S244751

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 No. CJC11004661, The Honorable John E. Munter

RESPONDENTS' STATE OF CALIFORNIA, ET AL. ANSWER BRIEF ON THE MERITS

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I.

INTRODUCTION

The arguments raised by the Represented Employee subclass in this action threaten the integrity of the collective bargaining process between the State of California and its employees by seeking to rewrite labor agreements that have existed for two decades. Since 1998, plaintiffs in the Represented Employee subclass[1] have worked schedules established under section 207(k)

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[1] On January 28, 2011, the trial court certified the following class in this action:

> 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.

(Vol. 1, AA000039.)

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, whose labor relations with the State are governed by the Ralph C. Dills Act (Gov. Code § 3512, et seq.) (AA, Vol. 3, p. AA 000604) and Unrepresented (Excluded) Employees, whose labor relations with the state are governed by the Bill of Rights for State Excluded Employees (Gov. Code, § 3525, et seq.). (AA, Vol. 3, p. AA 000605.)

This brief addresses issues involving the Represented Employee subclass. For issues involving the Unrepresented Employee subclass, see the State's Opening Brief on the Merits.

of the federal Fair Labor Standards Act. ("FLSA," see 28 U.S.C. § 207(k).) This "7(k) schedule" to which the Represented Employee subclass has been subject since 1998 is the result of a series of Memoranda of Understanding (MOUs) negotiated between the State and the Represented Employees' exclusive representative, the California Correctional Peace Officers Association ("CCPOA"), pursuant to the Ralph C. Dills Act. (Gov. Code § 3512, et seq.) Each of these MOUs, all of which included a 7(k) schedule, were submitted to the Legislature for adoption, were signed by the Governor, and were chaptered into law, as required by the Dills Act. (See Gov. Code § 3517.5) Furthermore, each of these MOUs was "scored," (i.e., the full costs of the MOUs were calculated) and funds were appropriated, based on the assumption that the 7(k) schedule, including the FLSA standard for determining the compensability of hours worked, applied to employees covered by the MOUs, namely the Represented Employee subclass. (See AA, Vol. 18, pp. AA004937 to AA 005008, Defs' Trial Exhibits 209 and 210.) Accordingly, the 7(k) schedule included in the MOUs between the State and CCPOA controlled the determination of the Represented Employees' wages and hours of work. (See *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1040 ["[I]t is clear that an MOU, once approved by the Legislature (either directly – see § 3517.5 – or through the appropriation of sufficient funds to pay the

agreed-upon employee compensation), governs the wages and hours of the state employees covered by the MOU."].)

Based on the continuous application of a 7(k) schedule to Represented Employees since 1998, both the trial court and the Court of Appeal found that the FLSA constitutes the legal standard for determining the compensable hours of work for that subclass. As a result of this conclusion, both the trial court and Court of Appeal correctly ruled that the Represented Employees' claim for additional compensation for pre- and post-work activities ("PPWA") was precluded as a matter of law because PPWA is non-compensable under the FLSA.

Despite the fact that the 7(k) schedules in the MOUs have governed the terms and conditions of their employment since 1998, Appellants seek to repudiate the effect of their agreement to such a schedule by challenging the rulings of the courts below. Appellants' arguments to this Court are essentially the same arguments as those rejected at both the trial and appellate level. The foundation on which those arguments are built is the contention that the failure to compensate PPWA constitutes a violation of California's minimum wage law. To be clear, this case is not, and never has been, about a violation of the minimum wage. None of the members of the plaintiff class were paid less than the minimum wage for the *compensable* hours of work they performed. While it is rhetorically convenient for Appellants to couch their arguments in the language of the minimum wage, such arguments

overlook the reality that in any case involving claims for unpaid wages, including this one, the threshold issue is whether the time for which compensation is sought constitutes "compensable hours of work." If a particular activity, and the time spent doing it, is non-compensable, then no wage – minimum, premium, or otherwise – is owed. Thus, the critical issue in this case is whether the PPWA for which Appellants seek compensation is, as a matter of law, compensable. It is not. As both lower courts found, because the FLSA is the controlling legal standard for determining the compensability of Represented Employees' hours worked, their PPWA is non-compensable. The FLSA expressly provides that PPWA is non-compensable time.

Appellants attempt to escape the clear import of the MOU provisions establishing a 7(k) schedule for the Represented Employee subclass by raising two arguments that both lower courts characterized as "flawed." First, Appellants argue that the language of the MOUs themselves do not compel a finding that the FLSA controls the determination of compensable hours worked. In this, they are wrong. The 7(k) schedules approved by the Legislature through adoption of the MOUs inherently include the FLSA standard for compensability. The 7(k) schedule is unique to the FLSA; there is no state law analog. By approving 7(k) schedules, the Legislature necessarily approved all aspects of that schedule, including the FLSA

standard for determining the compensability of hours worked. This is evident in the plain language of the MOUs approved by the Legislature.

Second, Appellants continue to argue, as they did below, that the collective bargaining process that led to the MOUs cannot be interpreted as a waiver of their wage rights under California law. Such an argument ignores the fact that the MOUs constitute legislative enactments, and are not mere private agreements between the State and its employees. The Legislature approved the 7(k) schedules, including the FLSA concepts inherent in that schedule. The concept of waiver thus has no place in the determination of the issues raised in this action.

Aside from their claim that the California standard for determining the compensability of hours worked should apply to them, the Represented Employee subclass also challenges the Court of Appeal's holding that they may not state a claim for breach of common law contract for payment of overtime. As the Court of Appeal correctly found, the MOUs at issue here contained "merger" clauses reciting that the MOUs reflect the complete agreement between the parties regarding all terms and conditions of employment. The notion of a separate implied agreement addressing the payment of overtime wages is antithetical to the comprehensive nature of the parties' MOUs.

Finally, Appellants challenge the rulings that Labor Code section 222 and 223 are inapplicable to the facts of this action. As both the trial court

and Court of Appeal correctly ruled, however, these code sections are inapposite.

This Court should not countenance Appellants' effort to thwart the Legislature's will as expressed in its adoption of MOUs going back to 1998, and its appropriation of funds in accordance with those MOUs, through their attempts to repudiate the 7(k) schedules in those agreements. Appellants' arguments lack merit and, for the reasons expressed below, should be rejected by this Court. The Court of Appeal's holding affirming the trial court's judgment in favor of the State as against the Represented Employee subclass should be affirmed.

II.

STATEMENT OF THE CASE

A. Statement of Material Facts.

1. Description of Represented 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) and Unrepresented (Excluded) Employees. (Gov. Code, § 3525, *et seq.*) (AA, Vol. 3, p. AA000605.)

