S 241655

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY, AND JEFFREY CARL,
Plaintiffs-Appellants

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant-Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE,
CASE NO. G048039

FROM THE SUPERIOR COURT, COUNTY OF ORANGE
CASE NO. 30-2008-00096591, ASSIGNED FOR ALL PURPOSES
TO JUDGE NANCY WIEBEN STOCK, DEPT. CX 105

APPELLANT'S REPLY BRIEF ON THE MERITS

Unfair Competition Case, Service on Attorney General and
District Attorney required by Bus. & Prof. Code § 17209

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I. INTRODUCTION

Orange Coast Memorial Medical Center's ("OCMMC") Answer Brief narrows the issues presented in this appeal. OCMMC agrees with Appellants' position that the interpretation of legislation is the province of the courts and that the legislature cannot retroactively deprive workers of vested rights without due process of law. What OCMMC asks this Court to focus on is the issue of whether the Industrial Welfare Commission ("IWC") had authority to adopt Wage Order 5, section 11(D) ("section 11(D)") authorizing health care workers to waive one of their two meal periods on shifts exceeding 12 hours (Reps. Brief p.6-7) and what effect SB 88 and SB 327 had on Section 11(D) (Resp. Brief p. 31-35). But narrowing the focus as OCMMC suggests still leaves open the question of whether the Legislature is able to reach back – despite a long passage of time – and dictate to the Court what a statute enacted by a prior Legislature meant.

Appellants Jazmina Gerard, Kristiane McElroy, and Jeffery Carl (collectively "Gerard") have already shown that the IWC's authority was limited to adoption of wage orders consistent with California Labor Code sections 517 (requiring IWC rules be "consistent with" the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 ("the Act")), section 516 (setting out the IWC authority), and section 512 (the statutory requirements for minimum meal periods). (AOB p. 21-26.) The limits on the IWC's authority were reaffirmed in SB 88, which clarified the IWC orders were always intended to be limited by section 512. Those orders were neither within the scope of the IWC's authority nor reasonably necessary to effectuate the Act. As a

result, the IWC's adoption of section 11(D) was void at its inception.

The Legislature's 2015 attempt, through SB 327, to reach back fifteen years and expand the IWC's authority to allow adoption of regulations contrary to sections 517, 516, and 512 was improper and interfered with the court's interpretative function. (AOB p.26-28.) The Court of Appeal's decision should be reversed.

II. ARGUMENT

A. OCMMC Agrees with Gerard that it is the Court's Function to Interpret the Law

Understanding that it is the sole province of the courts to discern the meaning of statutes where such meaning is contested is essential to resolving this appeal. OCMMC agrees, stating "[O]f course the Legislature cannot 'usurp the power of the Judiciary' or 'dictate to the courts'" and notes the Court of Appeal in *Gerard v. OCMMC* (2017) 9 Cal.App.5th 1204 ("*Gerard II*") emphatically affirmed "the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (Reps. Brief p.6-7.)

B. OCMMC Also Concedes that the Legislature Cannot Retroactively Deprive a Citizen of Vested Rights Without Due Process of Law

Similarly, OCMMC admits that "of course the Legislature cannot 'retroactively deprive workers of vested rights without due process.'" (Resp. Brief p.7) This admission is important here because OCMMC also acknowledges that a finding that health care employers failed to adequately compensate health care workers for meal periods "could result in millions of dollars in

liability." (Resp. Brief p. 21.) Thus, SB 327's declaration that section 11(D), was "valid and enforceable on and after October 1, 2000," overturning the Court of Appeal's finding in *Gerard I* that the IWC "exceeded its authority" by creating "additional exemptions to the meal period requirements beyond those provided by the Legislature,"[1] deprived workers of their vested right to millions of dollars without due process.

C. Section 11(D) is Neither Valid Nor Enforceable

1. Section 11(D) is Not Within the Scope of IWC's Authority or Reasonably Necessary to Effectuate the Statute

OCMMC's Answering Brief urges the Court to focus on the validity of section 11(D). *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, instructed that the "standard for assessment of the validity" of an IWC wage order was established by this Court in *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310. "In assessing the validity of a formal regulation 'the judicial function is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' (Gov. Code, [former] § 11373) and (2) is 'reasonably necessary to effectuate the purpose of the statute.' (Gov. Code, § 11374.)'" (*Agnew*, 21 Cal.4th at p. 322.) As set forth below, section 11(D) is neither within the scope of authority nor reasonably necessary to effectuate the Act.

