Case No. S232607

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR ALVARADO,

Petitioner

v.

DART CONTAINER CORPORATION OF CALIFORNIA,

Respondent

After Decision by the Court of Appeal
Fourth Appellate District Case No. E061645
Appeal from the Superior Court of Riverside County
Hon. Daniel A. Ottolia (Superior Court Case No. RIC1211797)

REQUEST TO FILE BRIEF OF AMICUS CURIAE BY NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DART CONTAINER CORPORATION OF CALIFORNIA

Michael J. Lotito (State Bar No. 108740)
mlotito@littler.com
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104
Phone: 415.433.1940

Elizabeth Parry (State Bar No.163841)
mparry@littler.com
LITTLER MENDELSON, P.C.
1255 Treat Boulevard
Suite 600
Walnut Creek, CA 94597
Phone: 925.932.2468

Linda E. Kelly
Patrick N. Forrest
Leland P. Frost
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW, Suite 700
Washington, DC 20001

Attorneys for Amicus Curiae The National Association of Manufacturers

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Attorneys for Amicus Curiae The National Association of Manufacturers

REQUEST TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), Amicus Curiae, the National Association of Manufacturers ("NAM"), respectfully requests leave to file the attached brief in support of Respondent, Dart Container Corporation of California ("Dart Container"), in the appeal filed by Petitioner Hector Alvarado ("Alvarado") to this Supreme Court.

This dispute centers around the appropriate formula a California employer must use to calculate the regular rate for overtime purposes on incentive attendance bonuses paid in the same pay period earned. This case does not involve employees who were unlawfully refused California overtime pay by their employer, Dart Container. Instead, it involves an employer that complied with the controlling federal regulations regarding the calculation of overtime. No state law exists providing an alternative formula for calculating overtime on an attendance bonus paid to an hourly employee in the same pay period it was earned. Despite the absence of controlling California law, the Petitioner asks this Court to impose an alternative formula on employers under the guise of public policy.

The issues presented by this case reach outside the manufacturing industry and impact all California employers. Employers must be able to rely on fixed, published regulations for determining applicable overtime rates. Employers trying to pay their employees fairly, and reward their employees, should not be penalized because of the ambiguity and

uncertainty in California law. Reversing the Court of Appeals decision would discourage employers from offering flat rate and attendance bonuses and expose employers acting in good faith reliance on published regulations to substantial liability and potential statutory and criminal penalties.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

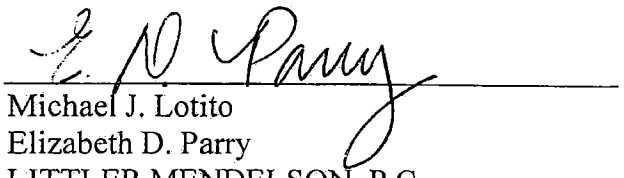
The outcome of this case directly affects NAM members. The NAM and its members encourage employer compliance with all overtime laws while ensuring that those laws provide straightforward guidance on overtime calculations. The NAM and its members need certainty regarding attendance bonuses and the calculation of overtime liability. The NAM believes that the Court of Appeals appropriately found that the employer in this case lawfully applied the federal formula for computing overtime on an hourly employee's flat sum bonuses in the absence of applicable California law.

The NAM reviewed and fully supports the Brief submitted by Dart Container Corporation of California and does not seek to repeat those arguments. The NAM is filing this brief to make four narrow, but significant, additional points: (a) No California law exists providing employers guidance on how to calculate the regular rate of overtime on bonuses paid in the same pay period they are earned; (b) In the absence of controlling California law, courts look to the federal regulations for guidance; (c) In the absence of applicable California law, this Court should not legislate a new formula where none exists, and; (d) Employers must be able to rely on published law to determine applicable overtime rates and to provide attendance incentives to their employees.

