No. S170577

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DONALD SULLIVAN, DEANNA EVICH, and RICHARD BURKOW, individually, and on behalf of other persons similarly situated and the general public,

Petitioners,

vs.

ORACLE CORPORATION, a Delaware Corporation, ORACLE UNIVERSITY, form unknown, and DOES 1 through 10, inclusive,

Respondents.

U.S. Court of Appeals for the Ninth Circuit
No. 06-56649
U.S. District Court, Central District of California
Hon. Alicemarie H. Stotler, Judge
No. CV-05-00392-AHS

ANSWER BRIEF ON THE MERITS OF RESPONDENT ORACLE CORPORATION

PAUL, HASTINGS, JANOFSKY & WALKER LLP
PAUL W. CANE, JR. (SB# 100458)
paulcane@paulhastings.com
STEPHEN L. BERRY (SB# 101576)
stephenberry@paulhastings.com
55 Second Street, 24th Floor
San Francisco, California 94105-3441
Telephone: 415) 856-7000
Facsimile: (415) 856-7100

Attorneys for Respondent
ORACLE CORPORATION

No. S170577

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

DONALD SULLIVAN, DEANNA EVICH, and RICHARD BURKOW, individually, and on behalf of other persons similarly situated and the general public,

Petitioners,

vs.

ORACLE CORPORATION, a Delaware Corporation, ORACLE UNIVERSITY, form unknown, and DOES 1 through 10, inclusive,

Respondents.

U.S. Court of Appeals for the Ninth Circuit
No. 06-56649
U.S. District Court, Central District of California
Hon. Alicemarie H. Stotler, Judge
No. CV-05-00392-AHS

ANSWER BRIEF ON THE MERITS OF RESPONDENT ORACLE CORPORATION

PAUL, HASTINGS, JANOFSKY & WALKER LLP
PAUL W. CANE, JR. (SB# 100458)
paulcane@paulhastings.com
STEPHEN L. BERRY (SB# 101576)
stephenberry@paulhastings.com
55 Second Street, 24th Floor
San Francisco, California 94105-3441
Telephone: 415) 856-7000
Facsimile: (415) 856-7100

Attorneys for Respondent
ORACLE CORPORATION

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

I. INTRODUCTION

This case presents the question this Court reserved in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996): whether California's wage-and-hour laws cover business travelers, who live and primarily work out of state, when they visit California. In *Tidewater*, this Court noted that "the Legislature may not have intended IWC wage orders to govern . . . nonresidents, though the nonresident employees enter California temporarily." *Id.* at 578. The Court continued: "[W]e are not prepared, without more thorough briefing of the issues, to hold that IWC wage orders apply to *all* employment in California . . . ." *Id.* at 578 (emphasis in original).

The U.S. Court of Appeals for the Ninth Circuit now has certified that question to this Court. Three Oracle Corporation employees, who live and principally work outside of California, here invoke California wage-hour law for time spent in California on business trips of as little as a single day. The U.S. District Court for the Central District of California (Stotler, J.) granted Oracle summary judgment. The court that held that business travelers are subject to the wage-hour law of the state in which they are *based*; the applicable law does not vary when temporary business travel occurs.

This Court should hold that Judge Stotler was right. Indeed, that result follows directly from the logic of *Tidewater*. It held that California wage-hour law follows Californians on their business travel outside the state. *Id.* ("If an employee resides in

California, receives pay in California, and works exclusively, *or principally*, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of [California law].") (citation omitted; emphasis added). The rule should work both ways. If California wage-hour law follows Californians when they leave the state temporarily to work, comity requires the wage-hour law of other states to follow persons based elsewhere when they temporarily enter California. Any other rule would create enormous practical difficulties that the Legislature could not possibly have intended, as Oracle demonstrates below.

II. QUESTIONS PRESENTED

1. Whether California wage-hour law applies to business travelers who temporarily visit the state, for as little as a single day.

2. Whether California's Unfair Competition Law, California Business and Professions Code section 17200 *et seq.* ("UCL") requires the application of California wage-hour law to the same business travelers.

3. Whether the UCL provides a remedy for alleged Fair Labor Standards Act violations involving employees based outside of California for work done outside of California.

III. STATEMENT OF THE CASE

A. Overview.

Defendant and respondent Oracle Corporation hired Plaintiffs Donald Sullivan, Deanna Evich and Richard Burkow as instructors in a program known as "Oracle University." Most of Plaintiffs' work was performed in the state in which each resided (Colorado, for Sullivan and Evich; Arizona, for Burkow). At times Plaintiffs also traveled to perform their duties in other states around the country, including California. No Plaintiff, however, worked more than a small fraction of the time in California.

Plaintiffs thus were hired in other states, worked primarily in other states, and paid taxes in the state in which each was based. Plaintiffs nevertheless contend in this lawsuit that they and others are eligible for overtime compensation, under California's unique wage-hour laws, for business trips in which they worked in California for as little as a single day.

B. Course Of Proceedings.

This is the second of two related wage-hour lawsuits. The first case, *Gabel and Sullivan, et al. v. Oracle Corp.*, No. SACV 03-348 AHS (MLGx) (C.D. Cal.) ("*Sullivan I*"), was a purported nationwide class alleging that Oracle had misclassified instructors at Oracle University as exempt from overtime under the FLSA and the

California Labor Code. The parties settled *Sullivan I* in part. Oracle refused, however, to settle claims made under California law (the Labor Code and the UCL) by non-California residents for time spent in California on business travel. (SER 1-8.)

