S245607

IN THE

SUPREME COURT OF CALIFORNIA

GEORGE MELENDEZ, et al.,
Plaintiffs and Petitioner,

v.

SAN FRANCISCO BASEBALL ASSOCIATES, LLC
Defendant and Respondent,

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
CASE NO. A149482

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rules 8.208)

The following entities have either an ownership interest of 10 percent or more in the party filing this certificate (Cal. Rules of Ct., rule 8.208(e)(1)), or a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Ct., rule 8.208(e)(2)):

1. Bay Ball, Inc.
2. Grand Slam Baseball LP
3. Charles B. Johnson Trusteed IRA

Dated: July 12, 2018 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: 

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INTRODUCTION

At issue here is whether plaintiff George Melendez's claims for final wages under Labor Code section 201 require interpretation of, or substantially depend on or are intertwined with, the collective bargaining agreement between Melendez's union and the Giants (CBA), such that his claims are preempted under Section 301 of the Labor Management Relations Act (Section 301 or LMRA). Defendant San Francisco Baseball Associates, LLC (the Giants)[1] moved to compel arbitration of Melendez's claims, in part, on the basis that the claims are preempted by federal law and therefore are exclusively a matter for arbitration. The Court of Appeal agreed with the Giants and reversed the trial court's denial of the Giants' motion. The Court of Appeal decision should be affirmed.

The parties and the lower courts all agree that Melendez's claims for final wages and waiting time penalties depend on whether Melendez was "discharged" within the meaning of section 201. Melendez works year-round as a security guard for the Giants at AT&T Park, and has done so continuously since 2005. Even he does not allege he was fired or otherwise affirmatively terminated from his employment. Instead, Melendez purports to rely on the principle, enunciated by this Court in *Smith v. Superior Court* (2006) 39 Cal.4th 77 (*Smith* or *L'Oreal*), that an employee hired for a specific assignment or specified time period is automatically discharged when that assignment or period ends.[2]

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[1] The Giants are erroneously sued as San Francisco Giants Baseball Club LLC. At the time of the underlying motion, the appropriate entity was San Francisco Baseball Associates L.P. Since then, the entity has undergone restructuring and is now the San Francisco Baseball Associates, LLC.

[2] This brief identifies the principle enunciated in *Smith*—that an agreement for a fixed term or duration will naturally end at the conclusion of that term, without any affirmative action of the parties—as a "contractual discharge."

Invoking *Smith*, Melendez alleges he is employed to work for short assignments or time periods (such as a homestand, a season, or a single event), and is automatically "laid off" after completing each such assignment or period. He then argues that each such "layoff" is a form of discharge under Labor Code section 201. But what Melendez terms as a "layoff" is just the passage of time between scheduled shifts in an ongoing employment relationship. The Giants hired Melendez as a continuous employee who can only be discharged for cause, as reflected by the terms of the CBA. He has never been discharged or laid off; to the contrary, he has worked in every pay period reflected in the record.

Ultimately, however, this appeal does not concern whether Melendez or the Giants are right about the duration of the Melendez's employment—it is about *how* that question is answered. If answering the question requires interpretation of the CBA, or depends on or is intertwined with the CBA for its resolution, then it must be resolved in arbitration under Section 301 principles, as the Court of Appeal held.

Smith, which defines discharge under Labor Code section 201, and on which Melendez bases his theory, repeatedly ties the principle of contractual discharge to terms of the parties' employment, including what the employee was "hired for" in the first instance. Here, the CBA is "the sole and exclusive Agreement concerning the wages, hours and working conditions of all bargaining union employees." (AA 171.) And as the Court of Appeal noted, the CBA contains several provisions that provide insight as to the duration that security guards were "hired for" (e.g., provisions regulating scheduling, discharge (for cause only), seniority, vacations, holiday pay, and health and welfare issues, among others). Thus, under *Smith*, to determine if Melendez's employment is continuous, or if he was employed only for "specific assignments" (like homestands) as he claims, a trier of fact must analyze the parties agreement—the CBA.

Faced with this reality, Melendez takes a different approach: he simply presumes the answer to dispute at issue, arguing that all time between his scheduled shifts are "layoffs," which amount to "discharges" under Labor Code 201. Starting with that premise, the CBA is irrelevant to Melendez because he was (by his definition) laid off or discharged whenever there was a break in his schedule. Thus, he proposes that the Court simply count the days between his scheduled shifts to determine if there has been an automatic "layoff." In so doing, however, Melendez is no longer seeking application of *Smith* or contract principles but he is requesting a radical deviation from both. He invites this Court to create a new type of "discharge," in the form of implied temporary layoffs, which are automatically triggered after the passage of an arbitrarily set number of days or the completion of intermediary assignments during an *ongoing* employment relationship. The Court should decline this invitation, as it runs counter to well-established case law (including *Smith*), basic contract principles, many decades of legislation, and public policy, not to mention it leads to absurd and illogical results.

Instead, the Court should apply *Smith*, under which Melendez has to prove that the Giants and Melendez's union agreed to create an assignment-based or duration-based employment relationship for security guards (i.e., a fixed term employment), such that they would be automatically discharged at the end of each homestand, event, or baseball season. As the Court of Appeal held, such a showing cannot be made without resort to the CBA, the parties' exclusive agreement on the terms and conditions of employment, thereby triggering Section 301 preemption.

The opinion of the Court of Appeal should be affirmed and the matter remanded to the trial court for further proceedings to enforce Section 301 preemption.

FACTUAL AND PROCEDURAL BACKGROUND

A. Relevant Facts

As the Court of Appeal recognized, although the parties strongly disagree about the application of legal principles, the facts are not disputed. (See *Melendez v. San Francisco Baseball Associates LLC* (2017) 16 Cal.App.5th 339, 342.)

1. The Giants and AT&T Park

San Francisco Baseball Associates, LLC is a multi-faceted business enterprise headquartered at AT&T Park in San Francisco. Its principal business is the exhibition of Major League Baseball games at AT&T Park, where the Giants baseball team plays 81 regular season home games from April to October of each year. Each of these games is typically played in a series of 6-10 games in a row, known as a "homestand." (AA 157–158.) As a multi-purpose venue, AT&T Park is open almost every day of the year, and hosts hundreds of activities and events in addition to baseball games (e.g., ballpark tours, private parties, concerts, fundraising events, youth clinics, fantasy camps and other sports such as football, rugby and even ice-skating). (AA 158.) As a high-profile, public assembly facility, AT&T Park is staffed with security 24 hours each day, seven days per week. Melendez works as one of these year-round security guards.

2. Melendez

Melendez has been continuously employed by the Giants as a security guard at AT&T Park since March 2005. (AA 156–157.) The Giants have never fired Melendez or purported to lay him off, nor has he ever resigned. (AA 156.) To the contrary, Melendez (like other security guards) routinely works year-round, at baseball and non-baseball events, both during and between baseball seasons. (AA 156–157.) For example,

Melendez worked in every pay period during the last full year leading up to this lawsuit (2015), plus every pay period of the following year until the Giants filed their Motion to Compel Arbitration at the end of May, 2016.[3] (*Ibid.*)

Like all AT&T Park security guards, Melendez is a member of the Service Employees International Union, United Service Workers West of San Francisco (the Union). (AA 156–158.) The Union is the sole collective bargaining agency for security personnel employed by the Giants at AT&T Park. (AA 160.) The CBA is the sole and exclusive agreement governing the terms and conditions of employment for security guards. (AA 160, 171.)

3. The CBA's express and implied terms

The CBA contains express and implied provisions reflecting the parties' intent as to the duration of their employment relationship. For example, the CBA creates a process for the hiring and unionization of new security guards, who must join the Union within 31 days after hire. (AA 164.) Like nearly every collective bargaining agreement, the CBA only allows the Giants to discipline or discharge its security guards "for cause." (AA 169; see *Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 320, disapproved on another ground by *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 (*Guz*) ["Under most union contracts, employees can only be dismissed for 'just cause,' and disputes over what constitutes cause for dismissal are typically decided by arbitrators chosen by the parties."].) Similar to other labor contracts, the CBA also contains a comprehensive

[3] These are the only time periods reflected in the record. Melendez has never presented any evidence of missed pay periods or other gaps in his employment with the Giants.

grievance and arbitration procedure for disputes regarding the interpretation or application of the CBA. (AA 169.)

Among its other express terms, the CBA classifies security guards by seniority based on the number of hours worked in the previous one, five or 10 years, without regard to homestands or seasons. (AA 160–163.) Each security guard's seniority affects his or her pay rate, eligibility for benefits, and scheduling priority. (AA 164–169.) For example, certain security guards accrue between two to four weeks of paid vacation annually, based on their classification and number of "full years of service." (AA 164.) Similarly, certain security guards are entitled to health benefits if they worked 120 hours in the prior month, without regard to the month being during or after the baseball season. (AA 166.) Guards are free to (and do) sign up for their own schedules, but the Giants have discretion in scheduling employees, subject to restrictions in the CBA, such as requiring breaks, establishing minimum hours for each scheduled shift, requiring overtime, and prioritizing employees with seniority. (AA 160, 165.)