The Represented Employee subclass consists of the following job classifications: Correctional Officers, Youth Correctional Officers, Correctional Counselor I, Correctional Counselor II (Specialist), Youth Correctional Counselor, and Medical Technical Assistant. These job classifications are represented for collective bargaining purposes by the California Correctional Peace Officers Association ("CCPOA") (AA Vol. 3, p. AA000604.)

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

Labor relations between the State and Represented Employees are governed by the Dills Act. (AA, Vol. 3, p. AA000604.) Pursuant to Government Code section 3517, the Governor or his or her designee (*i.e.*, CalHR) and recognized state employee bargaining representatives (*e.g.*, CCPOA) are required to meet and confer in good faith to address wages, hours, and other terms and conditions of employment. When an agreement is reached between the parties, they are required to prepare a joint written MOU that is submitted to the Legislature for approval. (Gov. Code § 3517.5; see also (AA, Vol. 3, pp. AA000604-605.) The MOU, like any other law, is introduced in the Legislature as a proposed bill, adopted by both houses of the Legislature, and forwarded to the Governor for signature, before being chaptered into law by the Secretary of State.

3. Specific Labor Relations History Between The State And The Represented Employee Subclass Relevant To The Issues On This Appeal.[2]

(a) 1998-1999 MOU Between The State And CCPOA (Defendants' Trial Exhibit 199, AA, Vol. 8, pp. AA002037, *et seq.*).

Beginning in approximately March 1998, the State and CCPOA began negotiating a successor MOU for employees in State Bargaining Unit 6 ["BU6"], the bargaining unit represented by CCPOA. (RT, Vol. 3, 289:4-9, Testimony of David Lewis ["Lewis"].)[3] At the time these negotiations began, BU6 employees were subject to a standard 40-hour, seven-day workweek. (RT, Vol. 3, 296:16-24 (Lewis).)

Before negotiations for the 1998 MOU, David Gilb, the then Assistant Chief of Labor Relations at CalHR (then DPA) and the States' chief negotiator for the 1998 MOU (RT, Vol. 4, 450:2-12, Testimony of David Gilb ["Gilb"]), approached CCPOA representatives to discuss the prospect of utilizing a 7k schedule for BU 6 employees. (RT, Vol. 4, 494:2-16 (Gilb).) This would be the first MOU between the State and CCPOA to include a 7k schedule. (See e.g., RT, Vol. 3, 299:5-8 (Lewis).) The purpose for proposing

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[2] The facts discussed in this section were, for the most part, the subject of the parties' pre-trial stipulated facts found at AA, Vol. 3, AA000602. Nonetheless, they were the subject of considerable proof at trial as the citations to the record here demonstrate.

[3] David Lewis was a member of CCPOA's negotiating team for the 1998 MOU and was one of the principal drafters of CCPOA's proposals regarding the 7k schedule to be included in that MOU. (RT, Vol. 3, 287:14-18, 337:3-8 (Lewis).)

a 7k schedule to CCPOA was to provide a mechanism for compensating PPWA. (*Id.*, at 494:17-495:16.) CCPOA generally was receptive to the concept of a 7k schedule. (*Id.*, at 497:16-24; see also, RT, Vol. 3, 299:22-24, 338:12-17 (Lewis); RT, Vol. 3, 383:8-11, Testimony of Steve Weiss ["Weiss"].)[4]

From the outset, and throughout negotiations for the 1998 MOU, the State made it clear it was defining compensable PPWA to be included in the 7k schedule as the time from an employee picking up his or her tools (e.g., keys, pepper spray, etc.) to the time when the employee arrived at his or her assigned post in the correctional institution. (RT, Vol. 4, 498:20-499:11 (Gilb).) The State based this definition of compensable PPWA on its position that the FLSA only requires compensation from the employee's first principal activity, *i.e.,* picking up tools. (RT, Vol. 4, 501:8-23 (Gilb).) CCPOA understood this was how PPWA was being defined. (See RT, Vol. 3, 308:5-18, 321:11-17, 353:16-20 (Lewis).) As Mr. Weiss, CCPOA's chief negotiator, testified on direct examination:

> Q. And do you recall there being a definition of what PPWA meant anywhere in the MOU?
>
> A. Yes.
>
> Q. You recall an actual definition?
>
> A. Yes. Pre- and post-work activities.

---

[4] Steve Weiss was the chief negotiator for CCPOA during bargaining for the 1998 MOU. (RT, Vol. 3, 381:1-4 (Weiss).)

> Q. Okay. Beyond knowing what the acronym stood for, is there anyplace [*sic*] in the MOU that you're aware of where that phrase, pre- and post-work activities, is more specifically defined so one would know specifically what was meant by that phrase?
>
> A. All throughout the 7k contract sections, it talks about 4 hours of pre- and post-work activities per work period.
>
> Q. Okay. And was there ever any definition that talked about what activities – what work activities would be included in that definition?
>
> A. Not so much drawn out in the MOU. But in the conversations at the table, it was picking up your keys, picking up your tools, Mace, whatever was appropriate for the particular post that they were working.

(RT, Vol. 3, 386:20-387:14 (Weiss).)

Not only did the parties to the 1998 negotiations understand PPWA was intended to provide compensation from tool pickup to post, they also understood federal, not California, law applied to the 7k schedule. At no time during the 1998 negotiations was there any discussion about applying California state law to the 7k schedule. (RT, Vol. 3, 310:13-18 (Lewis).) As Mr. Lewis testified:

> Q. During the course of the 1998 negotiations did you believe California state law to apply to the FLSA 7k schedule you were negotiating?
>
> A. I did not believe state law applied.
>
> Q. Okay. And that was the reason you personally never raised the subject at the bargaining table, correct?
>
> A. I did not raise the subject at the bargaining table because we were negotiating under the federal law. And that's the only thing we were talking about at the time was federal law.

(RT, Vol. 3, 359:14-24 (Lewis).) Mr. Weiss similarly testified there was no discussion of California state law in connection with the proposed 7k schedule. (RT, Vol. 3, 428:9-17 (Weiss).) Mr. Gilb testified he informed CCPOA's representatives the State would not compensate PPWA prior to the time employees picked up tools because the FLSA, and specifically the Portal-to-Portal Act, did not require compensation before that point in time. (RT, Vol. 4, 501:19-502:9 (Gilb).)

The 1998 negotiations resulted in an agreement between the State and CCPOA regarding the 7k schedule, which was embodied in section 11.12 of the 1998 MOU. Pursuant to the 7k schedule in the 1998 MOU, employees in posted positions were assigned to 168 hours in a 28-day work period. (AA, Vol. 8, pp. 2037, 2087 [Defendants' Trial Exhibit 199].) Section 11.12 of the MOU begins with the prefatory statement:

> CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein.

