F.R. part 541.205(b) provides in relevant part: "The administrative operations of the business include the work performed by so-called white-collar employees engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." (10 Exs. 2857.) Defendants argue that claims handlers do a few of these tasks such as conferring with management regarding their daily activities – so as to be "advising" in an administrative capacity. Defendants' argument proves too much.

Reasonably read, subsection (b) does not mean that every act of planning, advising and the like, divorced from context, makes someone an exempt administrative employee. In a way, all employees "service" a business owned and controlled by others. To illustrate, a skilled and experienced legal secretary may advise a law firm partner on the form of a brief or other document. This does not make the secretary an administrative worker. As the Second District majority explained, "in order for the listed tasks to fall on the administrative side of the dichotomy, they must be carried on at the level of policy or general operations." (*Harris*, *supra*, 154 Cal.App.4th at p. 180, emphasis deleted.) Defendants' suggestion – the context should be ignored – would irrationally sweep line employees into the exemption simply because

they confer with supervisors, as is unavoidable, about the company's day-to-day business.

Unsurprisingly, defendants cite no authority to support their expansive interpretation of subsection (b). Courts, in fact, reject it. "[W]hile the regulations provide that 'servicing' business may be administrative, *id.* § 541.205(b), 'advising the management' as used in that subsection is directed at advice on matters that involve policy determinations, *i.e.*, how a business should be run or run more efficiently, not merely providing information in the course of the customer's daily business operation." (*Bratt*, *supra*, 912 F.2d at p. 1070; see also 4 Exs. 1013-1014 [discussing *Bratt*].)

Comparing *Bratt* to this case, the Court of Appeal majority observed: "Plaintiffs' planning, negotiating, and representing are likewise not carried on at the level of policy or general operations. They are all part of the day-to-day business of processing individual claims." (*Harris*, *supra*, 154 Cal.App.4th at p. 181.) In the words of a federal court, even assuming the claims handlers here have "broad discretion," this point is non-responsive "to the relevant inquiry: i.e., the relationship of the [claims handlers] to the management policies or general business operations . . . ." (*Reich v. State of N.Y.*, *supra*, 3 F.3d at p. 589.) Put colloquially: "There is a difference between 'one who merely works around the place' [and] one who has something to say about 'running the place.'" (*Brock v. National Health Corp.* (M.D.Tenn. 1987) 667 F.Supp. 557, 566, citation omitted.) Obliterating this distinction would disregard that "California's overtime laws are remedial and are to be construed so as to promote employee protection." (*Sav-On*, *supra*, 34 Cal.4th at p. 340; accord, *Murphy*, *supra*, 40 Cal.4th at p. 1103.)

3. 29 C.F.R. Part 541.205(c) Addresses the Distinct Substantial Importance Requirement, Not Whether Plaintiffs Work in an Administrative Capacity

In contending that the class does administrative work, defendants focus primarily on 29 C.F.R. part 541.205(c). Of particular interest to them, this provision states: "Employees whose work is 'directly related' to management policies or to general business operations include those [whose] work affects policy or whose responsibility is to execute or carry it out." (10 Exs. 2857.) Defendants interpret this language to mean that any employee who affects management policy or carries it out must work in an administrative capacity. The problem with this argument, and other theories based on subsection (c), is that this seeks to blur separate prongs of the administrative exemption. The most reasonable reading is that subsection (c), including defendants' quoted language, "focuses on the substantial importance requirement." (*Harris*, *supra*, 154 Cal.App.4th at p. 174.)

To be sure, this provision is not a model of spectacular draftsmanship. Complicating the task of judicial construction, subsection (c) "concerning the substantial importance requirement often uses the 'substantial importance' language and the 'directly related' language interchangeably." (*Harris*, *supra*, 154 Cal.App.4th at p. 175.) Nonetheless, as discussed above, a "reading of the regulation as a whole leaves little room for doubt that substantial importance is [the] sole concern" addressed in subsection (c). (*Id.* at p. 184.) Other courts agree that the nature of the work (whether administrative) and its level of importance (whether substantial) are separate exemption requirements. (See *Bothell*, *supra*, 299 F.3d at p. 1128; *Martin v. Cooper Electric Supply Co.* (3d Cir. 1991) 940 F.2d 896, 901-902 (*Martin*); *Jones & Associates, Inc. v. District of Columbia* (D.C. 1994) 642 A.2d 130, 134 (*Jones*).)