The CBA also contains implied provisions developed and evidenced by custom and past practice between the Giants and the Union. For example, AT&T Park security guards (1) do not turn in their uniforms or badges at the end of homestands or baseball seasons; (2) do not reapply for work or submit new hire paperwork at the beginning of each homestand or baseball season; (3) are not terminated by the Giants at the end of each homestand or baseball season; (4) remain on the Giants' payroll between homestands and baseball seasons, and (5) are paid within the regular pay cycle for each pay period in which they work. (AA 157.)

B. Procedural History

1. Melendez filed suit in superior court

After working for the Giants continuously from 2005 to the present, Melendez sued the Giants for the purported failure to pay him "final wages" upon "discharge."[4] (AA 16–23.) Despite alleging he was discharged multiple times each year, Melendez continues to be employed by the Giants, and is routinely scheduled to work year-round.

Accordingly, Melendez does not allege in his First Amended Complaint (FAC) that he has ever been affirmatively discharged. Instead, Melendez bases his theory of recovery on *Smith*, *supra*, 39 Cal.4th at pp. 93–94, where this Court held that discharge under Labor Code sections 201

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[4] This matter stems from one of two companion cases involving Labor Code sections 201 and 203 claims by AT&T Park security guards based on the contractual discharge theory articulated in *Smith*. On April 16, 2013, former security guard Wilfredo Rivas filed a putative class action complaint based on the theory that he was discharged from employment at the end of every baseball season. (AA 9–14.) Rivas was employed by the Giants as a security guard at AT&T Park from 2000 until August 2012, when his employment was terminated for misconduct after a physical altercation with a coworker. (AA 34.) On November 25, 2015, while the *Rivas* matter was pending, Melendez filed the present matter (represented by the same counsel representing Rivas), making the same allegations but adding claims for discharges purportedly at the end of each homestand and at the end of each event held at AT&T Park. (AA 16–23.) The Giants brought a motion to dismiss Rivas on the ground that Rivas lacked standing due to a settlement of a prior wage and hour case. (AA 29–43.) The trial court granted the Giants' motion in part and disqualified Rivas as class representative, but provided his counsel leave to locate a suitable representative. (AA 83–84.) The trial court then ordered the parties in *Rivas* and *Melendez* to meet and confer on the possibility of a consolidated complaint. (AA 84–85.) The parties ultimately stipulated to the filing of a consolidated complaint under the *Rivas* case number (CGC-13-530672) with Melendez designated as the putative class representative in both matters. (AA 316.) The consolidated complaint has not been filed, as the cases were stayed pending the resolution of this appeal. (AA 380.)

and 203 "may be satisfied either when an employee is involuntarily terminated from an ongoing employment relationship or when an employee is released after completing the specific job assignment or time duration for which the employee was hired." Melendez alleges he has been employed "intermittently" by the Giants "for periods of limited and specific duration" such that he is automatically "laid off" (which he equates with discharge) each time he completes an "assignment" (e.g., a homestand or single concert) or "time period" (e.g., a season).[5] Effectively, Melendez claims he is discharged between each scheduled work assignment, no matter how much or little the time between them. (AA 21.)

2. The Giants moved to compel arbitration

The Giants dispute Melendez's allegation that he worked "for any "specific job assignment or time duration," and assert they have continuously employed him since March 2005 without firing him or laying him off. The Giants also maintain that resolution of this dispute—in essence, a dispute over the duration of Melendez's employment—requires examination of the parties' intent and agreement as to the terms of that employment, which here is exclusively memorialized in the CBA. Accordingly, the Giants timely moved to compel arbitration on the ground that resolution of Melendez's claims requires analysis or interpretation of the CBA to determine if a discharge had actually occurred, thereby triggering Section 301 preemption.[6] (AA 92–176.)

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[5] As discussed below, Melendez does not allege he was "hired for" (or contracted to work for) any specific assignment or time period.

[6] The Giants also moved on the ground Melendez's claims fall within the scope of the arbitration provision of the CBA under Federal Arbitration Act and California Arbitration Act principles. Only the Section 301 preemption issue is under review by this Court.

In opposing the Giants' motion to compel arbitration, Melendez did not point to any facts supporting his allegation that he was employed as an "intermittent employee" who was automatically discharged after each homestand, baseball season, and event between homestands and seasons (amounting to dozens of discharges per year). Instead, like here, Melendez simply presumed he was employed for specific assignments or durations, and all of his breaks between scheduled assignments were "discharges" (or as he now calls them, "layoffs") such that the only matter before the court was to simply count the days between scheduled shifts and calculate damages.

The trial court confined its preemption analysis to a narrow issue: whether a specific provision of the CBA "has any connection ... to whether plaintiffs here were or were not terminated, the core (if not only) factual issue pertinent to the statutory claims." (AA 256.) Using this narrow approach, the trial court concluded Section 301 preemption did not apply to Melendez's claims because they arose from statute (not the CBA), and there was no express term of the CBA governing termination that required interpretation or application. The trial court denied the motion to compel arbitration and the Giants timely appealed. (AA 253–259, 322–323.)

3. Proceedings on appeal

The Court of Appeal unanimously reversed the trial court and held Melendez's claims were preempted under Section 301. (*Melendez, supra*, 16 Cal.App.5th 339.) Like the trial court, the Court of Appeal recognized the "underlying legal issue, as all parties recognize, is whether plaintiffs were 'discharged' within the meaning of Labor Code section 201." (*Id.* at p. 346.) Unlike the trial court, however, the Court of Appeal determined: "[w]hile resolution of the controversy may not turn on the interpretation of any specific language in the CBA, it does not follow that the meaning of

the CBA is irrelevant to the outcome of the dispute." (*Ibid.*) Citing directly to *Smith*, the Court of Appeal found "to determine whether the conclusion of a baseball game or season or other event constitutes a discharge as interpreted in [*Smith*], it is necessary to first determine the terms of employment." (*Ibid.*, citing *Smith, supra*, 39 Cal.4th 77.) Applying *Smith's* holding, the Court of Appeal concluded that "[i]t is essential to determine, therefore, whether the CBA provides for employment of security guards for only a single game or homestand or season or other event, or whether the agreement contemplates extended employment from season to season, event to event, year to year, recognizing that not every day will be a day of work. If the latter, there is no termination of employment, and therefore no 'discharge,' at the conclusion of each baseball game, homestand, season or other event." (*Ibid.*)

The Court of Appeal went on to hold that "[a]lthough no provision of the CBA provides an explicit answer, the duration of the employment relationship must be derived from what is implicit in the agreement. There are numerous provisions from which inferences may logically be drawn," including provisions dealing with the classification of employees, hiring of new guards, specification of paid holidays, and discharge for cause, among others. (*Id.* at pp. 346–347.)

This Court granted Melendez's petition for review, limiting review to the following issue:

> Whether plaintiffs' statutory wage claim under Labor Code section 201 requires the interpretation of a collective bargaining agreement and is therefore preempted by section 301 of the Labor Management Relations Act. [7]

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[7] At the same time, the Court denied the Labor Commissioner's request to depublish the Court of Appeal opinion.

As discussed further below, whether Melendez and putative class members were ever discharged under Labor Code section 201 depends upon interpretation of the CBA; or at a minimum, resolution of the dispute "substantially depends on" or is "inextricably intertwined with" an analysis of the express or implied CBA. As such, the analysis is preempted by the LMRA.

LEGAL BACKGROUND

A. Standard of Review

The trial court's order refusing to compel arbitration is reviewed de novo. (See *Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1567.) "When the issues regarding federal preemption involve undisputed facts, it is a question of law whether a federal statute or regulation preempts a state law claim," subject to de novo review. (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 311, citing *Smith v. Wells Fargo Bank, N.A.*, 135 Cal.App.4th 1463, 1476.) Similarly, whether the doctrine of complete federal preemption applies is a question of law reviewed de novo. (*Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal.App.4th 526, 535.)

B. The Powerful, Preemptive Force of Section 301 Preemption

Section 301 of the LMRA provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . ." (29 U. S. C. § 185(a).) Section 301 expresses a "congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 209, citing *Textile Workers* v. *Lincoln Mills* (1957) 353 U.S. 448.) To further that goal, where "resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the

application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute." (*Lingle v. Norge Div. of Magic Chef* (1988) 486 U.S. 399, 405–406.)