(*Ibid.*)

Section 11.12 of the 1998 MOU specifically addressed PPWA at subsection (A)(1)(b) and provided as follows:

> All institutional-based staff shall be scheduled to [f]our (4) hours per work period to allow for pre and post work activities. *CCPOA agrees that generally this is sufficient time for all pre and post work activities during each work period, and that the*

> *compensation allotted for these activities under this provision is full compensation for all of these activities.*

(*Ibid.*, emphasis added.)

Finally, section 11.12 of the 1998 MOU stated at subsection (C)(1):

> The State and CCPOA agree that they have made a good faith attempt to comply with all requirements of the FLSA in negotiating this provision. ... CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA.

Following agreement on all terms of the 1998 MOU, Mr. Gilb prepared a summary of the parties' agreements along with a costing analysis that was submitted to the Legislature. (RT, Vol. 4, 504:3-18, 505:8-506:1 (Gilb).) The costing analysis submitted to the Legislature included not only the overall costs of the 7k schedule but the cost of the PPWA component as well. (*Ibid.*, see also, RT, Vol. 4, 595:12-17 (Gilb). The California Legislative Analyst's Office included the costing information associated with the new 7k schedule in its report regarding the overall cost impact of the 1998 MOU. (AA, Vol. 18, pp. AA005001, 5003 [Defendants' Trial Exhibit 211].)

Consistent with the requirements of the Dills Act and its constitutional authority over the terms and conditions of state employment, the Legislature approved the 1998 MOU as AB 2472. The bill was then signed by the Governor and chaptered into law by the Secretary of State. (Stats. 1998, ch. 820, § 2, p. 93.)

(b) 1999-2001 MOU Between The State And CCPOA (Defendants' Trial Exhibit 200, AA, Vol. 8, pp. AA002197, *et seq.*).

In 1999, the State and CCPOA negotiated a successor agreement to the 1998 MOU. In the 1999 MOU, the 7k schedule was renumbered as section 11.11. (AA, Vol. 8, pp. AA002197, 2258.) Other than this renumbering, the 7k schedule was "rolled over" from the 1998 MOU into the 1999 MOU. (RT, Vol. 3, 330:19-331:3 (Lewis).) Rolling over the 7k schedule from the 1998 MOU to the 1999 MOU included not only a rollover of the actual MOU language but also a rollover of the parties' bargaining history underlying the 7k schedule. (RT, Vol. 3, 362:19-363:5 (Lewis); RT, Vol. 3, 430:14-19 (Weiss).)

The 1999 MOU was approved by the Legislature as SB 615. It was then signed by the Governor and chaptered into law. (Stats. 1999, ch. 778, § 6(b), p. 96.)

(c) 2001-2006 MOU Between The State And CCPOA (Defendants' Trial Exhibit 201, AA, Vol. 9, pp. AA002371, *et seq.*).

In 2001, the State and CCPOA once again rolled over the 7k schedule, into a successor MOU. (RT, Vol. 3, 430:20-23.) On this occasion, however, the 7k schedule was reduced from 168 hours in a 28-day work period to 164 hours effective July 1, 2004. (AA, Vol. 9, pp. AA002371, 2446.) In all other respects, however, section 11.11 in the 2001 MOU was identical to the language contained in both the 1998 and 1999 MOUs. (*Ibid.*)

The 2001 MOU was passed by the Legislature as SB 65. It was then signed by the Governor and chaptered into law. (Stats. 2002, ch. 1, § 2, p. 94.)

(d) The State's Implemented Last, Best, And Final Offer, 2007-2011 (Defendants' Trial Exhibit 7, AA, Vol. 6, p. AA001380, *et seq.*)

Before the 2001 MOU expired, the State and CCPOA began negotiating for a successor MOU. Those negotiations took place throughout 2006 and 2007 but were unsuccessful in achieving a successor MOU. (RT, Vol. 4, 491:18-20 (Gilb).) As a result, the State declared an impasse and implemented the terms of its last, best, and final offer. (*Id.*, at 492:9-493:16 (Gilb).) The 7k schedule which had been part of the 2001 MOU was continued, without change, as part of the State's implementation of its last, best, and final offer. (RT, Vol. 4, 513:20-516:6 (Gilb); AA, Vol. 6, p. AA001380 [Defendants' Trial Exhibit 7].)

(e) 2011-2013 MOU Between The State And CCPOA (Defendants' Trial Exhibit 202, AA, Vol. 10, p. AA002583, *et seq.*

The State and CCPOA negotiated a new MOU in 2011. By that time, the present action had been filed. The 2011-13 MOU maintained the same 7k work schedule from prior MOUs. (AA, Vol. 10, pp. AA002583, 2659.)

The parties continued to agree in the 2011 MOU that employees subject to the 7k schedule "are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the

employer is declaring a specific exemption for these employees under the provisions specified herein." (*Ibid.*) However, the 2011 MOU eliminated the longstanding language in which CCPOA agreed that four hours constituted sufficient time and compensation for PPWA. (*Ibid.*) Instead, the parties agreed to Sideletter No. 7 to the MOU, which provided that no change in the language of the 2011 MOU "shall have prejudicial effect to either side's argument in *Stoetzl v. State of California.*" (AA, Vol. 8, p. AA002036.)

The 2011 MOU was adopted by the Legislature as SB 151. It was thereupon signed by the Governor and chaptered into law. (Stats. 2011, ch. 25, § 2(b), p. 95.)

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 complaint 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.) 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 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 Court Decision.

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 Represented Employee subclass, the trial court specifically found that "at all times relevant the FLSA's principal activity test constitutes the controlling legal standard" for determining compensable hours of work. (AA, Vol. 20, p. AA005427.) The trial court based this finding on its determination that "the plain language of the MOUs unambiguously establishes that the parties agreed that the FLSA's first principal activity test is the controlling legal standard. (*Ibid.*) The trial court further found that "[a]side from the text of the MOUs, ... the persuasive trial evidence established that the parties understood and agreed in each MOU that the FLSA's principal activity test was to be the controlling legal standard." (*Ibid.*)

The trial court considered and rejected the same waiver argument Appellants renew in their Opening Brief to this Court. As the trial court found, "[t]he flaw in [Appellants'] argument is that it overlooks the fact that the MOUs were approved by the Legislature and constitute law. While it is generally true that individuals cannot waive their statutory labor rights in a contract (see, e.g., *Gentry v. Superior Court* (2007) 42 Cal.4th 443), that general rule has no application here because the Legislature has given approval to each of the MOUs." (*Id.* at p. AA005429.)