Plaintiffs then filed this case, *Sullivan II*, principally re-alleging the claims carved out of the *Sullivan I* settlement. The Second Amended Complaint alleged three causes of action: (i) for overtime pay and penalties under various California Labor Code provisions for work performed by instructors on their occasional business trips to California;[1] (ii) for violation of the UCL based on the same Labor Code provisions that allegedly support the first cause of action; and (iii) for violation of the UCL, seeking overtime pay under the FLSA, for work performed outside California by persons resident in states other than California. (ER 1-35.)

Plaintiffs and Oracle filed cross-motions for summary judgment on June 19, 2006. (ER 66-77.)[2] On October 18, 2006, Judge Stotler granted Oracle's motion. (ER 78-79.) The court held that the state wage-hour law applicable to each Plaintiff's employment

---

[1] The provisions at issue include California Labor Code sections 201, 202, 203, 216, 225.5, 226, 510 and/or 1198.

[2] The parties stipulated to have the summary judgment motions heard before considering the issue of class certification. *See, e.g., Wright v. Schock*, 742 F.2d 541, 545-46 (9th Cir. 1984) ("[W]here considerations of fairness and economy dictate . . . , and where the defendant consents to the procedure, it is within the discretion of the district court to decide the motion for summary judgment first.").

relationship is the law of the state in which each was based, and that the applicable law does not change with the vagaries of business travel. Specifically, the court held that employees "who travel on business to California from other states are governed by the state law where they principally work . . . [and] the Labor Code provisions do not apply to Plaintiffs and the class they seek to represent." (ER 88.) Thus, Plaintiffs' first and second causes of action failed. The court also rejected the third cause of action because plaintiffs "failed to overcome the presumption against nationwide application of § 17200." (ER 92.)

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. That court first rendered an opinion on November 6, 2008, reversing the summary judgment on the first and second causes of action but affirming summary judgment on the third. 547 F.3d 1177 (9th Cir. 2008). Both sides timely petitioned for rehearing, with several *amici curiae* supporting Oracle's petition. The panel on February 17, 2009, vacated its opinion and certified to this Court the three questions presented. 557 F.3d 979 (9th Cir. 2009), *citing* CAL. R. CT. 8.548(a).

This Court accepted the certification on April 22, 2009.

C. Statement Of Facts.

The facts are stipulated.

1. Sullivan lived and worked primarily outside of California.

Sullivan worked for Oracle from 1998 to January 2004. (ER 71.) He lived in Colorado the entire time and worked primarily in Colorado. (ER 71.) He traveled for business periodically, sometimes to California, other times to Florida, Georgia, Illinois, Maryland, Massachusetts, Oregon, Texas, Utah, Virginia, and Washington. (ER 71-73.)

In 2001, for example, Sullivan worked in Colorado at least 150 days. (ER 71.) He worked 32 days that year in California. (ER 71.) In 2002, Sullivan was in California for 12 days, but he again worked at least 150 days in Colorado. (ER 72.) In 2003, Sullivan worked in California for 30 days, but he spent at least 150 days working in Colorado. (ER 72.)

The district court correctly summarized the facts: "During the . . . time period relevant to this action, Sullivan worked at least 450 days in his home state of Colorado. At least 91 days were spent in 11 other states . . . [, and] 74 days were spent in California." (ER 81.)

Sullivan never paid California state income tax on any of his Oracle income. (ER 73.)

2. Evich lived and worked primarily outside of California.

Evich received her Oracle job offer in Colorado in 1999. (ER 73.) During the more than four years she worked for Oracle, she lived in Colorado and worked primarily there. (ER 73.)

Evich, like Sullivan, sometimes traveled to other states, including California, as part of her duties. (ER 73-74.) In 2000, she did not work in California at all. (ER 73.) In 2001, she traveled to California on 33 days, but she worked at least 150 days in her home state, Colorado. (ER 73.) In 2002, Evich worked in California on 11 days, and in Colorado on 30 days. (*Id.*) In 2003, Evich did not work in California at all. (*Id.*) In 2004, Evich worked 36 days in California, but she worked at least 100 days in Colorado. (ER 73.) Throughout this period, Evich also worked in Illinois, Michigan, Minnesota, Texas, Virginia, and Washington. (ER 73-74.)

The district court concluded that, overall, Evich "[w]orked at least 310 days in her home state of Colorado [and] traveled on business to California on 80 days." (ER 82.)

Evich never paid California state income tax on any of her Oracle income. (ER 74.)

3. Burkow lived and worked primarily outside of California.

Burkow worked for Oracle from 1998 until 2002. (ER 74.) He lived in Arizona and worked primarily there. (ER 74-75.)

Burkow, like the others, traveled extensively. In 2001, Burkow worked in California on 15 days. (ER 74.) That year, he also worked in Illinois for 25 days, and he worked in Texas on at least 23 days. (ER 74.) He worked at least 100 days in his home state, Arizona. (ER 74.) The following year, 2002, Burkow worked in California on five days. (ER 74.) That year, he also worked in Illinois, Indiana, Kansas, Minnesota, New Mexico, Ohio, and Oklahoma. (ER 74, 75.)

The district court concluded that Burkow "[w]orked at least 160 days in his home state of Arizona [and] worked at least 30 days in Illinois and 23 days in Texas [as well as] 13 other states . . . . He worked 20 days in California." (ER 83.)

Burkow, like the other Plaintiffs, paid no California state income tax on any of his Oracle income. (ER 75.)