Since most labor contracts call for arbitration to resolve disputes, federal preemption assures that such disputes "remain firmly in the arbitral realm." (*Lingle*, *supra*, 486 U.S. at p. 411.) "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." (*Id.* at p. 411, quoting *Lueck*, *supra*, 471 U.S. at p. 220.) Thus, if Section 301 preemption applies, the matter is exclusively one for arbitration under federal law. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762; accord *Lingle*, *supra*, 486 U.S. at p. 411 ["judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements."].)

At its core, Section 301 preempts any state law claim based on or governed by a collective bargaining agreement. (*Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for So. Calif.* (1983) 463 U.S. 1, 23; see also *Sciborski v. Pacific Bell Directory* (2012) 205 Cal.App.4th 1152, 1164.) "[T]he preemptive force of Section 301 is so powerful that it displaces entirely any state cause of action for violation of a collective bargaining agreement . . . and any state claim whose outcome depends on analysis of the terms of the agreement." (*Newberry v. Pacific Racing Ass'n* (9th Cir. 1988) 854 F.2d 1142, 1146, citing *IBEW v. Hechler* (1987) 481 U.S. 851, 859.)

Whether preemption applies involves a two-step analysis. (*Burnside v. Kiewit Pacific Corp.* (9th Cir. 2007) 491 F.3d 1053, 1059; *Sciborski, supra*, 205 Cal.App.4th at p. 1164.) "First, the court should evaluate whether the claim arises from independent state law or from the collective bargaining agreement." (*Sciborski, supra*, 205 Cal.App.4th at p. 1164.) Here, the parties agree that Melendez's section 201 claims are founded on rights established by independent state law and not from the CBA. That fact, however, is not dispositive. Claims can be preempted even if founded on independent state law. (*Cramer v. Consol. Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 693; *Sciborski, supra*, 205 Cal.App.4th at pp. 1164–1165; *Newberry, supra*, 854 F.2d at p. 1146; *Young, supra*, 830 F.2d at p. 996; *Ruiz v. Sysco Food Services* (2004) 122 Cal.App.4th 520, 529.) The United States Supreme Court has held that a state may "create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be preempted by § 301." (*Valles v. Ivy Hill Corp.* (2005) 410 F.3d 1071, 1081–1082, quoting *Lingle, supra,* 486 U.S. at p. 407, n. 7.) Similarly, "if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted." (*Lingle, supra,* 486 U.S. at p. 407, n. 7.)

So, even if the claim arises from independent state law, the second step of the analysis must be addressed: the court must determine "whether the claim requires 'interpretation or construction of a labor agreement.'" (*Sciborski, supra*, 205 Cal.App.4th at p. 1164, internal citation omitted; see *Burnside, supra*, 491 F.3d at p. 1059 ["If, however, the right exists independently of the CBA, we must still consider whether it is nevertheless 'substantially dependent on analysis of a collective-bargaining agreement.'"] quoting *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386,

394.) A claim requires interpretation or construction of a labor agreement if: (1) "the application of state law require[s] the interpretation of a collective bargaining agreement, or substantially depend[s] upon analysis of the [collective bargaining agreement]" (*Newberry, supra*, 854 F.2d at p. 1147); (2) "evaluation of the claim is inextricably intertwined with consideration of the terms of the labor contract'" (*Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 999, citing *Lueck, supra*, 471 U.S. at p. 213); *or* (3) "permitting the state law claims to proceed would infringe upon the arbitration process established by the collective bargaining agreement" (*Ruiz supra*, 122 Cal.App.4th at p. 529, quoting *Tellez v. Pac. Gas and Elec. Co.* (9th Cir. 1987) 817 F.2d 536, 537–538). If the answer to *any* of these questions is yes, then the claim is preempted by Section 301. (*Burnside, supra*, 491 F.3d at p. 1059.)

As a Union member, Melendez is bound by the terms of the CBA between the Union and the Giants. (See *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462, 1466 ["a member of a bargaining unit is bound by the terms of a valid collective bargaining agreement"].) Accordingly, he is subject to the broad scope of Section 301 and, where it applies, he must pursue his remedies under the mechanisms set forth in the CBA. (*Avco Corp. v. Machinists* (1968) 390 U.S. 557, 561.)

C. California Labor Code Provisions Governing Wage Payments

To establish his sole substantive claim for waiting time penalties under Labor Code section 203,[8] Melendez must prove the Giants willfully failed to pay him timely final wages upon discharge as required by Labor

[8] The parties agree that Melendez's claim under the California Private Attorneys General Act (PAGA), is wholly derivative of his Labor Code § 201 et seq. claim.

Code section 201.[9] (See Labor Code § 203(a).) Labor Code section 201 requires that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Labor Code § 201(a).) Critical for here, section 201 requires a *discharge* before it is triggered. (*Smith, supra*, 39 Cal.4th at pp. 93–94.)

Labor Code section 201 is not the only provision addressing the payment of wages to workers. In the same article, Labor Code sections 202 and 204 also address the proper payment of wages. The first, section 202, provides the timing for payment of wages where an employee, who does not have a written contract for a definite period, quits his or her employment—in which case, the employee must be paid within 72 hours. Together, Labor Code sections 201 and 202 "ensure that employers make prompt payment of final wages upon the termination of the employment of a person who does not have a contract for a definite period—whether the employment is terminated involuntarily, by discharge (§ 201), or voluntarily, by quitting (§ 202)." (*McLean v. State of California* (2016) 1 Cal.5th 615, 622; accord *Smith, supra,* 39 Cal.4th at p. 85.)

By contrast, Labor Code section 204 governs payment of wages where there is an ongoing employment relationship. It provides that "[a]ll wages, other than those mentioned in Section 201 [and 202] ... earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." (Lab. Code, § 204, subd. (a).) Section 204 also provides very specific timing for wage payments, requiring that "[l]abor performed

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[9] Labor Code § 203(a) states that "If an employer willfully fails to pay, without abatement or reduction, in accordance with Section[] 201 ... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month." (*Ibid.*)

To recap: "Labor Code sections 201 through 202 call for the payment of wages *at the end of the employment relationship*, either upon termination or resignation of employees working in various fields. Labor Code section 203 provides penalties for employers who fail to pay 'any wages of an employee' in violation of those sections. Labor Code section 204 requires payment of wages at certain specified times *during the course of employment.*" (*On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1086 [emphasis added].)

D. *Smith* Defines "Discharge" Under Labor Code Section 201

This Court in *Smith* examined whether "discharge" under Labor Code sections 201 and 203 "requires an involuntary termination from an ongoing employment relationship, such as when an employer fires an employee, or whether this element also may be met when an employer releases an employee after completion of a specific job assignment or time duration for which the employee was hired." (*Smith*, *supra*, 39 Cal.4th at p. 81.)

In *Smith*, L'Oreal approached Smith to work as a model at one of its hair shows, and "agreed to pay her $500 for one day's work at the show." (*Ibid.*) When Smith completed her assignment, L'Oreal released her but delayed paying her the agreed-upon $500 for more than two months. (*Ibid.*) Smith sued L'Oreal for waiting time penalties under Labor Code section 203. (*Id.* at p. 82.)

To determine if a discharge had taken place on these facts, this Court began by looking at the terms of the parties' agreement, determining that L'Oreal had indisputably hired Smith for a "specific job assignment or time duration." (*Id.* at p. 81.) The Court then turned to whether the completion of that agreed-upon assignment or duration fell within the meaning of "discharge" under Labor Code sections 201 and 203. The Court saw its "fundamental task" as ascertaining "the Legislature's intent so as to effectuate the purpose of the statute." (*Id.* at p. 83.) In so doing, the Court gave the words of the statute "their usual and ordinary meaning" and construed that language "'in the context of the statute as a whole.'" (*Ibid.*)

Applying these principles of statutory construction, the Court found that "discharge" is not defined in the Labor Code or in the regulations promulgated by the Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE). (*Id.* at p. 84.) So the Court examined dictionary meanings of the term "discharge," as well as the nature of the employer-employee relationship, directly linking discharge to the terms of employment. (See, e.g., *id.* at pp. 84–85 ["[t]he very nature of an employer-employee relationship supports a more inclusive construction, particularly as to cases where an employer *hires an employee for a specific job assignment*, for generally it is up to the employer, not the employee, to direct how the assignment is to be executed and to determine when it has been completed."] [emphasis added].)

The Court also examined the legislative scheme as a whole, including Labor Code sections 201, 202, and 203, as well as exceptions for final pay relating to certain industries. In so doing, the *Smith* court again linked discharge to the terms of employment, concluding that even the statutory "exceptions pertain to situations anticipating the employees will complete *the particular job assignment or period of service for which they were hired*—i.e., when a discharge or a layoff occurs 'by reason of the

termination of seasonal employment' (§ 201, subd. (a)) or upon 'completion of a portion of a [motion] picture' (§ 201.5, 2d par.)." (*Id.* at p. 86 [emphasis added].)