Pursuant to Rule 8.520(f)(4)(A)(i) of the California Rules of Court, the undersigned applicants represent that this brief was authored by the NAM's counsel. No party or counsel for a party to the pending appeal authored the applicant amicus brief or financially contributed to its preparation or submission.

For the foregoing reasons, the NAM respectfully requests that the Court accept the attached brief for filing in this case.

Dated: September 28, 2016



Michael J. Lotito
Elizabeth D. Parry
LITTLER MENDELSON, P.C.
Attorneys for the *Amicus Curiae*
NATIONAL ASSOCIATION OF
MANUFACTURERS

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PROPOSED BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTUERS IN SUPPORT OF RESPONDENT DART CONTAINER CORPORATION OF CALIFORNIA

Michael J. Lotito (State Bar No. 108740)
mlotito@littler.com
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104
Phone: 415.433.1940

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I. INTRODUCTION

The sole issue addressed by the Court of Appeals in the underlying decision was whether the employer lawfully applied the federal formula to calculate the overtime rate for weekly attendance bonuses paid to hourly employees. In his complaint, the Petitioner claims that Dart Container ("Respondent" or "Employer") failed to pay proper overtime, in violation of the California Labor Code, by not including bonuses in overtime wages. (Lab. Code, §§ 510 and 1194).

The employer in this case did not fail to include bonuses in overtime wages. In fact, it is undisputed that the employer paid overtime for all hours worked in excess of eight hours per day and 40 hours per week.[1] Dart Container relied in good faith on the only controlling regulations providing a formula for calculating overtime to include these bonuses, federal regulations interpreting the Fair Labor Standards Act. (See 29 C.F.R. §§ 778.209(a) and 778.110). No state law exists to provide an alternative formula for an attendance bonus paid to an hourly employee in the same pay period it was earned. (*Marin v. Costco Wholesale Corporation* (2008) 169 Cal.App.4th 804, 812-813 (*Marin*)). Employers must be able to rely on lawfully published regulations to determine applicable overtime rates. Reversing the Court of Appeals decision, and adopting the Petitioner's

[1] The facts in this case are undisputed as the parties filed a "Joint Statement of Undisputed Facts" in the underlying proceedings.

proposed formula, would require this Court to legislate a new formula under the guise of public policy and implicates separation of power and due process concerns.

II. ARGUMENT

A. THE EMPLOYER LAWFULLY APPLIED THE FEDERAL FORMULA FOR CALCULATING OVERTIME IN THE ABSENCE OF APPLICABLE CALIFORNIA LAW

The employer's method of calculating overtime for the attendance bonus complied with relevant federal law. Dart Container divided the employee's compensation, including the attendance bonus, by all hours worked (including overtime) in accordance with the federal formula. Petitioner contends that California's public policy discouraging overtime requires the employee's compensation to be divided only by regular hours worked (excluding overtime).

To earn the employer's attendance bonus, employees must be regularly scheduled to work a weekend shift and actually work the shift. (AA, at p. 069 ¶30. The bonus is $15.00 per day, regardless of the number of hours worked. The maximum weekly bonus is $30.00. (*Id*). Under the FLSA, employers must include attendance bonuses in the regular rate. "Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Attendance bonuses . . . are in this category. They must be included in the regular rate of pay." (*Chavez v.*

City of Albuquerque (10th Cir. 2011) 630 F.3d 1300, 1308 citing 29 C.F.R. § 778.211(c)). It is undisputed that Dart Container included the attendance bonus in the regular rate and paid the bonus in the same pay period it was earned. (AA at pp.068-072).

In calculating the regular rate, Dart lawfully divided Alvarado's total weekly compensation by all hours worked, including overtime. This formula complied with the formula provided in the federal regulation interpreting the FLSA. Under that regulation, "No difficulty arises in computing overtime compensation if the bonus covers only one weekly pay period. The amount of the bonus is merely added to the other earnings of the employee (except statutory exclusions) and the total divided by total hours worked." (29 C.F.R. § 778.209(a)).