IV. SUMMARY OF ARGUMENT

California wage-hour law does not cover Plaintiffs' employment. Plaintiffs are not California residents; they were based

and primarily worked in other states. Plaintiffs' contention that California law governs their claims ignores the interests their own home states have in the employment relationships. Choice-of-law principles show that California has minimal, if any, interest in regulating the wages of business travelers. Indeed, California has a substantial interest in *not* doing so, because the costs and complexities that would result from doing so would chill interstate travel that benefits the state. The California Legislature never intended to set (and should not be presumed to have set) the wage-hour rules for nonresident business travelers, and for good reason: It would wreak havoc on the payroll systems of employers as they struggled to comply with a crazy-quilt of conflicting state laws. Moreover, constitutional limits — the Commerce Clause — prohibit the extension of California state law to Plaintiffs. The Court should construe California law to avoid that serious constitutional question.

The UCL adds nothing to Plaintiffs' claims. If the overtime provisions of the Labor Code do not apply to business travelers who cross state lines, a claim under the UCL that incorporates by reference the same Labor Code provisions does not, either.

Plaintiffs' final claim, seeking recovery under the UCL for supposed FLSA violations occurring outside of California, also fails. The UCL does not apply extraterritorially. Plaintiffs contend that California law applies because Oracle is headquartered in California, and classified instructors as exempt employees "primarily"

in California. Plaintiffs are incorrect. An FLSA violation (if there was one) occurred where the supposedly misclassified employees actually worked and received their wages — which is outside of California.

V. THE COURT SHOULD ANSWER "NO" TO THE THREE CERTIFIED QUESTIONS

The California Labor Code and the UCL do not govern the employment relationships of nonresident business travelers briefly entering the state. The UCL also does not provide an extraterritorial California-law remedy for alleged FLSA violations occurring out of state. Oracle addresses the three certified questions in Sections A, B, and C, respectively.

A. The California Labor Code's Overtime Rules Do Not, And Constitutionally Cannot, Apply To Nonresidents Who Work Primarily In Other States.

Plaintiffs' claims rest on statutes that simply do not apply to them. The California Labor Code is intended to protect California-based employees, not any business traveler who happens temporarily to cross state lines.

1. The logic of *Tidewater* forecloses Plaintiffs' claims.

Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557 (1996), considered wage-hour claims of California residents who left California to work. The case involved persons who performed services offshore. California (as *Tidewater* holds) has an interest in regulating employment relationships that are *based* in California. The employees contended that they should be paid under California law, and this Court agreed: "If an employee resides in California, receives pay in California, and works exclusively, *or principally*, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of [California law]," no matter where the services at issue are actually performed. *Id.* at 578 (citation omitted; emphasis added); *see also* California Division of Labor Standards Enforcement, ENFORCEMENT POLICY & INTERPRETIVE MANUAL § 43.6.12 (2002) (California wage-hour law covers "individuals who are domiciled in California but who work partly or, under some circumstances, even principally, outside the state.") (citing *Tidewater*) [hereinafter "DLSE MANUAL"].

The Ninth Circuit earlier reached the same conclusion in another case involving California law. *Pac. Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1424-25 (9th Cir. 1990) (because plaintiffs were California residents, were interviewed and hired in California, paid taxes in California, and performed work important to California,

California law followed them and governed their work outside California's borders).[3]

The now-vacated Ninth Circuit panel opinion acknowledged that, under *Tidewater*, "California residents working outside California [a]re covered by the [California] Labor Code." 547 F.3d at 1183 (emphasis deleted). But the panel did not explain why, if California law follows Californians who work temporarily elsewhere, the rule should not work both ways, with the law of other states governing their own citizens' business travel. Plaintiffs' brief in this Court makes only passing mention of *Tidewater* (Op. Br. at 10), and the reason is plain. Plaintiffs' position would produce a rule that California law trumps all other states' law in all cases, whether the business travelers are nonresidents entering our state or Californians leaving it. That rule cannot be reconciled with an appropriate "concern with comity," *United Bldg. & Constr. Trades Council v. Mayor & City Council of Camden*, 465 U.S. 208, 220 (1984) (emphasizing the importance of "interstate harmony").

---

[3] Here, by contrast, none of the Plaintiffs paid California state income tax. Rather, each Plaintiff paid income tax solely in the state in which he or she was principally based. Plaintiffs' lawsuit therefore seeks the benefits of California law (eligibility for overtime compensation, under California's unique wage-hour laws, for days in which they worked in California) without accepting the corresponding burden (the obligation to pay California state income tax on the resulting earnings).

The Washington Supreme Court recently considered just this problem. In *Bostain v. Food Express, Inc.*, 153 P.3d 846 (Wash.), *cert. denied*, 128 S. Ct. 661 (2007), at issue was which state's law covered interstate truck drivers. The drivers were Washington-based, but their duties took them on the road for substantial periods of time. The relevant Washington statute covered only "employment within the state of Washington." *Id.* at 851, *citing* RCW 49.46.005. The Washington Supreme Court held, however, that its state law covers employment *relationships* grounded in Washington ("Washington-based employees," *id.* at 855), and that Washington wage-hour law covered the drivers even as they traveled elsewhere. As a result, even though the drivers spent much of their time away from Washington, their "employer would not be required, under a choice of laws analysis, to comply with another state's wage and hour statute as to that employee." *Id.* at 856.

The same rule should apply here.

2. The Restatement of Conflicts contradicts Plaintiffs' position.

The Restatement's rule is that normally only a single state's law governs an employment relationship. "The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, *or a major portion of the services*, be rendered, unless, with

respect to the particular issue, some other state has a more significant relationship . . . ." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 196 cmt. c (1971) (emphasis added). *See also* DLSE Op. Letter of H. Thomas Cadell, Jr. (June 12, 2002) ("Were a conflict to arise and no choice of law intent was evident in the contract between the parties, the question of the correct law to apply would depend, of course, on which state (foreign or domestic) has the greater interest in the outcome of the matter. *In large part, the residence of the parties would be determinative.*") (emphasis added).

