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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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KURT STOETZL, ET AL.

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET AL.

Defendants and Respondents.

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California, County of San Francisco, Case Number CJC11004661, The Honorable John E. Munter

OPENING BRIEF ON THE MERITS OF STATE OF CALIFORNIA, ET AL.

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I.

ISSUES PRESENTED FOR REVIEW

Because this Court's November 29, 2017 Order granting review in this action did not specify the issues to be briefed, Respondents State of California, the California Department of Human Resources (CalHR, f/k/a the Department of Personnel Administration or DPA), the California Department of Corrections and Rehabilitation (CDCR), and the California Department of State Hospitals (DSH, f/k/a the California Department of Mental Health or DMH) (collectively, "Respondents" or "the State") set forth verbatim the issues presented in their Petition for Review to this Court as follows:

1. Whether the Court of Appeal erred in holding the definition of "hours worked" found in the Industrial Wage Commission's Wage Order No. 4, as opposed to the definition of that term found in the federal Fair Labor Standards Act, constitutes the controlling legal standard for determining the compensability of the Unrepresented Employee subclass' preliminary and postliminary "walk time."

2. Whether the Court of Appeal erred in holding that the Unrepresented Employee subclass can pursue a common law breach of contract claim for unpaid overtime, without adducing evidence at trial of an implied contract from which such contractual obligations may be derived.

II.

INTRODUCTION/SUMMARY OF ARGUMENT

The present action is what commonly is referred to as a "walk time" case. Appellants are a class of correctional employees who, by stipulation of the parties (Appellants' Appendix [AA], Vol. 1, pp. AA 000230) are divided into two subclasses: Represented Employees, whose labor relations with the State are governed by the Ralph C. Dills Act, Government Code section 3512, *et seq.*, and Unrepresented Employees, whose labor relations with the State are governed by the Bill of Rights for State Excluded Employees, Government Code section 3525, et seq. The plaintiff class claims it has not been paid for all time worked, including the time it takes them to walk to their posts in the correctional institutions at which they work.

Throughout the course of this litigation, Appellants continually have characterized the central issue presented as whether their minimum wage rights have been violated. That is *not* the issue, however, on which this case turns. Rather, the critical issue before this Court is more fundamental. The question on which this case turns is whether the controlling legal standard for determining the compensable hours worked for employees in the plaintiff class is the federal Fair Labor Standards Act (FLSA), 29 U.S.C. section 201, et seq. or California's "control" test as embodied in IWC Wage Order No. 4 and as articulated by this Court in *Morillion v. Royal Packing Co.* (*Morillion*) (2000) 22 Cal.4th 575.

Since the mid-1980's, the method for compensating employees in the Unrepresented Employees subclass[1] has been contained in rules and regulations adopted by CalHR pursuant to the Legislature's broad and express delegation of authority to it, which includes the authority "to establish and adjust salary ranges" for state excluded employees (Gov. Code § 19826, subd. (a)), to "adopt rules governing hours of work and overtime compensation" (Gov. Code § 19849), and, of particular relevance to the present discussion, to "provide for overtime payments as prescribed by the Federal Fair Labor Standards Act." (Gov. Code § 19845.)

Under the rules adopted by CalHR, the compensability of Unrepresented Employees' hours worked is, and always has been, governed by the FLSA. The Court of Appeal erred by holding that California's definition of "hours worked," rather than the FLSA, governs the determination of compensable hours worked for the Unrepresented Employee subclass. The Court of Appeal's holding vitiates the express

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[1] Following the trial of Phase I, which by stipulation of the parties involved various threshold legal issues described in full below, the trial court rendered a decision in favor of the State. (AA, Vol. 20, p. AA005409.) The trial court thereupon entered judgment for the State (AA, Vol. 20, p. AA 005438) and Appellants appealed. (AA, Vol. 20, p. AA 005466.) On appeal, the Court of Appeal affirmed the trial court's judgment for the State with respect to the Represented Employee subclass, but reversed the trial court as to the Unrepresented Employee subclass. Both sides filed Petitions for Review to this Court and on November 29, 2017, both Petitions for Review were granted. The present brief addresses the State's challenge to the Court of Appeal's decision reversing the trial court's judgment in its favor regarding the Unrepresented Employee subclass.

delegation of authority to CalHR by the Legislature to establish rules and regulations for compensating excluded employees. The Court of Appeal's holding also fails to give proper deference to the regulations adopted by CalHR pursuant to this express delegation of authority, which establish a methodology for compensating employees in the Unrepresented Employees subclass based on the FLSA.

Along with the Court of Appeal's error in holding that California law, rather than the FLSA, controls the determination of what constitutes compensable hours worked, the Court of Appeal further erred in holding that Appellants could maintain a common law breach of contract claim against the State for allegedly failing to pay overtime pay. At the trial court correctly concluded, Appellants failed to adduce any evidence at trial demonstrating the existence of a contractual obligation to pay them overtime. Furthermore, none of the rules or regulations on which they potentially could rely for such a proposition evince an unequivocal intent to create a contractual obligation to pay overtime, as opposed simply to creating overtime policies.

Based upon the arguments set forth below, as well as the record in this case, the State respectfully requests this Court reverse that portion of the Court of Appeal's decision regarding the Unrepresented Employee subclass and reinstate the trial court's judgment in its favor.

III.

STATEMENT OF THE CASE

A. Statement of Material Facts.

1. Description of Unrepresented Employee Subclass.

There are nine job classifications contained in the class certified by the trial court in its January 28, 2011 order. (AA, Vol. 1, p. 000039.) Pursuant to the stipulated order dated January 6, 2012 (AA, Vol. I, pp. AA000230-000235), the plaintiff class was divided into two subclasses: Represented Employees (AA, Vol. 3, p. AA 000604 [Stip. No. 7]) and Unrepresented (Excluded) Employees. (Gov. Code, § 3525, et seq.) (AA, Vol. 3, p. AA 000605 [Stip. No. 10].) The Unrepresented Employee subclass, which is the focus of this brief, consists of the following job classifications: Correctional Sergeants, Correctional Lieutenants, and Senior Medical Technical Assistants. The California Correctional Peace Officers Association (CCPOA) and the California Correctional Supervisors Organization (CCSO) are the non-exclusive representatives for the members of the Unrepresented Employee subclass. (AA Vol 3, p. 000605 [Stip. No. 9].)

2. Labor Relations Between the State and the Unrepresented Employee Subclass.

Labor relations between the State and the Unrepresented Employee subclass are governed by the Bill of Rights for State Excluded Employees,

Government Code section 3525, et seq. (AA, Vol. 3, p. AA 000605 [Stip. No. 10].) Employees covered by the Bill of Rights for State Excluded Employees, such as those in the Unrepresented Employee subclass, are excluded from the collective bargaining process with respect to the wages, hours, or other terms and conditions of their employment. Instead, CalHR is authorized to "adopt rules and regulations for the administration of excluded employer-employee relations" (Gov. Code § 3535) and to "adopt or amend regulations to implement employee benefits for those state officers and employees excluded from, or not otherwise subject to, the Ralph C. Dills Act." (Gov. Code § 3539.5.)