2. The IWC's Authority was Always Limited to Adopting Wage Orders Consistent with Section 512 of the Labor Code

"The authority of an administrative agency to adopt

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[1] (*Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285, 183 Cal.Rptr.3d 721,730 ("*Gerard I*").)

regulations is limited by the enabling legislation." (*Bearden,* 138 Cal.App.4th, at p. 435.) The IWC's authority to adopt Wage Orders arises from Labor Code section 517, but that authority requires all such Wage Orders be consistent with the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, including section 512. Section 517 specifically states the IWC "shall, at a public hearing to be conducted by July 1, 2000, adopt wage, hours, and working condition orders *consistent with this chapter*" (emphasis added). Section 517, like sections 516 and 512, is found in Labor Code Division 2, Employment Regulations and supervision, Part 2, Working Hours, Chapter 1, General, Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. "The directive to adopt wage orders consistent with 'this chapter' in section 517 was a directive to adopt wage orders consistent with the 1999 Act." (*Thurman v. Bayshore Transit Mgmt., Inc.* (2012) 203 Cal.App.4th 1112, 1138.) "Consistent with this chapter" included a requirement that the IWC wage order be consistent with section 512 from the moment the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 was enacted. Section 516 specifically granted the IWC authority to adopt wage orders related to meal periods, but did not grant authority to disregard the minimum standards established in the Act in section 512. "The rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature." (*Bearden,* 138 Cal.App.4th at p. 436.)

Section 11(D) exceeded the IWC's authority the moment it

was adopted. "A ministerial officer may not...under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute...a regulation which impairs the scope of a statute must be declared void." (*Bearden,* 138 Cal.App.4th at p. 436.)

Similarly, the Government Code declares that any rule or regulation inconsistent with the enabling statute is invalid. "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)

The intent to limit the IWC's authority with the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 was recognized by this Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004. *Brinker* stated:

> While the Legislature in section 516 generally preserved the IWC's authority to regulate break periods, it intended to prohibit the IWC from amending its wage orders in ways that 'conflict[ ] with [the] 30-minute meal period requirements' in section 512. (Legis. Counsel's Dig., Sen. Bill No. 88 (1999–2000 Reg. Sess.) 6 Stats.2000, Summary Dig., p. 212; see *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438, 41 Cal.Rptr.3d 482.)

(*Brinker*, 53 Cal.4th at p. 1043.)

The clear, explicit language of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 required any

wage order to be consistent with that Act. The adoption of a wage order inconsistent with section 512 was outside the authority granted to the IWC.

3. SB 88 Clarified that the IWC Had No Authority to Adopt Wage Orders Contrary to Section 512

Section 516 adds the authority for IWC to "adopt and amend working condition orders with respect to break periods, meal periods, and days of rest." Nine months later the Legislature adopted SB 88, "an urgency statute," clarifying that section 516 was not intended to grant the IWC authority to override the meal period requirements enacted by the Legislature as part of the Labor Code in section 512. As noted in both *Bearden*, 138 Cal.App.4th at p. 438 and *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560, 1571, the Senate third reading analysis for Senate Bill No. 88 states:

> This bill **clarifies** two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. *This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512. ...*

(*Bearden, supra*, at p. 438 [bold added, italics added by the *Bearden* court].) This Court agreed with this analysis, citing SB 88 as a basis of its conclusion as to the Legislature's intent "to prohibit the IWC from amending its wage orders in ways that conflict ... with ... section 512," quoted above. (*Brinker*, 53

Cal.4th at p. 1043.)

Although the clarification was unnecessary given the failure of the IWC to comply with section 512 as required by section 517, the enactment of SB 88 removed any doubt as to the limits of the IWC's authority. By enacting Senate Bill No. 88, the Legislature intended that exceptions to the meal period requirements of section 512(a) such as those in section 11(D), were invalid from their inception.

4. OCMMC Contends the Wage Order was Valid and Enforceable for a Number of Reasons, All of Which Are Wrong

(a) The "Notwithstanding Any Other Provision of Law" Clause Does Not Confer Authority to Exceed the Law

Section 516, as enacted in 2000, states in pertinent part: "Notwithstanding any other provision of law, the [IWC] may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers." OCMMC now argues that the "notwithstanding any other provision of law" statement gave the IWC carte blanche to adopt any regulations irrespective of any other law protecting worker rights.[2] OCMMC's interpretation of this language is incorrect to the extent it suggests that the IWC had authority to enact wage orders contrary to law as happened here.