Plaintiffs' argument largely rests on a *reductio-ad-absurdum* contention: that, if business travelers are not covered by California's *wage-hour* laws, they enter California protected by *no law at all* — not traffic laws, not antismoking rules, not workplace safety codes. (*See* Op. Br. at 17: "[N]o state would have jurisdiction to enforce its laws to ensure safe working conditions . . . . [The employee would be immune from] virtually any law . . . free from any oversight.") That is incorrect. Wage-hour law regulates a relationship, an *intangible*. *E.g.*, *Kramer v. Nowak*, 908 F. Supp. 1281, 1285 (E.D. Pa. 1995) (Pollak, J.) (applying New Jersey law, even though some of the work was done in Pennsylvania and New York; because the bulk of the work was done in New Jersey, it follows that "New Jersey has a strong interest in having its law *govern a relationship* such as this one that was centered *primarily* in New Jersey") (emphasis added). By contrast, workplace safety regulations, speed limits, and other such regulations concern a *place*, which (if the

place is in California) the state has ample authority to regulate, regardless of who occupies or uses it.

3. This Court should not assume that the Legislature, by its silence, intended to create a rule that would cause practical problems.

Because the Legislature has not addressed the issue specifically,[4] the Court in construing the law should take into account the (im)practical consequences of the regime that Plaintiffs espouse. *E.g.*, *Wasatch Prop. Mgmt. v. Degrate*, 35 Cal. 4th 1111, 1122 (2005) (in applying California law, "The court will apply common sense to the language at hand and interpret the statute to make it workable and

---

[4] Plaintiffs contend that the Legislature *did* address the issue specifically, by defining "employee" to mean "every person, including aliens," in Labor Code section 350(b). (Op. Br. at 9.) That definition, however, applies only to "this article" of the Labor Code, *id.* § 350, which deals solely with employees' receipt of gratuities. If anything, the Legislature's failure similarly to define "employee" elsewhere in the Labor Code suggests an intention not to define covered "employees" so broadly for other purposes. The scope of coverage of the wage-hour law for other purposes is that expressed in *Tidewater*: A "'wage earner of California' [who] presumptively enjoys the protection of [California law]" is someone who "resides in California, receives pay in California, and works exclusively, or principally, in California." 14 Cal. 4th at 578. The other case Plaintiffs cite on this point (Op. Br. at 8), *DeCanas v. Bica*, 424 U.S. 351 (1976), holds only that states have the police power to regulate employment within their borders. That case does not hold that states must, should — or that California here did — attempt to impose its wage-hour law on nonresidents who enter the state briefly on business travel.

reasonable.") (citation omitted). As the Ninth Circuit recognized in a recent FLSA case, practicality and administrative ease *matter*, especially in wage-hour cases. If a proposed rule of law would "creat[e] a significant administrative burden," then the proposed rule likely is one that the legislature could not have intended. *In re Farmers Ins. Exch. Overtime Pay Litig.*, 481 F.3d 1119, 1132 (9th Cir. 2007), *citing Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 457 (4th Cir. 2003).

Applying the Labor Code's overtime rules to these Plaintiffs would create a morass of practical problems. Plaintiffs assert that the rule they propose creates "no new additional burden . . . . No new software needs to be written. No new accounting principles have to be put in place." (Op. Br. at 20.) That is simply false. This case involves overtime compensation for allegedly nonexempt workers. The computation of pay and generation of paychecks by its nature involves software and accounting issues. What is the regular work week? How many hours were worked? On what days? What is the regular rate of pay? Is overtime owed? On which hours? At what rate?

And there is much more to wage-hour law than that. Plaintiffs here would avoid discussing the issue, but if pressed they surely will contend that, if California's overtime rules apply to business travelers, it logically follows that other aspects of California wage-hour law must apply as well, including:

Exempt status. A threshold question is whether a worker is exempt (salaried) or nonexempt (hourly paid). California has unique tests for determining exempt status. *E.g.*, *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 801 (1999) ("recogniz[ing] California's distinctive quantitative approach to determining [exempt status]," which differs from that prevailing elsewhere). An employee can be properly classified as exempt for FLSA and other-states' law purposes, even while nonexempt for California state-law purposes. *Compare Bell v. Farmers Ins. Exch.*, 87 Cal. App. 4th 805, 810-29 (2001) (insurance claims adjusters are nonexempt, entitled to overtime under California law) *with In re Farmers Ins. Exch. Overtime Pay Litig.*, 481 F.3d 1119, 1129-32 (9th Cir. 2007) (the same insurance adjusters, working in seven other states, are properly classified as exempt). Other examples of jobs that generally are exempt elsewhere, but often are nonexempt in California, include lower-level supervisors, nurses, pharmacists, and some outside salespersons.

If California's wage-hour laws apply to persons working in California on business travel, then some individuals will be properly classified as exempt for the part of the week they work elsewhere, but they must be reclassified as *non*exempt for the part of the week they work in California. That is a contradiction in terms. How does the employer pay a salary — which by its nature covers all hours worked for the week — for a period less than a week? And since *bona fide* exempt status requires the employee to be paid on a salary basis for all hours worked for the week, without regard to the quantity of work performed, 29 C.F.R. § 541.602(a), requiring hourly

pay for the day(s) of work in California would destroy the exemption for the rest of the week as well, *see id.* § 541.603(a) — including that portion worked in the individual's home state.

