S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff-Appellant

v.

LOEWS HOLLYWOOD HOTEL, LLC,

Defendant-Respondent.

SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B283218

LOS ANGELES COUNTY SUPERIOR COURT, NO. BC586176

APPLICATION OF CALIFORNIA EMPLOYMENT LAW COUNSEL, EMPLOYERS GROUP, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT LOEWS HOLLYWOOD HOTEL, LLC

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.250(f)(1) of the California Rules of Court, California Employment Law Counsel ("CELC"), Employers Group, and the Chamber of Commerce of the United States of America (the "Chamber") respectfully apply for leave to file an amici curiae brief in support of Defendant-Respondent Loews Hollywood Hotel, LLC. The proposed brief is attached.

I. STATEMENT OF INTEREST

California Employment Law Council. CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private-sector employers in the State of California, who collectively employ hundreds of thousands of Californians.

CELC has been granted leave as amicus curiae to orally argue and/or file briefs in many of California's leading employment cases, including *Augustus v. ABM Security Services*, 2 Cal. 5th 257 (2016); *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1 (2016); *Iskanian v. CLS Transp., L.A., LLC*, 59 Cal.4th 348 (2014); *Duran v. U.S. Bank, N.A.*, 59 Cal. 4th 1 (2014);

Harris v. City of Santa Monica, 56 Cal. 4th 203 (2013); *Brinker v. Superior Court*, 53 Cal. 4th 1004 (2012) and *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007).

Employers Group. Employers Group is one of the nation's largest and oldest human resources management organizations for employers. It represents nearly 3,000 California employers of all sizes in a wide range of industries, which collectively employ nearly three million employees. As part of its mission, Employers Group maintains an advocacy group designed to represent the interests of employers in government and agency policy decisions and in the courts. As part of that effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions governing employment relationships.

Employers Group has appeared for decades before this Court as amicus curiae including in: *Frlekin v Apple*, 8 Cal.5th 1038 (2020); *Kim v Reins International California, Inc.*, 9 Cal.5th 73 (2020); *Oman v Delta Airlines, Inc.*, 9 Cal.5th 762 (2020); *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018); *Alvarado v. Dart Container Corporation of California*, 4 Cal.5th 542 (2018); *Troester v. Starbucks Corporation*, 5 Cal.5th 829 (2018); *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074 (2017); *Augustus, supra*, 2 Cal.5th 257; *Kilby, supra*, 63 Cal.4th 1; *Iskanian, supra*, 59 Cal.4th 348; *Duran, supra*, 59 Cal.4th 1, and numerous other cases.

Chamber of Commerce of the United States of America. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country—including throughout California. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

No party or counsel for a party has authored the attached brief, either in whole or in part; nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the amici curiae, their members, or their counsel has contributed money intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.520(0(4).

II. PROPOSED *AMICI CURIAE* BRIEF

This case presents an important issue of law: at what rate should employees be compensated due to their employer's failure to provide a meal or rest break under Labor Code Section 226.7. The answer to this question is important because Section 226.7 and California's Wage Orders

require virtually all employers are obligated to provide meal and rest breaks to their non-exempt employees.

Due to their wide-ranging experience in employment matters, CELC, Employers Group, and the Chamber are uniquely equipped to assess the impact and implications of the question presented here. The proposed *amici curiae* brief will assist the Court in deciding this matter by explaining that, under this Court's precedents, the Legislature's deliberate choice of the term "regular rate of compensation" in Section 226.7—rather than the California term of art "regular rate of pay"—means that employees must be paid at their base hourly rate of compensation. The proposed brief also explains why significant public policy and practical considerations undercut Plaintiff Jessica Ferra's contrary position.

Finally, the proposed brief explains that, if the Court nevertheless concludes that "regular rate of compensation" and "regular rate of pay" are somehow interchangeable, it should give its ruling only prospective effect. In the absence of contrary judicial or administrative guidance, employers generally have paid break premiums at the straight hourly rate of compensation. Employers should not be penalized retroactively for their reasonable conclusion that the Legislature's use of different language in Section 226.7 was meaningful.

Respectfully submitted,

DATED: September 30, 2020

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INTRODUCTION

This case presents an issue of law that affects virtually all employers in California: at what rate should non-exempt employees be compensated when their employer fails to provide a compliant meal or rest break under Labor Code Section 226.7?

Section 226.7 provides that the break premium is "one additional hour of pay" at the employee's "regular rate of compensation." The Court of Appeal correctly interpreted the statutory language to mean plaintiff Jessica Ferra's base hourly compensation rather than her "regular rate of pay," which is a term of art in state overtime law. Plaintiff, however, wants the language in Section 226.7 to mean something the Legislature never said: that "regular rate of pay," a well understood term of art, is the same as "regular rate of compensation," a term the Legislature used *exclusively* in Section 226.7.

Thus, for this Court to reverse, it would need to conclude that "regular rate of pay" and "regular rate of compensation" are interchangeable terms. But settled principles of statutory construction, as dictated by this Court's precedent, require the very *opposite* conclusion: that the Legislature meant different things when it based overtime on the "regular rate of pay" (Labor Code Section 510) and based meal/rest period premium pay on the "regular rate of compensation" (Section 226.7). That presumption has particular force here because the Legislature enacted

Sections 226.7 and 510 *contemporaneously*, yet chose different language in each.