This is not a situation where a state regulation is more generous than the FLSA. No applicable California law exists imposing an alternative formula. This court has recognized that the Industrial Welfare Commission's ("IWC") "wage orders, although at times patterned after federal regulations, also ***sometimes*** provide greater protection than is provided under federal law in the Fair Labor Standards Act (FLSA) and accompanying federal regulations." (*Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal.4th 785, 795 (emphasis added)). When state law provides greater protection than federal law, those minimums will override the protections of the FLSA. (29 C.F.R. § 778.5; *Skyline Homes, Inc. v.*

Department of Industrial Relations (1985) 165 Cal. App.3d 239 (*Skyline*); *Ramirez v. Yosemite Water Co., Inc., supra,* 20 Cal.4th at p. 795 citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 567 and 29 U.S.C. § 218(a); *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 602–605; *California Corr. Peace Officers' Ass'n v. State of California* (2010) 189 Cal. App. 4th 849, 861). However, only "where the language or intent of state and federal labor laws substantially differ" would reliance on federal regulations or interpretations to construe state laws or regulations be misplaced. (*Ramirez v. Yosemite Water Co., Inc., supra,* at 798; *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 948 citing *Martinez v. Combs* (2010) 49 Cal.4th 35, 68).

The California Labor Code and IWC wage orders remain silent on attendance bonuses. (See *Marin, supra,* 168 Cal.App.4th at pp. 812-813). The Legislature maintains the authority to distinguish state wage law from its federal analogue, the FLSA, but has chosen not to in this area. (*Martinez v. Combs, supra,* 49 Cal.4th at pp. 59-60). This Court should decline to penalize employers for the lack of California law or regulations. In the absence of controlling or conflicting California law, California courts look to federal regulations under the FLSA for guidance. (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 903 citing *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 903). In this case, the Court of Appeals correctly determined that no applicable

California law or regulation sets a more beneficial standard for overtime payments than the FLSA. Accordingly, this Court should uphold the Court of Appeal's decision approving the employer's use of the federal formula, and the Trial Court's grant of summary judgment, in favor of Dart Container.

The Petitioner contends that this Court should apply the method of calculation set forth in the Division of Labor Standards Enforcement ("DLSE") Manual. (DLSE Manual §§49.2.4.2 and 49.2.4.3). Section 49.2.4.2. provides:

> If the bonus is a flat sum, such as $300 for continuing to the end of the season, or $5.00 for each day worked, the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours worked during the period to which the bonus applies. This is so because the bonus is not designed to be an incentive for increased production for each hour of work; but, instead is designed to insure that the employee remain in the employ of the employer. To allow this bonus to be calculated by dividing by the total (instead of the straight time hours) would encourage, rather than discourage, the use of overtime. Thus, a premium based on bonus is required for each overtime hour during the period in order to comply with public policy.

The public policy underlying this provision is inapplicable to the employer's attendance bonus, which Dart Container gives to encourage employees to work weekend shifts and increase productivity, not to "insure that the employee remain in the employ of the employer." As the federal

regulations recognize, attendance bonuses induce employees to "work more steadily or more rapidly or more efficiently." (29 C.F.R. § 778.211(c)). In fact, the flat rate attendance bonus actually discourages the use of overtime. The payment plan does not differentiate between days or weeks that trigger overtime obligations, and those that do not. The attendance bonus increases the amount the employer pays for overtime because the bonus payment is included in the calculation of the overtime rate. In addition, the attendance bonus discourages overtime by ensuring that more employees work their regular shifts, even if they fall on the weekends, which reduces the number of overtime hours other employees work to cover weekend shifts. Rather than encouraging overtime, the bonus impacts how overtime is allocated. (See *Marin, supra,* 168 Cal.App.4th at p. 819).