The logistical implications, including the computation and preparation of paychecks, are immense. As one *amicus*, suggesting rehearing *en banc* in the Ninth Circuit, noted:

> Consider a national insurance company, now taking action to help policyholders victimized by the recent California wildfires. To provide emergency customer service following these natural disasters, the insurer redeploys to California extra claims adjusters, persons normally based in other states. . . .
>
> Consider an Oregon-based adjuster. He is properly classified as exempt and paid a salary. Then he is given a special assignment: to spend a week or two working in California during the fires. Under the panel's rule, his exempt status changes when he temporarily lends an emergency hand across state lines. Suppose he worked Monday and Tuesday in Oregon. On Wednesday, the adjuster flies to California and begins work. Under the panel's rule, the adjuster is properly classified as exempt on Monday and Tuesday but becomes nonexempt on Wednesday — even though the adjuster continues to perform exactly the same duties that made him exempt the day before. How is the paycheck prepared for a week in which the individual is partly exempt and partly nonexempt? What state's pay-stub rules apply? Is it reasonable to think that the

> California Legislature intended to create such impediments to interstate business travel benefiting California?

Brief for California Employment Law Council as *Amici Curiae* Supporting Defendant-Appellee at 12, *in Sullivan v. Oracle Corp.*, 557 F.3d 979 (9th Cir. Nov. 24, 2008) (No. 06-56649).

A rule of wage-hour law is "untenable" if it requires periodic reevaluation of an employee's exemption status. *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 457 (4th Cir. 2003). Yet that is the result that Plaintiffs' position produces.[5]

Pay stubs. California's pay-stub rules are the most specific and restrictive in the country; California Labor Code section 226 requires (on pain of significant penalties)[6] that a pay stub show the gross wages earned; the total hours worked by the employee; the number of piece-rate units earned; all deductions; the net wages earned; the inclusive dates of the period for which the employee is

---

[5] Paycheck issues are just the beginning of the complexity and practical difficulty. Many companies give extra benefits to exempt employees: extra vacation, special bonuses and incentive plans, and stock options. Under Plaintiffs' theory, the temporary conversion of an exempt employee to nonexempt status would require the employer somehow to wrench the employee out of these special programs — for periods of as little as a single day.

[6] Labor Code section 226(e) sets per-employee-per-pay-period penalties that can mushroom into huge sums, up to $4,000 *per employee*.

paid; the name of the employee and the last four digits of his or her social security number or an employee identification number; the name and address of the employer; and all applicable hourly rates in effect during the period, with the number of hours worked at each rate. Other states' laws, by contrast, normally go nowhere near that far.[7]

What happens, then, when business travel occurs? Consider a Colorado-based employee who in a particular week works two days in California, and three days at his or her regular office in Colorado. How is the employer to prepare a paycheck? Which hours must be shown? What other information? If California wage-hour law applies, the employer of a Colorado- or Arizona-based employer will have to issue multiple paychecks (and pay stubs) in order to avoid the risk of penalties for noncompliance. If an employee works in several different states, each with its own pay stub law, perhaps three or four different paychecks (and stubs) would have to be generated.

Overtime calculation. Unlike most states, California prohibits what is known as "rate in effect" overtime,[8] prohibits

---

[7] Colorado, for example, requires reporting only the gross wages earned, all withholdings and deductions, the net wages earned, the inclusive dates of the pay period, the name *or* social security of the employee, and the name and address of the employer. *See* COLO. REV. STAT. § 8-4-103(4).

[8] Many employees earn more than one rate of pay each week — for example, because they work different shifts with different premiums, or because they work in two jobs for the same employer. The

(*Continued . . .*)

fluctuating workweek calculations,[9] and requires specialized calculation of the regular rate of pay, the figure that is used as the base for calculating overtime.[10] If California wage-hour law applies to an

---

regulations under the FLSA permit an employer to pay overtime at the rate in effect at the time that the overtime occurs. 29 C.F.R. § 778.415-.421. By contrast, the California Division of Labor Standards Enforcement forbids the rate-in-effect method, requiring employers instead to create an overtime rate which is a weighted average of the rates at which each employee has worked during the week. DLSE MANUAL § 49.2.5.

[9] FLSA regulations permit an employer, under specified circumstances, to pay an employee a fixed salary for all hours worked in one work week and to determine the rate for any overtime hours by dividing the fixed salary by all of the hours worked in the week. As a result, the higher the number of hours worked — 45, 50, 55 or more — the lower the effective overtime rate, because increasing the denominator naturally divides the fixed salary into smaller increments. 29 C.F.R. § 778.114. California prohibits compensation according to the fluctuating workweek method. *Skyline Homes, Inc. v. Dep't of Indus. Relations*, 165 Cal. App. 3d 239, 249-50 (1985), *disapproved on other grounds*, *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996).

[10] Both the FLSA and California law require the payment of overtime as a multiple of the regular rate of pay — a figure that may be higher than an employee's nominally stated rate of (say) $20 per hour — because the regular rate includes all forms of compensation, not just standard hourly wages. Thus, shift premiums, certain bonuses and incentives and many other forms of pay must be included in the regular rate, increasing the nominal rate to a higher figure in weeks to which those payments are attributed. While the federal and California rules for the calculation of the regular rate sometimes overlap, they deviate in significant respects. The DLSE spends an entire chapter of its Manual on these similarities and differences. DLSE MANUAL §§ 49.1-49.2.6.2. The programming complexities of any one set of these rules is enormous, let alone the combination of both sets of rules in the same week for someone on business travel.

employee on business travel in California, here again the employer must engage in a wholly separate analysis and set of computations, involving payroll-computer reprogramming, for the day(s) in which the employee works in California.

Meal periods. California law requires special handling of meal periods — I.W.C. Orders 1-2001–15-2001 § 7(A); I.W.C. Order 16-2001 § 10; I.W.C. Order 17-2001 § 9 — but most other states' law does not. Here again, if California wage-hour law applies to business travelers, the panel's opinion would compel expensive reprogramming of time-recording systems.