Having found that the FLSA standard for determining compensable hours of work applies to the Represented Employee subclass pursuant to the 7(k) schedule adopted by the Legislature through approval of the parties' MOUs, the trial court concluded this finding disposed of Appellants' minimum wage claim. The trial court found that the specific provisions of the MOU controlled the determination of Appellants wages and hours worked and to apply conflicting provisions of the IWC wage orders "would emasculate the specific" provisions of the 7(k) schedule contained in the parties' MOUs. (*Id.* at p. AA005432.)

Finally, the trial court also concluded the Represented Employees could not state a claim for breach of common law contract on the ground that "[t]he comprehensive and exclusive nature of the MOUs forecloses the Represented Employees from asserting common law claims for overtime." (*Id.* at p. AA005433.)

6. Court of Appeal Decision.

On appeal, the Court of Appeal affirmed the trial court's decision regarding the Represented Employees' claims. In language very similar to that of the trial court, the Court of Appeal rejected Appellants' argument that the application of California wage and hour law could not be waived through the collective bargaining process:

> The flaw in plaintiffs' argument is that the MOUs were not only negotiated by CCPOA and the State, but they were also approved by the Legislature, signed by the Governor, and chaptered into law. They are thus not simply agreements between the parties, but laws specifically governing the terms and conditions of plaintiffs' employment.

(Slip Opn. at p. 15.)

The Court of Appeal also affirmed the trial court's finding that the Represented Employees cannot state a claim for breach of common law contract. The Court of Appeal noted that each MOU "provided that it 'set[] forth the full and entire understanding of the parties regarding the matters contained herein ...' And each was approved by the Legislature. There is no basis to conclude that either the parties or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOUs." (Slip Opn. p. 24.)

III.

LEGAL ARGUMENTS

A. As Legislative Enactments, The Provisions Of The MOUs Are Entitled To Deference As The Definitive Statement Regarding The Terms And Conditions Of The Represented Employees' Employment With The State.

Without a great deal of explanation regarding its relevance, Appellants argue at pages 27 to 29 of their Opening Brief that the IWC wage orders are entitled to "extraordinary deference," citing to this Court's well-known statement to that effect in *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004, 1026. To the extent Appellants are arguing the IWC wage orders, and their definition of hours worked, are entitled to greater deference than the MOUs adopted by the Legislature, which establish the FLSA as the standard for determining compensable hours of work, Appellants are in error.

It is now 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, supra,* 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).)

With respect to the Represented Employee subclass, the Legislature exercises this constitutional authority pursuant to the requirement contained in the Dills Act that all MOUs entered into by the State and its employee bargaining units be submitted to it for review and approval. (Gov. Code § 3517.5.) As noted in *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th at 181, fn. 17, "[t]hat the Legislature intended to retain ultimate authority over state employees' wages, hours and working conditions is ... demonstrated by the fact that, in its initial version, section 3532 of the [Dills] act permitted the state and unions to reach 'binding agreements,' but this language was transferred to and amended in section 3517.5 to require submission of memoranda of understanding to the Legislature for approval. (Sen. Amend. to Sen. Bill No. 839 (1977-1978 Reg. Sess.) Apr. 25, 1977; Assem. Amend. to Sen. Bill No. 839 (1977-1978 Reg. Sess.) Aug. 31, 1977." (See also *Department of Personnel Administration v. California Correctional Peace Officers Assn* (2007) 152 Cal.App.4th 1193, 1201-1202.)[5]

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[5] The Legislature's intention to retain ultimate authority over the terms and conditions of state employment also is reflected in the legislative history underlying the Dills Act. Ralph C. Dills, author of the Dills Act, emphasized in a statement regarding its passage by the State Senate on June 21, 1977 that the Dills Act would not "impinge in any way on legislative sovereignty" because "[a]ny and all major issues agreed upon between the state and

It is undisputed that the MOUs at issue here were submitted to the Legislature for adoption and enactment into law. The 1998 MOU was adopted by the Legislature as AB 2472, signed by the Governor, and chaptered into law. (Stats. 1998, ch. 820, § 2, p. 93.) The same is true for the 1999 MOU (SB 615, Stats. 1999, ch. 778, § 6(b), p. 96), the 2001 MOU (SB 65, Stats. 2002, ch. 1, § 2, p. 94), and the 2011 MOU (SB 151, Stats. 2011, ch. 25, § 2(b), p. 95). As a result, the MOUs govern the terms and conditions of the Represented Employees' employment. (See *Professional Engineers, supra,* 50 Cal.4th at 1040 ["[I]t is clear that an MOU, once approved by the Legislature (either directly – see § 3517.5 – or through the appropriation of sufficient funds to pay the agreed-upon employee compensation), governs the wages and hours of the state employees covered by the MOU."].)

B. The Legislatively Enacted MOUs Between The State and The Represented Employee Subclass Establish The FLSA As The Controlling Legal Standard For Determining Compensable Hours Worked.

As already noted, beginning in 1998, and in every MOU relevant to this action, the State and CCPOA agreed to, and the Legislature expressly adopted, a 7(k) schedule for Represented Employees. (See AA, Vol. 8, p. AA002087 [Defendants' Exhibit 199]; Vol. 8, p. AA002258 [Defendants'

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employee representatives where any financial costs [were] involved [were required] to be brought to [the] Legislature for approval." (AA, Vol. 16, pp. AA 004410-11.)

Exhibit 200]; Vol. 9, p. AA002445 [Defendants' Exhibit 201]; Vol. 10, p. AA002659 [Defendants' Exhibit 202].) Each of those MOUs include the same prefatory language to the 7(k) work schedule:

> CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein

(*Ibid.*)

Moreover, each of the MOUs, except the 2011 MOU (AA, Vol. 10, p. AA002583), included language by which the State and CCPOA agreed "(1) that they had made 'a good faith attempt to comply with all requirements of the FLSA in negotiating' the 7(k) schedule; (2) that the four hours of compensation for PPWA provided to certain employee classifications was 'sufficient time for all pre and post work activities during each work period and [(3)] that the compensation allotted for these activities under this provision is full compensation for all of these activities.'" (AA, Vol. 20, p. AA005426.)

Section 7(k) of the FLSA (29 U.S.C. § 207(k)) permits public employers to utilize a work schedule for law enforcement personnel, including employees working in correctional facilities, of up to 171 hours during a recurring 28-day work period. (See also 29 C.F.R. § 553.211, subd. (f); 29 C.F.R., § 553.230.) The 7(k) schedule is unique to the FLSA.

California state law has no comparable method for scheduling law enforcement personnel work hours.

Inherent in the FLSA 7(k) schedule is the FLSA concept of hours worked. 29 Code of Federal Regulations section 553.221, subdivision (a) specifically provides: "The general rules on compensable hours of work are set forth in 29 C.F.R. part 785, *which is applicable to employees for whom the 7(k) exemption is claimed.*" (Emphasis added.)