Finally, the Court reviewed the legislative history of Labor Code sections 201 and 203. (*Id.* at pp. 86–90.) In so doing, the Court reasoned that "[e]xcluding employees like plaintiff from the protective scope of sections 201 and 203 would mean that employees who fulfill their employment obligations by completing the specific assignment or duration of time *for which they were hired* would be exposed to economic vulnerability from delayed wage payment." (*Id.* at p. 93 [emphasis added].)

Ultimately, *Smith* held that an employer's final wage payment obligation on discharge can be triggered in only one of two ways: (1) affirmatively, through voluntary resignation or involuntary termination (i.e. firing), or (2) contractually, at the end of the previously established assignment or duration for which an employee was hired. In both types of discharge, the relationship ends—the difference is the type of relationship that is terminated (i.e., ongoing vs. fixed term). (See *id.* at p. 81 ["Application of settled statutory construction principles leads us to conclude the statutory discharge element contemplates *both types* of employment terminations"] [emphasis added]; see also *id.* at p. 84 [discharge occurs when employer "formally releases the employee and ends the employment relationship at the point the job or service term is deemed complete"].)

E. The Plaintiff's Claim Controls the Analysis, Subject to Rules Governing Preemption

For purposes of preemption, the "plaintiff's claim is the touchstone for [the] analysis." (*Cramer*, *supra*, 255 F.3d at p. 691.) However, a plaintiff cannot avoid preemption by artfully pleading the claim. (See *Olguin v. Inspiration Consol. Copper Co.* (9th Cir. 1984) 740 F. 2d 1468,

1472; accord *Hyles v. Mensing* (9th Cir. 1988) 849 F.2d 1213, 1215.) Whether a claim is preempted requires a case-by-case analysis, dependent on the particular facts of each case. (*Cramer*, *supra*, 255 F.3d at p. 691; *Sciborski*, *supra*, 205 Cal.App.4th at pp. 1164–1165.) The analysis for Section 301 preemption must include: (1) the terms of the labor contract, (2) the elements of the plaintiff's state law claims, (3) the facts which the plaintiff believes support them, and (4) the facts which the defendant may assert in defense of the claims. (*Newberry, supra*, 854 F.2d at pp. 1148–1150; *Moreau v. San Diego Transit Corp.* (1989) 210 Cal.App.3d 614, 624.)

Here, Melendez's FAC attempts to construct a claim for waiting time penalties by alleging he and putative class members were "intermittently employed by the Giants for limited duration assignments," and thus were discharged "at the end of each period of intermittent employment within the meaning of Labor Code Section 201 (*Smith v. Superior Court*, *supra*)." (AA 21; see also Appellant's Opening Brief at p. 8.) Thus, Melendez's claims are based on *Smith's* definition of contractual discharge, both by direct citation and by adoption of *Smith's* language (i.e., referring to specific job "assignments" and "limited durations"). (See *id.*)

Despite relying expressly on *Smith*, however, Melendez does not allege he was ever "involuntarily terminated" from the Giants (fired), or that he was "hired for specific job assignments or time periods." (AA 17; accord *Smith*, *supra*, 39 Cal.4th at pp. 93–94.) To the contrary, his Opening Brief argues what he was "hired for" is irrelevant because he was automatically "laid off" between his scheduled shifts. Melendez's FAC does not allege any facts to support this contention, beyond alleging he was discharged (or now, "laid off") after each homestand, after each baseball season, and again after each of the hundreds of non-baseball events that take place at the ballpark (e.g., concerts, theatrical performances, fan

appreciation days, tours, etc.)—essentially, amounting to dozens of times a year and potentially multiple times per week.[10] (AA 17.)

As the trial court and the Court of Appeal both recognized, and in the words of this Court in *Smith,* "[t]he central dispute here is whether defendant effectuated a 'discharge' of plaintiff within the contemplation of" Labor Code sections 201 and 203. (*Smith, supra,* 39 Cal.4th at p. 82.) Melendez's claims are preempted if their resolution depends on any analysis of the CBA to determine if he was "discharged" at the end of each homestand, event, and season for which he was employed, such that he was released from employment and immediately owed final wages.

LEGAL ARGUMENT

Notwithstanding his arguments to the contrary, Melendez does not seek application of *Smith.* Instead, he is asking this Court to sidestep *Smith,* and create new and unsupported law redefining "discharge." The Court should decline to do so. Applying *Smith's* definition of discharge, and the well-established standard for Section 301 preemption, Melendez's claims must be compelled to arbitration under the parties' CBA.

A. The Court Should Apply *Smith*'s Definition of Discharge Rather Than Adopt Melendez's New Unfounded Definition

While Melendez purports to fit his claims within *Smith's* holding on contractual discharge, he nonetheless argues that his employment terms, including whether he was hired for a specific job assignment or time duration, are irrelevant to any finding of contractual discharge. (See, e.g., AOB at pp. 6, 41 ["Nothing in *Smith* suggests *it is essential* to determine whether the Giants' employees are only hired for a season, homestand, or

[10] Given there are hundreds of non-baseball-game events at AT&T Park per year, it is common to have several such events each week, and sometimes even multiple events on the same day.

other event, rather than hired for extended employment from year to year, or season to season with periodic layoffs."] [emphasis in original].) Indeed, Melendez seems to propose that the Court can only look at the passage of an (as yet undefined) time period between his scheduled shifts to determine there has been an automatic "layoff," and then equate all such time off as "discharges." He is wrong on both counts.

Initially, *Smith* never finds, or even suggests, that time between scheduled work days during ongoing employment could constitute a "layoff." Further, *Smith* never suggests that a plaintiff could uncouple "discharge" from the terms of the parties' agreement—or calculate layoffs or discharges by merely establishing an arbitrary number of allowable days between scheduled shifts. On the contrary, *Smith* repeatedly, and logically, links contractual discharge to the contractual terms "for which the employee was hired." (See, e.g. *Smith*, *supra*, 39 Cal.4th at pp. 84–85, 86, 91, 93–94.) [11] Thus, Melendez's argument, that he is temporarily laid off dozens of times per year during ongoing employment—despite remaining

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[11] (*Smith*, *supra*, 39 Cal.4th at pp. 93–94 [discharge occurs where "an employee is released after completing the specific job assignment or time duration *for which the employee was hired.*"]; accord *id.* at pp. 84–85 ["...particularly as to cases where an employer *hires an employee for a specific job assignment*..."]; *id.* at p. 86 ["Notably, these exceptions pertain to situations anticipating the employees will complete the particular job assignment or period of service *for which they were hired.*"]; *id.* at p. 91 ["an employer effectuates a discharge within the contemplation of sections 201 and 203, not only when it fires an employee, but also when it releases an employee upon the employee's completion of the particular job assignment or time duration *for which he or she was hired.*"] [all emphasis added]; accord *Jappa v. California* (S.D.Cal. Jan. 8, 2009, No. 08cv1813 WQH (POR)) 2009 U.S.Dist.Lexis 1194, at *21–22 [there was no claim under Labor Code section 203 because plaintiff failed to allege she was hired to perform a specific task for a specific duration, and that the job assignment or time duration for which she was hired was complete].)

employed pursuant to the CBA, scheduled for continued work under its terms, and on the Giants' payroll—does not fit within *Smith's* holding.

To avoid preemption, Melendez instead advocates for a *new* type of discharge under Labor Code section 201. Under Melendez's theory, an employee who retains an ongoing employment relationship is still "laid off" (and thus discharged) either: (1) after an arbitrary number of days has passed between his scheduled shifts,[12] or (2) after completing any intermediate job assignment or time duration, regardless of the duration of his employment or ongoing scheduled work as agreed to by the parties' employment agreement. This request, for the creation of an automatic "layoff" during ongoing employment, is a drastic deviation from, and expansion of, the definition of discharge as set forth by *Smith*. An employee cannot be simultaneously discharged under statute while continuing to remain continuously and gainfully employed by contractual agreement.

The Court should decline such a far-reaching change in the definition of discharge under Labor Code section 201. Neither the statutory scheme of the Labor Code governing timely wage payments, nor the legislative history of Labor Code sections 201 through 204 support such a change. Moreover, none of Melendez's stated public policies supports it. Finally, none of the authorities he cites, including the DLSE's guidance, supports his theory.

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[12] Melendez has never offered an actual or consistent proposal for what this arbitrary number may be to trigger a temporary layoff. Based on his briefs to date, he seems to propose that anything from one day (e.g., two concerts on consecutive days between baseball seasons), to "weeks," "a few weeks," or "months" could constitute a layoff or discharge. (AOB 41–42; AA 185–186; accord Respondent's Appellate Brief at 31.)