Travel time. California has special rules for travel time, unlike those in most other states.[11] Suppose an Arizona-based employee flies from Phoenix to San Francisco on a Monday; that she works in San Francisco on Tuesday and Wednesday; and that she flies home from San Francisco to Phoenix on Thursday. Is the travel time Monday and Thursday recorded using California law or Arizona law? Does the rule of the place of origin control? The place of arrival? The time spent in respective states' airspace? Whatever the answer,

---

[11] Under federal law, the travel time is compensable only to the extent that it falls within normal business hours, or normal business hours on nonbusiness days. Thus, if a 9:00 to 5:00 employee travels to an overnight location by plane after 5:00, under the FLSA he or she is entitled to no travel time compensation. 29 C.F.R. § 785.39. California specifically rejects the federal rule and requires compensation for all travel time from home to the remote destination. DLSE MANUAL §§ 46.3 & 46.3.1.

the certain result is confusion and administrative inconvenience if California law applies to business travelers entering the state.

Other Wage-Hour Laws. The list of differences, and conflicts, between California wage-hour law and the wage-hour law of other states consumes hundreds of pages. There are special California rules regarding reporting time pay, I.W.C. Orders 1-2001 – 16-2001 § 5(A); call-back pay, *id.* § 5(B); pay timing for current employees, CAL. LAB. CODE § 204; pay timing for those who quit, *id.* § 202; pay timing for those who are discharged, *id.* § 201; direct deposit of wages, *id.* § 212; pay deductions, *id.* §§ 221 & 224; vacation pay accrual and forfeiture, *id.* § 227.3; *see Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 783-84 (1982); meal periods, CAL. LAB. CODE § 512; rest periods, I.W.C. Wage Orders 1-2001–15-2001 § 12; I.W.C. Order 16-2001 § 11, and so on.

Plaintiffs' position thus fails to heed the Ninth Circuit's teaching just last year, in *In re Farmers Insurance Exchange Overtime Pay Litigation*, 481 F.3d 1119 (9th Cir. 2007). In that case the court explained that courts disfavor wage-hour rules that are "simply unworkable in practice." *Id.* at 1132. A rule flunks the test of workability, the court explained, if "from pay period to pay period, an [employee's] status could change from exempt to nonexempt, even though his core duties stayed the same." *Id.* (emphasis deleted). A legislature should not be presumed to have intended to create wage-hour laws that would "creat[e] a significant administrative burden."

Id. Yet the Plaintiffs' theory here would impose just that burden and ignores the importance of workability.[12]

4. The rule announced in the now-vacated opinion sharply departs from accepted practice.

Oracle is unaware (and undersigned counsel are unaware) of *any* business, *anywhere*, that computes employee pay and issues paychecks in the manner Plaintiffs' theory would require. The uniform practice is that (i) the state law applicable to an employment relationship is the law of the state in which the employee principally works, and (ii) the state law governing that relationship does not change as an employee travels from state to state or performs short temporary assignments away from home.

That is relevant because, on choice-of-law questions, "'the justifiable expectations of the parties'" matter. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 837 (1985) (citation omitted). Plaintiffs' theory departs from uniformly accepted practice. The

---

[12] Plaintiffs concede that California law should not apply to business travelers who work less than a full day in the state. (Op. Br. at 10.) That concession fails to solve the practical problems identified above, and it also cannot be reconciled with Plaintiffs' contention that California's police power inexorably attaches the moment a business traveler crosses state lines. If, as Plaintiffs contend, "California's [wage-hour] laws apply within California's borders" (Op. Br. at 8), then it should not matter whether a business traveler spends three days, three hours, or three minutes inside California's state lines.

change would upset settled expectations and created massive (and needless) complexity, for any business that sends employees on temporary assignments of as little as a single day.[13]

---

[13] After the Ninth Circuit panel's original decision, dozens of major law firms immediately issued emergency alerts to their clientele. For example:

Morgan, Lewis & Bockius:

> "[*Sullivan* is] a case with potentially far-reaching implications for California and non-California employers alike . . . . Unless the Ninth Circuit's decision is reversed or limited, employers throughout the nation will need to [drastically change their practices] whenever their employees work inside California's boundaries."

http://www.morganlewis.com/pubs/LEPG_LF_CANonresidentLaborCode_12nov08.pdf (last visited Dec. 10, 2008).

Proskauer Rose:

> "*Sullivan* potentially has enormous ramifications for employers with employees who travel to and work in California. . . . If followed (even modestly) to its logical conclusion, *Sullivan* will have enormous consequences for companies whose employees perform *any* work in California."

http://www.proskauer.com/news_publications/client_alerts/content/2008_11_12/_res/id=sa_PDF/17144-111208-Ninth%20Circuit%20Extends%20Reach%20of%20the%20California%20Labor%20Code.pdf (last visited Dec. 10, 2008) (emphasis in original).

K&L Gates:

> "The price tag on conferences and business trips in California just went up. . . . [W]hile a business trip to California may sound like a nice perk for the employee, it may turn out to be a much more expensive trip for the employer than originally planned."

http://www.klgates.com/newsstand/Detail.aspx?publication=5129 (last visited Dec. 10, 2008).

5. The U.S. Constitution supplies a further reason for rejecting Plaintiffs' position.

a. The Court should construe the Labor Code to avoid a serious constitutional question.

Courts interpret a statute to make it constitutionally sound rather than construing it in such a way that makes it constitutionality infirm. *E.g.*, *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 129 (2000) ("[A] court must, whenever possible, construe a statute so as to preserve its constitutional validity."); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146 (2003) ("In ascertaining the Legislature's intent, we attempt to construe the statute to preserve its constitutional validity, as we presume that the Legislature intends to respect constitutional limits.").

