No. S259172

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JESSICA FERRA,
Plaintiff and Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC
Defendant and Respondents

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE
NO. B278642
FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY,
NO. BC539194
PRESIDING JUDGE KENNETH R. FREEMAN

APPLICATION OF BET TZEDEK TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED AMICUS BRIEF ON BEHALF OF APPELLANT JESSICA FERRA

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APPLICATION OF BET TZEDEK FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF

Pursuant to rule 8.520(f) of the California Rules of Court, Bet Tzedek seeks permission to file the accompanying Brief of Amicus Curiae in Support of Appellant Jessica Kim on the following issue: Did the Legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" under Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour? (Order Granting Petition for Review January 22, 2020.)[1] a plaintiff's resolution of a companion individual claim strips him of standing to serve as a deputized proxy for the state in the separate enforcement action under the Labor Code Private Attorneys General Act of 2004 (PAGA).

As demonstrated below, Amicus Curiae's accompanying brief provides focused assistance to this Court. The brief expands on several points in Appellant Jessica Ferra's merits briefing that are important to this Court's consideration.

Thus, in accordance with California Rule of Court 8.250(f)(4), no party or counsel for any party, has authored any part of the proposed brief or

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[1] Labor Code section 226.7(c) provides: "If an employer fails to provide an employee a meal or rest or recovery period in accordance with state law, . . ., the employer shall pay the employee *one additional hour of pay at the employee's regular rate of compensation* for each work day that the meal or rest period is not provided." (Italics added.) (As originally enacted, this subsection was subsection (b), and did not reference recovery periods.)

Labor Code section 510(a) provides in relevant part that work that qualifies for overtime premiums "shall be compensated at the rate of no less than one and and-half times the *regular rate of pay* for an employee. . .[or] no less than twice the *regular rate of pay* for an employee." (Italics added.)

funded the preparation of the brief.

STATEMENT OF APPLICANTS' INTEREST

Bet Tzedek—Hebrew for the "House of Justice"—was established in 1974 as a nonprofit organization that provides free legal services to Los Angeles County residents. Each year their attorneys, advocates, and staff work with more than one thousand pro bono attorneys and other volunteers to assist more than 20,000 people regardless of race, religion, ethnicity, immigrant status, or gender identity. Bet Tzedek's Employment Rights Project focuses specifically on the needs of low-wage workers, providing assistance through a combination of individual representation before the Labor Commissioner, civil litigation, legislative advocacy, and community education.

Bet Tzedek's interest in this case comes from over 15 years of experience advocating for the rights of low-wage workers in California. As a leading voice for Los Angeles's most vulnerable workers, Bet Tzedek has an interest in the correct development and interpretation of California's worker-protection laws, including the law on meal period and rest period premiums. Bet Tzedek supports an interpretation of the Labor Code to ensure that all workers are properly compensated.

CONCLUSION

For the foregoing reasons, amicus curiae Bet Tzedek respectfully requests that the Court accept the accompanying Brief for filing and consideration.

Dated: September 30, 2020

Respectfully submitted,

Capstone Law APC

By: ***/s/ Melissa Grant***

Melissa Grant
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INTRODUCTION

When an employer fails to provide an employee with a legally compliant meal or rest period, Labor Code section 226.7(c) and the Industrial Welfare Commission's (IWC)[2] wage orders require the employer to pay the employee "one additional hour of pay at the employee's regular rate of compensation." The majority of the Court of Appeal held that the phrase "regular rate of compensation" means the employee's "base hourly rate," and not the "regular rate of pay" that is used to calculate overtime pay under Labor Code section 510(a).[3] In so ruling, the majority found that "the statutes' use of different *definitions* for the different premiums [was not] ambiguous" and that a single canon of statutory construction—"[w]here different words or phrases are used in the same *statute*, it is presumed the Legislature intended a different meaning"—dictated its conclusion. (*Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239, 1247-1248, 1252. [italics added].)