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.[6] 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

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[6] "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.*)

an activity engaged in by an employee after the completion of his 'principal' activity or activities." (29 C.F.R., § 790.7.) Even when the parties have agreed in a labor agreement, such as the MOUs at issue here, that preliminary or postliminary activities shall constitute hours worked, this fact does not render them compensable hours worked pursuant to 29 U.S.C. § 254, subsection (a). Rather, those hours become compensable solely based on the terms of the parties' labor agreement. (29 U.S.C. § 254(b).) Moreover, "only the amount of time allowed by the contract ... is required to be counted. If, for example, the time allowed [for preliminary or postliminary activities] is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes." (29 C.F.R. § 785.9, citing *Galvin v. National Biscuit Co.* (S.D.N.Y. 1949) 82 F.Supp. 535.)

Recently, the Supreme Court had occasion to apply these FLSA compensability standards in *Integrity Staffing Solutions, Inc. v. Busk* (2015) 135 S.Ct. 513. 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.

These FLSA compensability standards are inseparable from the 7(k) schedule to which the State and Represented Employees consistently have agreed, and which the Legislature consistently has approved, since 1998. (29 C.F.R. § 553.221, subd. (a).) Nonetheless, Appellants argue California's compensability standards should apply to them. Appellants argue the application of California law is necessary to "harmonize" the provisions of the MOUs with the requirement of California wage and hour law. Appellants' argument, however, does not amount to "harmonization," but rather constitutes an effort to repudiate the 7(k) schedule in the MOUs.

Such efforts to rewrite legislatively approved MOUs routinely have been rejected by California courts. For instance, in *Department of Personnel Administration v. California Correctional Peace Officers Assn* (2007) 152 Cal.App.4th 1193, CCPOA appealed a trial court decision vacating an arbitrator's award. The arbitrator had ruled that a 10,000-hour cap on the amount of leave an employee could take to perform union-related business, as set forth in the express terms of the parties' MOU, was no longer in effect as a result of an off-the-record side deal. (*Id.*, at 1199.) In affirming the trial

court's decision vacating the arbitrator's award, the appellate court held that "by reforming the written MOU in a manner that changed the provisions approved by the Legislature, the arbitrator violated the Dills Act and the important public policy of legislative oversight of employee contracts. Consequently, the arbitrator exceeded her powers, and the superior court properly granted the petition to vacate the arbitration award." (*Id.*, at 1203.)

In *California Dept. of Human Resources v. Service Employees International Union, Local 1000* (2012) 209 Cal.App.4th 1420, the issue was whether an arbitrator could grant an award requiring the State to pay salary increases to union employees over and above those approved by the Legislature in an MOU. SEIU contended its members were not only entitled to the salary increases contained in the MOU but also to additional salary increases ordered by a federal court in litigation challenging the adequacy of the health care system in California state prisons. (*Id.*, at 1427.) In response, the State contended the federal court's ruling approving new salary ranges for employees engaged in the prison health care system had been superseded by the Legislature's adoption of an MOU subsequent to that decision, which incorporated salary increases and, therefore, the State was required to pay only those salary increases contained in the MOUs. (*Ibid.*) The arbitrator ruled in favor of SEIU and the trial court affirmed the arbitrator's ruling. (*Id.*, at 1427-1428.) The Court of Appeal reversed, holding the arbitrator's award "violates public policy because it mandates a fiscal result that was not

explicitly approved by the Legislature." (*Id.*, at 1434.) The court further noted that "an arbitrator cannot order a remedy in a public employee contract dispute if it compels payment of funds not explicitly approved by the Legislature." (*Id.*, at 1436, citing *California Statewide Law Enforcement Assn. v. California Dept of Personnel Admin.* (2011) 192 Cal.App.4th 1, 5-6.)

These cases are directly analogous to the situation here. The Legislature's approval of the 7(k) schedule for Represented Employees, a schedule uniquely found in the FLSA and for which there is no counterpart in California state law, inherently includes FLSA concepts of compensability. (29 C.F.R. § 553.221(a).) The Legislature's approval of these concepts as embodied in the MOUs established a method for compensating these employees, which ultimately resulted in an appropriation of funds corresponding to this compensation methodology. (AA, Vol. 18, p. AA004937 [Defendants' Trial Exhibit 210].) Imposing California's "control" standard for determining compensable hours worked would effectively rewrite the MOUs in a manner contrary to the Legislature's express adoption of the 7(k) schedule, which includes FLSA compensability standards. Application of California's control standard also would be contrary to the Legislatures' appropriation of funds for Represented Employee compensation consistent with that FLSA 7k schedule.

Appellants' reliance on *Grier v. Alameda Contra-Costa Transit District* (1976) 55 Cal.App.3d 325 as effectively requiring the MOUs to be rewritten so as to "harmonize" them with California's control standard for determining hours worked is misplaced. (See Appellants' Opening Brief, pp. 45-50.) The issue in *Grier* was whether a provision in the collective bargaining agreement between a local transit district and its employees could circumvent provisions of the California Labor Code. The transit district argued the collective bargaining agreement was consistent with statutes in the Public Utilities Code and, therefore, permissible. In rejecting this argument, the *Grier* court held:

> [I]t does not appear that the Legislature intended Alameda-Contra Costa County Transit District labor relations to be governed *only* by the Public Utility Code provisions relating thereto. Rather, the rules and regulations adopted by the board of directors (and administered by the general manager under § 24936 subd. (d)), including those adopted by a resolution approving a collective bargaining agreement, must themselves be promulgated *subject to* the limitations and restrictions of other applicable laws. (Emphasis in original.)

(55 Cal.App.3d 325, 333.)

Grier stands for the proposition that a local public authority's MOU remains subject to the state Legislature's greater constitutional authority to enact general statutes governing employment in this State. *Grier* did not involve the question of whether the Legislature's specific constitutional authority to establish the terms and conditions of state employment through enactment of MOUs is somehow circumscribed by its earlier actions

adopting statutory provisions of general application. As the Court of Appeal correctly found in its decision, "*Grier* does not stand for the proposition that a labor agreement approved by the *Legislature* is subject to inconsistent labor laws of general application." (Slip Opn. p. 16.)

In sum, the MOUs adopted into law by the Legislature since 1998 establish a 7(k) working schedule for the Represented Employee subclass, which inherently includes the FLSA standard for determining compensable hours of work. The Legislature appropriated funds for the MOUs relying on the fact that PPWA (beyond the four hours accounted for in the MOUs themselves) would be non-compensable. (See AA, Vol. 18, pp. AA4937-5008, Defendants' Trial Exhibits 209 and 210.) Rewriting the MOUs in the manner advocated by Appellants would thwart the Legislature's intent and violate its constitutional prerogative to establish the terms and conditions of state employment.

