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In The Supreme Court of the State of California

JAZMINA GERARD, KRISTIANE McELROY AND JEFFERY CARL
Plaintiffs and Appellants,

v.

ORANGE COAST MEMORIAL MEDICAL CENTER
Defendant and Respondent.

On Review From the Court of Appeal for the Fourth Appellate District, Division Three
4th Civil No. G048039

After an Appeal from the Superior Court of Orange County
Honorable Nancy Wieben Stock, Judge
Case Number 30-2008-00096591

ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, defendant and respondent Orange Coast Memorial Medical Center (Orange Coast) states that it is a not-for-profit organization and knows of no entity or person that has at least a 10 percent ownership interest in Orange Coast or of any other person or entity that has a financial or other interest in the outcome of the proceeding that Orange Coast reasonably believes the justices should consider in determining whether to disqualify themselves from this matter.

Dated: October 13, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By Richard J. Simmons by RJS

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ORANGE COAST MEMORIAL
MEDICAL CENTER

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INTRODUCTION

Plaintiffs and appellants Jazmina Gerard, Kristiane McElroy, and Jeffery Carl (Plaintiffs) present two issues for review relating to the Legislature's enactment of Senate Bill No. 327 (2015-2016 Reg. Sess.) (SB 327):

> 1. Did the Legislature usurp the power of the Judiciary to interpret laws enacted and amended by a prior Legislature when it declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000?
>
> 2. When the Legislature declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, did it retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay under Labor Code section 226.7 without due process of law?

Both issues are anomalous in two respects. First, the court of appeal did not base its holding on SB 327. Its opinion was based on its own independent analysis and conclusions, including its analysis of the "subtle but critical distinction in administrative law—the date an agency regulation or order is *adopted* is not the same as the date it becomes *effective*." (*Gerard v. Orange Coast Memorial Center* (2017) 9 Cal.App.5th 1204, 1210 (*Gerard II*), original italics.) After reaching this conclusion, the court observed that SB 327 merely "reinforces our conclusion section 11(D) is valid." (*Id.* at p. 1211.) The court would have upheld the meal period waiver even if the Legislature had not enacted SB 327. Yet both issues Plaintiffs present center exclusively on SB 327, and neither addresses the actual basis of the court of appeal's holding.

Second, as phrased, both issues Plaintiffs raise have obvious and unremarkable answers. Of course the Legislature cannot "usurp the power

of the Judiciary" or "dictate to the courts." As the court of appeal observed, "[u]ltimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Gerard II, supra*, 9 Cal.App.5th at p. 1212.) And of course the Legislature cannot "retroactively deprive workers of vested rights without due process." Moreover, neither issue exists here because the Legislature did not usurp the power of the Judiciary, dictate the court of appeal's interpretation of the law, or retroactively deprive workers of vested rights without due process.

Instead, the dispositive issue is whether the Industrial Welfare Commission (IWC) had the authority to adopt the meal period waiver provision in subdivision 11(D) of Wage Order 5 when it did so on June 30, 2000. The court of appeal correctly concluded the answer is yes – a conclusion that comports with the plain meaning of the key statutes and their legislative history, the position of the Division of Labor Standards Enforcement (DLSE), and established practice for hospitals and health care unions throughout California for more than 25 years.

SB 327, which the Legislature approved unanimously as urgency legislation and which confirmed the IWC's authority to issue the meal period waiver provision at issue, thus constitutes a clarification, not a change, in the law. IWC Wage Order No. 5, subdivision 11(D), is valid and enforceable in authorizing health care workers to voluntarily choose to waive one of their two meal periods on shifts that exceed 12 hours.

For decades, the option to sign a meal period waiver has enjoyed strong support from health care employees, labor organizations, and hospitals because it promotes the health and welfare of those workers. Hundreds of employees, organized labor, hospital, and industry representatives testified about the benefits to employees and patients promoted by such waivers when the IWC first adopted them in 1993, and again in 1999-2000, when the IWC conducted hearings throughout

California to determine whether the waiver provisions should be retained under Assembly Bill 60 (1999-2000 Reg. Sess.) (AB 60).

For these reasons, the Court should hold the court of appeal correctly concluded the meal period waiver provisions in Wage Order 5-2001 are valid and enforceable and affirm the trial court's order granting summary judgment and denying class certification. Should the Court decide otherwise, it should hold its ruling does not apply retroactively in light of the long reliance health care employees, employers, and labor organizations have placed on established practice and pronouncements from the IWC and DLSE that uniformly confirm the validity of the waiver provisions.

BACKGROUND

The Complaint

Plaintiffs were employed by Orange Coast as health care employees in the health care industry. (1 Appellants' Appendix (AA) 208, 282; 8 AA 2139-40, 2228; 9 AA 2324, 2348.) As is common, all three were scheduled to work three 12-hour shifts each week and take four days off. (1 AA 208, 282; 8 AA 2158; 9 AA 2374-76.) Orange Coast's meal period policy provides a 30-minute, uninterrupted meal period for each day of work over five hours. It also provides a second 30-minute, uninterrupted meal period for each day of work over 10 hours. (5 AA 1424, 1426, 1432-33.) For shifts longer than 10 hours, Orange Coast permits employees to voluntarily waive one of their two meal periods in the manner Wage Order 5-2001 authorizes. Employees are free to revoke their waiver at any time. (5 AA 1426-27.)

Many employees choose to sign waivers so they can complete their work day earlier. (1 AA 210.) If employees waive one of two meal periods in a 12-hour shift, their work day is 12.5 hours (12 hours of work, plus one off-duty 30-minute meal period). (*Ibid.*) If employees desire two meal periods, their work day is 13 hours (12 hours of work, plus two off-duty 30-

minute meal periods). (1 AA 210-11.) Whether employees elect one or two meal periods, they work and are paid for 12 hours. The decision to waive a meal period does not change the number of hours employees work or their total pay for a day's work. All three Plaintiffs voluntarily signed meal waivers during their employment, and none revoked his or her waiver. (8 AA 2035:11-19, 2115-2118, 2182:13-2183:13; 2245; 9 AA 2364:3-2366:4, 2372.)

In August 2008, Plaintiff Gerard filed this purported class action alleging various wage and hour violations. In her first amended complaint, Gerard added a claim for penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, §§ 2698-2699.5). After the trial court ruled Gerard's claims were not typical of the proposed class, McElroy and Carl joined as plaintiffs for all but the PAGA claim. (See, e.g., 1 AA 50-51.) Plaintiffs' meal period cause of action alleges:

> 51. During the relevant time period, Plaintiffs and other class members who were scheduled to work for a period of time in excess of twelve (12) hours were required to work for periods longer than ten (10) hours without a second uninterrupted meal period of not less than thirty (30) minutes.
>
> [¶] . . . [¶]
>
> 54. Defendant's conduct violates the applicable IWC Wage Orders and California Labor Code sections 226.7 and 512(a).