More importantly, this Court already determined that the DLSE Manual's written policies and opinion letters interpreting the IWC wage orders are void regulations not adopted in accordance with the required Administrative Procedure Act rulemaking process. (*Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th 557). Other California Courts have followed suit and give no weight to DLSE Manual provisions. (See *Marin, supra,* (2008) 168 Cal.App.4th 804; *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16; *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1578-1579; *Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal.App.4th 260, 271 fn.8). Since the DLSE's Manual does not carry

the weight of law, the employer lawfully relied on the only specific regulations available, the federal formula.

The Petitioner argues that *Skyline* compels the use of the DLSE formula. (*Skyline, supra,* 165 Cal.App.3d 239). Alvarado contends that Dart Container's computation of the regular rate, "by dividing the combined fixed wages and the hourly wages by a varying number of hours from pay period to pay period" essentially applies a fluctuating work week methodology rejected by *Skyline*. The Petitioner claims that "as a matter of substance" the fixed rate bonus in this case is no different than the *Skyline* flat amount salaries.

Skyline is clearly distinguishable from this case. *Skyline* involved a fluctuating work week for salaried employees, not additional incentive pay paid each week to encourage hourly employees to work unpopular shifts to meet production needs. (*Skyline, supra,* 165 Cal.App.3d at p. 254). *Skyline* specifically noted that it only concerned salaried employees, not employees working on a commission, piece rate, or other wage basis. (*Id.*). Although the Petitioner attempts to convert the employer's bonus into a salary, it is clear that the bonus is conditional based on the employee being scheduled to work on a weekend and actually working the shift, not a payment for hours worked. The Petitioner was paid on an hourly basis, received overtime for hours worked over eight hours a day, and received a conditional attendance bonus, not a salary, so *Skyline* is inapplicable to this

case.

Skyline is also distinguishable because the court relied on an IWC Wage Order imposing a more favorable standard than the FLSA. (*Skyline, supra,* 165 Cal.App.3d at p. 253.) Unlike the DLSE Manual, the California Wage Orders have the force of law. (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra,* 14 Cal.4th at p. 577; *Martinez v. Combs, supra,* 49 Cal.4th at p. 61). The Wage Order provided a maximum number of hours per day, eight, that may be worked before the overtime rate must be paid, compared to the FLSA requirements that overtime be paid only if an employee works over 40 hours in one workweek. The *Skyline* court determined that the FLSA authorized the State to "require payment of an overtime rate that recognizes the state's imposition of a maximum workday and/or a lower maximum workday." (*Skyline, supra,* 165 Cal.App.3d at p. 239). Since the FLSA allowed states to establish higher standards, the court found that the statute necessarily authorizes the state to require the payment of a daily overtime rate for a maximum work day. (*Id.*.).

The *Skyline* court specifically noted that its decision was based on the "dissimilar language **and** purpose of the California statute and regulation" from the federal regulation. (*Skyline*, *supra,* 165 Cal.App.3d at p. 250 (Emphasis Added)).[2] In this case, no directly applicable California

[2] *Skyline* also relied on the DLSE's guidance and rejected the argument that the DLSE's enforcement policies must comply with the APA. (*Skyline,*

Wage Order or other more favorable state standard exists. Therefore, *Skyline's* reasoning regarding the enforcement of more favorable California law cannot apply.

Alvardo also argues that *Marin* compels this Court to apply a formula requiring that the regular rate be computed only on regular hours, not all hours worked including overtime. (*Marin v. Costco Wholesale Corp., supra,* 169 Cal.App.4th 804). Alvardo's reliance on *Marin* is misplaced. That case concerned semi-annual bonuses not identifiable in a particular work week. *Marin* concluded that "no California court decision, statute, or regulation governs bonus overtime, the DLSE Manual sections on the subject do not have the force of law, and the DLSE advice letters on the subject are not on point. Thus, there is no controlling California authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay." (*Marin, supra*, 160 Cal.App.4th at p. 815 citing Lab. Code, § 510 subdiv. (a)). In addition, the *Marin* court noted that FLSA guidance existed for computing the regular rate for bonuses paid and earned in the same pay period, but not for these specific facts, and the employer's formula was not inconsistent with that guidance. (*Id.* at p. 820 citing 29 C.F.R. § 778.209(a)). Therefore, the employer's formula was not prohibited and did not violate

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supra, 165 Cal.App.3d at p. 249). That rationale was expressly rejected by this Court in *Tidewater Marine Western, Inc. v. Bradshaw, supra,* 14 Cal.4th 557.