The conclusion that subsection (c) spells out only substantial importance is fortified by a crucial rule of statutory interpretation.

Exemptions to California's overtime laws are, again, "narrowly construed." (*Ramirez, supra*, 20 Cal.4th at p. 794.) To the extent the purpose of subsection (c) in 29 C.F.R. part 541.205 is murky, any doubt is resolved in plaintiffs' favor. (See also *Arnold v. Ben Kanowsky, Inc.* (1960) 361 U.S. 388, 392 [as to FLSA exemptions, "plainly and unmistakably within their terms and spirit"].)

Despite prominent discussion in the Second District majority opinion, the opening brief does not address the distinction between administrative capacity – required under subsection (a) and elaborated in subsection (b) – and substantial importance – also required under subsection (a) but separately elaborated in subsection (c). In their trial court papers, defendants recognized the two things were independent prerequisites. (1 Exs. 165-166, 210.) Also declining to merge the two concepts, the Court of Appeal majority kept its eye on the ball. "Because plaintiffs are not primarily engaged in work that falls on the administrative side of the dichotomy," the panel explained, "it is unnecessary for us to analyze the other elements of the administrative exemption, including the substantial importance requirement and the requirement that the employee exercise discretion and independent judgment." (*Harris, supra*, 154 Cal.App.4th at p. 185, fn. 10; see also *id.* at p. 184.) Indeed, apart from whether an employee performs work of substantial importance, the nature of the work may "fall on the 'production' side – the 'day-to-day carrying out of the business affairs' – of the line." (*Jones, supra*, 642 A.2d at p. 134, citing *Bratt, supra*, 912 F.2d 1066 and *Dalheim, supra*, 918 F.2d 1220; see also *Bothell, supra*, 299 F.3d at p. 1128.) So it is with the class of claims handlers here, as the Court of Appeal majority determined.[2]

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[2] To be clear, the record does not support the conclusion that plaintiffs perform work of substantial importance. (See, e.g., *Martin, supra*, 940 F.2d at p. 906 [rejecting argument that employees' collective financial impact on enterprise necessarily makes work substantially important].) In any event, as

4. 29 C.F.R. Part 541.205(c)(5), Regarding "Claims Agents and Adjusters," Does Not Carry the Weight Defendants Give It

Defendants also rely heavily on 29 C.F.R. part 541.205(c)(5). It provides in full: "The test of 'directly related to management policies or general business operations' is also met by many persons employed as ***advisory specialists*** and ***consultants*** of various kinds, credit managers, safety directors, ***claim agents*** and ***adjusters***, wage-rate analysts, tax experts, account executives of advertising agencies, customers' brokers in stock exchange firms, promotion men, and many others." (10 Exs. 2858, emphasis added.) According to defendants, subsection (c)(5) mandates the conclusion, for purposes of subsection (a), that plaintiffs work in an administrative capacity. Once more, however, defendants are off the mark.

Most fundamentally, subsection (c)(5) is part of lengthy subsection (c) elaborating the meaning of substantial importance. In the words of a federal court facing this interpretive question: "[T]he language in § 541.205(c) may merely establish that claims agent and adjusters are of 'substantial importance' to a business, not that their work is necessarily directly related to business management. [Citations.] This closer reading of the regulations is consistent with the Ninth Circuit's policy of construing exemptions narrowly against employers." (*Palacio v. Progressive Insurance Co.* (C.D.Cal. 2002) 244 F.Supp.2d 1040, 1046.) The Court of Appeal majority so interpreted subsection (c)(5) here, agreeing that it goes to substantial importance, not administrative capacity. (See *Harris*, *supra*, 154 Cal.App.4th at p. 184.) The panel noted further reasons why defendants could not prevail based on subsection (c)(5). (*Id.* at pp. 183-185.)

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discussed above, the other prongs of the administrative exemption are not at issue now.

In addition, defendants overlook that "it is important to consider the nature of the employer's business when deciding whether an employee is an administrative or production worker." (*Martin*, *supra*, 940 F.2d at p. 903, internal quotation marks omitted.) In its 1998 opinion letter, the DLSE addressed this point:

> A claims adjustor employed by an employer whose principal business is ***not*** that of handling claims is ***not*** engaged in production work, and falls under the ambit of section 541.205(c)(5). In contrast, the processing and resolution of claims constitutes the principal product of an insurance company, so that an insurance company claims adjustor is nothing more than a line worker, engaged in the "production" of his her employer's principal product.