(1 AA 60.)

Plaintiffs have never alleged their meal waivers were not entirely voluntary, that they did not have the opportunity to revoke them at any time, or that they ever attempted to exercise their right to revoke them. Instead, they allege they worked slightly over 12 hours on a handful of occasions and that their waivers were not permissible on such shifts even though the waivers comported with Wage Order 5-2001. Plaintiffs do not

allege they were not paid properly for the time they worked more than 12 hours.

The Trial Court's Rulings

After four years of litigation, the trial court granted Orange Coast's motion for summary judgment, dismissing Plaintiffs' individual and PAGA claims. The court stated there were no disputed issues of material fact that Plaintiffs were provided with all required meal periods and that their illegal meal period waiver theory was "incorrect per *Brinker* [*Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*)]." (RT 138:11-12.) The court also granted Orange Coast's motion to deny class certification and strike all of Plaintiffs' class allegations because, among other things, Plaintiffs "have failed to show that they have any claim against the Defendant . . . ." (10 AA 2823.) The order denying class certification encompassed all of Plaintiffs' claims, including their meal period, rest period, reimbursement, and final pay claims, among others. Plaintiffs appealed but limited their appeal to their meal period claim.

The Court of Appeal's First Opinion (*Gerard I*)

In February 2015, the court of appeal reversed and directed the trial court to deny Orange Coast's motion for summary judgment and consider Orange Coast's other grounds for denying class certification. (*Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285 (*Gerard I*).) Fundamental to both rulings was the court's holding that IWC Wage Order 5-2001 was partially invalid to the extent it allows health care employees to waive their second meal period on shifts longer than 12 hours. The court of appeal observed that subdivision 11(D), which "permits health care workers to waive their second meal periods, even on shifts in excess of 12 hours," conflicts with Labor Code section 512(a), "which limits second period meal waivers to shifts of 12 hours or less." (*Gerard I, supra*, 234 Cal.App.4th at p. 294.)

The court reasoned that although the Legislature had enacted Labor Code section 516 to empower the IWC to *adopt* new wage orders by July 1, 2000 "[n]otwithstanding any other provision of law," it retroactively nullified this grant of authority just ten weeks later when Senate Bill 88 (1999-2000 Reg. Sess.) § 4 (SB 88) amended this introductory phrase in section 516 to read, "*Except as provided in Section 512*" (section 512 limits second meal period waivers to shifts of not more than 12 hours). (*Gerard I, supra*, 234 Cal.App.4th at pp. 294-298.) In *Gerard II*, the court recognized it was mistaken because the IWC validly adopted the meal waiver provision on June 30, 2000, as required by AB 60 and section 517, before SB 88 was passed.

The court ruled that with one exception, the retroactivity of its decision partially invalidating subdivision 11(D) of the Wage Order must be litigated on remand. The exception was Plaintiffs' premium wage claims based on Labor Code section 226.7, which generally renders employers who fail to provide a required meal period liable for one hour of pay at the employee's regular rate of compensation. As to those claims, the court found there was no compelling reason of fairness or public policy to warrant an exception to the general rule of retroactivity for its decision partially invalidating subdivision 11(D). (*Gerard I, supra,* 234 Cal.App.4th at pp. 298-302.)

This Court's First Grant of Review

Orange Coast filed a petition asking this Court to review two issues: (1) Is the authority for meal period waivers in subdivision 11(D) of Wage Order 5-2001 valid for work shifts of more than 12 hours? (2) If not, should the opinion of the court of appeal partially invalidating the waiver be applied retroactively? The Court granted the petition.

In August 2016, after briefing was completed, the Court issued an order transferring this matter to the court of appeal with directions "to

vacate its decision and to reconsider the cause in light of the enactment of Statutes 2015, Chapter 505 (Sen. Bill No. 327 (2015-2016 reg. sess.))."

The Court of Appeal's Second Opinion (*Gerard II*)

On remand, after receiving the parties' supplemental briefing, the court of appeal issued its opinion concluding, "it appears we erred" in *Gerard I* because the court "failed to account" for the "critical" fact that on June 30, 2000, the date the IWC adopted subdivision 11(D), it had the authority to do so. (*Gerard II*, 9 Cal.App.5th at pp. 1210-1211.) In holding the meal period waiver provision in Wage Order 5-2001 was valid the court noted the "lynchpin of our analysis [in *Gerard I*] was the conclusion that Wage Order No. 5, section 11(D) conflicts with section 512(a). .However, in reaching this conclusion we failed to account for a subtle but critical distinction in administrative law—the date an agency regulation is *adopted* is not the same as the date it becomes *effective*." (*Id.* at p. 1210, original italics.) The court noted that "[l]ong-settled case law validates the distinction between the adoption date and the effective date." (See, e.g., *Ross v. Bd. Of Retirement of Alameda County Employees' Retirement Assn.* (1949) 92 Cal.App.2d 188, 193, 206 P.2d 903.)[1]

Contrary to Plaintiffs' assertions, this holding was not "dictated" by SB 327, which does not mention when Wage Order 5-2001 was adopted or what role that date played in clarifying that subdivision 11(D) was "valid

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[1] The California Administrative Procedures Act (APA) sets forth a three-step process: first, Article 5 describes the "Procedure for *Adoption* of Regulations" by an administrative agency. (APA §§11346-11348, (italics added)); second, the Office of Administrative Law (OAL) must "review all regulations *adopted* [by the agency]." (*Id.*, §11349.1 (italics added)); and third, once approved by the OAL and filed with the Secretary of State, adopted regulations "*become effective*" in accordance with a prescribed quarterly schedule. (*Id.*, §11343,4 (italics added).) Thus, under the APA "adoption" precedes and has a distinct legal meaning from "effectiveness."

and enforceable" on and after October 1, 2000 when the Wage Order took effect. With this distinction in mind, the court noted "the SB 88 amendment to section 516(a) took away the IWC's authority to *adopt* wage orders inconsistent with the second meal period requirements of section 512(a) as of September 19, 2000. But the IWC had already adopted section 11(D) on June 30, 2000, under the AB 60 version of section 516(a) which authorized the IWC to do so 'notwithstanding' section 512(a).[2] Thus, the SB 88 amended version of section 516(a) should have been irrelevant to our analysis in *Gerard I*. Instead, it became dispositive. We concluded section 11(D) is subject to the SB 88 amended version of section 516(a). It isn't." (*Gerard II, supra*, 9 Cal.App.5th at p. 1211.)