The majority's reasoning, however, is flawed for three reasons. First, while acknowledging that courts must "give significance to every word, phrase, sentence and part of an act" and "should avoid construction of the wage order or statute that renders any part meaningless, inoperative, or

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[2] The Industrial Welfare Commission (IWC) is the state agency empowered to formulate wage orders governing employment in California. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561.) The Legislature defunded the IWC in 2004, however its wage orders remain in effect. (*Huntington Memorial Hospital*, *supra*, 131 Cal.App.4th at p. 902, fn. 2.)

[3] All Code citations are to the California Labor Code unless otherwise stated.

superfluous," *ibid.* at p. 1246, the majority nevertheless disregarded the Legislature's use of the term of art "regular rate" in both section 226.7(c) and 510(a). As the dissenting opinion[4] explained, "regular rate" is part of the "labor code lexicon" as a "term of art" meaning an employee's hourly rate plus nondiscretionary compensation. (*Ferra*, *supra*, 40 Cal.App.5th at p. 1264 [Edmon, J., dis. opn.].) If the Legislature had meant for meal and rest period premiums to be paid at the base hourly rate, if would have said so instead of using the well-understood term of art "regular rate." The majority is silent on this issue of statutory construction.

Instead, the majority concludes that construing the phrase "regular rate of compensation" to mean the "regular rate" "would render meaningless the Legislature's choice to use 'of compensation' in one statute and 'of pay' in the other." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1247.) But by doing so, the majority renders the term "regular rate" meaningless.

Second, in construing a statute, a court must "choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and *avoiding a construction that would lead to absurd consequences*." (*Smith v. Superior Court*, *supra*, 39 Cal.4th at p. 83 [italics added].) Here, the majority's conclusion that the "regular rate of compensation" means an employee's base hourly rate not only defeats the statute's purpose it will result in absurd consequences.

As this Court made clear in *Murphy v. Kenneth Cole Prods., Inc.* (2007)

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[4] Judge Edmon concurred with the majority that Loews's policy of rounding time to the next quarter-hour is lawful. (*Ferra*, *supra*, 40 Cal.App.5th at p 1255 [Edmon, J., dis. opn.].) Because this Court denied review of the "rounding" decision, Judge Edmon's opinion will be referred to as the dissent.

40 Cal.4th 1094, 1103, 1105, 1110, the Legislature intended the additional hour of pay called called for by section 226.7(c) to compensate them having to work long hours without a meal or rest break, which are considered essential to their health and welfare, and an incentive to employers to comply with California's labor standards. Yet, the majority's ruling leaves the millions of employees—especially low-wage workers—who are not paid a "base hourly wage" but instead in whole or in part by commission, on a piece-rate basis, primarily in tips, by the mile or trips driven, or by delivery or items delivered, with a statutory right but no remedy.

Moreover, whereas an employee's base hourly is static, the regular rate can vary from week to week, depending on the nonhourly compensation an employee receives. The components of the regular rate also include additional hourly compensation, such as shift differentials that are paid to employees working nights, holidays, or Sundays. Thus, the regular rate reflects an employee's *actual* hourly pay.

And the majority's construction of the statute would not only deprive employees earning nonhourly compensation of any remedy for the loss of their statutory right to meal and rest periods, it would result in "one additional hour of pay" that is less than the actual hourly pay of employees paid additional hourly compensation.

Third, the majority improperly superimposing its own policy judgment in coming to a final conclusion,—which courts are cautioned never to do. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587.) According to the majority, "equating 'regular rate of pay' and 'regular rate of compensation' would elide the difference between requiring an employer to pay overtime for . . . *extra work*, and requiring an employer to pay a premium for . . . the *loss of a benefit*." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1252 [italics added].) Neither

relevant case law nor section 226.7(c)'s legislative history supports the majority's assertion. Besides, there would still be a difference between the amount paid in overtime wages and the amount paid in break premiums because overtime wages are paid at one and one-half or two times the regular rate, while break premiums are paid at the regular rate. Moreover, many employees are paid only a base hourly wage. Therefore, their base hourly rate would be their regular rate.