This general legislative delegation of authority to CalHR to adopt regulations governing the terms and conditions of state employment for employees in the Unrepresented Employee subclass is specifically reinforced in a series of statutes in the Government Code pursuant to which the Legislature has delegated to CalHR the specific authority to adopt rules and regulations governing the terms and conditions for compensating those employees.

For instance, Government Code section 19826, subdivision (a) delegates to CalHR the authority to set salary ranges:

> The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and

> responsibilities. In establishing or changing these ranges, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The department shall make no adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes. The department may make a change in salary range retroactive to the date of application of this change.

(AA, Vol. 13, AA003619 [Defendants' Exhibit 204].)

Government Code section 19843, subdivision (a) allows CalHR to create workweek groups:

> For each class or position for which a monthly or annual salary range is established by the department, the department shall establish and adjust workweek groups and shall assign each class or position to a workweek group. The department, after considering the needs of the state service and prevailing overtime compensation practices, may establish workweek groups of different lengths or of the same length but requiring different methods of recognizing or providing compensation for overtime. The department may also provide for the payment of overtime in designated classes for work performed after the normal scheduled workday or normal scheduled workweek.

(AA, Vol. 13, p. AA003621 [Defendants' Exhibit 205].)

Government Code section 19844, subdivision (a) allows CalHR to set overtime rules:

> The department shall provide the extent to which, and establish the method by which, ordered overtime or overtime in times of critical emergency is compensated. The department may provide for cash compensation at a rate not to exceed 11/2 times the regular rate of pay, and the rate may vary within a class depending upon the conditions of work, or the department may provide for compensating time off at a rate not to exceed 11/2 hours of time off for each hour of overtime worked. The provisions made under this section shall be based on the

> practices of private industry and other public employment, the needs of state service, and internal relationships.

(AA, Vol. 13, p. AA003622 [Defendants' Exhibit 206].)

Government Code section 19845, subdivision (a) permits CalHR to apply FLSA overtime rules to state employees:

> Notwithstanding any other provision of this chapter, the department is authorized to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees.

(AA, Vol. 13, p. AA 003623 [Defendants' Exhibit 207].)

Finally, Government Code section 19849, subdivision (a) directs CalHR to adopt rules governing working hours and overtime compensation:

> The department shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules.

(AA, Vol. 13, p. AA003624 [Defendants' Exhibit 208].)

3. CalHR's Exercise of its Legislatively Delegated Authority to Establish the Method for Compensating Unrepresented Employees.

Pursuant to the authority granted it by the Legislature both in the Bill of Rights for State Excluded Employees and the series of Government Code sections cited above, CalHR has adopted a number of regulations governing the method by which employees in the Unrepresented Employee subclass are compensated.

For instance, title 2, California Code of Regulations, section 599.666.1 provides:

> The pay plan for state civil service employees designated supervisory under Government Code section 3513(g) or excluded from the definition of state employee under Government Code section 3513(c) or managerial under Government Code section 3513(e) (Ralph C. Dills Act) consists of the salary ranges and rates established by the Department and the regulations contained in this article.

Title 2, California Code of Regulations, section 599.671 provides that that "[u]nless otherwise indicated in the pay plan, the rates of pay set forth represent the total compensation in every form except for overtime compensation."

Pursuant to the express authority granted it in Government Code section 19843, CalHR has established workweek groups for state employees. (Cal. Code Regs., tit. 2, § 599.701.) Based on this code section, CalHR, in 1983, divided state employees into two Work Week Groups (WWGs): WWGs 1 and 4. (*Ibid.*)

At the same time, and pursuant to the express delegation of authority granted it to provide for overtime payment as prescribed by the FLSA (Gov. Code § 19845) CalHR adopted regulations providing for the circumstances under which overtime would be compensable. One such regulation provides that "[i]n order to be compensable by cash or compensating time off, overtime in [WWG] 1 and Subgroups 4A, 4B, and 4D must be authorized in advance . . . by the appointing authority or its designated representative. This authorization must also be confirmed in writing not later than 10 days after the end of the pay period during which the time was worked." (Cal. Code

Regs., tit. 2, § 599.702.) Another regulation provides that overtime must be "ordered overtime" to be compensable. (Cal. Code Regs., tit. 2, § 599.704.)

David Gilb, the former CalHR Director, testified at trial that in order to implement the above regulations, and based upon the authority delegated it by the Legislature, CalHR developed the California Pay Scales Manual. (Reporter's Transcript [RT], Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.* [Defendants' Exhibit 79].) This manual documents, among other things, the salary ranges for each employee class in the state civil service. (*Ibid.*) At trial, Mr. Gilb testified that all of the job classifications in the Unrepresented Employees subclass are listed in the appendix to the Pay Scale Manual and that each of those job classifications is designated as Work Week Group 2.[2] (See generally, RT, Vol. 4, 474:22-485:25 (Gilb).)

Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) Subsection (f) of Section 10 of the Pay Scale Manual provides that "[t]he provisions of Work Week Group 2 are made applicable to all classes *which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA*." (*Id.* at

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2 After the initial adoption of the Pay Scales Manual, CalHR restructured the WWGs by reassigning WWG 1, 4A, 4B, and 4D to WWG 2 for those positions CalHR determined to be subject to the calculation of overtime rates under FLSA criteria. (RT, 402:10-405:3.)

AA002997, emphasis added.) Mr. Gilb testified that he, and each of his predecessors holding the position of CalHR Director since the adoption of the Pay Scales Manual, have determined that the positions in the Unrepresented Employee subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.)

B. Procedural History.

1. Operative Pleadings.

The action entitled *Stoetzl, et al. v. State of California, et al.*, San Francisco County Superior Court, Case No. CGC-08-474096 (hereinafter "*Stoetzl*") was commenced on April 9, 2008. (AA, Vol. 1, pp. AA000001, *et seq.*) On February 3, 2009, the trial court granted plaintiffs' request for a complex designation. (AA, Vol. 1, pp. AA000015, *et seq.*) At the time of the trial of this action, the operative pleading in *Stoetzl* was the Fourth Amended Complaint. (AA, Vol 1, p. AA 000073, *et seq.*)

On May 12, 2011, the *Stoetzl* action was coordinated with two other actions: *Shaw, et al. v. State of California, et al.*, Kings County Superior Court, Case No. 10C0081 ("*Shaw*") and in *Kuhn, et al. v. State of California, et al.*, Los Angeles County Superior Court, Case No. BC450446 ("*Kuhn*"). (AA, Vol. 1, p. AA000069.) By the time of trial, the operative complaint in *Shaw* was the Second Amended Complaint (AA, Vol. 1, AA000091, *et seq.*) and the operative complain in *Kuhn* was the First Amended Complaint. (AA, Vol. 1, AA000109, *et seq.*)

The complaints in the coordinated actions alleged causes of action for (1) failure to pay contractual overtime in violation of Labor Code sections 222 and 223; (2) failure to pay statutory minimum wage in violation of Labor Code sections 1182.11, 1182.12, 1194, and 8 California Code of Regulations section 11000, *et seq.*; (3) failure to keep accurate records of employee hours in violation of Labor Code section 1174; and (4) failure to pay contractual overtime in breach of common law contractual obligations. (AA, Vol. 1, p. AA000073, *et seq.*)

2. Class Certifications.

On January 28, 2011, the trial court granted class certification in *Stoetzl*. (Vol. 1, AA000039.) The Order defined the initial class as follows:

> All persons who are or who have been employed as Correctional Officers, Correctional Sergeants, Correctional Lieutenants, Medical Technical Assistants, Senior Medical Technical Assistants, Correctional Counselors I, Correctional Counselors II, Youth Correctional Officers, and/or Youth Correctional Counselors to [sic] work at adult and/or youth correctional institutions within the California Department of Corrections and Rehabilitation in the period commencing April 9, 2005 until the notice of pendency of this class action is given.