1. The statutory scheme for timely wage payments distinguishes between employment that is ongoing and that which has ended, refuting Melendez's proposed expansion of the law

California has a public policy regarding prompt payment of wages, which "has been expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325.) This public policy manifests itself in different ways depending on whether a worker's employment is ongoing or has ended. (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1331 ["The Labor Code's protections are 'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit'."], quoting *On-Line Power*, *supra*, 149 Cal.App.4th at p. 1085.) "The chapter of the Labor Code governing compensation and payment of wages includes provisions requiring immediate payment of wages upon discharge, layoff or resignation (Lab. Code, §§ 201, 202), [and] requiring regular payment of wages [during employment] (Lab. Code, § 204)." (*Davis*, *supra*, (2016) 245 Cal.App.4th at p. 1331.)

When employment ends, this Court has observed, "[t]he prompt payment provisions of the Labor Code impose certain timing requirements on the payment of final wages to employees who are discharged (Lab. Code, § 201) and to those who quit their employment (§ 202)." (*McLean*, *supra*, 1 Cal.5th at p. 619.) "The Legislature's apparent purpose in enacting the prompt payment provisions was to ensure that employers make prompt payment of final wages upon the *termination of the employment* of a person who does not have a contract for a definite period—whether the employment is terminated involuntarily, by discharge (§ 201), or voluntarily, by quitting (§ 202)." (*Id.* at p. 622 [emphasis added].) Thus,

the Legislature has deemed fit to apply the protections of Labor Code sections 201 through 203 at the end of the employment relationship.

By contrast, however, the Legislature established a different set of protections for employees engaged in ongoing employment, for whom prompt wage payments are solely governed by Labor Code section 204. (Lab. Code § 204, subd. (a) ["All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays."].) The Legislature has also placed strict timing requirements for payment of such wages during an ongoing relationship (discussed above). (*Ibid.*)

Based on this statutory scheme, the Legislature clearly distinguishes between employees whose employment relationship has ended and those who have an ongoing relationship. Melendez's claim for implied temporary layoffs, while maintaining an ongoing employment relationship, seeks to impose obligations that do not comport with the Legislature's statutory scheme. Indeed, Melendez's claim blurs the lines between these two distinct schemes and brings them into conflict with each other.

2. *The legislative history for Labor Code sections 201 to 204 also contradicts Melendez's proposed expansion of the law*

The legislative history for Labor Code sections 201 to 204 confirms that, from inception, the Legislature contemplated a dichotomy between workers whose employment had ended and those whose employment was ongoing. As noted in *Smith*, the Legislature first enacted an "immediate wage payment" provision, similar to Labor Code section 201, in 1911. (*Smith*, *supra*, 39 Cal.4th at pp. 86–87 & n.4 [citing Stats. 1911, ch. 663, § 1, p. 1268].) Besides section one, which was the predecessor to Labor Code sections 201 and 202, the 1911 act also contained the predecessor to Labor Code section 204: "All wages other than those mentioned in section

one of this act earned by any person during any one month shall become due and payable at least once in each month ... ." (Stats. 1911, ch. 663., § 2, pp. 1268–1269.)

The Legislature amended the statute in 1915 to adopt a civil penalty (the precursor to Labor Code section 203). (See *Smith, supra,* 39 Cal.4th at p. 87, fn. 4.) The penalty only applied where an employee was terminated or resigned. (Stats. 1915, ch. 143, § 1, p. 299.) At the same time, the Legislature enacted a statute providing for detailed timing requirements for payment of wages to ongoing employees, which are the same timing requirements now found in Labor Code section 204. (Stats. 1915, ch. 657, § 1, pp. 1292–1293.)[13]

In other words, from the outset, when enacting timely wage payment and the related penalty policies, the Legislature contemplated different protections to employees based on whether the employment relationship was ongoing or had ended.[14]

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[13] In 1919, the Legislature repealed the existing law but adopted essentially the same provisions and harmonized both 1915 statutes into a single act. (*Smith, supra,* 39 Cal.4th at p. 87, fn. 4.) Later, in 1937, when the Legislature established the Labor Code, the 1919 provision requiring immediate payment upon discharge was adopted as section 201, the provision requiring immediate payment upon quitting was adopted as Labor Code section 202, and the provision requiring semi-monthly pay days was adopted as Labor Code section 204. (*Ibid.*; Stats. 1937, ch. 90, p. 197.)

[14] This dichotomy is confirmed by reference to the biennial report published by the Bureau of Labor Statistics (BLS) in 1910, and cited by this Court in *Smith* as the impetus for Labor Code section 201. (*Smith, supra,* 39 Cal.4th at p. 87, citing BLS, 14th Biennial Rep.: 1909–1910 (1910).) That BLS report discussed the equal need for wage-related legislation for employment that was ongoing and ending:

> There should be enactment of suitable legislation providing for regular monthly settlement or payment of wage accounts by employers of labor on such certain specified days within the month and upon a date not later than may be fixed by the enactment, and to apply to all classes of labor. In other

The legislative history of sections 201 and 203 confirms that the *end* of the employment relationship—whether by discharge, resignation, or conclusion of a pre-established assignment/time period—is the trigger for payment of final wages. Timely payment of wages for ongoing employees was governed by a separate scheme, now described in section 204. Melendez's proposal to pay immediate final wages for automatic temporary layoffs during ongoing employment directly contradicts this legislative history.

3. Melendez's public policy arguments do not support his proposed expansion of law, and his attempt to redefine "discharge" is an artificial solution to a problem that does not exist

To support his novel theory that temporary layoffs during an ongoing working relationship require payment of final wages, Melendez repeatedly mischaracterizes the facts, issues, and policies involved in this case. Melendez argues that his new theory is needed, among other things, to: (1) prevent the Giants and the Union from "contracting around" statutory protections; (2) ensure that the Labor Code protects him and the proposed class members; and (3) ensure that men and women, who are out of work and without pay for months, receive their wages for life's necessities. None of those policy concerns, however laudable, is implicated by this case.

> words, a date limitation for the payment or settlement of wages due for the thirty days next preceding. A reasonable provision should be made for the *immediate payment following dismissal of an employee, or at the conclusion of specified employment.*

(BLS, 14th Biennial Rep.: 1909–1910 (1910), at p. 43 [emphasis added].)

First, the Giants and the Union (Melendez's own representative) do not now, and have never, sought to "contract around" the Labor Code's protections. Nor does this case involve "waiving" statutory protections by private agreement. The Giants do not dispute that *if* Melendez ever is discharged, he will be entitled to his final wages under section 201. The Giants only dispute they have discharged Melendez. And because the employment relationship is fundamentally contractual, and *Smith* links such contractual discharge to the terms of employment for which an employee is hired, whether Melendez was ever discharged due to a fixed duration of his employment coming to its natural conclusion must be determined by examining the terms of the parties' employment agreement—here, the CBA. (*Guz, supra*, 24 Cal.4th at p. 335–336, quoting *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 696; cf. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482 ["there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results"].)

Second, this case is not about a (false) choice between Melendez (and proposed class members) being protected by the Labor Code or not. This is a case about *which* Labor Code protections apply. As discussed at length above, in Labor Code section 204, the Legislature has established a detailed scheme for the timely payment of wages to employees who have an ongoing working relationship with their employers. Those protections entitle Melendez to semi-monthly wage payments and strict time limitations for payment of wages, and Melendez does not dispute having received these protections from the inception of his employment with the Giants in 2005. (Labor Code § 204; see also *In re Application of Moffett* (1937) 19 Cal.App.2d 7, 13–14 [Labor Code section 204, and its predecessors, have required "an employer of labor who comes within its terms to maintain two regular pay days each month, ... within the dates

required in that section."].) When employees, like Melendez, have an ongoing employment relationship, the Legislature has determined that the public policy in favor of full and prompt payment of wages is best served by satisfying the requirements of Labor Code section 204. Requiring final pay under Labor Code section 201 while Melendez maintains an ongoing working relationship with the Giants runs counter to more than 100 years of consistent legislation.

Finally, Melendez repeatedly suggests that his novel theory of discharge is needed to protect workers who have been out of work for months, and who need their unpaid wages to secure life's necessities. Those facts are not present here. The evidence shows Melendez worked in every pay period in 2015, as well as every pay period in 2016 leading to the filing of this lawsuit. Clearly, Melendez has not been out of work, even for weeks. Nor has Melendez ever disputed that the Giants have paid him and the other security guards all wages for work performed in a pay period on the regularly established payday for that pay period (twice a month and no more than 10 days in arrears as required by Labor Code section 204). Unlike *Smith*, this case is not about whether an employee will have to wait months after her employment ends to get paid—it is about whether employees with ongoing relationships are paid on regular pay day or a few days earlier after a non-existent "layoff." Lastly, even if (arguendo) there might be a security guard who does not schedule work with the Giants for an extended period, no wages would be outstanding to him during that time: the employee would have been paid all wages on his regular payday long before, as Labor Code section 204 requires.