The court concluded that Wage Order No. 5 "section 11(D) is valid—not invalid. It was specifically authorized by the AB 60 version of section 516(a) in effect on the date it was adopted, even though it conflicts with section 512(a) to the extent it sanctions second meal period waivers for health care employees on shifts of more than 12 hours. [Citation.] Therefore, the IWC did not exceed its authority by adopting section 11(D), and hospital's second meal period waiver policy does not violate section 512(a)." (*Ibid.*)

The court reached this conclusion independently of SB 327, but added that "SB 327 reinforces our conclusion section 11(D) is valid." (*Ibid.*) Applying the principles in this Court's opinion in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, the court noted "it is apparent SB 327 merely clarified rather than changed the meaning of

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[2] Because the Legislature simultaneously enacted section 512(a) and the "notwithstanding" language in section 516 as part of AB 60, it must have intended to authorize the IWC to make exceptions to section 512 the IWC deemed appropriate.

sections 512(a) and 516(a). Our opinion in *Gerard I* concerned a novel question of statutory interpretation. No prior published opinion had considered the validity of section 11(D) in relation to sections 512(a) and 516(a). SB 327 was enacted soon after *Gerard I*, and in direct response to the controversy our opinion created regarding the validity of section 11(D)." (*Gerard II, supra*, 9 Cal.App.5th at p. 1212.)

On remand, Plaintiffs argued SB 327 changed, rather than clarified the law. Plaintiffs' argument is rooted in the fallacy that "the IWC *never had* the authority to adopt wage orders inconsistent with section 512[(a)]." (See *id.* at p. 1213, original italics; see also Plaintiffs' Opening Brief [OB] at 26.) The court of appeal was not persuaded. (*Ibid.*) It explained that Plaintiffs' argument ignored the differences between the AB 60 version and SB 88 version of section 516: "SB 88 definitely changed the law. Before SB 88, the IWC had unlimited authority under section 516(a) to adopt wage orders like section 11(D), notwithstanding any other provision of law, including section 512(a). [Citation.] After SB 88, the IWC had no authority under section 516(a) to adopt wage orders like section 11(D) which are inconsistent with section 512(a)." (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.)

The court of appeal also observed that "nothing in the legislative history of SB 88 suggests the Legislature intended to invalidate wage orders like section 11(D), which were adopted under the AB 60 version of section 516(a) before July 1, 2000 as required by section 517." (*Ibid.*)

For these reasons, the court "accept[ed] SB 327 as the 'legislative declaration of the meaning' of sections 512(a) and 516(a) and 'g[ave] the Legislature's action its intended effect.'" (*Gerard II, supra*, 9 Cal.App.5th at p. 1214, citing *Western Security v. Superior Court, supra*, 15 Cal.4th at pp. 243, 246.)

The Meal Period Waiver Provision: A Short History

1. Origins in 1993 and Health, Safety, and Welfare Considerations

"The IWC is a five-member appointive board initially established by the Legislature in 1913." (*Collins v. Overnite Transportation Co.* (2003) 105 Cal.App.4th 171, 174.) The Labor Code authorizes the IWC "to establish minimum wages, maximum hours and standard conditions of employment for *all* employees in the state." (*Id.*, original italics.) Its authority is enshrined in California Constitution Article XIV, Section 1.

In establishing rules regarding wages, hours and the conditions of labor and employment, the IWC has the duty under Labor Code section 1173 "to investigate the health, safety, and welfare" of employees. The duty to protect the health, safety, and welfare of employees was also part of the standards created under AB 60 that applied to the IWC's rules for the health care industry to be published before July 1, 2000. (See Labor Code § 517(b).) The duty to protect the health, safety, and welfare of employees was thus of paramount importance when the IWC first adopted the meal period waiver provision in 1993 and when it preserved the provision on June 30, 2000.

"[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'" (*Brinker, supra*, 53 Cal.4th at p. 1027, citation omitted.) They "are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations." (*Id.*, citation omitted.) Under a unique statutory mandate in Labor Code section 517(a), the rules the IWC adopted by July 1, 2000 under AB 60, including the meal period waiver provision at issue, were "final and conclusive" for all purposes, and the IWC's findings of fact are conclusive in the absence of fraud under section 1187. That includes its findings regarding the health, safety, and welfare of employees.

In June 1993, the IWC amended Wage Order 5-1989 to add subdivision 11(C) to permit employees in the health care industry who worked shifts longer than eight hours (including shifts over 12 hours) to waive their right to a meal period:

> (C) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to a meal period. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

(See Orange Coast's Request for Judicial Notice (RJN), Ex. A at p. 2, 5.)

Before promulgating this meal period waiver provision, the IWC held hearings throughout California to receive testimony and evidence to meet its duty to investigate the impact the proposed meal period waiver provision would have on the health, safety, and welfare of health care workers. The IWC's Statement as to the Basis regarding the 1993 amendments explained this meal period waiver provision was supported by the "vast majority of employees testifying at public hearings" and "allows employees freedom of choice combined with the protection of at least one meal period on a long shift":

> The petitioner requested the IWC to allow employees in the health care industry who work shifts in excess of eight (8) total hours in a workday to waive their right to "any" meal period or meal periods as long as certain protective conditions were met. The vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a waiver, but only insofar as waiving "a" meal period or "one" meal period, not "any" meal period. Since the waiver of one meal period allows employees freedom of choice combined with the protection of at least one meal period on a long shift,

> on June 29, 1993, the IWC adopted language which permits [the waiver with the protections in subdivision 11(C)].

(See RJN, Ex. A at p. 9.)

The meal period waiver in Wage Order 5-1993, subdivision (C), was made available and applied by health care employees and employers for the next six and a half years without change. Moreover, it always authorized meal period waivers on shifts longer than 12 hours.

2. Assembly Bill 60

In 1998, the IWC issued Wage Orders that eliminated daily overtime requirements and made other changes to California's wage and hour rules. In response, in July 1999, the Legislature enacted AB 60, effective January 1, 2000, which added three sections to the Labor Code that are relevant to this dispute:

- Section 512, which provided that "[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." (See RJN, Ex. B at p. 18.) This 12-hour limit became known as the "12-hour meal waiver cap."

