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Supreme Court of California
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No. S244751

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KURT STOETZL, *et al.*

Plaintiffs, Appellants and Petitioners,

v.

STATE OF CALIFORNIA, *et al.*

Defendants and Respondents.

On Review From The Court of Appeal for the First Appellate District, Division Four, No. A142832

After an Appeal From the Superior Court for the State of California, County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

PETITIONERS KURT STOETZL, ET AL.'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I.

THE STATE ADMITS THAT THE ISSUE OF WHETHER STATE COMPENSABILITY STANDARDS APPLY TO STATE EMPLOYEES IS AN IMPORTANT QUESTION OF LAW

The State admits in its own Petition for Review – as it must – that questions pertaining to the application of federal and/or state law compensability standards to state employees present important questions of state law under California Rule of Court 8.500(b)(1). (State's Petition For Review at pp. 21-23.) Dubiously, however, in its Answer to Plaintiffs' Petition for Review, the State contends that review of questions about the compensability standards that apply to unrepresented state employees (which the State *lost* on in the lower court) *are* worthy of this Court's review, whereas questions about the compensability standards that apply to represented state employees (which the State prevailed upon in the lower court) *are not*.

The State cannot have it both ways. Its Answer argues that the Court should deny review of Plaintiffs' petition because the lower court got those issues right, but grant its own Petition for Review because the lower court got those issues wrong. However, the sometimes competing and sometimes complementary petitions for review filed by the parties are not supposed to resolve the merits. Rather, the proper purpose of a petition for

review is to identify issues worthy of consideration by this Court on the merits—regardless of who is ultimately right.

Inadvertently, the State's Answer affirms the importance of the issues presented for review by Plaintiffs. For example, the State does not deny, and essentially admits, that the issues presented in the petitions for review largely overlap. (See, e.g., State's Answer ("Ans.") at p. 10, n. 3 [acknowledging that the applicability of the FLSA standard for compensable hours worked permeates both petitions].) More importantly, the State does not deny that Plaintiffs' Petition affects far more state employees than does its own—which, if anything, means Plaintiffs' Petition raises the more important issues, which are certainly at least as worthy of review as the State's issues.

Nor does the State deny one of Plaintiffs' central arguments in support of review: that the court of appeal's published decision affects far more than just the plaintiff classes in this case. (See Plaintiffs' Petition for Review ("Plaintiffs' Pet. for Rev.") at pp. 19-21 [decision impacts approximately 160,000 state employees who are subject to collective bargaining laws].)

Instead, the State mistakenly attempts to belittle Plaintiffs' arguments for why review is appropriate by arguing its side of the merits, largely ignoring Plaintiffs' own merits arguments. One glaring example is found in its discussion of Labor Code sections 222 and 223. (Ans. at pp.

33-36.) The State simply discusses its preferred authority, ignores Plaintiffs', and fails to address either the conflict between the two groups of cases or the importance of the issue underlying the disputed interpretations. (See Plaintiffs' Pet. for Rev. at pp. 24-27.)

That is a misuse of the States' Answer. The court of appeal took Plaintiffs' arguments seriously, and while it agreed with some but not others, it did not suggest, like the State, that any were trivial or easily resolved. That everyone involved believes this decision implicates multiple important questions of state law (Cal. Rules of Court, rule 8.500(b)(1)) is apparent from the fact that both sides seek this Court's review.

II.
THE STATES' ANSWER RECOGNIZES THE IMPORTANT QUESTIONS OF STATE LAW PRESENTED IN THIS CASE

A. *Professional Engineers* Did Not Address Any Of The Issues Presented In This Case

Much of the States' argument against review of the issues presented by the represented employees hangs on its citation to *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Ca1.4th 989. But *Professional Engineers* did not decide any of the disputed issues in this case. In *Professional Engineers,* this Court considered whether Governor Schwarzenegger's 2009 furlough program was legal. The Court concluded it was, because the Legislature incorporated the cuts in employee

compensation that the furlough program created into the state budget. (*Id*. at pp. 1047-1048.)

This case is different. It concerns the Legislature's delegation of authority over California minimum wage standards to the Industrial Welfare Commission ("IWC") (slip op. at pp. 9-11, citing *Martinez v. Combs* (2010) 49 Ca1.4th 35, 57), and the conflict the court of appeal found between IWC-promulgated wage orders that apply minimum wage protections to state employees and successive ratified state employee memoranda of understanding. (Slip Op. at pp. 16-17.) It raises distinctions between federal and state compensability standards and whether federal overtime laws may be harmonized with California minimum wage laws. (Plaintiffs' Pet. for Rev. at pp.18-19.) It presents a novel question of whether a state employee union could agree to bind the employees it represented to only federal minimum wage and compensability standards notwithstanding the statutory bar on the waiver of California minimum wage rights under Labor Code sections 1194 and 1197. (*Id*. at pp. 15-19, citing *Gentry v. Superior Court* (2007) 42 Cal.4th 443[1].)