On October 4, 2011, after coordination of the *Shaw* and *Kuhn* matters, the trial court granted class certification in those actions. (Vol. 1, AA000156-157.) On January 6, 2012, the trial court approved the parties' stipulation dividing the plaintiff class into two subclasses: Represented Employees and Unrepresented Employees. (AA, Vol. 1, p. AA 000230.)

3. Motion for Judgment on the Pleadings

On March 16, 2012, the State moved for judgment on the pleadings in all three coordinated suits. (Vol. 1, AA000242-427.) On June 19, 2012, the trial court granted the motion in part. (Vol. 2, AA000573-578.) Specifically, the trial court granted judgment on the pleadings with respect to Appellants' causes of action for violation of Labor Code sections 222 and 223 and failure to keep records in violation of Labor Code section 1174, but denied judgment on the pleadings with respect to the two remaining causes of action for failure to pay the minimum wage and breach of common law contract. (AA, Vol. 3, p. AA000573.)

4. Pre-Trial Stipulations.

On January 30, 2013, the parties stipulated to, and the trial court approved, the following issues to be tried to the court during Phase 1 of this action (AA, Vol. 2, p. AA000579):

> Compensability
>
> (a) Whether the California state law standard of compensability (the "control" standard") or the FLSA standard of compensability ("first principal activity of the day") establishes the standard for determining plaintiffs' compensable hours worked; as to Represented Employees: During the relevant time period, did the parties agree the FLSA would constitute the controlling legal standard for determining represented employees' compensable hours worked?
>
> Minimum Wage
>
> (b) Whether Labor Code sections 1182.11, 1182.12, 1194 and 8 CCR section 11000 et seq. and/or the Wage Orders apply to the state employer for purposes of establishing the minimum

wage applicable to plaintiffs.

(c) Represented Employees: During the relevant time period, did the parties contractually agree to apply the federal minimum wage instead of the California minimum wage and, if so, is such an agreement enforceable?

Breach of Contract Claims

(d) Is there any legal prohibition, including but not limited to, the Ralph C. Dills Act (Govt. Code § 3512, *et seq.*) for represented employees and the Bill of Rights for State Excluded Employees (Govt. Code §3525, *et seq.*) for unrepresented employees, against stating a claim for breach of common law contract regarding the terms and conditions of employment against the state, or against an employee for receiving overtime for hours worked beyond their regular work schedule?

(e) For represented employees, what contractually enforceable overtime policies existed when (1) the 2001-2006 MOU was in effect, including by operation of effect of Government Code § 3517.18 until September 18, 2007, (2) the state's Implemented Terms were in effect, and (3) once the 2011-2013 MOU took effect?

(f) Assuming represented employees can state a common law contract claim, were represented employees required to exhaust contractual grievance procedures and/or other administrative remedies prior to bringing a civil breach of contract action?

(g) Assuming unrepresented employees can state a common law contract claim, what contractually enforceable overtime policies existed during the class period?

Along with the issues to be tried during phase 1, the parties agreed to certain stipulated facts for that trial. (AA, Vol. 2, p. AA000602.)

5. Trial.

Trial began on August 13, 2013 and continued through August 19. 2013. Closing arguments occurred on September 30, 2013. After trial, the

trial court issued a tentative statement of decision to which Appellants submitted objections. (AA, Vol. 19, p. AA005390.) The trial court issued its Final Statement of Decision on January 21, 2014 finding in favor of the State on the critical issues of the applicable legal standard for determining the compensability of hours worked and on whether the plaintiff class could establish a breach of common law contract claim against the State. (AA, Vol. 20, p. AA005409.)

With respect to the Unrepresented Employees subclass, the trial court found that "[t]he persuasive evidence adduced during trial established that the current WWG 2 definitions consistently reference the FLSA as the controlling legal standard for measuring Unrepresented Employees' compensable hours worked." (AA, Vol. 20, p. AA 005430.) In reaching this conclusion, the trial court noted that section 10(a) of the Pay Scales Manual defines "hours worked" in part, as follows: "For the purposes of identifying hours worked under the provisions of the FLSA, only the time spent which is required or controlled by the State and pursued for the benefit of the State need be counted." The trial court rejected Appellants' argument that the reference to "control" in this definition rendered the Pay Scales Manual's definition of "hours worked" more consistent with California state law than the FLSA. (AA, Vol. 20, pp. AA 005430-31.) On this basis, the trial court concluded that "[a]t all relevant times and consistent with its legislatively delegated authority, CalHR has applied the FLSA as the standard for

measuring plaintiff's compensable hours worked. It follows that, as applied here, the FLSA standard of compensability constitutes state law." (*Id.* at p. AA 005431.)

With respect to the Unrepresented Employees subclass' claim for breach of common law contract, the trial court found that "CalHR has established specific rules addressing the subject of overtime pay, thereby foreclosing plaintiffs' common law claims. [¶] Moreover, plaintiffs failed to persuasively establish at trial the existence of any agreement to pay overtime to the Unrepresented Employees. *See Retired Employees Ass'n of Orange County, Inc. v. County of Orange,* 52 Cal.4th 1171, 1187-89 (2011). The Court finds and concludes that there was no such agreement." (AA, Vol. 20, p. AA 005434.)

Because the trial court's decision was determinative of all of Appellants' remaining claims, judgment was entered in favor of the State on June 23, 2014. (AA, Vol. 20, p. 5438.)

6. Court of Appeal Decision.

Following entry of the trial court's judgment, Appellants timely appealed to the First District Court of Appeal. (AA, Vol. 20, p. AA005466.) After the case was briefed fully, the Court of Appeal heard oral argument on August 8, 2017.

On August 31, 2017, the Court of Appeal issued its decision. With respect to the Unrepresented Employee subclass, the appellate court reversed

the judgment of the trial court. On the issue of the legal standard for determining the compensability of hours worked, the Court of Appeal held that the California "control" test for determining compensability, as set forth in IWC Wage Order No. 4, controlled because "our Supreme Court has explained that wage orders are entitled to 'extraordinary deference' and have 'the same dignity as statutes,'" citing, *Brinker Restaurant Corp v. Superior Court (Hohnbaum)* (*Brinker*) (2012) 53 Cal.4th 1012, 1027. (Slip Opn., p. 19.) The Court of Appeal further found,

> [I]t is possible to harmonize the California Pay Scale Manual and Wage Order No. 4, as we must seek to do under *Brinker*. [Citation.] The manual does not expressly state that law enforcement employees are not subject to the provisions of the wage orders applicable to their job classifications, nor does it contain any provisions concerning compensation for pre- and post-work activities. Wage Order No. 4, on the other hand, explicitly provides that its 'Definitions' (section 2) and 'Minimum Wages' (section 4) provisions apply to employees of the State.