Nothing in the statutory text or legislative history supports conflating these distinct terms. Indeed, "regular rate of pay" has been a California term of art denoting overtime premiums since 1968, yet neither the IWC nor the Legislature chose that term to describe meal/rest break premiums. Amici thus urge this Court to give effect to the Legislature's intent, as reflected in its deliberate choice of statutory language.

Plaintiff's contrary position amounts to a *policy preference* that break premiums include other forms of pay beyond base hourly wage. That preference should be expressed not to this Court, but to the Legislature, which has twice amended Section 226.7 *without* replacing "regular rate of compensation" with "regular rate of pay"—all the while leaving the latter term intact in Section 510. In any event, basing break premiums on the "regular rate of pay" would not always be more generous to employees. For example, the "regular rate of pay" (a weighted average) can decrease for each hour an employee spends on lower-paid work (*e.g.* time on controlled standby), resulting in a *lower* premium payment than one based solely on the employee's base hourly wage.

For employers, moreover, basing the break premium on the "regular rate of pay" would have significant practical implications. For those with incentive pay plans, for example, it would add the burden of continually

having to examine historical payroll records in order to "true-up" Section 226.7 payments each time a bonus, commission or other incentive pay subsequently is earned—a particular burden for small employers. That added complexity and administrative sophistication could lead employers to scale back, or entirely eliminate, incentive pay packages or bonuses for non-exempt employees, the benefits of which this Court has recognized.

Amici thus urge this Court to affirm the judgment in favor of Respondent.

ARGUMENT

I. This Court Cannot Disregard The Legislature's Deliberate Word Choice In Section 226.7

Plaintiff asks this Court to conclude that "regular rate of compensation" in Section 226.7 means the same thing as "regular rate of pay"—a term that has long had a specialized meaning within the overtime laws. To do so, as Loews correctly explains, would require the Court to disregard well-settled principles of statutory construction. Amici write to caution against such over-reaching.

A. Under this Court's precedents, distinctions in statutory language are presumed to be deliberate and meaningful.

Courts "must look first to the words of the statute, because they generally provide the most reliable indicator of legislative intent." *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal. 4th 1244, 1250 (2012); *Anderson Union*

High Sch. Dist. v. Shasta Secondary Home Sch., 4 Cal. App. 5th 262, 278 (2016) ("courts should first look to the plain dictionary meaning of the word unless it has a specific legal definition.").

Further, "where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning." *Rashidi v. Moser*, 60 Cal. 4th 718, 725 (2014); *Campbell v. Zolin*, 33 Cal. App. 4th 489, 497 (1995) (same). This is because "'[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.'" *Rashidi*, 60 Cal. 4th at 725, quoting *City of Port Hueneme v. City of Oxnard*, 52 Cal.2d 385, 395 (1959).

Applying these principles in *Rashidi*, this Court rejected the argument that "the Legislature used the terms 'losses' and 'damages' interchangeably" in two sections of the same statute (MICRA). 60 Cal. 4th at 725 (concluding "'loss' is the generic term, which includes 'damage' as a subset"). Similarly, in *Campbell*, the Court of Appeal concluded the Legislature's use of "any" and "the" in different sections of the Vehicle Code meant different things. 33 Cal. App. 4th at 497 (accident is reportable when it results in injury "of *any* person," while exception delineated in

another section "speaks narrowly of '*the* property of *the* driver or owner of *the* motor vehicle'") (emphasis in original).

Differences in statutory word choice are particularly meaningful when the Legislature uses a term with a specific legal definition in one provision but not in another. In *Anderson*, *supra*, for example, the Court of Appeal rejected the contention that the "terms 'site' and 'schoolsite'" in the Charter Schools Act "are used 'interchangeably' and both refer only to classroom-based facilities." 4 Cal. App. 5th at 277.

The *Anderson* court first noted that the proposed interpretation "is contrary to [the] well-established rule of statutory construction" that a Legislature's choice of different words is meaningful. *Id.* at 277-78. "Each word, phrase and provision in a statute" the court noted, "is presumed to have a meaning and to perform a useful function." *Id.* at 278. "The term 'schoolsite' has a particular meaning, as set forth in" the statute, the court observed, while "site" is not defined. The court thus interpreted "site" using "the plain dictionary meaning" (*i.e.*, geographic location), and interpreted "schoolsite" according to its statutory definition ("use for classroom instruction"). *Id.*

In short, under settled California law, differences in legislative word choice—even seemingly trivial distinctions between "the" and "any"—are presumed to be deliberate and meaningful. Plaintiff asks this Court to presume just the opposite—that the Legislature intended "regular rate of compensation" to mean the same thing as "regular rate of pay," even though the latter has a specific and long-established meaning and the former does not. *Ferguson v. Workers' Comp. Appeals Bd.*, 33 Cal. App. 4th 1613, 1621 (1995) ("[t]he Legislature is presumed to have in mind existing law when it passes a statute."). Plaintiff gives no compelling reason for the Court to depart from its ordinary mode of statutory interpretation.