Similarly, by claiming that paying employees a full extra hour of pay at the base hourly rate for working through a 30-minute meal period or a 10-minute rest break sufficiently "favors the protection of employees," the majority shows a contempt for California's long-standing canon of statutory construction that given that legislative enactments governing "working conditions are intended for employees' protection and benefit, they are to be broadly construed "with an eye to promoting such protection." (*Brinker Rest. Group v. Superior Court* (2012) 53 Cal.4th 1008, 1026-1027 [citation omitted].)

LEGAL ARGUMENT

I. The Majority Improperly Rendered the Term of Art, Regular Rate, in Section 226.7(c) Meaningless Surplusage

In statutory construction cases, the court's "fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1255 [Edmon, J. dis. opn., citing *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272].) The court "must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" (*Id.* at p. 1246 [quoting *Murphy, supra,* 40 Cal.4th at p. 1103].) In addition, a court "must give significance to every word, phrase, sentence and part of an act . . .[and] should avoid construction of the wage order or statute that renders any part meaningless, inoperative,

or superfluous." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1246 [citations and internal quotations omitted].) Here, the majority's construction of section 226.7(c) rendered the term "regular rate" meaningless surplusage.

Section 226.7(c) requires employers who fail to provide an employee with a legally compliant meal or rest (or recovery) period to pay the employee "one additional hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest or recovery is not provided." (Cal. Lab. Code section 226.7, subd.(c) [Italics added].) Section 510(a) requires employers to compensate an employee who works overtime no less than one and one-half times the employee's "regular rate of pay" and an employee who works double overtime no less than twice the employee's "regular rate of pay." (Cal. Lab. Code section § 510, subd. (a) [italics added].)

As the Presiding Judge Edmon explained in his dissenting opinion, the term "regular rate" has long been part of the "labor code lexicon" and has evolved into a "term of art" meaning an employee's base hourly rate plus all nondiscretionary compensation. (*Ferra*, *supra*, 40 Cal.App.5th at p. 1264 [Edmon, J., dis. opn.].) Indeed, both federal and California law define "regular rate" to mean "*all remuneration* for employment paid to, or on behalf of, the employee, subject to certain exceptions not relevant here." (*Id.* at p. 1258 [citing 29 U.S.C. § 207 (subds. (a)(1),(e)].) Thus, "'[t]he regular rate by its very nature must reflect *all payments* which the parties have agreed shall be received regularly during the workweek, exclusive of overtime.'" (*Ibid.* [italics in original; quoting *Walling* v. *Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424].)

"'[W]hen the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware of the ramifications of its choice of language.'" (*People v. Gonzales* (2017) 2 Cal.5th 858, 871 ("*Gonzalez*")

[quoting *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850, fn. 3].) Indeed, it is a "cardinal rule of statutory construction" that, when the Legislature employs a term of art, "'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'" (*F.A.A. v. Cooper* (2012) 566 U.S. 284, 292 [citing *Molzof v. United States* (1992) 502 U.S. 301, 307 [quoting *Morissette v. United States* (1952) 342 U.S. 246, 263]]).)

But despite the Legislature's use of the term of art "regular rate," which like all terms of art has "a specific, precise meaning in a given specialty," *Gonzalez, supra*, 2 Cal.5th at 871, the majority completely disregarded it. In fact, the majority failed to give any significance at all to the Legislature's decision to use this term of art in both section 226.7(c) and section 510(a). Instead, the majority viewed the issue to be whether the phrase "regular rate of compensation" is synonymous with the phrase "regular rate of pay" and concluded that construing both as meaning the same as the "regular rate" "would render meaningless the Legislature's choice to use 'of compensation' in one statute and 'of pay' in the other." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1247.) But by doing so, the majority rendered the term "regular rate" meaningless surplusage.