(Slip Opn., p. 21.)

Thus, the Court of Appeal concluded, "[w]e 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."

With respect to the Unrepresented Employees subclass' claim for breach of common law contract, the Court of Appeal also reversed the trial

court's decisions. The Court of Appeal concluded because the Unrepresented Employees subclass is "entitled to compensation for all hours worked under California's broader standard," a breach of contract claim for "earned but unpaid wages" could be asserted. In so holding, the Court of Appeal relied on the holdings in *Madera Police Officers Assn. v. City of Madera* (*Madera*) (1984) 36 Cal.3d 403; *White v. Davis* (*White*) (2003) 30 Cal.4th 528; and *Sheppard v. North Orange County Regional Occupational Program* (*Sheppard*) (2010) 191 Cal.App.4th 289. (Slip Opn., p. 24.)

It is the ruling on these two issues affecting the Unrepresented Employees subclass on which the State now seeks this Court's review.

IV.

LEGAL ANALYSIS

A. Standard of Review.

This Court independently reviews the appellate court's decision and need not defer to it. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.)

B. The Court of Appeal Erred In Holding That IWC Wage Order No. 4 Establishes The Controlling Legal Standard For Determining Compensable Hours Worked For Employees In The Unrepresented Employee Subclass.

The Court of Appeal's holding that the California "control" standard, rather than the FLSA, governs the determination of the Unrepresented Employees' hours worked is erroneous and should be reversed by this Court. The Court of Appeal's holding fails to afford proper deference to both the

express delegation of authority granted by the Legislature to CalHR to adopt rules and regulations governing the method for compensating members of the Unrepresented Employees subclass, as well as the rules and regulations CalHR has adopted pursuant to that delegation of authority. Contrary to the Court of Appeal's holding, the FLSA-prescribed method for determining whether an employee is entitled to overtime payment, which inherently includes the FLSA's standards governing compensable hours worked, cannot be harmonized with the "control" standard contained in IWC Wage Order No. 4 and articulate by this Court in *Morillion.* Accordingly, the Court of Appeal's decision should be reversed and the trial court's judgment in favor of the State with respect to the Unrepresented Employees subclass should be reinstated.

1. The Legislature Has Delegated To CalHR Its Constitutional Authority To Establish The Method By Which Members Of The Unrepresented Employee Subclass Are Compensated.

It is well established that "[u]nder the California Constitution it is *the Legislature* ... that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments...." (*Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1015-1016 ("*Professional Engineers*") ["[T]he authority to set salaries [of public employees] has traditionally been viewed as a legislative function, with ultimate authority

residing in the legislative body."] (emphasis in original; internal citations omitted).) "[A]ny authority that the Governor or an executive branch entity ... is entitled to exercise in this area emanates from the Legislature's delegation of a portion of its legislative authority to such executive officials or entities through statutory enactments." (*Ibid.*)

Employees in the Unrepresented Employee subclass are excluded from the collective bargaining process of the Dills Act. (Gov. Code §§ 3513, subd. (g), 3527, subd. (b); *California Assn. of Professional Scientists v. Department of Finance* (2011) 195 Cal.App.4th 1228, 1232; *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325.) Instead, "[t]he Legislature has delegated to [CalHR] the authority to set salaries for state employees excluded from collective bargaining ([Gov. Code] §§19825, 19826)." (*Cal. Assn. of Prof. Scientists v. Dept. of Fin., supra,* 195 Cal.App.4th at 1232.)

The Legislature's delegation of authority to establish the method by which the members of the Unrepresented Employee subclass are compensated is manifested in the series of Government Code sections set forth in full in the Statement of Material Facts section of the brief. To summarize, those code sections include Government Code section 19826, subdivision (a) [directing CalHR to "establish and adjust salary ranges" for employees in the state civil service], Government Code section 19843 [authorizing CalHR to establish workweek groups and to assign classifications to workweek groups for purposes of calculating overtime

pay], Government Code section 19844 [directing CalHR to establish rules by which ordered overtime and overtime worked in times of critical emergency shall be compensated], Government Code section 19845 [permitting CalHR "to provide for overtime payments as prescribed by the federal Fair Labor Standards Act to state employees"], and Government Code section 19849 [mandating CalHR "to adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records"].

Taken together, these statutes constitute a broad delegation of authority by the Legislature to CalHR to establish the method by which excluded employees are compensated, which includes the express authorization to CalHR "to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees." Pursuant to this express delegation of authority, CalHR has adopted rules and regulations for compensating employees in the Unrepresented Employee subclass based on the FLSA, as will now be described.

2. CalHR Has Exercised The Authority Delegated To It By Unequivocally Establishing The FLSA As The Controlling Legal Standard For Measuring The Compensable Hours Worked For Members Of The Unrepresented Employee Subclass.

Pursuant to the authority delegated it under the above-referenced Government Code sections, CalHR has adopted a series of regulations governing the compensation of employees, such as those in the

Unrepresented Employee subclass, who are excluded from the collective bargaining process pursuant to the Bill of Rights for State Excluded Employees, Government Code section 3525, et seq. Of particular relevance, title 2, California Code of Regulations, section 599.666.1 provides that the pay plan for excluded employees "consists of the salary ranges and rates established by the Department and the regulations contained in this article." Furthermore, title 2, California Code of Regulations, section 599.701 authorizes the creation of work week groups in order to implement the various pay plans established by CalHR.

In order to effectuate and implement these regulations – regulations established pursuant to the Legislature's express delegation of authority to it – CalHR adopted the California Pay Scales Manual, which identifies the FLSA as the controlling legal standard for determining the compensability of Unrepresented Employees' hours worked. (RT, Vol. 4, 467:9-468:5 (Gilb); AA, Vols. 11-13, AA p. 002794, *et seq.* [Defendants' Exhibit 79].)

As David Gilb, the former Director of CalHR, testified at trial, the Pay Scales Manual documents, among other things, the salary ranges set for each class of employees in the state civil service. (*Ibid.*) At trial, Mr. Gilb identified each of the job classifications in the Unrepresented Employee subclass in the appendix to the Pay Scales Manual and noted that each of those job classifications had been designated Work Week Group 2 (WWG 2). (See generally, RT, Vol. 4, 474:22-485:25 (Gilb).)