B. Section 226.7 cannot reasonably be interpreted to require payment at the "regular rate of pay."

a. The statute's plain meaning. As Loews correctly explains, the term "regular rate of pay" has been a term of art in California wage-hour law for decades and originated with the Industrial Welfare Commission. *See, e.g.*, Wage Order 2-80, §3 (1980 Wage Order requiring overtime at 1.5 times "the employee's regular rate of pay"); Wage Order 3-80, §3 (same). The intent, as explained by California's Division of Labor Standards Enforcement (DLSE), was to adopt the FLSA definition of "regular rate," which "include[s] all remuneration for employment paid to or on behalf of, the employee." 29 U.S.C. § 207(e). *See* DLSE

Enforcement Policies and Interpretations Manual (Revised), §49.1.2 ("In not defining the term 'regular rate of pay,' the Industrial Welfare Commission has manifested its intent to adopt the definition of 'regular rate of pay' set out in the [FLSA] 29 USC § 207(e)"); DLSE Op. Letter, March 6, 1991; *Alcala v. W. Ag Enterprises*, 182 Cal. App. 3d 546, 550 (1986).1

Against this backdrop, effective January 1, 2000, the Legislature amended Labor Code Section 510 to mandate overtime based on the "regular rate of pay." Assembly Bill No. 60 (AB 60) (Stats. 1999, ch. 134). In the same bill, the Legislature enacted Section 511(b), which likewise bases overtime on the "regular rate of pay." *Id.* The Legislature did not specifically define "regular rate of pay," but based on the "consistency" of the language, *Advanced-Tech Sec. Servs., Inc. v. Superior Court*, 163 Cal. App. 4th 700, 707 (2008), California courts have long relied on FLSA precedent for guidance in interpreting the phrase. *Huntington Mem'l Hosp. v. Superior Court*, 131 Cal. App. 4th 893, 902 (2005).

The California "regular rate of pay" "is not the same as the employee's … normal hourly wage," "can change from pay period to pay period," and "includes adjustments to the [normal hourly wage], reflecting, among other things, shift differentials and the per-hour value of any

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[1] Congress enacted the FLSA in 1938, requiring employers to pay employees overtime at one and one-half times their "regular rate." 29 U.S.C. 207(a). Regulations defining the "regular rate" were promulgated in 1948. *See generally* 29 C.F.R. part 778.

nonhourly compensation the employee has earned." *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542, 554 (2018).[2]

A few months after AB 60 took effect, in the same legislative session, the Legislature began exploring a different issue: whether—and in what amount—employees should be paid in the event the employer does not provide a required meal or rest break. Assembly Bill No. 2509 (1999–2000 Reg. Sess.) (AB 2509). In the resulting legislation, effective January 1, 2001, the Legislature did *not* use term "the regular rate of pay"—it chose "regular rate of compensation" instead. Lab. Code §226.7(c) ("the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation.").

This Court thus must presume that the Legislature intended "regular rate of compensation" to mean something different than "regular rate of pay," which is a term of art that the Legislature had deliberately included in Labor Code Sections 510 and 511(b) just the year before. *Rashidi*, *supra*; *Anderson*, *supra*; *People v. Gonzales*, 2 Cal. 5th 858, 871 (2017) ("[W]hen the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware of the ramifications of its choice of language."); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 73 Cal.

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[2] While California overtime law is "modeled after" the FLSA, *Alcala*, 182 Cal.App.3d at 250, the federal "regular rate" is not always the same as California's "regular rate of pay." *Alvarado*, 4 Cal. 5th at 564 (law differs for purposes of factoring flat sum bonuses into overtime pay).

App. 4th 338, 353 (1999) ("courts should apply a presumption that the Legislature is aware of a consistent and very long-standing administrative interpretation"). And because meal/break premiums have no federal analogue in the FLSA (unlike overtime), the Legislature's deliberate choice of an alternate statutory phrase in Section 226.7 is meaningful and cannot be ignored.

Plaintiff, however, argues that "regular rate" is the dispositive phrase, such that differences in statutory language ("of pay" in Sections 510 and 511(b) vs. "of compensation" in Section 226.7) can be ignored. But as Loews explains, California's statutes and Wage Orders consistently use "regular rate of pay" to refer to the overtime premium—"regular rate," by itself, does not have inherent meaning under California law.

Indeed, earlier this month, the Legislature again used "regular rate of pay" (not just "regular rate") to define the amount of COVID-19 supplemental paid sick leave for food service workers. Assembly Bill No. 1867 (2019-2020 Reg. Sess.), enacting Labor Code § 248(d)(3)(A)(i). If the words "of pay" were superfluous, as Plaintiff suggests, then the Legislature would not still be using them in current statutory drafting.

Further, this Court recently confirmed that "regular rate" as used in federal law is not synonymous with "regular rate of pay" for purposes of factoring flat sum bonuses into overtime pay. *Alvarado*, 4 Cal. 5th at 564. Thus, Plaintiff's assertion that "regular rate" is independently meaningful in

California, without reference to the rest of the statutory text ("regular rate of pay"), is simply incorrect.