In short, Melendez's new definition of "discharge" offers a solution to a problem that does not exists—at least not in this case.[15]

4. Melendez's statutory and case law arguments do not support his temporary layoff theory

Melendez erroneously cites to statutory and case law to argue for the proposition that time between scheduled shifts in an ongoing employment relationship is a "layoff," which he equates with a "discharge." His citations do not support his theory.

First, Melendez points to the statutory exceptions to the "immediate payment" requirements of section 201, including those which reference "layoffs" in Labor Code sections 201, 201.5, and 201.7, as support for his argument that layoffs are discharges. However, *Smith* analyzed those same exceptions and noted that they actually "pertain to situations anticipating the employees will complete the particular job assignment or period of service *for which they were hired* ...." (*Smith*, *supra*, 39 Cal.4th at p. 86 [emphasis added].) In other words, the layoffs discussed in Labor Code sections 201, 201.5, and 201.7 come within *Smith*'s definition of discharge specifically because the employee completes an agreed-upon assignment or duration. Nothing in *Smith* or the statutory scheme supports Melendez's arguments that time between scheduled shifts is a layoff, that layoffs are

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[15] In reality, Melendez's new definition of "discharge" would create intractable problems with no practical solution. A baseball game does not have a fixed time schedule, and can last from a couple of hours to multiple hours, and even longer if the game goes into extra innings. So the Giants could not know how much to pay security guards "for a homestand" until *after* the last game ends. And even then, the Giants would have no practical means of calculating and paying security guards their final wages upon "discharge," short of making them wait in line for hours after a game ends, while numerous payroll specialists are brought in to individually calculate each security guard's final wages and issue individual paychecks.

always discharges, or that layoffs or discharges can be determined irrespective of the parties' terms in their employment contract.[16]

Next, Melendez's reliance on two cases—*Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, and *Franks v. Bowman Transportation Company* (1976) 424 U.S. 747—is equally unavailing. Both cases dealt with the so-called "bona-fide" seniority exception contained in section 703(h) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. section 2000e-2(h), which permits differential treatment in terms and conditions of employment pursuant to a "bona fide seniority or merit system."[17] Neither case dealt directly with layoffs, terminated employees, questions of discharge, payment of final wages, *or even California law.* Thus, they cannot act as authority for propositions not considered in them.

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[16] Relatedly, Melendez argues that the Giants can lobby the Legislature for their own statutory "baseball" exception to Labor Code section 201. The argument is misguided. The Giants do not seek to exempt themselves from section 201. To the contrary, they regularly comply with it on separation of employment. The Giants simply reject Melendez's attempt to redefine the terms of his employment as set forth in the CBA, or to seek final wage payments during ongoing employment.

[17] Section 703(h) reads in pertinent part: "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(h).) *Int'l Bhd. of Teamsters* held that Title VII permitted a union to maintain a bona fide seniority system which effectively perpetuated past racial and ethnic discrimination, and tangentially discussed how seniority mechanically impacted an employee's protection from layoff and rights to recall from layoff. (*Int'l Bhd. of Teamsters*, *supra*, 431 U.S. at pp. 343–344.) Similarly, *Franks* held that applicants who were denied employment because of race could be awarded seniority status retroactive to the dates of their employment applications, and discussed how seniority impacted the order of, and recall from, layoffs. (*Franks*, *supra*, 424 U.S. at p. 767.) Neither case is relevant to the facts or issues of this case.

(*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 680 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court."], quoting *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.)

In sum, neither the statutory "exceptions" governing layoffs under Section 201, nor the case law interpreting unrelated issues, supports the proposition that the time off between Melendez's scheduled shifts during ongoing employment amounts to a layoff, or that such so-called layoffs amount to discharge under Labor Code section 201.

5. Melendez's reliance on the DLSE Manual is misplaced and leads to absurd results

Finally, Melendez argues that the DLSE's interpretive guidance as to when "layoffs" trigger final pay obligations supports his theory for implied temporary layoffs (which he equates with discharges) during ongoing employment. (AOB at p. 32–34.)[18] As an initial matter, this Court has repeatedly found that the DLSE's guidance is not entitled to *any* deference, a principle of law which Melendez ignores. (See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576–577; see also *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903, 946 [collecting cases].) While the Court may choose to adopt the DLSE's interpretation if the Court finds it independently persuasive (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 557), there are multiple reasons to decline to do so here.

First, this Court already reviewed the DLSE Manual and determined that it does not define "discharge" under Labor Code section 201. (See

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[18] Citing DLSE, The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised) <http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf>, § 3.2.2 [as of July 13, 2018] (DLSE Manual).

Smith, supra, 39 Cal.4th at p. 84.) Section 3.2.2 of the DLSE Manual, on which Melendez relies, is the same now as it was when *Smith* was decided, and is still found in the same section of the DLSE Manual (Section 3, "Wages Payable Upon Termination"). Given that this "layoff" language was in the DLSE Manual at the time of *Smith*, it is presumed that this Court determined section 3.2.2 was irrelevant to the definition of "discharge" under Labor Code section 201.

Second, the Court should be skeptical of the DLSE's interpretation on this issue since the DLSE itself has been unable to formulate a single standard for such "layoffs." Indeed, the DLSE has now announced three different standards, which are all inconsistent with each other:

- Per DLSE Manual: a layoff will trigger final pay obligations if an employer "lays off" an employee without a specified return date in the same pay period (DLSE Manual §3.2.2);[19]
- Per DLSE Opinion Letter 1993.05.04 (cited by section 3.2.2 as authority): "plant shutdowns" trigger final pay obligations if a shutdown exceeds ten days and there is no definite date given for return to work (DLSE, O.L. 1993.05.04.); and
- Per the Labor Commissioner's letter to this Court dated December 15, 2017: final pay is triggered if there is no return date within the pay period *or* if the employee is not scheduled to return to work within 10 days. (David Balter, Counsel for

[19] Notably, section 3.2.2 of the DLSE Manual does not actually define "layoff." This section only presents guidance that certain types of layoffs will trigger the final pay obligations under section 201 (i.e. when there is a layoff without a return to work date in the same pay period).

Cal. Labor Commissioner, letter to Chief Justice Cantil-Sakauye and Associate Justices, Dec. 15, 2017.)[20]

As evident from the above, each of these three standards is different from the other.[21] It is unclear which of the DLSE's published and unpublished interpretations Melendez relies on in support of his theory, but the DLSE does not appear to have any "long-standing policies" at all. Rather, it seems that the DLSE creates or amends its guidance on an ad hoc basis when different fact patterns arise that it finds compelling.[22]

Third, the case law forming the basis of DLSE Manual section 3.2.2 is inapposite to the issue of discharge, and does not support Melendez's theory of layoffs during an ongoing employment relationship. Section 3.2.2 is based in large part on *Campos v. EDD* (1982) 132 Cal.App.3d 961, a Court of Appeal decision under the Unemployment Insurance Code. The question in *Campos* was "whether workers on indefinite layoff are disqualified from receiving unemployment benefits when they refuse to accept recall offers in the course of a trade dispute." (*Campos, supra*, 132 Cal.App.3d at p. 966.) Within that context, *Campos* found that "where

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[20] This was the Labor Commissioner's letter requesting depublication of the Court of Appeal's decision in this matter, which this Court denied. In it, the Commissioner presented this third standard as a "long-standing" but unpublished enforcement policy.

[21] The first standard only considers whether the employee has a specific return date in the same pay period, without regard to the number of days that have passed; while the second does not consider the pay period at all, and only examines if a plant shut down lasts for more than 10 days *or* if there is a specified return date (without regard to the pay period). The third, by contrast to each of the foregoing, incorporates both a pay period requirement *and* a 10-day restriction.