C. Application Of The FLSA Standard For Determining Compensable Hours Of Work Does Not Constitute A Waiver Of Fundamental Wage And Hour Rights.

Appellants spend the bulk of their Opening Brief arguing that the California minimum wage cannot be waived and, therefore, the subject MOUs cannot be interpreted so as to waive such rights. Appellants attempt to overcome the impact of a nearly 20-year history of the Legislature adopting a 7(k) schedule by arguing California state law must be applied because its applicability could not be waived through the collective

bargaining process. Appellants make the startling, and ultimately unsupportable, claim that because statutory rights cannot be waived through the collective bargaining process, the Legislature cannot abrogate such rights through its adoption of an MOU. By ignoring the Legislature's well-established constitutional authority over state employment, Appellants' argument, if adopted, would effectively sideline the Legislature and impermissibly restrict its prerogatives when it comes to determining the terms and conditions of state employment, a result expressly contrary to the intent underlying the Dills Act. (See footnote 5, *supra*.)

The flaw underlying all of Appellants' waiver arguments is that the 7(k) schedules contained in the parties' MOUs were not just the product of private negotiations between the State and CCPOA. The MOUs were approved by the Legislature, signed by the Governor, and chaptered into law. Thus, as the Court of Appeal found, "[t]hey are thus not simply agreements between the parties, but laws specifically governing the term and conditions of [the Represented Employees'] employment." (Slip Opn., p. 15.) As a result, the concept of "waiver" has no application here. Instead, enforcing the 7(k) schedule results from recognizing the Legislature's constitutional authority to approve specific terms and conditions of employment for state employees through the adoption of MOUs, notwithstanding potentially contrary provisions of California labor law of general application.

1. Both the Express Language of the Parties' MOUs, As Well As the Bargaining History Underlying Those MOUs, Demonstrate An Intent to Adopt the FLSA As the Exclusive Legal Standard For Determining Represented Employees' Compensable Hours of Work.

Appellants first argue that neither the terms of the parties' MOUs, nor the extrinsic evidence relating to their negotiation and adoption, establish a waiver of their rights under California's wage laws, and specifically, California's minimum wage. Aside from Appellants' myopic focus on the minimum wage, their argument misses the point. Both the express terms of the MOUs and the bargaining history underlying them evidence an intent to adopt the FLSA as the exclusive legal standard for establishing the compensable hours of work for the Represented Employee subclass.

In each of the MOUs since 1998, the parties agreed that "the employees listed below are working under the provisions of Section 207k [*sic*] of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein." (See e.g., AA, Vol. 8, pp. AA002037, AA002087 [Defendants' Trial Exhibit 199].) These same MOUs, up to the 2011 MOU, further stated "[t]he State and CCPOA agree that they have made a good faith attempt to comply with *all requirements of the FLSA* in negotiating this provision." (*Ibid.*, emphasis added.) Thus, by the express terms of the MOU, the parties agreed, and the Legislature approved, an adoption of "all requirements of the FLSA" in connection with the 7(k)

schedule, including by necessary implication, the FLSA's definition of compensable hours worked.

This conclusion is further supported by reference to the parties' bargaining history with respect to the 7(k) provision of the MOU. The record before this Court establishes that all parties involved in negotiations for the subject MOUs understood federal law to be the exclusively applicable legal standard for determining compensable hours worked. Both CCPOA's chief negotiator for the 1998 MOU, Steve Weiss, and David Lewis, a member of the 1998 negotiating team, testified they did not believe California state law applied to the 7(k) schedule and, for that reason, California state law was never discussed during negotiations for the 1998 MOU. (RT, Vol. 3, 359:14-24 (Lewis); Vol. 3, 428:9-17 (Weiss).) David Gilb, the State's chief negotiator, testified he informed CCPOA's representatives during the 1998 negotiations that the State would not compensate PPWA prior to the time employees picked up tools because the FLSA, and specifically the Portal-to-Portal Act, did not require compensation before that point in time. (RT, Vol. 4, 501:19-502:9 (Gilb).) Thus, the uncontradicted evidence in the record before this Court, both in the form of the express language of the MOUs and the parties' bargaining history, demonstrates it was the parties' intent to adopt the FLSA as the exclusive legal standard for compensating the Represented Employees for hours worked.

2. The Legislature's Authority to Adopt the FLSA As the Legal Standard for Determining Compensable Hours of Work Is Not Constrained by Labor Code Sections of General Application.

As the Court of Appeal appropriately found, the Legislature's authority to approve MOUs is not subject to inconsistent labor laws of general application. (Slip Opn., p. 16.) In fact, because the MOUs, once adopted by the Legislature and chaptered into law, are specific provisions governing the terms and conditions of the affected state employees' employment, "the more specific provision takes precedence over the more general [and] [t]o the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the general statute." (See Slip Opn., p. 15, citing *Salazar v. Eastin* (1995) 9 Cal.4th 836, 857.)

Notwithstanding this well-established rule of statutory construction, Appellants argue that the Legislature's ability to adopt a MOU, which applies the FLSA as the standard for compensable hours worked, is foreclosed by Labor Code section 1194. (See Appellants' Opening Brief on the Merits at pp. 41-45.) That code section provides that employees have the right to receive the minimum wage notwithstanding an agreement to the contrary. Appellants argue that because section 1194 prohibits an agreement that deprives employees of the minimum wage, the Legislature could not purport to adopt such an agreement.

Appellants' argument misconstrues the nature of the MOUs in question. Once again, this case is not about depriving the Represented Employees of their minimum wage rights. It is about establishing a standard – in this case the FLSA – by which the compensability of employees' time is determined. Appellants fail to point to any authority for the proposition that the Legislature is prohibited from adopting the FLSA in specific situations as the standard for compensating state employees. In fact, the Legislature has authorized the use of the FLSA as the standard for the payment of wages to state employees in contexts other than the subject MOUs. Government Code section 19845 provides that CalHR "is authorized to provide for overtime payments as prescribed by the Federal Fair Labor Standards Act to state employees." This statute constitutes an express delegation by the Legislature to CalHR to utilize the FLSA as the standard for paying overtime. The legislative history underlying section 19845 is particularly illuminating with respect to the Legislature's intent to rely on the FLSA as a controlling legal standard applicable to terms and conditions of state employees in certain contexts. As set forth in the staff analysis of SB 1344 (Dills), the intent behind section 19845 was "to make collective bargaining provisions in state law consistent with the Fair Labor Standards Act of federal law." (AA, Vol. 18, p. AA004900, Def. Trial Ex. 121.) This statute, along with the subject MOUs approved by the Legislature, constitute an expression of the Legislature's constitutional authority to establish the terms and conditions of

state employment through the application of the FLSA when the Legislature deems it to be appropriate.