Plaintiff's position also would render the words "of pay" and "of compensation" superfluous, which runs afoul of yet another principle of statutory construction: courts must give significance to every word in a statute, *Flowmaster, Inc. v. Superior Court* 16 Cal. App. 4th 1019, 1028 (1993), and must not "construe statutory provisions so as to render them superfluous." *Shoemaker v. Myers*, 52 Cal. 3d 1, 22 (1990); Cal. Civ. Code §3532 ("The law neither does nor requires idle acts").

Plaintiff also points out that the words "compensation" and "pay" appear in both statutes: Section 510 requires employees to "be *compensated* at the rate of no less than one and one-half times the regular rate o*f pay*," while Section 226.7 sets the premium at "one additional hour of *pay* at the employee's regular rate of *compensation*." Opening Br. at 6-7. But this only underscores that the Legislature structured the statutes differently. Again, the Court cannot simply assume the Legislature used "pay" and "compensation" interchangeably, especially when "regular rate of pay" has been a term of art for decades while Section 226.7 is the *only* provision that uses "regular rate of compensation."[3] *California Teachers Assn. v.*

[3] The Legislature has *twice* amended Section 226.7 since its enactment, as Loews explains (Answering Br. at 26), but has never given "regular rate of compensation" a specialized meaning or changed the provision to say "regular rate of pay." And when the Legislature enacted Labor Code

Governing Bd. Of Rialto Unified School Dist., 14 Cal.4th 627, 633 (1997) ("This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.").

Nor can Plaintiff gloss over these stark textual differences between Sections 510 and 226.7 by resorting to the mantra that wage statutes are to be construed in favor of employees. "[T]his principle does not provide [courts] with the authority to rewrite applicable legislation to conform to an appellant's view of what the law should be.'" *Soto v. Motel 6 Operating, L.P.*, 4 Cal. App. 5th 385, 393 (2016) (internal quotations and alterations omitted); *accord Mora v. Webcor Constr., L.P.*, 20 Cal. App. 5th 211, 223 (2018)

Finally, because "regular rate of compensation" is not a defined legal term, the Court must give the term its "plain and commonsense meaning." *Kirby*, 53 Cal. 4th at 1250. The plain meaning is an employee's ordinary hourly rate. A simple example illustrates the point. Assume an employee of a small business earns $20 per hour and does not receive a rest period on September 1. The small business owner promptly pays him a rest break premium of $20. On December 1, the employee receives a $100 bonus for perfect attendance over the prior three months, during which time he

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Section 226.75(b) in 2018, setting rest period premiums for certain safety-sensitive positions at the "regular rate of pay," it did not amend Section 226.7 to conform the premiums to the same levels.

worked 500 hours. His "regular rate of pay" during that three-month period would be $20.20 per hour.

If the Legislature had intended for the small business owner, on December 1, to retroactively pay the employee an extra 20 cents for the September 1 rest break, the only reasonable conclusion is that it would have used the well-understood term of art "regular rate of pay" in Section 226.7. Instead, the Legislature chose "regular rate of compensation," an undefined term, which must be given its plain English meaning. *Anderson*, 4 Cal. App. 5th at 278 ("courts should first look to the plain dictionary meaning of the word unless it has a specific legal definition.")

A reasonable employer and employee in this scenario would agree that, in ordinary usage, "regular rate of compensation" means the $20 hourly rate the employee earned for his regular work, not $20.20. That understanding would be buttressed by the fact that the employer was required to pay the break premium "immediately" following the September 1 missed break. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1110 (2007). To say that the small business owner in our example would have to pay an extra 20 cents three months later to arrive at the "regular rate of compensation" does not reflect the plain, common-sense meaning of the term.

b. Legislative history. The legislative history underscores that the distinct statutory wording in Section 226.7 is deliberate and meaningful.

"During the 1999-2000 legislative session, the Legislature considered at least four bills that included versions of section 226.7." *Kirby*, 53 Cal. 4th at 1258. In *none* of these bills did the Legislature select "regular rate of pay" as the measure of the break premium; rather, each expressed the premium in terms of the "hourly" wage. *See, e.g.*, Assembly Bill No. 633 (1999–2000 Reg. Sess.), as introduced Feb. 19, 2000, pp. 13–14 (premium of "twice his or her average *hourly rate*"); Assembly Bill No. 1652 (1999–2000 Reg. Sess.) as amended Sept. 3, 1999, p. 9 ("twice his or her average *hourly rate*") (emphasis added).

Similarly, legislative analyses of these bills express the premium in terms of hourly rates. *See, e.g.*, 9/7/99 Senate Floor Analysis of AB 1652 (premium is "an amount twice the hourly rate of pay … of the full meal or rest period."); *accord* 4/6/99 Assembly Committee Analysis of AB 633 (premium is "twice the employee's hourly rate for the full length of the meal or rest period.").

AB 2509 (which ultimately enacted Section 226.7), like earlier bills, originally set the premium at an "amount equal to twice [the employee's] average *hourly rate* of compensation…." AB 2509, § 12, as introduced Feb. 24, 2000 (emphasis added). An employee's "hourly" rate can only

reasonably be construed as the employee's base rate, *not* a rate that includes *non-hourly* pay like bonuses, commissions, and other wage differentials that comprise the "regular rate of pay."