The Pay Scales Manual establishes an FLSA-based method for compensating employees designated WWG 2, which includes the Unrepresented Employees here. Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) That section states, in part, "[t]he provisions of [WWG 2] are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA." (*Ibid.*) Section 10 of the Pay Scales Manual further provides that "[t]he beginning of a work week may be changed if the change is intended to be permanent and it is not intended to evade the overtime provisions *of the FLSA*." (*Ibid.*, emphasis added.) Subsection (f) of Section 10 of the Pay Scale Manual specifically provides that "[t]he provisions of Work Week Group 2 are made applicable to all classes which are determined by the Director of the Department of Personnel Administration to include positions subject to the FLSA." (*Id.*, at AA002997.) Mr. Gilb testified that both he and his predecessors have determined that the positions in the Unrepresented Employees subclass, all of which are included in Work Week Group 2, are subject to the FLSA. (RT, Vol. 4, 472:17-473:15.) Thus, the Pay Scales Manual repeatedly and comprehensively applies the FLSA to employees, such as those in the Unrepresented Employee subclass, as the basis for determining hours worked and overtime compensation.

Section 10(a) of the Pay Scales Manual defines "hours worked," in part, as follows: "For the purposes of identifying hours worked *under the provisions of the FLSA*, only the time spent which is required or controlled by the State and pursued for the benefit of the State need not be counted." (*Ibid.*, emphasis added.) Despite the clear and repeated references in the Pay Scales Manual to the FLSA as the legal standard for determining the compensability of hours worked, Appellants argued at trial that the use of the word "control" in section 10(a) of the Pay Scales Manual constituted an admission by the State that the broader California control standard applied to the determination of plaintiff's compensable hours worked. (See AA, Vol. 20, p. 005430.) The Court of Appeal implicitly accepted this argument by noting in its decision that "the manual provides that 'only the time spent which is *controlled or required* by the State and pursued for the benefit of the State need be counted,'" (Slip Opn., p. 20, emphasis in original), language which the Court of Appeal characterized as "similar" to the control standard in IWC Wage Order No. 4.

Unlike the Court of Appeal, the trial court, in its Statement of Decision, correctly concluded that the reference to "control" in section 10(a) of the Pay Scales Manual is more consonant with the FLSA than IWC Wage Order No. 4:

> To begin with, the quoted sentence makes clear that the definition of 'hours worked' contained in the Pay Scales Manual is 'under the provisions of the FLSA.' Contrary to

> plaintiffs' assertion, the concept of 'control' is not antithetical to the determination of compensable hours worked under the FLSA. As noted in the Code of Federal Regulations, the United States Supreme Court has interpreted the FLSA as requiring compensation 'for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."' 29 C.F.R. § 785.7 (*quoting Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). The language from the *Tennessee Coal* case is identical to that found in section 10(a) of the Pay Scales Manual and further confirms defendants' intention to apply the FLSA concept of hours worked to employees who are subject to that section of the Manual.

(AA, Vol. 20, pp. AA 005430-31.) While footnote 14 of the Court of Appeal's opinion quotes this same language, it is evident the Court of Appeal erroneously concluded that the reference to "control" in section 10(a) of the Pay Scales Manual is more akin to the California "control" standard than that of the FLSA. This is evident from the Court of Appeal's comment that the reference to "control" in Section 10(a) of the Pay Scales Manual is "similar" to that of IWC Wage Order No. 4. In other words, unlike the trial court, the Court of Appeal incorrectly identifies the concept of "control" in section 10(a) of the Pay Scales Manual as consistent with IWC Wage Order No. 4 despite the prolix references in section 10 of the Manual to the FLSA and despite the fact that the very sentence in which the term "control" appears in Section 10(a) makes clear that the definition of "hours worked" contained in the Pay Scales Manual is "under the provisions of the FLSA." (AA, Vol. 11, pp. AA002996-2999.)

In contrast to the evidence of the repeated references in the Pay Scales Manual to the FLSA, Appellants failed to adduce any evidence at trial that the California state law standard for compensability has ever been applied to Unrepresented Employees for purposes of determining their compensable hours worked. Thus, as the trial court ruled, "[a]t all relevant times and consistent with its legislatively delegated authority, CalHR has applied the FLSA as the standard for measuring plaintiffs' compensable hours worked." (AA, Vol. 20, p. AA005431.) Thus, the Court of Appeal's decision lacks any support in the record before this Court and, therefore, should be reversed.

3. The Court Of Appeal Incorrectly Concluded The California Pay Scale Manual And IWC Wage Order No. 4 Can Be "Harmonized" By Applying California's Broader "Control" Standard To Determine The Unrepresented Employee Subclass' Compensable Hours Worked.

In analyzing the interplay between the Pay Scales Manual and IWC Wage Order No. 4 in determining whether the FLSA or California state law should control the determination of compensable hours worked, the Court of Appeal relied heavily on this Court's decision in *Brinker Restaurant Corp. v. Superior Court, supra,* (2012) 53 Cal.4th 1004. The Court of Appeal essentially engaged in a three-part analysis. At each stage of its analysis, the Court of Appeal erred.

First, it found that the definition of "hours worked" in IWC Wage Order No. 4 was entitled to great deference. It did so, however, without any

mention of the deference to be accorded the Pay Scales Manual as an exercise by CalHR of its legislatively delegated authority. (See Slip Opn., p. 19.)

Second, the Court of Appeal incorrectly interpreted the Pay Scales Manual in two respects. It concluded that the Manual does not expressly state that law enforcement employees, such as those in the Unrepresented Employee subclass are not subject to Wage Order No. 4. The Court of Appeal further concluded that the Pay Scales Manual does not mention preliminary and postliminary activities explicitly. (Slip Opn., p. 21.) Only as a result of these misinterpretations of the Pay Scales Manual was the Court of Appeal erroneously able to conclude that the definition of "hours worked" found in IWC Wage Order No 4 should be applied to the Unrepresented Employees subclass. Yet, the Court of Appeal's conclusion on each of these aspects of the Pay Scales Manual conflicts with the clear and repeated references in it to the FLSA as the controlling legal standard governing the method for compensating employees in the Unrepresented Employees subclass. (See generally, RT, Vol. 4, 474:22-485:25 (Gilb).)

Finally, the Court of Appeal concluded it could harmonize the Pay Scales Manual and IWC Wage Order No. 4, as it contended *Brinker* required, by "reasonably constru[ing] the regulatory schemes to mean that entitlement to overtime 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 Opn., p. 21.) This statement is clear error. In fact,

the application of the definition of "hours worked" from Wage Order No. 4 vitiates the very foundation on which the FLSA-based regulatory scheme contained in the Pay Scales Manual is based.

(a) The Pay Scales Manual Are Entitled To At Least Equal, If Not Greater, Deference Than IWC Wage Order No. 4, On The Subject Of The Method For Compensating State Employees.

In *Brinker,* this Court noted that "the IWC's wage orders are entitled to "extraordinary deference, both in upholding their validity and in enforcing their specific terms." (*Brinker, supra,* 53 Cal.4th at 1027, citing, *Martinez v. Combs* (2010) 49 Cal.4th 35, 61.) "The IWC's wage orders are to be accorded the same dignity as statutes. They are "presumptively valid" legislative regulations of the employment relationship." (*Id.,* citing, *Martinez v. Combs, supra,* 49 Cal.4th at p. 65.)