- Section 516, which empowered the IWC to "adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California consistent with the health and welfare of those workers." (*Id.* at p. 19.) The first words of section 516 provided that the IWC had the power to adopt such rules "[n]otwithstanding any other provision of law," which would include the 12-hour meal waiver cap in section 512. (*Ibid.*)

- Section 517, which directed the IWC to adopt, "at a public hearing to be concluded by July 1, 2000, [ ] wage, hours, and working conditions orders consistent with this chapter without convening wage boards," which "shall be final and conclusive for all purposes." (*Id.* at pp. 19-20 [section 517(a)].) AB 60 specified that such hearings must include "a review of wages, hours, and working conditions in the . . . health care industry." (*Id.* at p. 20 [section 517(b)].) In directing the IWC to review the wages, hours, and working conditions of several industries, including the health care industry, section 517(b) reiterated the IWC could adopt or modify regulations "consistent with its duty to protect the health, safety, and welfare of workers pursuant to section 1173." (*Ibid.*)

AB 60 also reinstated Wage Order "5-89 as amended in 1993 . . . until the effective date of wage orders issued pursuant to Section 517." (*Id.* at p. 22 [SEC. 21].) In enacting AB 60, the legislature noted its concern that "[f]amily life suffers when either or both parents are kept away from home for an extended period of time on a daily basis." (*Id.* at p. 13 [SEC. 2(e)].)

3. The Meal Period Waiver Provision

Between October 1, 1999 and June 30, 2000, in accordance with the directive in section 517, the IWC held 11 public meetings to implement AB 60's directives. (See RJN, Ex. C at pp. 26-60.) At these meetings, the IWC received evidence and heard testimony from hundreds of witnesses, including health care workers and labor organizations. (*Ibid.*; see also Labor Code § 70.1 (the IWC's five-member board must include two representatives of organized labor).)

On June 30, 2000, the last day pursuant to AB 60's mandate, the IWC adopted 15 new Wage Orders, including Wage Order 5-2001. Subdivision 11(D) of Wage Order 5 maintained (with minor revisions) the special meal period rules the IWC first promulgated following multiple

hearings as subdivision 11(C) in 1993. New subdivision 11(D), which remains in the current version of this Wage Order, permits second meal period waivers for employees who work shifts longer than eight hours:

> (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

(RJN, Ex. F at p. 83.)

In accordance with section 517, which empowered the IWC to adopt new Wage Orders by July 1, 2000, this waiver provision was "final and conclusive for all purposes" at the time the IWC adopted it on June 30, 2000. The IWC's findings of fact, including its findings that the meal period waiver was consistent with the health, safety, and welfare of employees and patients, were conclusive under section 1187.

4. Senate Bill 88

On September 19, 2000, almost three months after the IWC adopted Wage Order 5-2001, the Legislature enacted SB 88, which among other things amended the first line in Labor Code section 516. In an about face, it replaced "Notwithstanding any other provision of law" with "Except as provided in Section 512," the IWC "may adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California." (RJN, Ex. G at p. 108.) In short, SB 88 replaced the AB 60 version of section 516 with the SB 88 version that changed it, as the court of appeal acknowledged in its second opinion. (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.)

SB 88 provided that if enacted, section 512 "*would* prohibit the commission from *adopting* a working condition order that conflicts with those 30-minute meal period requirements. . . ." (RJN, Ex. G at p. 105, italics added.) Thus, on September 19, 2000, the Legislature changed the law for the first time to restrict the IWC's authority to deviate from the meal period rules in Labor Code section 512. The IWC had adopted the meal period waiver provision for health care employees on June 30, 2000, almost three months earlier. As a result, under Wage Order 5-2001, subdivision (D), health care employees and employers continued to utilize the meal period waiver that was first adopted by the IWC in Wage Order 5-1993, subdivision (C), consistent with AB 60 and SB 88.

5. Senate Bill 327

By unanimous vote on September 11, 2015, with strong support from both labor organizations representing health care employees and hospitals, the Legislature enacted SB 327, amending section 516 of the Labor Code as an urgency measure. (RJN, Ex. H at pp. 110-111.) In section 2(b), SB 327 declared the validity and enforceability of the health care employee meal period waiver provision on and after October 1, 2000, when subdivision 11(D) of Wage Order 5 became effective: "Notwithstanding subdivision (a), or any other law, including Section 512 [of the Labor Code], the health care employee meal period waiver provisions in Section 11(D) of Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable." (RJN, Ex. H at p. 111.) Section 2(b) adds that "[t]his subdivision is declarative of, and clarifies, existing law." (*Ibid.*)

The legislative history of SB 327 describes the support for the bill. There was no registered opposition. (See, e.g., RJN, Ex. K at p. 117-145.) Management, represented by the California Hospital Association, noted that

unless there was clarification that the meal period wavier for health care employees in section 11(D) has been valid since the IWC adopted it in 2000, "hospitals will be liable for a missed meal period premium on any day an employee worked even 1 minute over the 12-hour mark. This could result in millions of dollars in liability, as well as scheduling changes throughout the hospital industry . . . ." (*Id.* at p. 119.)

Two unions—the United Nurses Association of California/Union of Health Care Professionals (UNAC) and Service Employees International Union, United Healthcare Workers West (SEIU-UHW)—also supported SB 327 from the perspective of health care employees. (*Id.* at p. 121.) They explained how patients benefit dramatically "where the nurses and other health care professionals can place priority on the needs of their patients without interruption by an arbitrary meal period when the shift runs long. (RNs are generally able to eat during work time in break rooms.) In addition, allowing health care workers the option of working longer shifts enables them to take extra days off during the work week, which in turn ensures that they are fully rested when they return to work to provide better patient care." (*Ibid.*) The unions also noted the 12 hour shifts and meal period waiver allows employees to "spend less time commuting and more time with family and friends," resulting in "enhanced work-life balance" that "increases job satisfaction and less burn-out." (*Ibid.*) They concluded that "[r]ather than risk overturning 22 years of settled regulation we are asking for a legislative solution that would simply codify the existing regulation into law." (*Ibid.*)

The uncodified preamble in SB 327 provides that:

- "Existing wage orders of the [IWC] provide that employees in the health care industry who work shifts in excess of 8 total hours in a workday may voluntarily waive their right to 1 of their 2 meal periods in a prescribed manner." (RJN, Ex. H at p. 110.)

- "This bill would provide that the health care employee meal period waiver provisions in those existing wage orders were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable." (*Id.* at p. 111.)

- "The bill would state that the bill is declarative of, and clarifies, existing law." (*Ibid.*)

The codified text of SB 327 includes two declarations.