The final version of AB 2509 changed the language to "one hour of pay at the employee's regular rate of compensation." But as this Court explained, the change was not intended to be substantive: the break premium "provision in the original [version of AB 2509] was *similar* to the one ultimately enacted." *Murphy.*, 40 Cal. 4th at 1106 (emphasis added). Had the Legislature intended the change in language to encompass *non-hourly* forms of pay (as in the overtime context), it could have easily used the term of art "regular rate of pay" in AB 2509. It did not do so.

Instead, even after the language in AB 2509 changed, the Legislature retained its focus on *hourly* compensation. *See* Sen. Floor Analyses, 3d reading analysis of AB 2509, as amended Aug. 25, 2000, p. 4 (premium is "*one hour of wages* for each work day when rest periods were not offered.") (emphasis added). Because, as this Court observed, the original and final versions of AB 2509 were "similar," *Murphy*, 40 Cal. 4th at 1106, amending the language from "hourly rate or compensation" to "regular rate of compensation" was not meant to effect a sweeping change in how premiums were to be calculated.

The reason for AB 2509's textual change, as this Court explained in *Murphy*, was straightforward: the Legislature "intended to track the existing

provisions of the IWC wage orders regarding meal and rest periods." *Id.* at 1107-08. Those wage orders, which took effect at the same time that AB 2507 became law (January 1, 2001), have the exact same "regular rate of compensation" language. *See e.g.* Wage Order 4-2001, §12(B); *United Parcel Serv. Wage & Hour Cases*, 196 Cal. App. 4th 57, 67 (2011) ("the author of AB 2509 stated the bill codified the 'actions of the IWC' establishing a pay remedy and 'has been amended to conform to the IWC levels.'").

In contrast, the overtime provisions of the very same wage orders are based on the "regular rate of pay." *Id.* As noted above, decades ago, the IWC chose the term "regular rate of pay" for the wage orders, with the intent to "adopt the definition of 'regular rate of pay' set out in the [FLSA] 29 U.S.C. § 207(e)." DLSE Enforcement Policies and Interpretations Manual (Revised), §49.1.2. Thus, meal and rest break premium pay is the *only* place in the Wage Orders where the IWC used "regular rate of compensation." [4]

[4] The IWC was also deliberate in how it defined other premiums in the wage orders. *See e.g.* Wage Order 5-2001, Cal. Code Regs., tit. 8, § 11050, subd. 4(C) (split shift premium is "one hour's pay at the minimum wage"); *id.*, subd. 5(A) (reporting time pay: "employee shall be paid for half the usual or scheduled day's work … at the employee's regular rate of pay."). The IWC's choice of the term "regular rate of compensation" for meal and rest break premiums cannot be dismissed as simply the equivalent of "regular rate of pay."

That both the Legislature and the IWC deliberately—and exclusively—chose the unique phrase "regular rate of compensation" with respect to meal/rest break premium pay, and avoided using an established term of art linked to overtime compensation, underscores that the phrase is not equivalent to "regular rate of pay." Indeed, the majority of district courts to have considered the issue have honored that textual distinction, as Loews explains. Answering Br. at 53-58.

c. Statutory purpose. The distinct purposes of break premiums and overtime pay confirm that the Legislature did not intend for them to be calculated in the same way.

In *Kirby*, this Court explained that "Section 226.7 is not aimed at protecting or providing employees' wages." 53 Cal. 4th at 1255. Rather, the statute is "primarily concerned with … requiring that employers provide meal and rest periods as mandated by the IWC." *Id.* Therefore, "[n]onpayment of wages is not the gravamen of a section 226.7 violation." *Id.* at 1167. Instead, the statute "defines a legal violation solely by reference to an employer's obligation to provide meal and rest breaks." *Id.*

In other words, under *Kirby*, the purpose of meal and rest period premium pay is *not* to pay for work performed. (After all, rest periods are always paid, and employees receive pay for working through meal breaks.) Rather, the premium is "the legal remedy" for the failure to provide meal and rest breaks. 53 Cal. 4th at 1257 ("a section 226.7 claim is not an action

brought for nonpayment of wages; it is an action brought for non-provision of meal or rest breaks."); *see also Ling v. P.F. Chang's China Bistro, Inc.*, 245 Cal. App. 4th 1242, 1261 (2016) ("the fact that the [226.7] remedy is measured by an employee's hourly wage does not transmute the remedy into a wage as that term is used in section 203, which authorizes penalties to an employee who has separated from employment without being paid"). And consistent with its purpose to incentivize employers rather than to compensate employees for work, the Section 226.7 premium (one hour of pay) does not correspond to the duration of the time worked due to the missed rest break (10 minutes) or meal break (30 minutes).

Understanding that the Legislature saw Section 226.7 *as a legal remedy* rather than an action for wages, it was entirely reasonable for lawmakers to have selected the employee's hourly rate—rather than each and every component of employee remuneration—as the appropriate remedy for the non-provision of breaks.