California or federal law. (*Id.* at p. 820). In this case, federal regulations directly address the calculation and that formula applies absent more favorable California law. Dart Container could not ignore these federal rules. Accordingly, nothing in *Marin* supports Alvarado's assertion that *Skyline* must apply to the attendance bonuses in this case.[3]

Under the California Code of Regulations, a "willful failure to pay wages" occurs when an employer intentionally fails to pay wages when due. (Cal. Code of Regs. § 13520). However, a reasonable and good faith dispute as to whether wages are due acts as a defense against imposition of penalties under Labor Code Section 203. (*Barnhill v. Robert Saunders & Co.* (1989) 125 Cal.App.3d 1, 7; *Smith v. Rae-Venter Law Group* (2001) 89 Cal.App.4th 239 *aff'd* 29 Cal. 4th 345 (2002) *superseded by statute on other grounds).* An unsettled or unambiguous legal standard may serve as a reasonable ground for a payment dispute and, therefore, as an adequate defense against section 203 penalties. *(Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1203).

Federal regulations also provide guidance regarding employer good faith reliance on published regulations. The federal regulations codify a

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[3] *Marin* also noted that *Skyline's* analysis was confined to salaried employees "and the specific problem of calculating a regular rate of pay when such employees work variable hours." *Skyline* also did not address bonuses and involved an employer's failure to pay overtime to employees who worked more than eight hours a day, which was not the case in either *Marin* or in this case. (*Marin v. Costco Wholesale Corp.*, *supra*, 160 Cal.App.4th at pp. 812-813).

defense for compliance:

> . . . an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that "the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation" or "any administrative practice or enforcement policy with respect to the class of employers to which he belonged."

(29 C.F.R. § 790.13(a); See also 29 C.F.R.§§ 790.13-790.19). The federal courts recognize this defense. (*Marshall v. Baptist Hospital, Inc.* (6th Cir. 1981) 668 F.2d 234; *General Electric Co. v. Porter* (9th Cir. 1953) 208 F.2d 805, 816). This defense allows an employer to establish that it made a good faith attempt to ascertain what the Act requires and to act in accordance with those requirements. (*Brock v. Shirk* (9th Cir. 1987) 833 F.2d 1326 *vacated on other grounds sub nom. Shirk v. McLaughlin* (1988) 488 U.S. 806). This Court should consider the employer's good faith attempt to comply with the federal regulations absent controlling California law. Recognition of an employer's good faith reliance on published regulations alleviates some of the uncertainty employers face in this complex area of law.

B. THIS COURT SHOULD DECLINE PETITIONER'S REQUEST TO LEGISLATE A NEW STANDARD

Petitioner essentially urges this Court to legislate a new California formula to comply with "public policy." Alvarado argues that the federal formula, which permits Dart Container to divide an employee's total compensation, including the attendance bonus for working weekend shifts, by all hours worked, rather than only regular hours worked, lowers employees' regular rate. Alvarado asserts that the federal formula encourages employees to work overtime contrary to California's public policy of discouraging overtime work.

As the Court of Appeals found, no more favorable California law exists for computing overtime on flat rate bonuses paid to hourly employees in the same pay period. Petitioner's claim generally asserts that Dart Container failed to pay proper overtime in violation of Labor Code Sections 510 and 1194 by not including bonuses in calculating overtime wages. (Lab. Code, §§ 510; 1194). Labor Code Section 510(a) provides:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. . .