(4 Exs. 1048-1049, emphasis added.) Consistent with the DLSE's reasoning, the *Bell* court mentioned "'a claim agent for a large oil company'" as illustrating the type of "'advisory specialists and consultants'" covered by subsection (c)(5). (*Bell II*, *supra*, 87 Cal.App.4th at p. 827; see also *Bell III*, *supra*, 115 Cal.App.4th at p. 735.) The current class of claims handlers, who merely process the insurers' daily claims inventory, are not in this category.

5. The Industrial Welfare Commission Did Not Intend for California's Administrative Exemption to Have an Evolving Meaning Tied to Unforeseen Changes in Federal Law

In light of defendants' reliance on recent federal doctrine, it is useful to address, first, what the IWC intended when it crafted Wage Order 4-2001 seven years ago. Courts typically apply current law to a dispute, unless the enacting body intends differently. This is such a case.

As noted, IWC wage orders are construed like statutes. (See *Bell II*, *supra*, 87 Cal.App.4th at p. 810.) When interpreting a statute, "a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining such intent '[the] court turns first to the words themselves for the answer.'" (*Moyer v. Workers' Comp. Appeals Bd.*

(1973) 10 Cal.3d 222, 230, citation omitted.) Here, the IWC made plain that subsequent changes in federal law would not govern California's administrative exemption. Wage Order 4-2001 provides: "The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective ***as of the date of this order***: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215." (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f), emphasis added.)

Thus, importantly for the present case, the IWC took a snapshot of the enumerated federal regulations and built them into the current administrative exemption – but only as written and interpreted in January 2001. The IWC stressed this temporal limitation in its "Statement as to the Basis" (Statement). There, the agency explained: "The IWC deems only those federal regulations specifically cited in its wage orders, and in effect at the time of promulgation of these wage orders, to apply in defining exempt duties under California law." (12 Exs. 3516.) In the interest of stabilizing California law, the IWC incorporated not just the federal regulations as they stood then, but also how courts had applied them. The Statement explained: "After digesting all the information received in its review, the IWC chose to adopt regulations for Wage Orders 1-13, and 15 that substantially conform to ***current guidelines*** in the enforcement of IWC orders, whereby certain Fair Labor Standards Act regulations (Title 29 C.F.R. part 541) have been used . . . ." (12 Exs. 3516, emphasis added.)

For the proposition that Wage Order 4-2001 should be interpreted based on subsequent guidelines in federal law, the opening brief refers to a few snippets from the Statement. As defendants note, the IWC sought "to promote consistent enforcement practices" and "uniformity of enforcement." (12 Exs. 3515-3516.) In context, however, it is apparent the IWC was assuming a stability in federal law that, on the particular issues here, promptly

evaporated when the new administration took office in January 2001. Nothing indicates the IWC intended to snuff out California's independent exemption based on unforeseen, even ephemeral, changes in course at the federal level. In this Court's words, the IWC follows a "distinct approach" – not a copycat approach – "to defining categorical overtime exemptions." (*Ramirez*, *supra*, 20 Cal.4th at p. 798, fn. 4 [citing administrative exemption under Wage Order 4 as illustrating this principle].)

Moreover, the IWC undertook the California revisions, leading eventually to Wage Order 4-2001, with an eye to bolstering, not undermining, employee protections. The Statement actually begins with the following: "Pursuant to the 'Eight-Hour-Day Restoration and Workplace Flexibility Act,' [citation], the Legislature reaffirmed the State's commitment to the eight-hour workday standard and daily overtime . . . ." (12 Exs. 3513.) As the dissent acknowledged, the Legislature in 1999 sought to temper "wage orders that deprived about eight million workers of their right to overtime pay." (*Harris*, *supra*, 154 Cal.App.4th at p. 190 (dis. opn. of Vogel, J.).) In any event, defendants cite no authority for their notion that select phrases from the Statement can trump the unambiguous language of Wage Order 4-2001, incorporating only regulations "effective as of the date of this order." (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f).)