"Notwithstanding any other provision of law," as found in

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[2] OCMMC relies in part on a December 1999 DLSE publication (Resp. Brief p.27 (citing RJN Exhibit D) but the DLSE publication merely restates the language of the statute; it does not add any interpretative guidance.

legislation, has been defined as a "term of art" expressing "a legislative intent 'to have the specific statute control despite the existence of other law which might otherwise govern.'" (*Ni v. Slocum* (2011) 196 Cal.App.4th 1636, 1647.) The correct reading is that the IWC was authorized to adopt orders as to break periods and meal periods even if another law limited IWC's authority to adopt such orders, not that the IWC could disregard *all* existing law in exercising its authority. Gerard's reading of the "notwithstanding" clause is in accord with *Bearden*: "[T]he broad powers granted to the IWC do not extend to the creation of additional exemptions from the meal period requirement beyond those provided by the Legislature." (*Bearden,* 138 Cal.App.4th at p. 440.)

(b) The Wage Order was Void from Its Inception

This Court has long held that "administrative regulations that violate acts of the Legislature are void." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.) "'To be valid, administrative action must be within the scope of authority conferred by the enabling statutes....' ... 'If the court determines that a challenged administrative action was not authorized by or is inconsistent with acts of the Legislature, that action is void.'" (*Hamilton v. Gourley* (2002) 103 Cal.App.4th 351, 363.) As set forth above, section 11(D) exceeded the authority the Legislature granted to the IWC. The Wage Order was void the moment the IWC adopted it.

(c) Any Forward-Looking Language in SB 88 is Irrelevant, as Section 11(D) was Void Even Before SB 88 was Adopted

OCMMC argues that the preamble of SB 88, stating the new law "would prohibit" adoption of certain orders conflicting with section 512 is evidence the prohibition was not in place before the adoption of SB 88 and thus shows a prospective change in the law. (Resp. Brief p. 32.) But that preamble language mentions only the "30-minute meal period requirement" and the timing of the required meal periods. Nothing in the preamble addresses the requirement of a second meal period after 12 hours. That is because the requirement of a second meal period for any employee working more than 12 hours was already clearly in place through section 512. As this Court held in *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 and reaffirmed in *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471: "[A] statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" "because the true meaning of the statute remains the same."

Regardless of what the preamble states, SB 88 was a clarification of section 516 – that the IWC's authority was to be exercised consistent with section 512.

(d) Subsequent Amendments of the Wage Order do not Remedy the Original Improper Wage Order

In its Answering Brief, OCMMC notes that Wage Order 5

was revised a number of times since its original adoption and that section 512 has been amended without specific repeal of Wage Order 5, section 11(D). (Reps. Brief p. 33.) However, revisions to a void regulation that do not remedy the initial terms rendering the regulation void do not save the regulation. The regulation, when brought before the court, must be examined as to whether it is "within the scope of the authority conferred" and whether it is "reasonably necessary to effectuate the purpose of the statute". (*Agnew,* 21 Cal.4th at p. 322.)

5. Section 11(D) was not Reasonably Necessary to Effectuate the Purposes of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999

Section 11(D) also fails the "reasonably necessary" prong of the *Agnew* review standard. The Act was adopted because the Legislature was troubled by the IWC's "weakening" and "rollback of employee protections." (*Brinker*, 53 Cal.4th at p. 1037.) Through the Act "the Legislature wrote into statute various guarantees that previously had been left to the IWC, including meal break guarantees." (*Id.*, at pp. 1037-1038.) Obviously, adoption of meal period rules inconsistent with the Act, rules that weakened the minimum standards set forth in the Act, are contrary to the purposes of the Act and not reasonably necessary to effectuate the Act.

D. The Adoption of SB 327 After the Court of Appeal Found Section 11(D) Invalid is, on its Face, a Change in the Law

OCMMC argues the SB 327 was a clarification of the law, not a change in the law requiring only prospective application.