(Lab. Code, § 510(a)). Nothing in these general Labor Code provisions require the imposition of the overtime formula advocated by Alvarado. In fact, no California statute or regulation imposes that formula. This court should not require Dart Containers, or other California employers, to comply with a law that does not exist.

Despite the existence of the federal regulation, the California Legislature did not prescribe a particular method of calculating the regular rate in this situation. A court's "judicial task is to decide what the Legislature has done, not what it should have done." (*Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 351). "As long as that body does not exceed its powers, and its judgment is not influenced by corruption, a court cannot substitute its judgment for that of the Legislature." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1365). Although it is within the legitimate power of the judiciary to declare the action of the Legislature unconstitutional, the courts have "no means, and no power, to avoid the effects of non-action." (*Campaign for Quality Education v. State* (2016) 246 Cal.App.4th 896, 905–06 citing *California State Employees' Assn. v. State of California* (1973) 32 Cal.App.3d 103, 109). Courts cannot impose additional burdens not sanctioned by statute. (*People v. Kwee* (1995) 39 Cal.App.4th 1, 5).

Alvarado's request that this Court create a new formula faces

barriers under the separation of powers doctrine. The California Constitution recognizes that, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (California Constitution, Art. III, § 3).

This concept manifests itself in various ways. For example, courts may not compel a legislative body to act. (*Steiner v. Superior Court (*1996) 50 Cal.App.4th 1771, 1783 citing *Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616, 618 (*Sklar*)). In *Sklar,* the court held taxpayers could not invoke judicial power to force the Franchise Tax Board, an administrative body, to control the use of alcohol entertainment expenses as a business deduction on state income tax returns. The court noted "the well-established principle, rooted in the doctrine of separation of powers, that the courts may not order the Legislature or its members to enact or not to enact, or the Governor to sign or not to sign, specific legislation." (*Id.* at p. 1783). This Court should decline to legislate a new formula applicable to the specific situation on this case in the absence of controlling California law and regulation.

C. THE READING OF THE CALIFORNIA LABOR CODE OVERTIME PROVISIONS ADVOCATED BY THE PETITIONER WOULD VIOLATE DUE PROCESS

Petitioner's reading of the Labor Code creates due process issues. Alvarado's interpretation requires the Court to construe the general Labor

Code provisions concerning overtime to require a specific unwritten formula for employers to compute overtime. This reading of the Labor Code would make the overtime provisions subject to an unnecessary vagueness challenge. A law may be challenged as unduly vague in violation of due process. (*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 497).

A statute is vague if a person of common intelligence must guess the meaning of the statute or its application. (*In re J.W.* (2015) 236 Cal.App.4th 663, 670 citing *People v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 339). The underlying concern of a vagueness challenge "is the core due process requirement of adequate notice." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115). A statute should be sufficiently certain so that a person may know what is prohibited and what may be done without violating its provisions. (*Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484).

The prohibition on vagueness is rooted in ordinary notions of fair play. This concern for fair warning aims to ensure that a person of ordinary intelligence has a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. The fear is that vague laws will "trap the innocent." (*In re Ana C.* (2016) 2 Cal.App.5th 333, 341 citing *In re Kevin F.* (2015) 239 Cal.App.4th 351, 357–358). The United States Supreme Court "recognized ... that the more important aspect of the

vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." (*Id.* citing *Kolender v. Lawson* (1983) 461 U.S. 352, 357–358). Nothing in the California Labor Code provisions cited by the Petitioner provides notice of his formula or guidelines in its enforcement. In essence, employers would be trapped by vague Labor Code provisions that require complying with a specific, unpublished formula.

The degree of vagueness that the Constitution tolerates, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the enactment. Economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry. (*Hoffman Estates v. Flipside, Hoffman Estates, supra,* 455 U.S. at pp. 498-499).