Overtime, in contrast, is paid directly for—and in proportion to—the amount of work an employee performs. *Huntington Mem'l Hosp. v. Superior Court*, 131 Cal. App. 4th 893, 902 (2005) (one "purpose" of overtime is "to compensate the employee for the burden of working longer hours."). Therefore, it is logical that overtime is paid at the "regular rate of pay," which encompasses "all remuneration for employment." *Advanced-Tech*, 163 Cal. App. 4th at 707.

In other words, overtime pay is a reflection of the value of the work an employee performs, while payments under Section 226.7 are not. That distinction further explains why the Legislature chose to treat them differently in the Labor Code.

In sum, to arrive at the result advocated by Plaintiff, this Court would have to disregard the Legislature's deliberate word choices in Sections 226.7 and 510, the legislative history, and the fundamentally different purposes served by break premiums and overtime pay. Amici urge this Court not to do so.

II. Public Policy, Even If Relevant To The Analysis, Does Not Support Using The "Regular Rate of Pay" As The Measure of Break Premiums

While the statutory text and legislative history answer the question, amici also address the policy reasons why this Court should hold that "regular rate of compensation" is not the same as "regular rate of pay." *Absher v. AutoZone, Inc.*, 164 Cal. App. 4th 332, 340 (2008).

First, this Court cannot assume that the "regular rate of pay" will always result in a higher premium payment to employees. Often, it will be lower. Employers can, and often do, pay different rates for different types of work. *See e.g.* DLSE Enforcement Policies and Interpretations Manual (Revised), §47.5.1.1 ("hourly rate of pay for the call time can be different from the regular rate paid for working time so long as the rate is set before

the work is performed and the amount of the remuneration does not fall below the applicable minimum wage for any hour").

For example, nurses, operating room technicians, security guards, and others often have controlled standby (time spent waiting to be called to work), that is paid at a rate lower than their regular hourly rate for work. *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). Controlled standby factors into the "regular rate of pay," which would result in a lower Section 226.7 payment. *Alvarado*, 4 Cal. 5th at 569 ("regular rate of pay is a *weighted average* reflecting work done at varying times, under varying circumstances, and at varying rates") (emphasis in original); 29 C.F.R. §778.115 (for employees working at two or more rates, regular rate of pay is a weighted average).

A numerical example illustrates the point: if a registered nurse works 30 hours in a week at her base hourly rate of $20, and has 10 hours of controlled standby at $10 per hour, her "regular rate of pay" would be $17.50.[5] Thus, under Plaintiff's view, the nurse would receive $17.50 for a missed rest break. But if, as Loews and amici contend, the premium should be based on the nurse's ordinary hourly rate, the nurse's rest break premium would be $20.

[5] [($20*30 hours) + ($10*10 hours)]/40 = $17.50.

Several other types of work time also may be paid at lower rates, including travel time, time spent in orientations or training, and other non-productive time. *See, e.g.*, DLSE Manual §46.3.2 ("employer may establish a different pay scale for travel time (not less than minimum wage) as opposed to the regular work time rate"). Indeed, these types of multi-rate pay arrangements—affecting nurses, technicians, and many other employees—are far more prevalent than Plaintiff acknowledges.

Thus, for the many employees whose workweek is comprised of multiple rates of pay, using "regular rate of pay" as the measure under Section 226.7 may well result in a *lower* break premium. The dissent's assumption that using regular rate of pay necessarily "raises the cost to employers of noncompliance" is, therefore, faulty. Dis. opn., p. 3.[6]

Second, Plaintiff's reliance on the regular rate of pay leads to arbitrary results. Two employees who have the same base hourly pay rate, and miss the same number of rest breaks in a pay period, could receive very different Section 226.7 payments depending on how much controlled standby one of them worked in that timeframe. Or, two salespeople who

[6] Despite Plaintiff's extensive focus on the issue, what "regular rate of compensation" means for employees who do not have a base hourly rate is not before the Court. Plaintiff's contention that "both parties agree" that, for those employees, the break premium "is based on their average hourly income from all sources" is not accurate—the cited portion of Loews brief (Answering Br. at 57) says no such thing. And regardless of how the premium is calculated in those instances, it does not alter the fact that, for those receiving a base hourly wage, the premium is not calculated at the "regular rate of pay."

each earn a $12 per hour base rate and who took the same number of rest periods would be entitled to different premium payments based solely on the amount of commission generated from their sales.

That arbitrary result runs contrary to the statute, which sets a uniform value for rest periods of similarly-situated employees: "one additional hour of pay at the employee's regular rate of compensation." Cal. Lab. Code § 226.7(c). And such disparities do nothing to fulfill Section 226.7's goal, articulated in *Kirby*, of incentivizing employers to provide breaks to all eligible employees.

Third, tying the Section 226.7 premium to the regular rate of pay would increase administrative burdens for employers—particularly small businesses—who pay incentive compensation at intervals that do not coincide with the pay period. Commissions and bonuses often are earned and payable on a quarterly or annual basis, and are part of the regular rate of pay.

Under Plaintiff's proposed approach, employers continually would have to "true-up" Section 226.7 payments to reflect subsequent incentive pay attributable to work performed on days a break was missed—often months later. In our example at pp. 17-18, above, the small business owner would have to issue a payment of 20 cents on December 1 for a break that was missed on September 1—a potential trap for the unwary. There is nothing to suggest that the Legislature intended to inject such complexity

into the process, particularly when Section 226.7 itself speaks in terms of a uniform "hour of pay" at the regular rate of compensation.