[22] It should also be noted that none of these arbitrary time periods seem to be necessary, especially under the facts of this case, given the strict timing requirements of Labor Code section 204 governing payment of wages to Melendez during ongoing employment relationship.

workers are laid off without a definite recall date, the layoff terminates the employment relationship."[23] (*Ibid.*) At no point did *Campos* cite or consider any provision of the California Labor Code, and thus cannot be authority for a proposition it did not consider. (See *Kinsman*, *supra*, 37 Cal.4th at p. 680.) Moreover, *Campos* is inapplicable to the present case since in *Campos:* (1) there was no dispute that the workers were hired "on a seasonal basis" (a disputed fact in this case), (2) the employer had *affirmatively and indefinitely* laid off the workers (facts not present in this case), and (3) the workers' labor contract contained a system of recalling laid-off workers according to seniority (not an issue in this case). (*Ibid.*)

Fourth, this Court should decline the DLSE's interpretation in section 3.2.2. because it leads to absurd and illogical results. Under section 3.2.2., an employee working under a weekly Sunday to Saturday pay period would be "laid off" (and owed final wages) when he leaves work on Friday and is scheduled to return on Monday (the next pay period). Similarly, employees working under a bi-weekly pay period would be deemed laid off even after a brief break in their scheduled shifts (e.g., an employee who takes a few days of unpaid personal time in the middle of one pay period, and returns the next pay period, would be deemed "discharged"). Even if section 3.2.2 is read to implicitly incorporate the 10-day "plant shutdown"

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[23] In *Campos*, frozen food processors, "employed on a seasonal basis," were placed on a seasonal layoff subject to possible recall and were collecting unemployment benefits when their union went on strike against their employer. (*Id.* at p. 965.) During the strike, the employer attempted to recall the laid-off workers, the workers refused to return to work, and EDD terminated their benefits. (*Ibid.*) The Court of Appeal found that the termination of benefits was improper because the Unemployment Insurance Code allows a worker receiving benefits to refuse "new work" if the vacancy is due to a strike, lockout or other labor dispute. (*Id.* at pp. 974–976.) Thus, *Campos* turned on whether the recall offers were considered "new work" under the Unemployment Insurance Code. (*Id.* at p. 977.)

rule from DLSE Opinion Letter 1993.05.04, this would effectively require a "discharge" for: (1) a part-time employee who is continuously scheduled to work every other week on Mondays and Tuesdays;[24] or (2) any employee who takes a week-long medical leave of absence, when the return date is not scheduled for 10 days. This theory has already been considered and rejected by a court in California. (*Velazquez v. Costco Wholesale Corp.* (C.D.Cal. Aug. 27, 2012, No. SACV 11-508 JVS (RNBx)) 2012 U.S.Dist.Lexis 122998, at *14–19 [Section 3.2.2 of the DLSE Manual did not support claim that extended medical leave of absence constituted a discharge for purposes of Labor Code section 203].)[25] Further, not only is such a theory nonsensical, unworkable, and contrary to the employment practices of nearly all California employers, but it also contradicts basic contract principles.[26]

Finally, even if the Court entertains Melendez's untenable layoff theory, Melendez still does not show that section 3.2.2 is applicable to the case at bar. Section 3.2.2 does not, by its own terms, support Melendez's

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[24] Such an employee would, by definition, have 10 days and a pay period between each scheduled shift.

[25] In *Vasquez,* the court determined that the DLSE position regarding its 10-day rule "was created to address the situation where an employer shuts down a facility or lays off multiple employees for a period of time subject to different recall situations," and did not apply to a medical leave of absence. (*Id.* at *17; accord *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1144-1145 [rejecting plaintiff's contention that his removal from the schedule was an indefinite layoff], (superseded by statute on other grounds).)

[26] *Smith,* and the contract principles discussed above, agree that discharge by completed performance—the natural conclusion of a fixed term employment agreement which ends by its own terms—is contractual (i.e., dependent what an employee was hired or contracted for). This test proposed by the DLSE and Melendez (found nowhere in the Labor Code or contract law) makes discharge both arbitrary and mandatory, regardless of the parties' contract.

position that all "'layoffs' are 'discharges'" (AOB, at p. 32.) In fact, Section 3.2.2 reflects the DLSE's policy that *not* all layoffs are discharges: final wages are only due where an employee is "laid off without a specific return date within the normal pay period," or does not have a specific return date in the same pay period that exceeds 10 days. Melendez does not point to any fact or allegation that his alleged "layoffs" are: (1) an actual or affirmative layoff (e.g., based on a plant closure); (2) without a return date; and (3) if there was a return date, whether the return date was outside his normal pay period and/or at least 10 days out.

For all of the foregoing reasons, no expansion of the law is justified to create a third kind of discharge, constituting automatic temporary layoffs during an ongoing employment relationship.

B. Melendez's Claims Are Preempted Under *Smith's* Actual Definitions of "Discharge"

Despite Melendez's attempts to obscure the issue, the preemption analysis in this case, at its center, turns on this Court's definition of "discharge" under sections 201 and 203, as set forth in *Smith.* The Court of Appeal applied *Smith* faithfully to determine that any adjudication of Melendez's claims would require analysis or construction of the CBA, subjecting them to Section 301 preemption. An examination of *Smith* and its definitions of discharge lead to the conclusion that the Court of Appeal was correct, and that Melendez's claims are preempted under Section 301.

1. Section 301 preempts a determination of whether Melendez was discharged after completing the specific assignment or time duration for which he was hired

In his FAC, and in the courts below, Melendez never alleged he was involuntarily terminated from an ongoing employment relationship (i.e., affirmatively discharged under *Smith*). In fact, Melendez rejected that theory when describing his claims in the trial court: "[t]his case literally

involves terminations 'resulting from completion of specified periods of service.'" (AA 190.) Now, Melendez has seemingly abandoned his initial theory of recovery under *Smith's* contractual discharge holding, likely because he realizes that any application of *Smith* here would lead to preemption of his claims under Section 301.

That is because, to determine whether Smith was discharged under Labor Code section 201, this Court began with the terms of her employment. (*Smith*, *supra*, 39 Cal.4th at pp. 81, 84, and 91; accord *Elliot v. Spherion Pacific Work, LLC* (C.D. Cal. 2008) 572 F.Supp.2d 1169, 1174–1177.) The determination that Smith was discharged after completing her one-day assignment was founded on the facts that: (1) L'Oréal hired her to work for one day at a hair show; (2) L'Oréal had agreed to pay her $500 for that single day of work; (3) she was released after completing the assignment (one hair show) and time duration (one day) for which L'Oréal had hired her; and (4) her employment relationship with L'Oréal ended on the completion of that assignment. (*Smith*, *supra*, 39 Cal.4th at pp. 81, 84, and 91.) In other words, *Smith* logically concluded that—where parties agreed that an employee was hired for a "particular job assignment" or "time duration"—their agreement would end by its own terms at the end of that assignment or time duration, even if the employer never affirmatively terminated her employment.[27] (See *ibid.*) If L'Oreal

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[27] This holding is wholly consistent with the settled principle that the employment relationship is fundamentally contractual in nature. (*Guz*, *supra*, 24 Cal.4th at pp. 335-336.) Indeed, it is merely application of the "the general rule that when a contract specifies the period of its duration, it terminates on the expiration of such period." (*Tollefson v. Roman Catholic Bishop* (1990) 219 Cal.App.3d 843, 854.) The same is true of employment agreements: where an employment contract is for a fixed term "'employment is terminated by ... [e]xpiration of its appointed term.'" (*Touchstone Television Prods. v. Superior Court* (2012) 208 Cal.App.4th 676, 681.)

had hired Smith to work for three hair shows, she would not have been "released" from employment after working only one hair show; and there is nothing in *Smith* to suggest she would have been "discharged" after completing only one of three agreed-upon shows. Nor would she have been "discharged" after working one day if she had been hired to work one day per week for four consecutive weeks.

Applying *Smith* here, to determine if Melendez was "released from employment" (and thus discharged between scheduled shifts) by completing the assignment or duration for which he was hired, the Court must initially inquire into the circumstances for which he was hired or contracted—i.e. whether it was for a specific homestand, event, or baseball season, or for a longer, ongoing relationship. And as in *Smith*, we must start with the parties' agreement. As the Court of Appeal found, the CBA contains multiple pertinent provisions that evidence the parties' intent and agreement as to the duration of security guards' employment, and which are inextricably intertwined with resolution of Melendez's claims.

For example, the CBA—which runs for multiple years without regard to homestands, events, or seasons, and continues year-over-year until a new CBA is agreed upon—specifically creates a process for the hiring and unionization of new security guards. (AA 164.) The CBA permits the Giants to hire security guards from any source, but the Giants must inform the Union of such new hires within 30 days of hire. (*Ibid.*) And new hires must join the Union within 31 days of being hired. (*Ibid.*) If employees are discharged every week or two (e.g., at the end of each homestand or event), the CBA's Union Membership section could be rendered superfluous as no security guard would make it 30 days before being released from employment. The Giants would never be obliged to inform the Union of new hires, no employee would be obligated to join the Union, and every security guard would always be classified as a new hire

who may be discharged for any reason (since new hires are not subject to the CBA's "discharge for cause only" requirements).[28]

The same applies to the CBA's provision requiring the Giants to deduct membership dues from each security guard's pay to maintain good standing in the Union. (AA 172.) Union dues may only be deducted after 30 days of hire. (*Ibid.*) Under Melendez's theory, no security guard would ever have enough tenure to be required to join the Union because each would be repeatedly discharged within 30 days of hire; thus, there would never be a basis to deduct Union dues.