The point is of fundamental importance. "In determining how much weight to give federal authority in interpreting a California wage order, courts are cautioned to make [a] comparative analysis" of state and federal overtime schemes. (*Morillion*, *supra*, 22 Cal.4th at p. 588, citing *Ramirez*, *supra*, 20 Cal.4th at p. 798.) As discussed below, the comparative analysis here reveals significant changes in federal law after Wage Order 4-2001, thereby undermining defendants' effort to invoke recent federal law.

6. In a Substantive Shift, the Federal Administrative Exemption Was Revamped After Wage Order 4-2001

In November 2002, with a new administration firmly in place in Washington, the shift at the federal level began to manifest itself. The federal DOL issued an opinion letter emphatically concluding that insurance claims adjusters, at least under certain assumed facts, were exempt. (9 Exs. 2402.) But, addressing the point in 2004, the First District found the DOL's analysis unhelpful on questions of California law. (See *Bell III*, *supra*, 115 Cal.App.4th at pp. 733-735.) "[T]he persuasive power of the DOL Opinion Letter is undermined by its failure to review the body of federal decisions applying the administrative/production worker dichotomy derived from 29 C.F.R. part 541.205(a)." (*Id.* at p. 734.) "In this respect, it appears to represent a departure from past opinion letters of the DOL Wage and Hour Division that have repeatedly employed this analysis. The administrative/ production worker dichotomy, as *Bell II* notes, offers a common frame of reference for federal decisions in this area and has led to summary judgment for the employees in a line of decisions." (*Id.* at pp. 734-735, footnotes omitted.)

Agreeing with the First District, the Second District majority flagged the flaws in the DOL's analysis. (See *Harris*, *supra*, 154 Cal.App.4th at pp. 185-186.) The dissent did not disagree. (*Id.* at pp. 190-197.) Faithful to the IWC's temporal limitation – "as of the date of this order" (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f)) – the trial court too declined to rely on the 2002 DOL opinion letter. As that court observed, "the opinion letter was not available at the time the IWC incorporated the federal regulations." (13 Exs. 3828, fn. 5.)

In March 2003, the new administration continued its push to change the regulatory landscape by proposing a major revamp of the federal overtime rules. (12 Exs. 3390 [initial proposed rules].) According to the opening brief,

the new rules are "a clarification (not a change) of the Department's position" as to the exemption status of insurance claims adjusters. (OBM 33.) The "change versus clarification" debate is beside the point because the IWC, in 2001, could not have intended to incorporate a federal regulatory patina that did not yet exist. Even putting the timing aside, defendants are wrong. Perhaps on a macro level, the new regulations "were not intended to cause a substantive change in the law." (*Neary v. Metropolitan Property & Casualty Insurance Co.* (D.Conn. 2007) 517 F.Supp.2d 606, 613, fn. 1.) But, this is just a generalization. On the issues of interest here, there were significant changes.

As defendants admit, after *Bell II* in 2001, the DOL "stated that one of its goals was 'to reduce the emphasis on the so-called "production versus staff" dichotomy in distinguishing between exempt and nonexempt workers.'" (OBM 41.) This is, in fact, what resulted. The new federal regulations entirely repealed the provision expressly incorporated into Wage Order 4-2001 and central here, 29 C.F.R. part 541.205(a). (10 Exs. 2857.) The language from this regulation, of course, is the basis for the administrative capacity analysis followed by the Courts of Appeal. (See *Harris*, *supra*, 154 Cal.App.4th at pp. 174-178; *Eicher*, *supra*, 151 Cal.App.4th at pp. 1372-1373; *Bell II*, *supra*, 87 Cal.App.4th at pp. 819-820 and fn. 16; *Bell III*, *supra*, 115 Cal.App.4th at p. 729.) In the words of defendants' cited authority: "It is clear from the revised language of the August 2004 Regulations that the Department of Labor has moved away from this 'administrative/production dichotomy' in the context of the service industries." (*Robinson-Smith v. Government Employees Insurance Co.* (D.D.C. 2004) 323 F.Supp.2d 12, 22, fn. 6.)

In addition, although substantial importance is a separate requirement for the exemption under 29 C.F.R. part 541.205(a), substantial importance is no longer a prerequisite under the new federal regulations. The DOL eliminated the term entirely. As discussed above, the distinction between the type of work done and its importance was central to how the Court of Appeal

majority read all of 29 C.F.R. part 541.205 and reconciled its various subsections. Again, defendants do not challenge this aspect of the opinion. (See *Harris*, *supra*, 154 Cal.App.4th at pp. 174-175.) Yet, the DOL has charted a different analytical path under the new regulations. The agency reconfigured the federal administrative exemption so that now "the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance." (29 C.F.R. part 541.202(a).)