The Labor Code is not merely economic regulation. If Petitioner's interpretation of the Labor Code was adopted by this Court, employers would be subject to potential civil, statutory, **and** criminal penalties for violation of an invisible statute. Alvarado's complaint as amended alleges the following causes of actions: (1) Failure to pay proper overtime in

violation of Labor Code Sections 510 and 1194 by not including shift differential premiums and bonuses in calculating overtime wages; (2) Failure to provide complete and accurate wage statements, in violation of Labor Code Section 226; (3) Failure to timely pay all earned wages due at separation of employment, in violation of Labor Code Sections 201, 202, and 203; (4) Unfair Business Practices, in violation of Business and Professions Code Section 17200 et seq.; and (5) civil penalties under the Private Attorneys' General Act of 2004, Labor Code Section 2698 et seq. ("PAGA").

The Labor Code establishes that the right to overtime pay also provides the remedy for failure to comply. Pursuant to Labor Code Section 1194, "any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (Lab. Code, § 1194). If the employer has not paid on time, the employee may also recover a statutory penalty under Labor Code Section 203. (Lab. Code, § 203). Labor Code Section 558 also provides for statutory penalties, in addition to any available civil and criminal penalties. (Lab. Code, § 558).

Alvarado's PAGA claim is a representative government action for statutory penalties. PAGA permits current or former employees to sue for

civil penalties that may be assessed and collected by the state's labor law enforcement agencies. (Lab. Code, §§ 2698-2699.5; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 381). The government entity on whose behalf the plaintiff files suit is always the real party in interest because the employee's action substitutes for an action brought by the government itself. (*Id.* at p. 382; *Arias, supra,* 46 Cal.4th at p. 986). Every "PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state." (*Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th at p. 387). Thus, Petitioner's PAGA claims are essentially a state enforcement action to recover statutory penalties in addition to other civil damages.

The alleged violations of the California Labor Code could also expose the employer to possible criminal penalties. Labor Code Section 553 specifies that "Any person who violates this chapter is guilty of a misdemeanor." (Lab. Code, § 553). This penalty applies to any provision regarding overtime, meal periods, alternative workweeks, and rest days. (Lab. Code, §§ 510-513, 551, 552). Provisions that do not identify a specific punishment are governed by Labor Code Section 23, which provides: "Except in cases where a different punishment is prescribed, every offense declared by this code to be a misdemeanor is punishable by imprisonment in a county jail, not exceeding six months, or by a fine not

exceeding one thousand dollars ($1,000), or both. " (Lab. Code, § 23). Similarly, Labor Code Section 215 makes it a misdemeanor for an employer to violate any provision regarding the timing, method, and place of wage payments, and Labor Code Section 216 makes it a misdemeanor to willfully refuse to pay wages due and payable after a demand has been made.[4] (Lab. Code, §§ 215, 216).

Given these potential statutory and criminal penalties, this Court should construe the Labor Code provisions at issue, and the Petitioner's proposed formula, in a manner that ensures that the statutes provide fair warning concerning any illegal conduct. (See *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312–13). When language is susceptible to two constructions in penal law, "the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit." (*Id.* at 312 citing *People v. Overstreet* (1986) 42 Cal.3d 891, 896). The more beneficial reading applies "if the court can do no more than guess what the legislative body intended" and if "egregious ambiguity and uncertainty" are present. (*People v. Avery* (2002) 27 Cal.4th 49, 58). The Court should safeguard against the excessive penalization of those found liable under a civil statute, particularly when the employer is acting in good faith in reliance on

[4] The criminal provisions of these statutes are enforceable and not illusory. (See *Martinez v. Combs, supra,* 49 Cal.4th at p. 56; *Home Depot USA, Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 217).

published applicable regulations. (*People ex rel. Lungren v. Superior Court, supra,* 14 Cal.4th at p. 314 citing *Hale v. Morgan* (1978) 22 Cal.3d 388).

The construction of the Labor Code advanced by the Petitioner requires this Court to guess what the Legislature intended. This judicial guess would then result in substantial liability for employers in addition to potential statutory and criminal penalties. Given the good faith action of this employer in reliance on the published federal formula, and the absence of any applicable California law, this Court should reject the Petitioner's expansive reading of the Labor Code to avoid due process concerns.