The same logic that led this Court to conclude that the IWC's wage orders are entitled to such deference also requires CalHR's regulations and the Pay Scales Manual to be afforded at least the same, if not greater, deference when it comes to the subject of the method for compensating state employees. CalHR's regulations and the Pay Scales Manual are a direct product of a broad delegation of authority from the Legislature, as previously explained. The Court of Appeal's failure to afford CalHR's regulations the deference to which CalHR's regulations and the Pay Scales Manual are

entitled warrants reversal of its decision regarding the Unrepresented Employees subclass.

When the Legislature grants an agency, such as CalHR, substantive rulemaking power, an agency that enacts rules in response is "making law" and their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11; see also *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 414-416.)

The case of *California Correctional Peace Officers' Assn. v. State of California* (2010) 181 Cal.App.4th 1454 is directly on point. In that case, the appellate court stated,

> Setting compensation for public employees is a legislative function. In the case of correctional supervisory employees, the Legislature has delegated the responsibility to DPA [now CalHR]. As a result, DPA's decision whether to adjust supervisory salary and benefits constitutes a quasi-legislative function. [¶] [In reviewing] an agency's action [that] depends solely upon the correct interpretation of a statute, question of law [*sic*], we exercise our independent judgment. In doing so, we are guided by the principle that an administrative agency interpretation of controlling statutes will be accorded great respect by the courts and will be followed if not clearly erroneous.

(181 Cal.App.4th 1454, 1460, internal citations and quotes omitted.) CalHR's regulations and the Pay Scales Manual constitute its interpretation and application of the Government Code sections cited above that delegate to it the authority to adopt rules and regulations governing the manner in which members of the Unrepresented Employees subclass will be compensated. Nothing in the Court of Appeal's decision demonstrates that CalHR's actions in this regard were "clearly erroneous" and, therefore, the Court of Appeal should have afforded these regulations and the Pay Scales Manual great respect rather than implicitly finding them to be of secondary importance in comparison to IWC Wage Order No. 4.

The Government Code sections that are discussed extensively above grant to CalHR the authority to adopt rules and regulations relating to the compensation of employees in the Unrepresented Employees subclass. In response, CalHR adopted regulations along with the Pay Scales Manual. The statement by the Court of Appeal that "the Pay Scales Manual is not a legislative enactment," (Slip Opn., p. 19) and (presumably) may, therefore, be given lesser status than, for example, Wage Order No. 4, overlooks the broad extent to which the Legislature has delegated its constitutional authority over the terms and conditions of state employment to CalHR, and fails to afford the proper deference to the actions taken by CalHR in response to that broad delegation of authority.

If anything, CalHR's regulations and the Pay Scales Manual should be given greater deference than IWC Wage Order No. 4 when it comes to the method for compensating state employees based on the specific delegation of authority granted to CalHR by the Legislature to establish rules and regulations for compensating state employees. It is well-settled that "[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577, citing *Rose v. State of California* (1942) 19 Cal.2d 713, 723–724].) The Legislature has delegated a very specific authority to CalHR to establish the terms and conditions for state employee compensation The Pay Scales Manual constitutes CalHR's direct response to this specific delegation of authority. As such, the Pay Scales Manual should control on the specific subject matter is was intended to cover, i.e., the method for compensating state employees – the very issue with which this action is concerned, over the general and less focused delegation of authority granted to the IWC to establish generic terms and condition for compensating employees, but which is not specifically targeted at state employee compensation. Accordingly, the Pay Scales Manual is entitled to the greater deference when it comes to the method for compensating those state employees covered by the Manual.

It is evident from the Court of Appeal's comment in its decision that the Pay Scales Manual is "not a legislative enactment" (Slip Opn., p. 19), that it failed to afford the Manual, and by extension CalHR's regulations, the deference they are due. The Court of Appeal should have taken account of the fact that, like IWC Wage Order No. 4, the Pay Scales Manual is the product of the Legislature's delegated authority and, therefore, is entitled to at least similar deference. Furthermore, because the Pay Scales Manual is a specific regulatory enactment in response to a specific delegation of authority over the terms of compensating unrepresented state employees, the Pay Scales Manual is entitled to even greater deference on that subject.

(b) The Court Of Appeal Made Two Critical Errors In Interpreting The Pay Scales Manual.

The Court of Appeal's decision that the definition of "hours worked" contained in IWC Wage Order No. 4 applies to the Unrepresented Employee subclass is premised on two erroneous findings.

First, the Court of Appeal found that the Pay Scales Manual does not expressly state that law enforcement personnel, such as those in the Unrepresented Employee subclass, are not subject to IWC Wage Order No. 4. (Slip Opn., p. 21.) Of course, there are many topics the Pay Scales Manual do not expressly address. This is of little relevance in interpreting this regulatory document, however. Courts, generally, are reluctant to rely on silence to ascertain the intent underlying a legislative or regulatory

enactment. (Cf. *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156.) On this basis, CalHR's silence in the Pay Scales Manual regarding the applicability or inapplicability of Wage Order No. 4 cannot be interpreted to somehow suggest CalHR intended it to apply to the Unrepresented Employees subclass.

More to the point, it is clear both from the express terms of the Pay Scales Manual, and from the facts adduced at trial, that it was CalHR's intent to apply the FLSA as the legal standard for determining the compensability of hours worked for employees in the Unrepresented Employee subclass. As noted above, Section 10 of the Pay Scale Manual is entitled, "Work Week Groups Established Under The Fair Labor Standards Act." (AA, Vol. 11, pp. AA002996-2999.) It is replete with references to the FLSA as the controlling standard for determining the compensability of hours worked for employees covered by that section, which, as the undisputed evidence adduced at trial established, includes all employees in the Unrepresented Employee subclass. Furthermore, as David Gilb, CalHR's former Director testified at trial, it was at all times the department's intent to apply the FLSA as the controlling compensability standard for employees in WWG 2, such as employees in the Unrepresented Employees subclass. (RT, Vol. 4, 472:17-473:15.) In short, it is indisputable that CalHR's intent in adopting the Pay Scales Manual was to rely on the FLSA as the legal standard for establishing the compensability of hours worked for these employees.

The Court of Appeal's second erroneous interpretation of the Pay Scales Manual consists of its finding that it does not "contain any provisions concerning compensation for pre- and post-work activities." (Slip Opn., p. 21.) To begin with, the same could be said for Wage Order No. 4, which does not contain an express provision governing compensation for pre- and post-work activities. Moreover, the non-compensability of pre- and post-work activities is inherent in the FLSA-based compensation system adopted by CalHR in the Pay Scales Manual. This is evident from the federal regulations and interpretive guidance undergirding the FLSA.

Starting with the most basic proposition, the FLSA regulations confirm that "[t]he amount of money an employee should receive cannot be determined without knowing the number of hours worked." (29 C.F.R. § 785.1.) In other words, the most fundamental and foundational concept in determining an employee's appropriate compensation is determining whether time spent by that employee constitutes "hours worked."