This is not minor tinkering. Indeed, the new federal regulations are not retroactive. They do not apply to overtime claims based on events pre-dating the new rules. As one court explained: "The [DOL] significantly revised the FLSA regulations effective August 23, 2004, especially the exemption provisions in 29 C.F.R. § 541 et seq." (*Tiffey v. Speck Enterprises, Ltd.* (S.D.Iowa 2006) 418 F.Supp.2d 1120, 1124, fn. 3.)

Of particular interest, the DOL added a provision declaring in conclusory fashion that "[i]nsurance claims adjusters" who perform certain duties qualify for the administrative exemption. (29 C.F.R. part 541.203(a).) Defendants now seek to get mileage out of this new regulation specifically targeting claims adjusters for exempt status. As defendants must admit, however, "the IWC did not have the benefit of this new regulation when it promulgated either Wage Order 4-1998 or Wage Order 4-2001 . . . ." (OBM 32-33.) For this reason, the new regulation, and others enacted after the IWC finished its work, are simply irrelevant to the matters of California law at issue here. (See Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f) [Wage Order 4-

2001 incorporating only certain regulations "effective as of the date of this order"].)[3]

7. Defendants' Recent Federal Case Law Rests Significantly on the Post-2001 Federal Landscape or Is Otherwise Distinguishable

This Court has emphasized that "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." (*Ramirez, supra*, 20 Cal.4th at p. 798.) "'The federal authorities are of little if any assistance in construing state regulations which provide greater protection to workers.'" (*Morillion, supra*, 22 Cal.4th at p. 594.) Ignoring these admonitions, defendants go heavy on recent federal decisions, which they say are "unanimous" in their favor. Defendants' cherry-picked cases, however, were virtually all decided under the new regulatory framework and in the context of the DOL's noticeable tilt in favor of insurance companies after January 2001. As the First and Second Districts have explained, the recent federal case authority is off base for these and other reasons. (See *Harris, supra*, 154 Cal.App.4th at pp. 186-188; *Bell III, supra*, 115 Cal.App.4th at pp. 728-735.)

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[3] Plaintiffs are aware of the recent decision in *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242 (*Combs*). On a record not resembling this case, the Fourth District found *Bell II* and *Bell III* "factually and legally distinguishable." (*Id.* at p. 1259.) Of concern, however, the *Combs* panel appears to have erroneously decided the appeal under the current federal regulations, not the ones the IWC carefully referenced in Wage Order 4-2001. (See, e.g., *id.* at pp. 182-183, 189-190.) As of this writing, a petition for review has been filed seeking "grant and hold" status pending resolution of this case. (See *Combs v. Skyriver Communications*, S161777, Petition for Review [filed Mar. 14, 2008].) Interestingly, the respondents in *Combs* did not ask the Fourth District to apply the current federal regulations. Rather, the respondents conceded that the federal regulations in effect when Wage Order 4-2001 was adopted were controlling. (See *Combs v. Skyriver Communications, Inc.*, D049984, Respondents' Brief [filed June 29, 2007].)

Among the recent cases, *In re Farmers Insurance Exchange, Claims Representatives' Overtime Pay Litigation* (9th Cir. 2007) 481 F.3d 1119 (*Farmers*) illustrates why recent federal doctrine has no bearing. The Ninth Circuit decided that case under the new exemption framework, not the preceding one incorporated into Wage Order 4-2001. (See *id.* at p. 1124 ["we are obligated to follow § 541.203"]; p. 1128 ["[t]he district court did not rely on" 29 C.F.R. part 541.203(a), "presumably because it was not in effect at the time the plaintiffs filed these actions," but "[n]evertheless, § 541.203 bears directly on our analysis"].) The same thing happened in *Roe-Midgett v. CC Services, Inc.* (7th Cir. 2008) 512 F.3d 865. Relying on the new regulations, the Seventh Circuit called the prior dichotomy analytical framework, among other things, "not terribly useful here, particularly given that the 2004 regulations suggest a more traditional meaning of 'production.'" (*Id.* at p. 872.)