(Resp. Brief p. 34.) The Legislature itself stated that SB 327 was adopted as a result of the Court of Appeal's finding that section 11(D) was invalid: "[T]his provision was enacted in direct response to *Gerard I*...In order to confirm and clarify the law applicable to meal period waivers for employees in the health care industry" Despite the Legislative declaration that this was a clarification, it came in response to the finding that the IWC exceeded its authority in issuing Section 11(D) and that the Wage Order was inconsistent with the law to the extent it authorizes waiver of second meal periods on shifts longer than 12 hours and is therefore void *ab initio*. (*Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285 ("*Gerard I*").) The only purpose of SB 327 was to overturn that decision, to change the law as the Court of Appeal had interpreted it.

E. OCMMC's Argument that Any Finding that Section 11(D) is Void Only Apply Prospectively Would Deprive Health Care Workers of a Vested Right to Payment of Lost Wages

As Gerard set out in Appellant's Opening Brief, under *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, the additional hour of pay provided by Section 226.7 constitutes a premium wage and "an employee is entitled to the additional hour of pay *immediately* upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's *immediate entitlement* to payment of wages or for overtime." (*Murphy*, 40 Cal.4th at p. 1108 (emphasis added).) (AOB p. 37.) If the Court were to find section 11(D) void, but apply that decision prospectively only, healthcare workers would be deprived of - in OCMMC's estimation - "millions of

dollars." (Resp. Brief p.21.)

OCMMC urges that fairness dictates it not be liable for such wages. But fairness to the healthcare employees must be the primary consideration when reviewing compliance with a statute enacted to end the weakening of employee protections and to guarantee meal breaks. (*Brinker*, 53 Cal.4th at p. 1037-1038.)

F. The Act's Protections are not Waivable Except Where the Law Specifically Permits Waiver

OCMMC asserts that health care workers prefer to waive a second meal period and this should weigh in favor of upholding section 11(D). (Resp. Brief p. 29-31.) But the law recognizes that statutes adopted to protect the rights of workers should not be subject to waiver, even when voluntary.

> The unwaivability of certain statutory rights "derives from two statutes...Civil Code section 1668 states: 'All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.'...Civil Code section 3513 states, 'Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.'"

(Iskanian v. CLS Transp. Los Angeles, LLC (2014) 59 Cal.4th 348, pp. 382–83.) Statutorily required meal and rest periods have been adopted for the protection of workers. "Meal and rest periods have long been viewed as part of the remedial worker protection framework." (*Murphy*, 40 Cal.4th at 1105.)

While some employees may be willing to forsake their breaks to be at the workplace for fewer hours, the benefits of regular breaks have been recognized as "consistent with the health and welfare of those workers" and are therefore enshrined in statute. (See, Sections 516 and 512.) Such protections should not be subject to bargaining; once protections can be bargained away, the worker is subject to pressure by the employer to do so. The Act was adopted, in part, to ensure the provision of meal and rest periods. As set forth above and in the AOB, the IWC was charged with adopting orders consistent with those protections and was not authorized to give those protections away.

Moreover, California law and public policy have long viewed mandatory rest periods "as part of the remedial worker protection framework" and require us to construe Wage Order No. 7 to "best effectuate[] that protective intent." (*Brinker*, *supra*, 53 Cal.4th at p. 1027; accord, *Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th. 1027, 1039.) Indeed, the Legislature views the right to a rest period as so sacrosanct that it is unwaivable. (See § 219 ["[n]othing in this article [including section 226.7] ... can in any way be contravened or set aside by a private agreement"]; *Brinker*, 53 Cal.4th at p. 1033 [right to rest breaks cannot be waived].)

III. CONCLUSION

Gerard and OCMMC agree on the role of the Court and the need to assure due process before depriving any person of a vested right. The issue on which the parties disagree is the validity of Wage Order 5, section 11(D), permitting waiver of a second meal period on shifts exceeding 12 hours, contrary to the

minimum meal period requirements of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. The IWC was required to exercise its authority consistent with the Act and failed to do so. Section 11(D) is void and Gerard and all healthcare workers should be provided the wages they lost in waving a second meal break when working shifts in excess of 12 hours.

Dated: November 21, 2017

Respectfully submitted,

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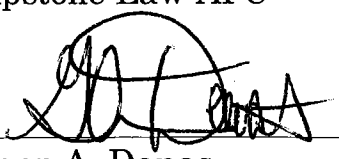
By: 

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Dated: November 21, 2017

Respectfully submitted,

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

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Name

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