(a) "From 1993 through 2000, Industrial Welfare Commission Wage Orders 4 and 5 contained special meal period waiver rules for employees in the health care industry. Employees were allowed to waive voluntarily one of the two meal periods on shifts exceeding 12 hours. On June 30, 2000, the Industrial Welfare Commission adopted regulations allowing those rules to continue in place. Since that time, employees in the health care industry and their employers have relied on those rules to allow employees to waive voluntarily one of their two meal periods on shifts exceeding 12 hours." (*Ibid.*)

(b) "Given the uncertainty caused by a recent appellate court decision, *Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285, without immediate clarification, hospitals will alter scheduling practices." (*Ibid.*) Such scheduling practices were those the IWC authorized to protect the health, safety, and welfare of employees who prefer the advantage of being at work 12.5 hours rather than 13 hours to complete a 12-hour shift.

Section 3 of SB 327 states the facts supporting the Legislature's enactment of the bill as an urgency statute as follows: "In order to confirm and clarify the law applicable to meal period waivers for employees in the health care industry throughout the state, it is necessary that this act take effect immediately." (*Ibid.*)

The file maintained by the Rules Committee of the California Senate of records pertaining to SB 327 includes a letter from the Honorable Congressman Michael M. Honda to Governor Edmund "Jerry" Brown urging him to sign SB 327. (RJN, Ex. I at p. 113.) Congressman Honda wrote to Governor Brown "as a principal co-author of SB 88 that was passed by the Legislature and signed by the Governor in 2000." (*Ibid.*)

Rep. Honda noted the "two primary purposes of SB 88 were to immediately address two significant issues that had arisen after passage of AB 60. The first purpose was to create a computer professional exemption such that highly compensated computer professionals could continue to qualify as exempt even if they were paid on an hourly basis. The second purpose was to authorize the IWC to establish exemptions to the overtime obligation for certain certified nurses. This was necessary because AB 60 created Labor Code 515(f), which precluded registered nurses from qualifying as exempt under the professional exemption. Both of those changes were cited in support of the justification for urgency legislation." (*Ibid.*)

Rep. Honda also noted that, "[w]hile it was clear that SB 88 amended Labor Code § 516 to limit the IWC's authority to adopt new meal period rules after SB 88 was enacted that were inconsistent with Labor Code § 512, there was no discussion or intent to impact any Wage Order provisions adopted prior to that date, including Wage Orders 4 & 5, Section 11(D). In other words, the intent was to limit the IWC's authority only prospectively," after SB 88 became effective, not to apply the new law retroactively or invalidate the IWC's longstanding health care waiver provision. (*Ibid.*)

SUMMARY OF ARGUMENT

Neither of the issues Plaintiffs raise regarding SB 327—whether the Legislature can "dictate to the Judiciary how to interpret laws regarding

meal period requirements" and whether the Legislature can "retroactively deprive health care workers of their vested rights to millions of dollars of premium pay without due process of law"—was a basis of the court of appeal's holding. In any event, both have obvious answers: no. Neither the issues nor their answers have anything to do with what occurred here or whether the court of appeal correctly decided the meal waiver provision in subdivision 11(D) is valid.

The real issue is whether the court of appeal correctly held the IWC had authority to adopt the meal period waiver provision in subdivision 11(D) on June 30, 2000. It did. As part of AB 60, new section 516 empowered and directed the IWC to adopt working condition orders with respect to break periods, meal periods, and days of rest for workers in California consistent with the health and welfare of those workers, "notwithstanding any other provision of law."

The IWC thus had direct statutory authority to disregard the 12-hour meal waiver cap in section 512—clearly a "provision of law"—so long as doing so was "consistent with the health and welfare of those workers." Before 2000, the IWC and DLSE had extensive experience with the 1993 meal period waiver provision that never contained a 12-hour cap. It afforded employees flexibility in their scheduling and allowed them to complete their shifts in 12.5 hours rather than 13 hours for the same pay. Employees were thus able to leave work sooner and spend more time with their families. The numerous public hearings the IWC held in accordance with AB 60 unequivocally established that the meal period waiver provision, which enjoyed strong support from health care employees, labor organizations, and employers alike, was consistent with the health and welfare of employees. Plaintiffs do not contend otherwise, and there no contrary evidence in the record.

The IWC's Statement as to the Basis for Wage Order 5 first examined the 12-hour workday for health care employees. It noted the IWC "received testimony and correspondence from numerous employees, employers, and representatives of the health care industry regarding alternative workweeks. Citing personal preference, commuter traffic, mental and physical wellbeing, family care, and continuity of patient care issues, the vast majority of testimony from health care employees urged the retention of the 12-hour workday." (RJN, Ex. F at p. 94.)

The Statement as to the Basis then examined the meal period waiver provision and its application to health care employees who worked longer than 12 hours. "Consistent with the health, safety, and welfare of employees in the health care industry, the IWC determined that Wage Orders 4 and 5 should have somewhat different language regarding meal periods. The IWC received correspondence from members of the health care industry requesting the right to waive a meal period if an employee works more than a 12-hour shift. The IWC notes that Labor Code §512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers." (RJN, Ex. F at pp. 100-101.) The IWC's findings that the second meal period waiver is consistent with the health, safety, and welfare of health care workers are conclusive under sections 517 and 1187.

Nothing in the text of SB 88 suggests the IWC did not have the authority to adopt this health care worker meal waiver provision on June 30, 2000. Its preamble provided that if enacted, SB 88 "*would* prohibit the commission from adopting a working condition order that conflicts with those thirty-minute meal period requirements . . . ." (Italics added.) Future

tense. Likewise, the text of SB 88 states that if enacted, the new law "*would* prohibit the commission from adopting a working condition order that conflicts with those thirty-minute meal period requirements . . . ." (Italics added.) Again, future tense.

In addition, as the court of appeal noted, "nothing in the legislative history of SB 88 suggests the Legislature intended to invalidate wage orders like section 11(D), which were adopted under the AB 60 version of section 516(a) before July 1, 2000, as required by section 517." (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.) Plaintiffs' argument based on the word "clarifies" in the Senate third reading analysis for SB 88 pales by comparison with the plain language in section 516, which empowered the IWC to promulgate wage orders "notwithstanding any other provision of law." The IWC expressly referred to and relied upon this authority when it adopted the special meal period waiver rule for health care employees in the face of its findings that it protected the health, safety, and welfare of those workers. It follows that SB 327, which confirmed the IWC's authority to adopt the meal period waiver provision, merely clarified, rather than changed, the law.