In applying the new regulatory regime, the *Farmers* court sought to justify its opinion with a broad proclamation: "For more than 50 years, the Department of Labor has considered claims adjusters exempt from the Fair Labor Standard Act's overtime requirement." (*Farmers*, *supra*, 481 F.3d at p. 1124.) This sweeping assertion was based on three DOL opinion letters from 1957, 1963 and 1985, referenced obliquely in the opening brief. (OBM 31, fn. 14.) Although this litigation was initiated seven years ago, defendants began citing these older letters only after *Farmers* was published. What little the Ninth Circuit said about the letters does not support the emphatically one-sided nature of the opinion there. For example, the 1957 letter apparently states that in certain circumstances, insurance claim adjusters "'may be [exempt].'" (*Farmers*, *supra*, 481 F.3d at p. 1129.) This is a far cry from concluding that all such adjusters "must" be exempt.

Addressing *Farmers*, the Second District majority was "not persuaded" by the three older letters. (*Harris*, *supra*, 154 Cal.App.4th at p. 186, fn. 11.)

"None of those letters mentions the administrative/production worker dichotomy. In each of them, the analysis of the 'directly related' requirement consists of a single sentence, which asserts that the requirement is met because of the reference to 'claim agents and adjusters' in 29 C.F.R. § 541.205(c)(5)." (*Ibid.*) For the reasons already discussed, subsection (c)(5) creates no presumption in defendants' favor on the administrative capacity prong.

Defendants' few other published cases also do not compel the conclusion that the present class of adjusters performs administrative work under California law. In *Cheatham v. Allstate Insurance Co.* (5th Cir. 2006) 465 F.3d 578, the plaintiff adjusters conceded the very point that is hotly contested here. They "admitted in court . . . that their duties consisted primarily of 'office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers.'" (*Id.* at p. 584.) The decision in *Jastremski v. Safeco Insurance Cos.* (N.D.Ohio 2003) 243 F.Supp.2d 743 is not on point because it relied heavily on the 2002 DOL opinion letter – as both the trial court (13 Exs. 3828, fn. 5) and First District noted in distinguishing that case. (See *Bell III*, *supra*, 115 Cal.App.4th at pp. 732-735.) In sum, defendants' purported "avalanche" of federal authority does not support the sharp change in California law they ask this Court to announce.

8. Defendants Ignore the Principle that California Law Is Free to Provide Workers Stronger Wage Protections

More elementary than tallying good or bad federal decisions, defendants overlook that federal case law is at most persuasive, not binding. The question here is the scope of California's overtime rules, not the federal ones. Again, importantly, "state law may provide employees greater protection than the FLSA." (*Morillion*, *supra*, 22 Cal.4th at p. 592 [collecting cases].) A ruling in plaintiffs' favor, therefore, would not "nullify" any federal overtime rule. (OBM 2.) To the contrary, "'federal law does not control

unless it is more beneficial to employees than the state law.'" (*Morillion*, *supra*, 22 Cal.4th at p. 594.)

California frequently extends workers wage protections unavailable under federal doctrine. For instance, the time employees spend riding a bus from an employer-designated location to the workplace constitutes compensable "work" hours under California law, despite a different conclusion under the FLSA. (See *Morillion*, *supra*, 22 Cal.4th at pp. 587-594.) Mechanics in California have been paid for overtime even though they would be exempt under the federal statute. (See *Keyes Motors, Inc. v. Division of Labor Stds. Enforcement* (1987) 197 Cal.App.3d 557, 563-564 and fn. 3.) There are many more illustrations. (See *Ramirez*, *supra*, 20 Cal.4th at p. 795 [collecting additional examples].)

9. Defendants' Policy-Based Critique of California Law Is for the Legislature and the Relevant Administrative Agencies to Consider

Boiled down, defendants' pitch to this Court is that existing California law is "'outmoded'" and "'outdated.'" (OBM 39.) This, however, is a request for a new and different wage order. The IWC could not have been more pellucid that only certain federal regulations "effective as of the date of this order" – January 2001 – were incorporated into Wage Order 4-2001. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(f).) The IWC's express instruction reflects the agency's "exercise of a considerable degree of policy-making judgment and discretion" in fulfilling its "broad statutory mandate." (*IWC*, *supra*, 27 Cal.3d at p. 702.) This realm is not one for judicial second-guessing. As this Court has stressed, "we should not engage in needless policy determinations regarding wage orders the IWC promulgates." (*Morillion*, *supra*, 22 Cal.4th at p. 587.)