If the matter is at all in doubt, courts interpret statutes in a manner that avoids the constitutional difficulties. *E.g*, *People v. Superior Court*, 13 Cal. 4th 497, 509 (1996) ("'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.'") (citation omitted); *Elkins*

v. Superior Court, 41 Cal. 4th 1337, 1357 (2007) (the statutory construction rule designed to "'avoid[] serious constitutional questions'" "permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law") (citation omitted). Where, as here, a proposed interpretation of a statute would raise serious constitutional concerns, such an interpretation should be avoided.

California courts for these reasons have declined to extend the protection of California employment law to nonresidents in similar situations. In *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850 (1996), for example, the plaintiff sued under California's Fair Employment and Housing Act, invoking the state law of the defendant's corporate headquarters. The court held that the action must be dismissed because the plaintiff was not a resident of California and worked in California only on a limited basis. *Id.* at 1858-59. "Without clearer evidence of legislative intent to [apply the FEHA to a nonresident's employment discrimination claim], we are unwilling to ascribe to that body a policy which would raise difficult issues of constitutional law by applying this state's employment-discrimination regime to nonresidents employed outside the state." *Id.* at 1859.

The same word of caution applies here. Because (as shown below) the rule proposed by Plaintiffs would violate (or at a minimum arguably would violate) the Commerce Clause, the Court should construe the statute to avoid the constitutional issue.

b. Application of the California Labor Code to Plaintiffs' claims would unduly burden interstate commerce and thereby violate the Commerce Clause.

The U.S. Constitution gives Congress the power to "regulate Commerce with foreign Nations and among the several States." U.S. CONST. art. 1, § 8. Embedded in this affirmative grant of authority to Congress is an "implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989). Thus, the Commerce Clause protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another state. "[T]he purpose of the commerce clause was to create and foster the development of a common market among the states [and] eradicating internal trade barriers." 2 R. ROTUNDA & J. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 11.1 (4th ed. 2009).

As shown above, applying California's Labor Code to every business traveler who happened briefly to work in the state would result in an administrative nightmare, severely impeding the ability of companies to send workers to California. In effect California would be imposing a tax in the form of (at a minimum) drastically increased recordkeeping and other compliance costs for workers crossing state lines. The Commerce Clause prohibits that kind of "economic Balkanization of the Union." *Id.*; *see Fitz-Gerald*

v. SkyWest, Inc., 155 Cal. App. 4th 411, 422 (2007) (upholding preemption and Commerce Clause challenge to the application of California wage-hour law to flight attendants; "The trial court . . . correctly ruled that application of IWC Order No. 9-2001 would substantially burden interstate commerce.") (alternative holding); *United Air Lines, Inc. v. Indus. Welfare Comm'n*, 211 Cal. App. 2d 729, 747-49 (1963) (holding invalid, based on the Commerce Clause, an IWC order governing the cost of flight attendants' uniforms; "state legislation is invalid if it unduly burdens [interstate] commerce"; here "that burden may not be very great, nevertheless the subject is one which necessarily requires uniformity of treatment"), *overruled on other grounds*, *Indus. Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 728 n.15 (1980).

Plaintiffs contend that there is no Commerce Clause difficulty because applying California law to business travelers grants no preference to California-based businesses. (Op. Br. at 17.) But there is more to the Commerce Clause than discrimination, as the Ninth Circuit reiterated very recently. *National Association of Optometrists v. Brown*, No. 07-15050, 2009 U.S. APP. LEXIS 11416 (9th Cir. May 28, 2009), was a Commerce Clause challenge to certain California statutes and regulations covering opticians. A district court held the laws unconstitutional because they discriminated against interstate commerce. The Ninth Circuit saw no discrimination, but noted that "[o]ur determination that the challenged laws are not discriminatory does not end our analysis. Even though not discriminatory, the laws may still be invalidated if the burden they

place on interstate commerce outweighs their benefits." *Id.* at *19. The court of appeals remanded the case to the district court to conduct that balancing. *Id.* at *20.

Thus, even where a state statute "regulates even-handedly to effectuate a legitimate local public interest," it will not be upheld if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The constitutionality of state statutes is not considered in a vacuum. "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336. This concern is especially appropriate here. If California decides to impose its Labor Code on business travelers, other states may follow suit. The resulting patchwork of conflicting state laws would have severe adverse impact on interstate commerce, resulting in an administrative burden as employers attempted to comply with varying and inconsistent state laws.

The United States Supreme Court has repeatedly invalidated laws that impose economic and administrative burdens, even where those laws were enacted for health and safety purposes. *See, e.g., Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 674-75 (1981) (striking down Iowa highway safety law that banned trucks

greater than 60 feet in length; the Iowa statute set rules different from those prevailing elsewhere, and required using smaller trucks or altering routes, thereby increasing costs and decreasing efficiency for trucking companies); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978) (striking down highway safety law banning use of 65-foot double semi-trailers where degree of interference with interstate commerce outweighed purported safety benefits).

For example, in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), the Court invalidated a state law that imposed economic and administrative burdens on interstate securities transactions. Illinois enacted a takeover statute regulating takeover offers to Illinois companies. *Id.* at 626-27. The Illinois statute required the acquiring entity to file its offer with the Illinois Secretary of State, wait 20 days while the Secretary evaluated the fairness of the offer, and attend a hearing to justify the fairness of the offer at the request of the target company's directors and shareholders. *Id.* MITE Corporation offered to buy shares of an Illinois corporation, and immediately sought a declaratory judgment that the Illinois statute violated the Commerce Clause. *Id.* at 627-28. The district court and Seventh Circuit agreed that the statute unduly burdened interstate business transactions, and the Supreme Court affirmed. *Id.* at 630. The Court hypothesized the adverse consequences that would follow if other states imposed similar regulations, noting that interstate transactions through tender offers for securities transactions would be "thoroughly stifled." *Id.*

That case is analogous here. The Illinois statute violated the Commerce Clause because the statute imposed economic and administrative burdens on cross-border *securities transactions*. Plaintiffs' proposed rule of law here would impose economic and administrative burdens on cross-border *business travel*, and would be unconstitutional for the same reasons that the Illinois statute was held unconstitutional in *Edgar v. MITE*.