By way of another example, employee seniority, pay and benefits status under the CBA is a function of the number of hours worked in set numbers of *years*, without regard to seasons, events, or homestands. (AA 160–163.) Under the CBA, all security guards start out in probationary status and earn an entry probationary wage for the first several hundred hours worked. (AA 163.) During the probationary period, the Giants have broad discretion in determining whether to retain or terminate an employee. (*Id.*) Once a security guard has worked the requisite number of hours in probationary status, he or she receives a pay increase and is only subject to termination for "cause." (AA 162–163, 174.) If employees are "discharged" after each homestand or event, no employee would make it past the probationary stage. After the probationary stage, employees matriculate into higher seniority classifications and pay rates based on *years* of service. (AA 162.) At the highest classification, full-time employees are required to work a minimum of 1700 hours per year to retain

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[28] Although not directly related to discharge under Labor Code section 201, the language of these provisions evidences what the parties intended and agreed as to the duration of security guard's employment. The Giants point to this language to show the parties did not intend to create an assignment-based relationship as Melendez claims, and that no such relationship was created.

their positions. (AA 160.) Full-time security staff members earn higher wages and receive medical coverage, vacation and other benefits. (AA 164–168.) Full-time and seniority status thresholds are achieved based on substantial hour commitments and years of service (AA 160–163), and would not be obtainable if employees were "discharged" dozens of times each year under Melendez's theory. The foregoing provisions of the CBA clearly contemplate employment to be continuous as opposed to merely short-term or assignment-based work.

Moreover, under the CBA, Regular Employees accrue between two to four weeks of paid vacation annually, based (among other things) on the number of their "full years of service," up to "a maximum of twice their annual accrual." (AA 164.) The chosen language ("full years of service") is evidence of the parties' intent as to the duration of their employment. But under Melendez's theory, security guards might never have any "full years" of service as they get discharged dozens of times per year. Further, the purpose of vacation pay "is to offer a reward of additional wages for constant and continuous service." (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780, quoting *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186; accord *id.* at p. 779 ["The consideration for an annual vacation is the employee's year-long labor."].) But under Melendez's theory, every security guard (including full time employees) are discharged at the end of each event and homestand and must be paid all final wages (including all accrued vacation pay) immediately. Thus, Melendez's theory would render the CBA's vacation provision superfluous as no security guard could ever accrue any substantial vacation, let alone "twice their annual accrual," as permitted under the CBA.

Similar results occur when examining employee health benefits under the CBA. Employees in the highest seniority classification are entitled to health benefits if they worked 120 hours the prior month. (AA

166.) However, to actually receive health benefits, such an employee would need to work 120 hours in one month and remain employed into the next month. (*Ibid.*) Under a contractual discharge theory, this would be impossible as each guard would be constantly separated from employment and thus not entitled to health benefits ("former" employees do not get health benefits but rather COBRA benefits). Further the CBA's grant of such benefits on a "monthly" basis, without regard to homestands or the baseball season, evidences that the parties anticipated work year-round.

To summarize, Melendez's layoff theory not only disregards evidence of the parties' intended employment duration, but also depends on the inference that the Giants and Union negotiated a CBA with meaningless unionization, job security, discharge, seniority, and benefits provisions. As the Court of Appeal noted, it is very reasonable to conclude that these provisions reflect the intention and understanding of the Union and the Giants to contract for continuous employment of security guards.

2. *To the extent Melendez argues he was involuntarily terminated from ongoing employment, his claims are preempted by Section 301*

Besides agreeing that Melendez was never fired or terminated from ongoing employment, the parties also agree that Melendez never quit, resigned, or retired. In fact, the parties even agree that Melendez worked every pay period in 2015 and 2016 reflected in the record, and that he is still gainfully employed by the Giants today. In the courts below, Melendez exclusively argued that he was discharged under *Smith*, when the "specific assignment" or "limited time duration" for which he had been employed came to an end. In his Opening Brief, Melendez reinvents his claims and appears to argue, for the first time, that the time between his scheduled shifts may also constitute an "involuntary termination" in the

form of a "layoff." The merits aside,[29] that new argument is still preempted as resolution of his claim would require analysis of the CBA.

The CBA contains several terms governing scheduling. It provides the Giants with the right to "establish what shall constitute a normal workday and to schedule employees at its discretion." (AA 165.) And the CBA does not require that the Giants schedule any employee to work any specified number of hours, days, weeks, or months, or any specific number of games, homestands, or seasons. But, while the Giants' scheduling discretion under the CBA is broad, it is not absolute. Among other things, the CBA also guarantees unit members a minimum of four hours of pay for each day they are scheduled; requires schedules be arranged to permit required breaks; and provides some employees "priority in scheduling over other classifications of employees." (AA 160–161, 165.) Subject to these restrictions, the Giants "reserve the right to make [final] scheduling decisions." (AA 160–161.) Significantly, the CBA also contractually requires that the Giants only discharge non-probationary employees "for cause." (AA 169.) (See *Foley*, *supra*, 47 Cal.3d at p. 665 [the statutory presumption of "at will" employment "may be superseded by a contract, express or implied, limiting the employer's right to discharge the employee"]; accord *Pugh, supra,* 116 Cal.App.3d at p. 320.)

Melendez essentially asserts that he was only employed during those periods in which he was scheduled to work, and was discharged between his scheduled shifts (i.e., he was "discharged" or "laid off" when he was not scheduled to work). Although the Giants have discretion to schedule

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[29] *Smith* directly contradicts such an interpretation, by using "involuntary termination from ongoing employment" interchangeably with the affirmative act of "firing" an employee (i.e., the Court's language describes affirmative action by an employer in expressly terminating an employee's employment). (*Smith*, *supra*, 39 Cal.4th at pp. 81, 88.) Melendez's implied or automatic temporary layoff theory does not fit within *Smith's* definition.

Melendez, it does not follow that the Giants automatically discharge their employees when they are not scheduled to work every day. Companies routinely do not schedule employees on days where the business is not open for business without risking "laying off" those employees. The fact that a business is closed on certain days does not suggest it has released its employees from ongoing employment. Similarly, the fact that Melendez is not scheduled to work during any given event or homestand while AT&T Park is open does not, under the terms of the CBA, mean that he was "discharged." For example, Melendez may have chosen not to schedule himself for work because he did not want to work or was unavailable; he may be on a brief personal leave, taking some unpaid sick days, or on an unpaid vacation (after having previously exhausted his benefits); he may be "bumped" from the schedule because an employee with higher priority (seniority) requested that shift; or the Giants may have otherwise exercised their scheduling discretion consistent with the CBA. Under these circumstances, the Court cannot simply count the days between Melendez's scheduled shifts to determine if he has been discharged. Instead, it must examine the terms of his employment and the reasons for the absence, which must begin with an analysis of the CBA.

In sum, whether the Giants can discharge employees by exercising their discretion in scheduling them requires analysis or interpretation of the terms of the parties' employment, including both the discharge and scheduling provisions of the CBA.

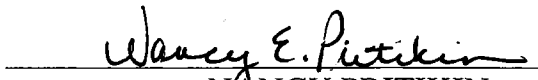
CONCLUSION

The law is clear. Adjudication of Melendez's claims requires inquiry into the job the Giants hired him to perform and the terms under which he was scheduled and worked. All of these inquiries, in turn, require interpretation of the parties agreement—here, the CBA—and thus

Melendez's claims are preempted under Section 301. Melendez's attempts to evade *Smith* and Section 301 preemption by characterizing the time between his scheduled shifts as automatic layoffs are unsupported by caselaw, statute, legislative history, or any rational policy considerations.

For all the foregoing reasons, the decision of the Court of Appeal should be affirmed, and the matter should be remanded to the superior court for further proceedings to enforce Section 301 preemption.

Dated: July 12, 2018 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: 

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Respondent's Answer Brief on the merits is proportionately spaced, has a typeface of 13 points, and contains 13,669 words, according to the counter of the word processing program with which it was prepared.

Dated: July 12, 2018 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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PROOF OF SERVICE

I am employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111. I am readily family with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On July 12, 2018, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

RESPONDENT'S ANSWER BRIEF ON THE MERITS

in a sealed envelope, postage fully paid, and addressed as follows:

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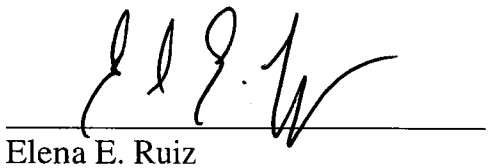
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 12, 2018, at San Francisco, California.



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