For these reasons, the Court should uphold the court of appeal's conclusion that the meal waiver provision is valid and affirm the trial court's order granting summary judgment in Orange Coast's favor and denying class certification. If it concludes otherwise, however, the Court should hold its ruling should not be applied retroactively.

ARGUMENT

I. The IWC Validly Adopted the Meal Period Waiver Provision in Subdivision 11(D) of Wage Order 5-2001

Though this case has had an unusual procedural history, including two trips to this Court and new legislation in response to the court of appeal's opinion in *Gerard I*, the analysis of the key issue is

straightforward. The conclusion that the IWC validly adopted the meal period waiver provision at issue follows from the plain meaning of Labor Code sections 512 and 516 when enacted as part of AB 60 in July 1999.

As noted above, section 512 created the 12-hour meal waiver cap by providing that "[a]n employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period . . . , except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee . . . ." Enacted at the same time, however, section 516 authorized the IWC to "adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California" and to do so "[n]otwithstanding any other provision of law," including the 12-hour meal waiver cap in section 512.

The contemporaneous analysis of AB 60 by the DLSE confirmed the IWC's authority was extensive. In its December 1999 analysis, the DLSE emphasized the broad scope of the IWC's authority to adopt new wage orders "notwithstanding any other provision of law." It noted the "IWC will continue to have an important role in defining meal period requirements, as section 10 of AB 60 adds section 516 to the Labor Code, which provides that notwithstanding any other provision of law, the IWC may adopt or amend regulations regarding meal periods . . . ." (See RJN, Ex. D at p. 69.) The DLSE continues to recognize the validity of the meal period waiver provision. In its "Enforcement Policies and Interpretations Manual, the DLSE discusses the "12-hour waiver cap" provision of Labor Code section 512 and notes the cap does not apply to employees in the health care industry under subdivision 11(D). (RJN, Ex. E at p. 73.)

The only limitation section 516 placed on the IWC's authority was that the IWC's wage orders must be "consistent with the health and welfare" of California workers. As required by new section 517, between

October 1, 1999 and June 30, 2000, the IWC held 11 public hearings to implement AB 60's directives. (See RJN, Ex. C at pp. 26-60.) In those public hearings, much of the testimony focused on the interplay between the proposed new wage orders and the workers' health, safety, and welfare. (*Ibid.*) Following these extensive hearings, and with strong support from health care employees and employers, the IWC adopted 15 new Wage Orders on June 30, 2000, including the meal period waiver provision at issue.

The IWC's Statement as to the Basis concerning the new Wage Orders noted that although section 512 "explicitly" did not permit employees to waive their second meal period on shifts longer than 12 hours, section 516 authorized the IWC to permit such waivers consistent with the health and welfare of such employees:

> The IWC notes that Labor Code § 512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers.

(RJN, Ex. F at pp. 100-101.)

After conducting its hearings, the IWC concluded the special meal period waiver provisions in Wage Orders 4 and 5 were, indeed, "[c]onsistent with the health, safety, and welfare of employees in the health care industry," and thus it "determined that Wage Orders 4 and 5 should have somewhat different language regarding meal periods." (*Id.* at p. 100.) These wage orders and the IWC's findings are conclusive for all purposes under sections 517(a) and 1187. Plaintiffs do not challenge the IWC's determination. Nor do they argue the meal period waiver provision is detrimental to the health and welfare of health care workers. And there is nothing in the record to suggest such is the case. To the contrary, the

record shows longstanding consistent support of the meal waiver provision from health care employees, labor organizations, and employers alike.

Health care workers have consistently expressed a strong preference for 12-hour shifts. (See RJN, Ex. K at p. 121.) As the UNAC noted in supporting SB 327, the 12-hour shifts allow employees to spend less time commuting and more time with family and friends, resulting in better work-life balance, increased job satisfaction, and less job burnout. (*Ibid.*) In supporting Orange Coast's petition for review, the UNAC and SEIU-UHW wrote that the "consequence of the Court of Appeal's decision [in *Gerard I*] would be to disrupt a well-established pattern for scheduling 12-hour shifts for nurses that both labor and management representatives have accepted and that the IWC endorsed. Many nurses started working 12-hour shifts in the late 1970s and early 1980s because they allow for more continuity of care and, as many nurses are parents, more days off to care for children. The trade-off between longer shifts and fewer work days has been a recruitment tool for hospitals and has attracted professionals to a physically and emotionally challenging job." (RJN, Ex. M at p. 270.)

The second meal waiver provision also allows health care employees to go home sooner at the end of the work day, which could make the difference for parents to spend time with their children before bedtime. This benefit to employee health and welfare from the meal period waiver is consistent with the preamble to AB 60, which recognized the negative impact on family life when parents are kept away from home longer than need be. (RJN, Ex. B at p. 15 [SEC. 2(e)].) At the same time, employees are generally able to eat during work time in break rooms. (See RJN, Ex. M at p. 268; Ex. N at p. 287.) Section 11(D) protects employees who do so, mandating that "[t]he employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect." Presumably acting in their own best interests, Plaintiffs

voluntarily signed meal period waivers and never exercised their right to revoke them. (8 AA 2035:11-19, 2115-2118, 2182:13-2183:13; 2245; 9 AA 2364:3-2366:4, 2372.)

Any argument that allowing employees to waive one of two meal periods on shifts over 12 hours will encourage employers to "overwork" their employees is misplaced. Several safeguards are already in place.

First, as noted, employees are not required to elect a meal period waiver and, if they do, may revoke it at any time. Second, a valid alternative workweek schedule in the health care industry is necessarily limited to a "regular schedule" of 12 hours, not more. (See Wage Order 5(3)(8).) Health care employees only work over 12 hours in a work day in unexpected circumstances, necessitated by unusual patient care needs. (See, e.g., RJN, Ex. M at pp. 269-270; Ex. N at pp. 287-290.) Third, employers must pay an "overtime rate of no less than double the regular rate of pay . . . for any work in excess of 12 hours per day." (Labor Code section 511(b).) Wage Order 5, section 3(B)(9)-(11) establishes additional limitations on the hours or work for employees who elect alternative workweek schedules.

As the Court noted in *Brinker*, the Legislature first regulated meal periods when it adopted AB 60 in 1999. By that time, the IWC had for more than a half century "developed a settled sense of employers' meal break obligations." (*Brinker, supra*, 53 Cal.4th at p. 1037.) The Court noted that "we begin with the assumption the Legislature did not intend to upset existing rules, absent a clear expression of contrary intent." (*Ibid.*) When the Legislature enacted AB 60, the IWC's 1993 Wage Order 5-1989 that permitted health care workers to waive second meal periods on shifts longer than eight hours had been in effect for six years.