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[1] The State disingenuously suggests that *Gentry* was abrogated in full and that Plaintiffs' citation to it "underscores the lack of merit" in their petition. Not so. As Plaintiffs explained on page 16 of their Petition, *Gentry* was overruled on other grounds (concerning enforceability of arbitration agreements conditioned on class-action waiver) in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1748, not for the proposition that the

This case also presents questions of whether Labor Code sections 222 and 223 apply to state employees and how broadly or narrowly those wage and hour standards should be construed in the face of directly conflicting court of appeal decisions. (Plaintiffs' Pet. for Rev. at pp. 24-27.) Finally, this case presents questions concerning the viability of, and the proper standards attributable to, state employee breach of contract claims under longstanding precedent of this Court. (*Id*. at pp. 27-28, citing *Madera Police Officers Assn. v. City of Madera* (1984) 36 Ca1.3d 403 and *White v. Davis* (2003) 30 Cal.4th 528.)

Professional Engineers does not address, much less resolve, any of those questions.

B. Whether The Legislature "Adopted" The FLSA And Whether, If It Did, It Nullified Wage Order 4's Minimum Wage Protections Are Important Questions Of State Law

The State argues that this case begins and ends with the negotiation and ratification of the MOU, which it contends "definitively adopted the FLSA as the controlling legal standard for determining compensable hours of work …." (Ans. at p. 10.) But this premise is flawed at its root. The FLSA is not "adopted" by bargaining parties or even state legislatures. It is

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statutory wage rights in Labor Code section 1194 are unwaivable (see 42 Cal.4th at pp. 456-457).

the law of the land, applying to the State not by any action of the California Legislature, but by the Supremacy Clause. (U.S. Const., Art. VI, Cl. 2.)

The one relevant part of the FLSA that is discretionary, and which the parties could—and did—negotiate over and then ratify to give effect to, is the so-called 7k exemption found in 29 U.S.C. section 207(k) ("section 207(k)). That statute permits employers of persons engaged in law enforcement activities, such as the correctional peace officers in this case, to elect to use a threshold for the application of federal overtime requirements that exceeds 40 hours in seven days. The parties stipulated that, whereas previously, represented employees typically worked a forty-hour work week, in 1998 the State and the employees' labor union agreed to use a 28-day work period, which triggered the obligation to pay overtime only when employees worked more than 168 hours. (3 AA pp. 606-607 [stipulations 14, 16-20, 22].)

The problem for the State is that the mere adoption of a higher overtime threshold under section 207(k) does not, in and of itself, require the implicit repeal of Wage Order 4's state minimum wage rights. The court of appeal recognized that federal overtime laws can be harmonized with state minimum wage laws: "We may reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of "hours worked" is

governed by Wage Order 4. Such a construction does violence to neither regulatory scheme." (Slip Op. at p. 21.)

Plaintiffs argued below that the court should have harmonized the two regulatory schemes in the same way for represented employees. But Plaintiffs recognize that a petition for review is not the place to resolve that question, only to point out its importance. (Cal. Rules of Court, rule 8.500(b)(1).) Because this Court has repeatedly recognized the importance of California's minimum wage standards (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319); its wage orders (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Ca1.4th 1004); the fact that California law provides different standards than federal law (*Morillion v. Royal Packing Co*. (2000) 22 Ca1.4th 575, 592); and that federal law should not be read to the exclusion of state law, especially by implication (*Mendiola v. CPS Security Solutions, Inc*. (2015) 60 Cal.4th 833, 843, citing *Morillion*, 22 Cal.4th at p. 592), it should accept review of this case to determine the co-existence of federal overtime laws, state minimum wage standards, and state employee contractual rights, particularly given the significant effect these issues present for a large number of state employees and their collective bargaining representatives.

III.
CONCLUSION

This case raises important questions about the application of fundamental state law protections to state employees. The Court should grant review.

DATED: November 9, 2017 MESSING ADAM & JASMINE LLP

By: *\/s/ Gregg McLean Adam*
Gary M. Messing
Gregg McLean Adam
Lead Class Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 1562 words.

DATED: November 9, 2017 MESSING ADAM & JASMINE LLP

By: *_/s/ Gregg McLean Adam_*
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Executed on November 9, 2017, at San Francisco, California.

/s/ Janine Oliker
Janine Oliker

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STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **A142832**

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/s/Gary Messing

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Law Firm