The absurdity of ascribing no significance whatsoever to the Legislature's use of a term of art in section 226.7(c) is self-evident. Indeed, given the definition of "regular rate," it makes no sense to conclude that "regular rate of compensation" means an employee's base hourly rate, simply because the Legislature added the modifier "of compensation." This is especially true because, as Presiding Judge Edmon pointed out, California authorities have concluded consistently that "regular rate" and "regular rate of pay" "are synonymous," despite the addition of the modifier "of pay." (*Id.* at

p. 1260 [Edmon, J., dis. opn.]; see also *Huntington Mem. Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902 [in light of the Industrial Welfare Commission's failure to define "regular rate," California will adhere to the standards adopted by the United States Department of Labor to the extent consistent with California law].) Indeed, this Court explicitly concluded that the "regular rate of pay," like the "regular rate," "includes adjustments to the straight time rate [i.e., the base hourly wage], reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation employee has earned." (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 554.)

Common sense leads one to ask if the Legislature had meant for meal and rest period premiums to be paid at the base hourly rate, why did it use the term of art the "regular rate" instead of "base hourly rate" in section 226.7(c). The majority offers no answer to this statutory conundrum.

II. The Majority's Conclusion That "Regular Rate of Compensation" Means the Base Hourly Rate Defeats the Statute's Purpose and Will Lead to Absurd Results

In construing a statute, a court must "choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and *avoiding a construction that would lead to absurd consequences*." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 [italics added].) Here, the majority's conclusion that the "regular rate of compensation" means an employee's base hourly rate not only defeats the statute's purpose, but it will also produce absurd results.

As this Court made clear in *Murphy*, *supra*, 40 Cal.4th at 1103, 1105, 1110, the Legislature intended the "additional hour of pay" called for in section 226.7(c) to serve two overarching purposes: to compensate employees for the loss of their statutory right to a legally compliant meal or rest period,

which the Legislature deemed essential to their health and welfare,[5] and as an incentive to employers to comply with California's labor standards.

Yet, the majority's ruling leaves millions of employees—especially low-wage workers whose pay is often derived from nonhourly compensation—with a statutory right but no remedy—and their employers with no incentive to comply with California's labor standards. That is because millions of employees are not paid a base hourly rate. Instead, they are paid on a piece-rate basis, primarily in tips, by the mile or trips driven, by delivery or items delivered, or in whole or in part by commission. Such compensation can

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[5] As delineated by this Court in *Murphy*, *supra*, 40 Cal.4th at p. 1113:

> "Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor. (See, e.g., Tucker et al., *Rest Breaks and Accident Risk* (Feb. 22, 2003) The Lancet, p. 680; Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers* (2001) 44 pt. 2 Ergonomics, pp. 164–174; Kenner, *Working Time, Jaeger and the Seven–Year Itch* (2004/2005) 11 Colum. J. Eur. L. 53, 55.) Indeed, health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt mandatory meal and rest periods in the first place. (*Cal. Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal.App.3d 95, 114–115). Additionally, being forced to forgo rest and meal periods . . . denies employees time free from employer control that is often needed to be able to accomplish important personal tasks. *Morillion. supra,* 22 Cal.4th at p. 586.
>
> While it may be difficult to assign a value to these noneconomic injuries (see *California State Council of Carpenters v. Superior Court* (1970) 11 Cal.App.3d 144, 162), the Legislature has selected an amount of compensation it deems appropriate."

That amount is "one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest [or recovery] period is not provided.

frequently change by the hour, week, and month.[6]

Unlike the majority's construction of section 226.7(c)'s remedy as an employee's static, base hourly rate, an employee's regular rate can vary from week to week, depending on the nonhourly compensation an employee receives. The regular rate can also account for additional hourly compensation such as shift differentials that are paid to employees working undesirable night, holiday, or Sunday shifts. Thus, the regular rate reflects an employee's actual hourly pay. As Appellant stated in her Opening Brief on the Merits:

> "The genius of the IWC and the Legislature's embrace of [the] 'regular rate' in Labor Code section 226.7, if properly construed, is that, in addition to devising a break violation remedy applicable to employees paid by the hour, it provides a remedy, on account of the 'all remuneration' aspect of 'regular rate,' for employees whose compensation schemes do not include base hourly rates."

(Appellant's Op. Br. at pp. 74-75.)