Further, "[a]s part of its response to the IWC's rollback of employee protections, the Legislature wrote into statute various guarantees that

previously had been left to the IWC, including meal break guarantees. (§ 512, subd. (a).) The declared intent in enacting section 512 was not to revise existing meal period rules but to codify them in part . . . . It follows that the duty the Legislature intended to impose was the duty as it had existed under the IWC's wage orders." (*Brinker, supra*, 53 Cal.4th at pp. 1037-1038.)

For these reasons, the court of appeal concluded the meal period waiver "was specifically authorized by the AB 60 version of section 516(a) in effect on the date it was adopted, even though it conflicts with section 512(a) to the extent it sanctions second meal period waivers for health care employees on shifts of more than 12 hours." (*Gerard II, supra*, 9 Cal.App.5th at p. 1211.) This Court should affirm.

II. SB 88 Did Not Invalidate the Special Meal Period Waiver

Plaintiffs argue that "on June 30, 2000, the IWC adopted a wage order *that it knew explicitly conflicted* with Labor Code section 512." (OB at 25, original italics.) They suggest this was improper, but AB 60 shows it was not. AB 60 established a general 12-hour meal waiver cap (section 512) but also empowered the IWC to adopt wage orders with effect to meal periods "[n]otwithstanding any other provision of law," so long as such orders were consistent with the health and welfare of those workers (section 516). AB 60 also made those wage orders conclusive for all purposes. (Section 517(a).)

Plaintiffs make no response to this straightforward interpretation of sections 512 and 516. Instead, they stake their argument that the IWC lacked authority to adopt the meal period waiver provision on one isolated bit of legislative history: the senate third reading analysis for SB 88. Plaintiffs rely on language in this analysis that SB 88 "clarifies two provisions of the Labor Code [sections 512 and 516] . . . and *provides that the IWC's authority to adopt or amend orders under Section 516 must be*

consistent with the specific provisions of Labor Code Section 512. . . ." (OB at 29, citing *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438, original italics.) Plaintiffs argue this language "denotes a legislative intent that Section 516 as then amended reflected the law as it always was, i.e., when Sections 512 and 516 were *originally* enacted. That means the Legislature never conferred upon the IWC authority to adopt or amend wage orders inconsistent with Section 512." (OB at 30, original italics.)

This conclusion does not follow for several reasons. First, "notwithstanding any other provision of law" means what it says: *notwithstanding any other provision of law*. Plaintiffs' interpretation of section 516, that "notwithstanding any other provision of law" means "any other provision of law except section 512," contradicts the plain language of the statute.

Second, Plaintiffs' argument also contradicts the language of SB 88. The preamble to SB 88 notes that if enacted, the new law "would prohibit the commission from adopting a working condition order that conflicts with those 30-minute meal period requirements . . . ." (RJN, Ex. G at p. 105.) "*Would* prohibit" means a prohibition that would take effect going forward, not one that was already there.

Third, had the Legislature intended to make clear the IWC lacked authority to adopt subdivision 11(D), it would have said so in clear, explicit language in the statute, not just in a brief snippet of legislative history that is at best ambiguous. As the principal co-author of SB 88 noted, the two primary purposes of the new law had nothing to do with the meal period waiver provision. And "[w]hile it was clear that SB 88 amended Labor Code § 516 to limit the IWC's authority to adopt new meal period rules after SB 88 was enacted that were inconsistent with Labor Code § 512, there was no discussion or intent to impact any Wage Order provisions

adopted prior to that date, including Wage Orders 4 & 5, section 11(D)." (RJN, Ex. I at p. 113.)

Fourth, after SB 88 became effective, the IWC amended Wage Order 5-2001 six times (January 1, 2002, July 1, 2003, January 1, 2004, January 1, 2005, January 1, 2006 and July 1, 2014).[3] Each time it retained the subject meal period waiver in subdivision 11(D). Likewise, between 2003 and 2010 the Legislature amended Labor Code section 512 three times to provide exceptions to the meal period requirements for various other industries. (See Lab. Code § 512(c)-(f); Stats. 2003, ch. 207, § 1 (AB 330); Stats 2005, ch. 414, § 1 (AB 1734); and Stats. 2010, ch. 662, § 1 (AB 569).) At no time did it purport to change or repeal subdivision 11(D) in Wage Order 5-2001. And, as noted above, the DLSE continues to recognize the validity of the meal period waiver provision at issue. (RJN, Ex. E at p. 73.)

In sum, as the court of appeal noted, "nothing in the legislative history of SB 88 suggests the Legislature intended to invalidate wage orders like section 11(D), which were adopted under the AB 60 version of section 516(a) before July 1, 2000 as required by section 517." (*Gerard II, supra,* 9 Cal.App.5th at p. 1213.) The court also rejected Plaintiffs' argument that SB 88 "clarified" the law. Instead, SB 88 "definitely changed the law. Before SB 88, the IWC had unlimited authority under section 516(a) to adopt wage orders like section 11(D), notwithstanding any other provision of law, including section 512(a). [Citation.] After SB 88, the IWC had no authority under section 516(a) to adopt wage orders like section 11(D) which are inconsistent with section 512(a)." (*Ibid.*)

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[3] See www.dir.ca.gov/iwc/wageorderindustriesprior.htm.

The court of appeal underscored the importance of this distinction by noting this Court's opinion in *Brinker* "did say SB 88 was, 'intended to prohibit the IWC from amending its wage orders in ways that "conflict[] with [the] 30-minute meal period requirements" in section 512[(a)]. [Citations.]' (*Brinker, supra*, 53 Cal.4th at p. 1043.) *Brinker* did not say SB 88 was intended to prohibit the IWC from adopting such wage orders before SB 88 became effective." (*Gerard II, supra*, 9 Cal.App.5th at p. 1213.)

III. SB 327 Reinforces the Court of Appeal's Conclusion that the Meal Period Waiver Provision Is Valid

For much the same reasons, SB 327 constitutes a clarification, not a change, in the law. The IWC had the authority to adopt the meal waiver provision under AB 60, and SB 327 clarifies and confirms this authority by expressly providing the waiver was valid and enforceable on and after October 1, 2000, when subdivision 11(D) became effective. In short, subdivision 11(D) was valid when it was adopted on June 30, 2000 and when it took effect on October 1, 2000.

Although the legislative declaration in SB 327 is not binding on the Court, it is entitled to due consideration. (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 ["[I]f the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration. [Citation.]"].) In enacting SB 327, the Legislature unanimously passed an urgency measure in response to the court of appeal's opinion in *Gerard I*, the detrimental impact it would have on the schedules of health care employees, and considerations of the health, safety, and welfare of health care employees.