In sum, the MOUs at issue here do not constitute waivers by the Represented Employees of their rights under California's wage laws. To the contrary, these agreements, as evidenced by both their express content and the bargaining history underlying them, were intended to establish 7(k) schedules for the Represented Employees. As established in the relevant federal regulations, such a 7(k) schedule necessarily includes the FLSA's concept of hours worked. (See 29 C.F.R. § 553.211, subd. (a).) This is the standard to which the Represented Employees have agreed, and the Legislature has approved, since 1998. Appellants have failed to demonstrate any reason to reverse that nearly 20-year history.

D. The Application Of the 7(k) Schedule To The Represented Employees, Along With the FLSA Standards For Compensable Hours Worked, Is Unaltered During The State's Implementation Of Its Last Best And Final Offer During The Period 2007 To 2011.

During the period from 2007 to 2011, the Represented Employees worked without an MOU due to an impasse in labor negotiations between the State and CCPOA. Appellants argue that even if they are not entitled to pursue their claims for uncompensated PPWA during the period in which the parties' MOUs were in effect, they should be permitted to pursue them for the period in which they were working under the terms of the State's last, best, and final offer (LBFO). (See Appellants' Opening Brief on the Merits

at pp. 53-54.) Appellants' position is contrary to the express terms of the Dills Act.

Under the Dills Act, the Legislature has authorized the State to impose the terms of its LBFO during periods of labor impasse with the only requirement being the State must seek legislative approval for any change in the law or any expenditure of additional funds. (See Gov. Code § 3517.8, subd. (b).) It is undisputed in the record that the 7(k) schedule contained in the LBFO during the period 2007 to 2011 was the same 7(k) schedule contained in the predecessor MOUs. (AA, Vol. 6, pp. AA1500-1504, Defs' Trial Exhibit 7.) Because no further Legislative approval was required for the continued implementation of the 7(k) schedule as part of the State's LBFO, there was no change in the Legislature's previous authorization to establish the 7(k) schedule, along with the FLSA standards for compensable hours of work, as a term and condition of the Represented Employees' employment with the State. As a result, the Represented Employees continued to work under this same legislatively-approved 7(k) schedule during the period of labor impasse. Thus, the Represented Employees' cannot seek compensation for PPWA during this period any more than they can for the periods in which it was expressly foreclosed by the terms of the parties' MOUs.

E. The Court Of Appeal Correctly Held That Both As A Matter Of Law And Fact The Represented Employees' Common Law Breach Of Contract Claim Cannot Be Sustained.

Appellants assert they are entitled to pursue a breach of common law contract claim for the State's alleged failure to pay them overtime for compensable hours worked beyond their regular work schedules. In ruling on this claim, the Court of Appeal "agree[d] with the trial court that [Appellants] have not established a contract that would support their claim." (Slip Opn., p. 24.) Because both the Court of Appeal's and trial court's rulings are supported by the applicable law and substantial evidence in the record before this Court, the adjudication of this claim in the State's favor should be affirmed.

Appellants' breach of common law contract claim is based largely on the holding in *Madera Police Officers Assn v. City of Madera* (1984) 36 Cal.3d 403. 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 the California Supreme 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, the California Supreme 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 the 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.)

As both the Court of Appeal and trial court ruled, Appellants failed to adduce evidence giving rise to common law contractual obligations. With respect to Represented Employees, the Court of Appeal correctly noted that "[e]ach MOU provided that it 'set[] forth the full and entire understanding of the parties regarding the matters contained herein ..." (Slip Opn., p. 24.) In light of this language, Represented Parties do not, and frankly cannot, point to any source outside of the MOUs that potentially gives rise to common law contractual obligations regarding the payment of overtime.

Ironically, Appellants argue that one source for their implied contractual rights is the MOUs themselves. (See Appellants' Opening Brief on the Merits, p. 57.) Such an argument places the Represented Employee

subclass in an untenable situation. They cannot, on the one hand, reject the MOUs' use of the FLSA as the exclusive standard governing the compensability of their hours worked, while simultaneously embracing the MOUs as the source for their contractual overtime claims. As the trial court aptly pointed out in its decision, "[t]o permit the plaintiffs to cherry pick certain terms out of the MOUs and ignore others, and then use those selected terms as predicates for common law breach of contract claims, would frustrate, indeed eviscerate," the structure of the MOUs themselves. (AA, Vol. 20, p. AA005433.)

The Represented Employees have failed to demonstrate, either as a matter of law or fact, that they are entitled to seek implied contractual remedies beyond those express contractual rights granted to them in the MOUs. Furthermore, "as a general matter, implied terms should never be read to vary the express terms" of an agreement between public employees and their employer. (*Retired Employees, supra,* 52 Cal.4th at 1179. The alleged implied contract Represented Employees seek to enforce is an obligation to pay them overtime for all hours worked in excess of their scheduled hours. There are several necessary predicates to this claim, however, that contradict the express terms of their MOUs: (1) that "hours worked" should be measured by California state law standards and include all PPWA despite the fact those hours are non-compensable under the FLSA standard incorporated into the MOUs and (2) that Represented Employees

should be paid for more than four hours for PPWA in a 28-day pay period despite the fact the 1998, 1999, and 2001 MOUs all state that four hours is adequate compensation for all PPWA. Thus, Represented Employees seek to impose an implied contract term that conflicts with their express contract. Such a claim is fatally infirm because they are asking this Court to find an implied agreement that is not only contrary to the express terms of their MOUs, but contrary to the expressed will of the Legislature as reflected in those MOUs.

F. The Court of Appeal's Decision Affirming The Trial Court's Grant Of Judgment On The Pleadings Regarding Appellants' Cause Of Action For Violation Of Labor Code Sections 222 And 223 Should Be Affirmed Because Those Code Sections Are Inapplicable To The State.

Both the Court of Appeal and the trial court found that Labor Code sections 222 and 223 are inapplicable to the State and on that basis granted the State's motion for judgment on the pleadings as to this cause of action. That ruling should be affirmed by this Court.

Appellants argue that because Labor Code section 220, subdivision (a) expressly exempts the State from the application of Labor Code sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205 and 205.5, any remaining sections in Article 1 of the Labor Code not listed must by negative implication apply to the State. (AOB, p. 34.) The First District Court of Appeal disposed of this argument in *California Correctional Peace*

Officers' Association v. State of California (2010) 188 Cal.App.4th 646, 652 (hereinafter, "*CCPOA v. State*"), in which the Court ruled as follows:

> CCPOA contends that because the Legislature expressly exempted public entities from these specific Labor Code provisions referred to in subdivision (a) of section 220, the Legislature must have intended the entirety of chapter 1 to be generally applicable to public entities. ...CCPOA provides no argument or authority to support its position. [The] specific exemptions [in section 220] cannot, by implication, be read as making chapter 1 generally applicable to public entities. Such an interpretation would violate the maxim that when the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.