The majority's absurd construction of section 226.7(c) would not only deprive employees who are not paid on an hourly basis any remedy for meal and rest period violations, it would also result in remedial compensation that is less than an employee's actual hourly pay for those who are paid compensation in addition to their base hourly wage. Put simply, the majority's absurd construction leads to a compensation scheme that cannot

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[6] (See, e.g., *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98 [commissioned based employees]; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864 [drivers paid not by the hour but by activity]; *Gonzalez v. Downtown LA Motors, LLP* (2013) 215 Cal.App.4th 36 [piece workers]; and *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 [deliveries or number of items delivered].)

rationally be read as providing the remedy the Legislature intended for all employees who are denied their statutory right to legally compliant meal and rest periods and therefore must be reversed.

III. The Majority Improperly Superimposes Its Own Policy Judgments on Its Construction of Section 226.7(c)

This Court has long emphasized that a court should not "superimpose its own policy judgment" in construing statutes governing work conditions. (*Morillion, supra,* 22 Cal.4th at p. 587 [citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702].) Nevertheless, that is precisely what the majority did in concluding its analysis of the meaning of the phrase "regular rate of compensation." According to the majority, "equating 'regular rate of pay' and 'regular rate of compensation' would elide the difference between requiring an employer to pay overtime for . . . *extra work*, and requiring an employer to pay a premium for . . . the *loss of a benefit*." (*Ferra*, *supra*, 40 Cal.App.5th at p. 1252 [italics added].) But nothing in relevant case law nor in the legislative history of section 226.7(c) even remotely suggests that premium wages for overtime should be paid at a higher rate than premium wages for meal and/or rest period violations; nor does the relevant case law and legislative history ascribe more value to performing extra work as compared to the loss of a statutory benefit intended for the protection of employees. Besides, paying both overtime wages and break premium wages at the regular rate would not "elide" the purported difference to which the majority alludes between requiring an employer to pay overtime premium wages versus break premium wages because overtime is paid at one and one-half or two times the regular rate, while break premiums are paid at the regular rate.

Moreover, many employees are paid only a base hourly wage. Therefore, their base hourly rate would be their regular rate. Under the

majority's reasoning, concluding that section 226.7(c)'s remedy is to be paid at the same rate as the regular rate would be unacceptable as it would "elide" the purported difference between working overtime and working more than five hours without a meal break, or working for free during a 10-minute rest break. Rather than elide the elusive differences between overtime work and long hours of work without a break, the majority's logic eludes reason.

Similarly, the majority's assertion that requiring employers to compensate employees with a full extra hour at their base hourly rate for working through a 30-minute meal period or a 10-minute rest break sufficiently "favors the protection of employees" betrays a contempt for California's long-standing tenant of statutory construction, that, given their remedial nature, legislative enactments governing "working conditions for the protection and benefit of employees are to be liberally construed with an eye to promoting such protection." (*Brinker, supra,* 53 Cal.4th at pp. 1026-1027 [citation omitted].)

IV. **Conclusion**

Defining "regular rate of compensation" as the base hourly rate instead of the "regular rate"—which is a long-standing term of art—render that term meaningless. It will also deprive employees who are not paid hourly compensation of any remedy for meal and rest period violations. And it will result in employees who are paid hourly compensation in addition to their base hourly rate less than their actual hourly wages. Finally, the majority improperly superimposes its own policy judgment on its construction of the statute; it asserts an additional hour of pay at the base hourly rate provides sufficient protection to employees. For these reasons, Amici supports Appellant's request that this Court reverse the majority's decision.

Dated: September 30, 2020

Respectfully submitted,

Capstone Law APC

By: ***/s/ Melissa Grant***

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed Proposed Amicus Brief, not including the Application for Leave to File Brief of Amici Curiae, was produced using 13-point Century Schoolbook type style and contains 3,343 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: September 30, 2020

Respectfully submitted,

Capstone Law APC

By: ***/s/ Melissa Grant***
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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Maria Olmos	***/ S / Maria Olmos***
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S259172**
Lower Court Case Number: **B283218**

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/30/2020

Date

/s/Maria Olmos

Signature

Grant, Melissa (205633)

Last Name, First Name (PNum)

Capstone Law APC

Law Firm