Where, as here, "the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give

the Legislature's action its intended effect." (*Western Security Bank v. Superior Court, supra,* 15 Cal.4th at p. 246, citations omitted.) A legislative enactment "which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute . . . ." (*Carter v. California Dept. of Veterans Affairs, supra*, 38 Cal.4th at p. 923.)

In enacting SB 327 the Legislature announced its intention to confirm and clarify the law applicable to meal period waivers for employees in the health care industry "[g]iven the uncertainty caused by [the court of appeal's first opinion]." (SB 327, subd. (b).) Because the Legislature enacted the new law shortly after the court of appeal's first opinion, the Court should regard the new law as a legislative declaration that clarified, not changed, the law. (See *Palacio v. Jan & Gail's Care Homes, Inc.* (2015) 242 Cal.App.4th 1133, 1141 n. 2 ["The purpose behind Senate Bill 327 was to clarify the law so hospitals would not have to alter scheduling practices as a result of the appellate court's decision in *Gerard* [I]."

IV. Should the Court Rule Otherwise, It Should Hold Its Ruling Does Not Apply Retroactively

It is a "general rule that judicial decisions are given retroactive effect," even if they "represent[] a clear change in the law." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978-979.) However, an exception to this general rule applies "when a judicial decision changes a settled rule on which the parties below have relied." (*Claxton v. Waters* (2004) 34 Cal.4th 367, 378.) The exception is based on "considerations of fairness and public policy." (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372, disapproved of on other grounds in *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 673, fn. 2.) It "applies in particular

when a party justifiably has relied on the former rule." (*Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 442 (*Bearden*).) That is exactly the situation here.

In other briefing, Plaintiffs argued two opinions, *Bearden*, *supra*, 138 Cal.App.4th 429 and *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560 (*Lazarin*) put health care employers "on notice" the meal period waiver provision in Wage Order 5 was not valid. Not so. Neither of these opinions addresses the validity of Wage Order No. 5-2001. Both focus on subdivision 10(E) of Wage Order No. 16-2001 (Cal. Code Regs., tit. 8, § 11060), which applies to construction workers, not health care employees.

The differences between Wage Order 16 and Wage Order 5 are critical. Unlike the meal period waiver provision at issue, Wage Order 16 was adopted after SB 88 took effect on September 19, 2000. Subdivision 11(D) of Wage Order 5-2001 was adopted on June 30, 2000, *before* SB 88 became effective.

In addition, although *Bearden* and *Lazarin* both involve Wage Order 16, they do not agree as to retroactivity. When both cases were decided, Labor Code section 226.7 provided an employer was liable for premium pay only if it failed to provide a meal period in accordance with an IWC W*age Order*.[4] In *Bearden*, the court held the defendant employer was not liable for premium pay because despite violating section 512, it had not violated a wage order. (*Bearden, supra,* 138 Cal.App.4th at p. 443.)

In L*azarin*, by contrast, the court imposed liability retroactively on the grounds the meal period waiver Wage Order 16 permitted was void *ab*

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[4] Effective January 1, 2014, section 226.7 was amended to provide for such liability if the employer's conduct violated a Wage Order or an *applicable statute* (including section 512).

initio and thus had effectively never been part of Wage Order 16-2001. (*Lazarin, supra*, 188 Cal.App.4th at p. 1584.) Yet another court of appeal disagrees with *Lazarin*. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1142-1143.)

> In any event, neither *Bearden* nor *Lazarin* put California health care employers "on notice" that subdivision 11(D) of Wage Order 5 was invalid. As noted above, Wage Order 16-2001 was adopted *after* SB 88 became effective on September 19, 2000. Wage Order 5-2001, however, was adopted *before* SB 88 became effective. It was reasonable for health care employers to believe this distinction made a difference given the plain language of Labor Code section 517 (i.e., directing the IWC to "adopt" wage orders "by July 1, 2000" that "shall be final and conclusive for all purposes"). The court of appeal found this distinction dispositive. (*Gerard II, supra*, 9 Cal.App.5th at p. 1211.)

After SB 88 was enacted, the IWC continued to include subdivision 11(D) in six amended versions of Wage Order 5-2001. Although a health care employer has no obligation to post a copy of Labor Code section 512, it is required to post and abide by the provisions of Wage Order 5. (See Wage Order 5-2001, subdivisions 20 and 22.) The DLSE continues to recognize the validity of the meal period waiver provision at issue. (See RJN, Ex. E at p. 73.)

As the Court noted in *Brinker*, after the Legislature repealed many wage order changes in adopting AB 60 in 1999, health care employers and employees "persuaded the IWC to at least preserve expanded waiver rights for their industry, along the lines of those originally afforded in 1993. [Citation.] . . . Notably, the waiver provisions permit meal waivers even on shifts in excess of 12 hours and thus conflict with language in the standard subdivision regulating second meal periods in other wage orders that limits

second meal waivers to shifts of 12 hours or less [citations]." (*Brinker, supra*, 53 Cal.4th at p. 1047.)

Health care employers and employees have reasonably relied upon the meal period waiver provision of Wage Order 5 for more than a generation. In light of these longstanding rules and well-established practice, if the Court decides the IWC lacked the authority to adopt the meal period waiver at issue, it should rule its holding should not be applied retroactively.

CONCLUSION

For these reasons, the Court should uphold the court of appeal's conclusion that the meal period waiver provision in Wage Order 5-2001 is valid and affirm the trial court's order granting summary judgement in Orange Coast's favor and denying class certification. Should the Court rule otherwise, it should hold its ruling should not be applied retroactively.

Dated: October 13, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(1)(d))

The text of this Answer Brief on the Merits consists of 10,268 words, including all footnotes, as counted by the computer program used to generate this brief.

Dated: October 13, 2017

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4 Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On October 13, 2017, I served the following document(s) described as

ANSWER BRIEF ON THE MERITS

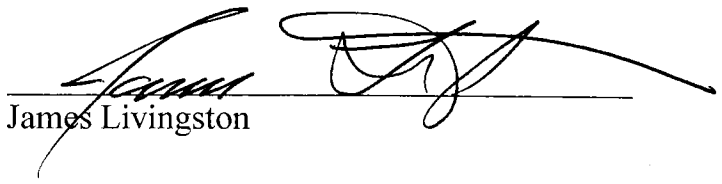
on interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

SEE ATTACHED LIST

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 13, 2017 at San Francisco, California.



James Livingston

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