Finally, if Plaintiff's position were adopted, employers may conclude that incentive compensation plans are simply too burdensome, and the premium pay disparities among employees too arbitrary, for such plans to be worthwhile. A reading of Section 226.7 that leads employers to abandon incentive pay plans, however, goes directly against the policies of this State, as expressed by this Court:

> the incentive bonus or commission [is] designed to promote diligence and a high standard of efficiency on the part of the employee. Such an arrangement between persons of mutual good will must inevitably tend to benefit both. The employer, of course, has the benefit of increased productivity or sales flowing from the employee's efforts; the employee, with little risk and with much to gain, acquires the additional status of entrepreneur, making it possible for him to realize tangible rewards for his diligence and care. In incorporating such a provision in a collective bargaining agreement the parties exercise their constitutional freedom to contract, *in a manner consonant with the declared public policy of the state*.

Kerr's Catering Serv. v. Dep't of Indus. Relations, 57 Cal. 2d 319, 334 (1962) (emphasis added); *see also Steinhebel v. Los Angeles Times Comms.*, 126 Cal. App. 4th 696, 709 (2005) (incentive payments "work to the benefit of employees and are to be encouraged," and "[s]hould we hold such a beneficial arrangement in violation of statute, the most likely result

would be the elimination of commissions and any incentive or opportunity for employees to earn income exceeding their hourly wage in proportion to their efforts.").

III. Practical Considerations Also Support The Conclusion That "Regular Rate of Compensation" Means The Base Hourly Rate

A number of real-world considerations lend further support to the Court of Appeal's conclusion that "regular rate of compensation" is the employee's base hourly rate.

First, as explained above, a break premium is the Legislature's chosen "legal remedy" for non-compliant meal and rest breaks—it is not compensation for work performed. *Kirby*, 53 Cal. 4th at 1257. That remedial premium payment must be paid "immediately" following the non-compliant break. *Murphy*, 40 Cal. 4th at 1110. Setting the break premium at the "regular rate of pay" is directly at odds with the Legislature's vision of the premium as an immediate, remedial payment.

For example, assume a car dealership asks its salesperson to delay his meal break by five minutes to serve a waiting customer. Immediate, remedial payment, as envisioned by the Legislature, would both require the employer to know right away the price of requesting the delayed break, and allow the employee to know how much he will receive. That price can only be the employee's known base hourly rate, *not* the regular rate of pay, which can be influenced by contingencies and payments (such as

commissions) occurring weeks or months later. There is no indication in the statute or legislative history of Section 226.7 that the Legislature envisioned multiple payments spread months apart, rather than a single, immediate payment.

Second, permitting the break premium to be influenced by later events can lead to break premiums wholly disconnected from the Section 227.6 injury (a non-compliant break).

Assume the salesperson who delayed his break by five minutes at the car dealership sold a $100,000 luxury car later that month. Also assume the salesperson's base hourly rate is $15, he earns a 3% monthly commission, and he worked 160 hours in that month. His break premium at the "regular rate of pay" would be (1) $15 in his next paycheck, and (2) another payment of $18.75 at the end of the month.[7] The Legislature simply could not have envisioned a break premium that is more than double an employee's base hourly rate, to be paid over multiple pay periods, all for a five-minute delay in a single meal break.

Third, tying break premiums to the regular rate of pay could result in the loss of a real-world benefit to many employees: the "no questions asked" automatic payment of the premium whenever an employee's time records reflect a missed, delayed, or shortened break. Many businesses

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[7] ($3,000 commission)/160 hours = $18.75, so the regular rate of pay is $33.75 ($15 hourly rate + $18.75).

have chosen to invest in such automated payment systems, which are mutually convenient for employers and employees, rather than to inquire whether every non-compliant break is the result of employee choice (no break premium owed) or employer mandate (premium owed).

But if break premiums must now reflect the regular rate of pay (potentially requiring multiple "true-up" payments of the break premium over an extended period of time), the automated payment system becomes less attractive. To avoid the hassle of multiple payments, employers may decide to inquire whether a missed, delayed, or shortened break was the result of employee choice—causing employees to lose what would have previously been a "no questions asked" payment of their base hourly rate.

Finally, amici are aware through their members' extensive experience with class action litigation and mediation that one of the most common wage-hour compliance issues concerns regular rate of pay calculations for overtime pay purposes. The technical rules are a particular challenge for small and mid-size employers. Tying each and every break premium payment to the regular rate of pay would exponentially increase the administrative burdens (and potential legal exposure) for such businesses.

IV. The Court Should Not Impose Retroactive Liability On Employers Who Reasonably Assumed "Regular Rate of Compensation" Was Not The Same As "Regular Rate of Pay"

Amici join Loews in urging the Court, if it decides that "regular rate of compensation" means "regular rate of pay," to give its ruling only prospective effect. For two decades, many of amici's members (and other employers) have been paying break premiums at the base hourly wage, reasonably assuming that "regular rate of compensation" is not the same thing as "regular rate of pay." In those years, there has been no authoritative judicial decision or agency guidance indicating otherwise. Saddling California employers with potentially massive retroactive liability in these circumstances would be grossly unfair.