It is apparent, then, that defendants' undisguised preference for a different California administrative exemption presents "policy-based

arguments" for the Legislature or the IWC. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1046.) The Second District majority was right that "[i]t is the function of the Legislature and the relevant agencies, not of the courts, to determine whether the 'directly related' requirement or any of its components have become obsolete, and to modify them as necessary." (*Harris, supra*, 154 Cal.App.4th at p. 188, fn. 12.) In the words of a recent decision: "We, of course, have no authority to rewrite the regulatory scheme. In the end, whether the present state of affairs is satisfactory is for the Legislature to decide, and we leave that question to the Legislature's considered judgment." (*Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 999; see also *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.)

10. Class Decertification Is Premature

Defendants suggest the entire class must be decertified if plaintiffs' summary adjudication motion is denied as a result of this Court's opinion. (OBM 3, 20, 56.) Defendants' petition for review, however, did not raise the propriety of class status as an issue. Instead, defendants limited the issue for review to the correct legal standard governing their potential liability. Even assuming for sake of argument that class decertification was "fairly included" in the petition (Cal. Rules of Court, rule 8.520(b)(3)), defendants' request is ill-founded.

There appears to be no dispute that under the dichotomy analysis the trial court applied to Wage Order 4, and the Second District majority applied to both wage orders, class certification is appropriate – as it was in *Bell*. (See *Bell III, supra*, 115 Cal.App.4th at pp. 720-725.) The dichotomy framework for the administrative capacity prong presents a "theory of recovery" that "is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On, supra*, 34 Cal.4th at p. 327.)

Although not clearly framed, the question defendants really pose is what should happen to the certified class if defendants' liability is assessed under a different legal theory. According to defendants, "[w]ithout the dichotomy, individualized issues of fact and law unquestionably predominate, and the Court should therefore direct the trial court to decertify the class in its entirety." (OBM 20.) This proposed leap is unsupported by the record. In their briefing below, plaintiffs pointed out that even if *Bell* were disregarded, a class action could still be pursued under other liability theories. (11 Exs. 3132-3137; 12 Exs. 3318-3326; 13 Exs. 3744-3752.) Defendants' own briefs highlighted the common nature of the relevant facts. (1 Exs. 166-172, 206-209.) In any event, class certification under different legal theories, should it ever be necessary to reach them, is not ripe for adjudication on this record. As the trial court's orders reflect, the point presents questions for another day after this appeal is over. (1 Exs. 131; 13 Exs. 3831-3832.)

Apart from the correct liability standard under the wage orders, class decertification would be another way, in practical effect, for defendants to avoid paying overtime compensation under California law. Due to the relatively small amounts individually at stake, precluding the claims handlers from suing as a class "would pose a serious obstacle to the enforcement of the state's overtime laws." (*Gentry*, *supra*, 42 Cal.4th at p. 450.) As this Court has stressed, "sound public policy" favors class status in unpaid overtime cases. (*Sav-On*, *supra*, 34 Cal.4th at p. 340.) Contrary to defendants' assumption, "wage and hour disputes (and others in the same general class) routinely proceed as class actions.'" (*Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121, 138, citation omitted.)[4]

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[4] Finally, defendants contend that plaintiffs' summary adjudication motion must be denied due to, if nothing else, "triable issues of fact" related to liability. (OBM 56.) But, defendants identify no pertinent fact disputes. The

V. CONCLUSION

For the reasons given, plaintiffs respectfully ask this Court to affirm the judgment of the Second District Court of Appeal.

DATED: April 10, 2008

Respectfully submitted,

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inquiry for this Court is the proper legal standard applicable to – as defendants themselves state elsewhere – "undisputed facts." (OBM 34.)

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed **ANSWER BRIEF ON THE MERITS** is produced using 13-point Roman type, including footnotes, and contains approximately 13,607 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: April 10, 2008

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DECLARATION OF SERVICE BY MAIL

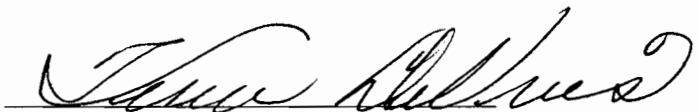
I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 655 West Broadway, Suite 1900, San Diego, California 92101.

2. That on April 10, 2008, declarant served the **ANSWER BRIEF ON THE MERITS** by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this tenth day of April, 2008, at San Diego, California.



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