D. EMPLOYERS MUST BE ABLE TO RELY ON PUBLISHED REGULATIONS AND FORMULAS TO DETERMINE APPLICABLE OVERTIME RATES

Alvarado contends that the Court of Appeals decision would encourage employers to "adopt pay schemes that emphasize 'fixed bonuses' and . . . thereby, through subterfuge, avoid payments of overtime premiums contemplated by law." Dart Container offered the attendance bonus to address a specific production need and encourage employees to work weekend shifts. There is no dispute that Dart Containers never used the attendance bonus to skirt any overtime provisions or to avoid paying employees overtime. This bonus effectively increased the employees' rate of overtime. This was not a scheme to avoid paying overtime. Instead, Dart Container relied on the only published law concerning flat rate bonuses, the

federal regulations, to calculate how to pay its employees overtime.

To remain in business, and encourage productivity, employers must be able to rely on fixed, published laws and regulations for determining overtime obligations. The federal regulations provide a clear, straightforward rule for how to calculate overtime in this situation. Employers should not be penalized for the uncertainty of California's law, which puts employers in the difficult situation of having to weigh whether the DLSE's interpretation is supported by state or federal legal authority and whether California law is more beneficial to employees than the federal law. This employer acted in good faith by paying employees an attendance bonus, paying that bonus promptly, and complying with all applicable laws.

An opposite decision would have far-reaching negative consequences on similar bonus systems in California by discouraging employers from offering attendance bonuses to meet their production needs. Requiring multi-state employers to structure their compensation systems differently in California would be create yet another layer of unnecessary business regulation. Overturning the decision will create incentives for a new area of litigation challenging similar bonus systems and encourage numerous class action lawsuits seeking penalties based on an employer's good faith attempt to reward employees and increase productivity. As this case shows, a contrary result would make employers open to penalties available under California law, including penalties for

failure to pay wages, penalties for inaccurate wage statements, claims under the PAGA, and attorneys' fees for trying to reward their employees and comply with all published, applicable laws and regulations.

III. CONCLUSION

For all the foregoing reasons, the NAM requests that this Supreme Court uphold the Court of Appeal's decision finding that the employer lawfully used the federal formula found in regulations interpreting the FLSA for computing overtime on an hourly employee's flat sum bonus.

Dated: September 28, 2016

Michael J. Lotito
Elizabeth D. Parry
LITTLER MENDELSON, P.C., P.C.
Attorneys for the *Amicus Curiae*
NATIONAL ASSOCIATION OF
MANUFACTURERES

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Brief of Amici Curiae by National Association of Manufacturers In Support of Position of Dart Container Corporation of California was produced using 13-point, Roman type font and contains 5,904 words.

Dated: September 28, 2016

E. N. Parry

Elizabeth Parry
Counsel for Amici Curiae

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PROOF OF SERVICE BY MAIL

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BRIEF OF AMICUS CURIAE BY NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DART CONTAINER CORPORATION OF CALIFORNIA

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Joseph Lavi
Lavi & Ebrahimian, LLP
8889 West Olympic Blvd., Suite 200
Beverly Hills, CA 90211

Dennis F. Moss
Attorney at Law
15300 Ventura Blvd., Suite 207
Sherman Oaks, CA 91403

Howard B. Golds
Best, Best, & Krieger, LLP
3390 University Ave., Fifth Floor
Riverside, CA 92501

Office of the Attorney General
Consumer Law Section
300 South Spring Street
Los Angeles, CA 90013

Honorable Daniel Ottolia
Riverside County Superior Court
Historic Courthouse
4050 Main Street
Riverside, CA 92501

Clerk, California Court of Appeal
Fourth District Court of Appeal
Division 2
33889 Twelfth Street
Riverside, CA 92501

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Gina Camacho

Gina R. Camacho