While "[i]t is axiomatic, under the FLSA, that employers must pay employees for all 'hours worked'" (*Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 903, *aff'd on other grounds sub nom. IBP v. Alvarez* (2005) 546 U.S. 21), whether a particular activity meets the FLSA's definition of work "as a threshold matter does not mean without more that the activity is necessarily compensable." (*Ibid.*) This is because the FLSA, as amended by the Portal-to-Portal Act (29 U.S.C. §§ 251-262), "relieves an employer of

responsibility for compensating employees for activities which are preliminary or postliminary to the principal activity or activities of a given job." (*Bamonte v. City of Mesa* (9th Cir. 2010) 598 F.3d 1217, 1221.) Specifically, 29 U.S.C. § 254, subsections (a)(1) and (2) provides in relevant part:

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee ...
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. ...

The Supreme Court has interpreted this section to apply when an activity before the commencement of, or after the completion of, the principal work activity is not an "integral and indispensable part of [an employee's] principal activities." (*Steiner v. Mitchell* (1956) 300 U.S. 247, 256.)

Following the Supreme Court's decision in *Steiner*, the DOL issued "interpretive statements" regarding preliminary and postliminary activities.[3] Pursuant to these interpretive statements, a preliminary activity means "an activity engaged in by an employee before the commencement of his 'principal' activity or activities, and the words 'postliminary activity' means an activity engaged in by an employee after the completion of his 'principal' activity or activities." (29 C.F.R., § 790.7.)

The flaw in the Court of Appeal's reasoning is the premise that the foundation of an FLSA-based compensation system, such as the one contained in the Pay Scales Manual, does not inherently include the full range of propositions underlying the FLSA's concept of compensable hours worked, including the applicability of the Portal-to-Portal Act, which establishes that preliminary and postliminary activities are not compensable. Once again, as succinctly stated in title 29, Code of Federal Regulations, section 785.1 "[t]he amount of money an employee should receive cannot be determined without knowing the number of hours worked." In a FLSA-based compensation system, such as that contained in the Pay Scales Manual, "knowing the number of hours worked" means applying the full range of the

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[3] "These statements are not promulgated regulations because Congress did not authorize the Secretary of Labor to issue regulations regarding the scope of exemptions." (See *Bonilla v. Baker Concrete Const., Inc.* (11th Cir. 2007) 487 F.3d 1340, 1343.) However, the illustrative examples included in these interpretive statements are "persuasive and should be given due deference." (*Ibid.*)

FLSA's concepts of compensability. The Court of Appeals decision fails to appreciate this reality as further explained below.

(c) Imposing the California State Law Concept of Hours Worked on an FLSA-based Method for Compensating Employees Creates Disharmony and Does Violence to Both Systems.

The Court of Appeal purported to "harmonize" the Pay Scales Manual with IWC Wage Order No. 4 by construing the "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." The Court of Appeal found that "[s]uch a construction does violence to neither regulatory scheme." The fallacy in the Court of Appeal's conclusion on this point is underscored by comparing this Court's decision in *Morillion v. Royal Packing Co., supra,* 22 Cal.4th 575 with the United States Supreme Court's interpretation of compensable hours worked under the FLSA in *Integrity Staffing Solutions, Inc. v. Busk* (*Busk*) (2015) 135 S.Ct. 513.

In *Morillion*, this Court held that the time spent by agricultural workers riding on a bus to the area of their work, as required by their employer, constituted compensable hours worked because it constituted time in which the employees were subject to their employer's control. (*Morillion, supra,* 22 Cal.4th at 578.) In reaching this conclusion, this Court expressly found that it need not give much weight to contrary federal authority because such authorities expressly were founded on the federal Portal-to-Portal Act,

a feature not found in California state law. (*Id.* at 590-592.) This Court specifically declined to import a federal standard for hours worked "[a]bsent convincing evidence" of an intent to so import that federal standard. (*Id.* at 592.)

Here, there is convincing evidence of an intent to apply exclusively, a federal standard for compensability as evidenced by the Pay Scales Manual. That standard forecloses the Unrepresented Employees subclass' claim for compensation for preliminary and postliminary activities. This is underscored by the United States Supreme Court's holding in *Busk.* In that case, the Supreme Court held that time spent by employees waiting in a security line upon exiting from work at the end of their shifts did not constitute compensable time worked under the FLSA. In so ruling, the Court specifically ruled as follows:

> We hold that an activity is integral and indispensable to the principal activities that an employee is employed to perform – and thus compensable under the FLSA – if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.

(*Id.*, at 519.) Because the Court found that time spent by employees waiting in security lines did not meet these criteria for finding an activity integral and indispensable to a principal activity, the Court found the time spent waiting in the security lines did not constitute compensable hours worked under the FLSA.

As this Court recognized in *Morillion*, the FLSA does not include an express definition of "hours worked." (22 Cal.4th at 588.) Nevertheless, cases such as *Busk*, make clear that the concept of compensating an employee only for activity that is integral and indispensable to the principal activities for which the employee is employed is a more restrictive standard than the broader control standard this Court sanctioned in *Morillion*. (See also, *IBP v. Alvarez, supra,* 546 U.S. at 42.) Furthermore, the FLSA's concept of compensable hours worked expressly includes the Portal-to-Portal Act. These more restrictive concepts of compensable hours worked are inherent in the scheme adopted by CalHR in its Pay Scales Manual and it cannot be harmonized with the IWC Wage Order

In summary, CalHR has exercised the express authority delegated to it by the Legislature to adopt regulations and the Pay Scales Manual that unequivocally utilize the FLSA as the legal standard for compensating employees in the Unrepresented Employee subclass. That FLSA-based system inherently excludes from the concept of compensable hours worked time spent in activities that are not integral and indispensable to the principal activities for which the employer is employed, including preliminary and postliminary activities that are excluded from the ambit of compensable hours worked under the Portal-to-Portal Act. These concepts are irreconcilable with the California "control" standard contained in IWC Wage

Order No. 4 and as articulated by this Court in *Morillion.*[4] The Court of Appeal's holding to the contrary is in error. Accordingly, this Court should reverse that portion of the Court of Appeal's decision regarding the Unrepresented Employee subclass and should reinstate the trial court's judgment in favor of the State.

C. **The Court Of Appeal Erred In Holding That The Unrepresented Employee Subclass Can State A Cause Of Action For Breach of Common Law Contract For Allegedly Unpaid Overtime.**

The Court of Appeal also erred in holding that the Unrepresented Employee subclass could maintain a cause of action against the State for breach of common law contract to pay overtime. As the trial court concluded, however, Appellants "failed to persuasively establish at trial the existence of any agreement to pay overtime to the Unrepresented Employees." (AA, Vol. 20, p. AA 005434.)