The "general rule" that "judicial decisions are given retroactive effect" has "not been an absolute one." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 979 (1989). An exception is appropriate "when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." *Id.* at 983.

"Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." *Smith v. Rae-Venter Law Grp.*, 29 Cal.4th 345, 372 (2002); *see, e.g.*,

Camper v. Workers' Comp. Appeals Bd., 3 Cal.4th 679, 688 (1992) (reliance on former rule was reasonable; statutory objectives not compromised by prospective application); *see also* Answering Br. at 60 (collecting cases).

Thus, the key considerations here are (1) the extent to which employers reasonably relied on the understanding that "regular rate of compensation" meant base hourly rate, not the "regular rate of pay," and (2) the negative impact if the Court's ruling were to be given retroactive effect. Amici are able to offer insight into both of these issues.

1. Amici are aware that the general practice among employers has been to pay break premiums at the base hourly rate. The reason, as Loews explains, is that employers reasonably have relied on the presumption that, when the Legislature used "regular rate of compensation" *solely* in the break premium statute, it meant something different than the term of art "regular rate of pay." *See* Part I(A)-(B), above.

Underscoring the reasonableness of employers' reliance, in the two decades since the Legislature enacted the break premium, a majority of district courts—along with the Court of Appeal in this case—have concluded that "regular rate of compensation" means the base hourly rate. Answering Br. at 53-58. No binding appellate decision or agency guidance has stated otherwise. Employers thus did not receive fair notice that break premiums have to be calculated at the "regular rate of pay," and that the

Legislature and IWC's choice of a different term ("regular rate of compensation") was actually meaningless.

2. Imposing retroactive liability not only would be unfair to employers under these circumstances, it also could be costly. The Court's ruling would affect virtually every employer in California, raising the specter of a wave of expensive class actions. These class actions stand to benefit class counsel more than class members, particularly in cases where the differential between the employees' base hourly rate and regular rate of pay is small.[8]

Retroactive liability would be especially draconian for employers who reward their employees with high commissions and bonuses (because the differential between the base hourly rate and regular rate of pay would be highest)—all because these employers reasonably assumed that the Legislature did not intend to conflate "regular rate of compensation" and "regular rate of pay." *See, e.g.*, *Ibarra v. Wells Fargo Bank, N.A.*, 2018 U.S. Dist. Lexis 78513, at *5 (C.D. Cal., May 8, 2018) (for Wells Fargo mortgage consultants on a commission plan, difference in break premium would be $72,812,703).

[8] Further, a retroactive ruling could leave some employees—like nurses whose controlled standby rate drives *down* their regular rate of pay below their base hourly rate, see Part II, above—subject to claw-back of excess premium payments.

The unfairness and potential exposure would be compounded if this Court were to reverse *Naranjo v. Spectrum Security Services, Inc.*, 40 Cal. App. 5th 444, 474 (2019) (holding that "unpaid premium wages for meal break violations do not entitle employees to additional remedies pursuant to [Labor Code] sections 203 and 226"), review granted & depublication den., Jan. 2, 2020, No. S258966. Were that to occur, plaintiffs could attempt to stack penalties under Labor Code sections 203 and 226(e) on top of the break premium.

Using the example of the employee who missed a rest break on September 1, the small business owner would potentially have to pay: (1) an extra 20 cents for the break premium (based on the employee's regular rate of pay); (2) $4,800 (30 days' wages at $20/hour) under Section 203; (3) $50 or actual damages, whichever is greater, for the failure to record the extra 20 cents in break premium pay on the employee's wage statement under Section 226(e); and (4) $100 in PAGA penalties under Labor Code Section 2699(f)(2). Thus, a 20 cent discrepancy in a break premium payment to a former employee could result in thousands of dollars of retroactive liability.[9]

Based on the lack of fair notice to employers, as well as the widespread impact of retroactive liability, amici urge that any ruling

[9] Even if the Court were to affirm in *Naranjo*, potential retroactive exposure to PAGA penalties and the specter of class-wide litigation would remain.

equating "regular rate of compensation" to "regular rate of pay" should be given only prospective effect.

CONCLUSION

The Court should affirm the judgment in Loews's favor. If the Court concludes otherwise, it should accord its ruling only prospective effect.

Respectfully submitted,

DATED: September 30, 2020

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), Amici hereby certify that the text of this Amicus Brief consists of 6,907 words as counted by the Microsoft Word processing program used to generate the Brief.

Respectfully submitted,

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Seyfarth Shaw LLP, 2029 Century Park East, Suite 3500, Los Angeles, California 90067. On September 30, 2020, I served the following document described as**:** **APPLICATION OF CALIFORNIA EMPLOYMENT LAW COUNSEL, EMPLOYERS GROUP, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AMICI CURIAE BRIEF; BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT LOEWS HOLLYWOOD HOTEL, LLC** as follows:

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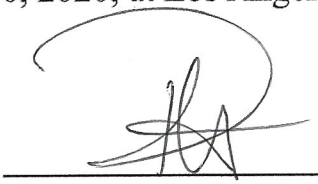

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