(*CCPOA v. State, supra,* 188 Cal.App.4th at 653-54.) Following the decision in *CCPOA v. State*, Appellants' argument regarding the interplay between Labor Code sections 220, subdivision (a) and 222 and 223 is untenable.

Sections 222 and 223 also are inapplicable to the State because general statutes contained in the Labor Code that do not contain specific language rendering them applicable to public employers are presumptively inapplicable. "[A]bsent express words to the contrary, governmental agencies are not included within the general words of [a] statute." (*Wells v. One2One Learning Foundation* (2006) 39 Cal. 4th 1164, 1192; see also *Regents of University of California v. Superior Court* (1976) 17 Cal.3d 533, 536; *Kubach Co. v. McGuire* (1926) 199 Cal. 215, 217 ["In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens

unless such public authorities be included within the limitation expressly or by necessary implication"].)

Consistent with the above presumption, this Court, in *Campbell v. Regents of the University of California* (2005) 35 Cal.4th 311, 330 quoting the Senate Committee on Industrial Relations, found "the provisions of the Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees." As the court in *Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729, 736 noted, the "Legislature's iteration of this rule [as quoted in *Campbell*] is an indication that the Legislature follows it."

There is nothing in the language of Labor Code sections 222 and 223 that expressly applies to public agencies, including the State of California and its subdivisions. As a consequence, and based on the holdings in *Johnson v. Arvin-Edison Water Storage District* and *CCPOA v. State* these code sections are inapplicable to the State.

Appellants cannot overcome the impact of these decisions, and the general presumption of inapplicability of these statutes, by arguing their application would not impact the State's sovereign governmental authority. Under the "sovereign powers" maxim, "government agencies are excluded [from the effect of general statutory provisions] only if their inclusion would result in an infringement upon sovereign governmental powers." (*Johnson v. Arvin-Edison, supra,* 174 Cal.App.4th at 738.) "'Where ... no impairment

of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language....'" (*Ibid.*, citing *Regents of University of Calif. v. Sup. Ct., supra,* 17 Cal.3d at 536.) Application of Labor Code sections 222 and 223 in the circumstances of this case, however, would infringe on the Legislature's sovereign authority over the terms and conditions of state employment. In a similar situation, the court in *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 640-641 held that statutes granting monetary compensation for meal and rest breaks did not apply to charter counties because to do so would infringe upon the sovereign immunity of those entities. Similarly, in *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1279, the court held, "the County has exclusive authority, as a charter county, to provide for the compensation and conditions of employment of its employees, and has done so with respect to probation officers through a collective bargaining agreement adopted by resolution." The State here is no different than the public entities in *Curcini* and *Dimon* cases. To impose Labor Code sections on the State that are not made expressly applicable to it would impermissibly infringe on the Legislature's "ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments" (*Professional Engineers in California Government v. Schwarzenegger, supra,* 50 Cal.4th 989, 1015.)

Labor Code sections 222 and 223 also are inapplicable here as a matter of fact. These code sections were "enacted to address the problem of employers taking secret deductions or 'kickbacks' from their employees." (*Amaral v. Cintas Corporation* (2008) 163 Cal.App.4th 1157, 1205; see also, *Kerr's Catering Service v. Dept. of Industrial Relations* (1962) 57 Cal.2d 319, 328-329 [an undisclosed accounting method utilized by the employer to charge back cash shortages to employees driving catering trucks constituted an impermissible "secret deduction" in violation of section 223] and *Sublett v. Henry's, etc. Lunch* (1942) 21 Cal.2d 273, 274, [addressing impermissible "kickback schemes" to defeat payment of union wages].)

More recently, this Court has had occasion to interpret section 223 in the context of one of the many appellate challenges to the State of California's 2009-2011 furloughs of state employees. In *Brown v. Superior Court* (*California Correctional Peace Officers' Ass'n*) (2011) 199 Cal.App.4th 971, 991, this Court addressed whether furloughs of state employees violated section 223. In holding they did not, the Court of Appeal stated:

> As our colleagues in Division Three aptly described it, this statute "was enacted to address the problem of employers taking secret deductions or 'kickbacks' from their employees. [Citations.] In such cases, the employer nominally pays employees the wage required by statute or collective bargaining agreement but then secretly deducts amounts or requires employees to pay back a portion of the wages, so that in reality the employees are earning less than was required. [Citations.] However, in all of the cases the underpayment of

> wages is a secret being *kept from applicable enforcement authorities*—i.e., the Labor Commissioner, the employee's union [citation], or a contracting party [citation]—not from the employees themselves, who presumably are well aware of how much they are paid. [¶] ... [T]he statute punishes secret underpayment." (Citing, *Amaral v. Cintas Corp., supra,* 163 Cal.App.4th 1157, 1205.)

Just as in *Brown v. Superior Court*, section 223, as well as section 222, are inapplicable to the Appellants' claims here, *i.e.,* allegedly unpaid compensable pre and post-work activities. Those claims are not based on the type of secret deduction or kickback the statutes were designed to prevent.

IV.

CONCLUSION

The Represented Employees' claims in this action are contrary to the express terms of MOUs dating back to 1998, and are thus contrary to the expression of the Legislature's will regarding their terms and conditions of employment as manifested in the Legislature's adoption of those MOUs. Contrary to the Represented Employees' arguments, this case is not about a violation of minimum wage rights, or about waiver of their fundamental rights under California's labor law. Rather, it is about maintaining the integrity of the collective bargaining process under the Dills Act, a process that is designed to "promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations." (Gov. Code § 3512.) If the

Represented Employee subclass is permitted to rewrite the parties' MOUs in the manner they propose, this system, which involves collective bargaining by the parties, Legislative adoption of the MOUs into law, and the appropriation of funds for those MOUs, all is placed at risk. Respondents urge this Court to reject such a result by affirming the Court of Appeal's decision in their favor as against the Represented Employees.

DATED: May 17, 2018

KRONICK, MOSKOVITZ,
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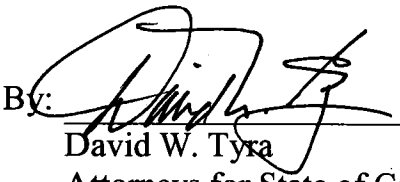

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

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 11,286 words.

DATED: May 17, 2018

KRONICK, MOSKOVITZ,
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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 May 18, 2018, I served true copies of the following document(s) described as **RESPONDENT STATE OF CALIFORNIA, ET AL.'S ANSWER BRIEF ON THE MERITS** 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.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address mmarlowe@kmtg.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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 May 18, 2018, at Sacramento, California.

May Marlowe

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