Both Appellants and the Court of Appeal rely on the holding in *Madera Police Officers Assn v. City of Madera, supra,* (1984) 36 Cal.3d 403 for the proposition that a claim for breach of common law contract can be stated for wages earned but unpaid. In *Madera*, police officers filed an FLSA

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4 At footnote 15 of its decision, the Court of Appeal states it is not opining whether the Pay Scales Manual can supplant IWC Wage Order No. 4 with respect to the definition of compensable hours worked for employees in the Unrepresented Employees subclass, but finds that in its current iteration it does not do so. (See Slip Opn., p. 20.) In light of the discussion above, it is evident this statement further underscores the clear error in the Court of Appeal's decision.

class action to recover overtime payment for hours worked in excess of eight hours in a workday or 40 hours in a workweek. Plaintiffs argued their time during lunch and dinner hours was so restricted that it had to be considered time worked and, therefore, compensable. (*Id.* at 406.) After concluding time spent by the plaintiffs during their meal breaks was, in fact, compensable, the Court turned to the question of whether they were entitled to overtime pay for that time. To resolve this issue, the Court analyzed "local compensation regulations" adopted by the City "to determine if overtime pay [was] authorized." (*Id.* at 412.) Resort to the City's compensation ordinances and regulations was necessary because "in the absence of preemptive legislation, *employees of a city are entitled only to such compensation as the city charter, and the ordinances enacted pursuant thereto, provide.*" (*Ibid.*, emphasis added.) Thus, the Court found that "'*to the extent services are rendered under statutes or ordinances then providing mandatory compensation for authorized overtime,* the right to compensation vests upon performance of the overtime work, ripens into a contractual obligation of the employer and cannot thereafter be destroyed or withdrawn without impairing the employee's contractual right.'" (*Id.* at 413; emphasis added, internal citations omitted.) The Court held the City's regulations adopted pursuant to its charter "*mandated* overtime for the police department employees for work performed in excess of the normal eight-hour day and forty-hour workweek." (*Ibid.*) This holding was dependent on finding the

City's regulations carried the force of law because they were adopted pursuant to the city charter and imposed mandatory duties to pay overtime.

Since the decision in *Madera*, more recent decisions have clarified the question of when actions by a legislative body give rise to binding contractual obligations. For instance, in *Sonoma County Association of Retired Persons v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109, the Ninth Circuit, relying on an earlier decision by this Court in *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189, held that in order for an enactment by a public entity to create a contract right, "the legislation's text or the 'circumstances accompanying its passage' [must] clearly evince an intent to contract, *as opposed to an intent to make policy.*" (Emphasis added.) In the *Retired Employees* case, this Court stated that a public entity's intent to create a contract must be clear and must be the result of either legislative ratification of an already existing contract or a situation involving "an unambiguous element of exchange of consideration by a private party for consideration offered by the state." (*Retired Employees, supra,* 52 Cal.4th at 1187. As stated by this Court in *Retired Employees*, "[i]t also is equally well established that the intention of the Legislature thus to create contractual obligations, resulting in an extinguishment to a certain extent of governmental powers, must clearly and unambiguously appear." (*Id.* at 1186.)

The Unrepresented Employees subclass has yet to identify with any specificity those statutes or regulations on which they rely for the proposition that the State has committed itself contractually to the payment of overtime. There is a certain irony if the Unrepresented Employees are claiming the very regulations that establish the FLSA as the standard for compensability are the same ones creating this purported contractual liability. They cannot have it both ways. Either those regulations are enforceable, in which case they establish the FLSA as the legal standard for determining compensable hours worked and thereby foreclose the Unrepresented Employees' claims, or those regulations are not enforceable, in which case they cannot serve as the foundation for a breach of common law contract claim.

In addition to *Madera*, the Court of Appeal also cited *Sheppard v. North Orange County Regional Occupational Program, supra,* (2010) 191 Cal. App. 4th 289 as supporting its conclusion that the Unrepresented Employee subclass can state a claim for breach of common law contract. *Sheppard* is inapposite to the present case, however. In *Sheppard*, the court addressed the "very narrow" issue of whether "all breach of contract claims by public employees against their employers are prohibited as a matter of law." (191 Cal.App.4th at 311.) That is *not* the issue here. The State has never claimed the Unrepresented Employees subclass is precluded, as a matter of law, from bringing a breach of contract claim. Rather, it has always been, and remains, the State's position that (1) the Unrepresented Employees

subclass cannot rely on the State's regulations to establish contractual liability because those regulations do not clearly evince an intent to contract, as opposed to an intent to make policy" (*Retired Employees Association of Orange County, Inc. v. County of Orange, supra,* 52 Cal.4th at 1189) and (2) the Unrepresented Employee subclass has failed to adduce any evidence establishing the State's contractual liability as the trial court correctly found.

The third case cited by the Court of Appeal to support its holding that the Unrepresented Employee subclass is entitled to pursue a breach of common law contract claim, *White v. Davis* (*White*) (2003) 30 Cal.4th 528, 571-572, also is inapposite. That case holds that state employees who work during a budget impasse obtain a right, protected by the contract clause, to the ultimate payment of salary that has been earned. Once again, that is not the issue presently before this Court.

In sum, the Court of Appeal's decision that the Unrepresented Employees subclass may pursue a breach of contract claim fails to address the trial court's conclusion that the Unrepresented Employees failed to adduce any evidence at trial of a contract, based on statutes or regulations that clearly evince on their face an intent to contract, as opposed to an intent to make policy. Accordingly, the Court of Appeal's decision is unsupported by the record before this Court and, for that reason, it should be reversed and the trial court's judgment in favor of the State should be reinstated.

V.

CONCLUSION

As the foregoing discussion demonstrates, the Court of Appeal erred when it held that the control standard found in IWC Wage Order No. 4, rather than the FLSA, governed the determination of what constitutes compensable hours worked for the Unrepresented Employees subclass. The Court of Appeal further erred in holding that the Unrepresented Employees subclass can pursue a breach of common law contract claim based on the record now before this Court.

Respondents respectfully request that this Court reverse that portion of Court of Appeal's decision relating to the Unrepresented Employees subclass and reinstate the trial court's judgment in favor of the State.

DATED: March 5, 2018

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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 10,409 words.

DATED: March 5, 2018

KRONICK, MOSKOVITZ,
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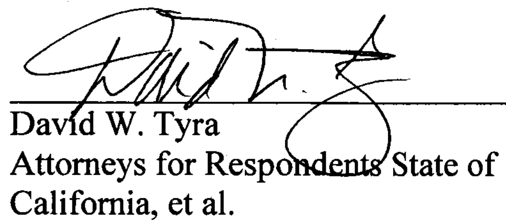
By: 

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PROOF OF SERVICE

California Correctional Employees Wage and Hour Cases
Supreme Court Case No. S244751

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814.

On March 5, 2018, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS OF STATE OF CALIFORNIA, ET AL.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kronick, Moskovitz, Tiedemann & Girard for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Sacramento, California.

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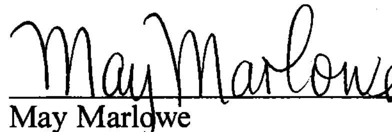
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on March 5, 2018, at Sacramento, California.



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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

KURT STOETZL, ET AL.

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, DEPARTMENT OF HUMAN RESOURCES, ET AL.

Defendants and Respondents.

On Review From The Court Of Appeal For the First Appellate District, Division One, 1st Civil No. A142832

After An Appeal From the Superior Court For The State of California, County of San Francisco, Case Number CJC11004661, The Honorable John E. Munter

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OPENING BRIEF ON THE MERITS OF STATE OF CALIFORNIA, ET AL.

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