6. Basic choice-of-law principles teach that the law governing the employment relationship is the law of the state in which the employee principally works.

California courts require "a reasoned analysis regarding the applicable law . . . in actions seeking to assert claims on behalf of non-residents." *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 915 (2001). The court's "main focus should be on whether plaintiff's proposed class members made an adequate showing of their own significant contacts with California, such that their claims predominantly arose here, and gave rise to a significant interest on the part of California in applying its laws to these classwide claims." *J.P. Morgan & Co. v. Superior Court*, 113 Cal. App. 4th 195, 221 (2003) (citing *Washington Mutual*, 24 Cal. 4th at 928-29).

California applies a three-step "governmental interest analysis." *Washington Mutual*, 24 Cal. 4th at 919. First, the court assesses the rules of law in each potentially concerned state. *Id.*

Second, the court determines what interest, if any, each state has in applying its law to the claim. *Id.* at 919-20. If the laws are materially different, and each state has an interest in applying its law, the court will continue to the third step and determine which state's interest would be "more impaired" if its laws were not applied. *Id.* at 920. Under that test, California wage-hour law does not apply to business travelers, as shown below.

a. California, Colorado, and Arizona have materially different overtime pay schemes.

The first step of the analysis reveals important material differences in the overtime laws of California, Colorado (the home state of Sullivan and Evich), and Arizona (the home state of Burkow).

(1) California overtime law.

California provides three so-called "white collar" exemptions from its overtime pay law: the executive, administrative, and professional exemptions. 8 CAL. CODE REGS. § 11040 ("IWC Wage Order 4-2001"). Oracle here relies on the teaching exemption, which in California is part of the professional exemption. In order to qualify, an employee must meet several elements. The employee must: (i) be licensed or certified by the State of California, (ii) primarily engage in teaching, (iii) customarily and regularly exercise the discretion and independent judgment of a teacher, and

(iv) earn a monthly salary no less than twice the state minimum-wage requirement for full-time employment. IWC Wage Order 4-2001(1)(a)-(d).

Employees who do not qualify for the exemption are entitled to overtime pay at the rate of one and one-half times their regular rate for all hours worked in excess of eight hours in one day, or 40 hours in one week, and for the first eight hours of the seventh consecutive day of work in a workweek. IWC Wage Order 4-2001(3)(A)(1). Further, employers must pay overtime at the rate of twice the regular rate for all hours worked in excess of 12 in one day or in excess of eight hours on the seventh consecutive day of work in a workweek. *Id.*

(2) Colorado overtime law.

Colorado's law differs from California's in several respects. The overtime law for teachers is subsumed within the professional exemption. It differs from California law in several fundamental ways. Colorado law (i) does not require a teacher to have a license or certification, (ii) does not require a teacher to be "primarily engaged" in the practice of teaching, and (iii) does not require a teacher to customarily and regularly exercise the discretion and independent judgment of a teacher. *Compare* 7 COLO. CODE REGS. § 1103-1(5)(c) *with* 8 CAL. CODE REGS. § 11040. Instead, the employee must merely be one "employed in a field of endeavor who has knowledge of an advanced type in a field of science or learning

customarily acquired by a prolonged course of specialized intellectual instruction and study." 7 COLO. CODE REGS. § 1103-1(5)(c).

Employees who do not qualify for the exemption are entitled to pay at time and one-half for hours worked in excess of: (i) 40 hours per workweek, (ii) 12 hours per workday, or (iii) 12 consecutive hours without regard to the starting and ending of a workday. *Id.* § 1103-1(4). Unlike California, Colorado does not have a double-pay requirement, does not require overtime pay for work on the seventh consecutive day worked (if none of the other thresholds has been met), and does not require overtime after eight hours of work in a day.

(3) Arizona overtime law.

Arizona has chosen to follow the FLSA instead of enacting its own overtime law.[14] The federal rules differ in several material respects from both the California and Colorado rules. First, the FLSA offers a broader teaching exemption than either California or Colorado, to "any employee employed in the capacity of academic administrative personnel or teacher." 29 U.S.C. § 213(a)(1). The FLSA also differs from California and Colorado law in that it requires

[14] *See* Industrial Commission of Arizona, *Wage Payment Laws: Frequently Asked Questions*, available at http://www.ica.state.az.us/faqs/labor/wage_payment_laws.html (last visited June 12, 2009).

that the employee's "primary duty" be teaching,[15] and that the teacher be employed at an educational establishment. 29 C.F.R. § 541.303(a). The FLSA, unlike California law, (i) does not require that a teacher regularly exercise discretion and independent judgment in the performance of his or her duties, (ii) has no "primarily engaged" requirement, and (iii) does not require a teaching certificate or that the teacher be employed at an accredited college or university.

The FLSA overtime pay scheme for nonexempt employees differs from California. The FLSA merely requires that nonexempt employees receive one and one-half times the regular rate of pay for all hours worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). The FLSA does not impose a daily overtime pay requirement, unlike either California or Colorado. The FLSA also does not impose any double pay requirements, and it does not require overtime pay for the seventh consecutive workday in a week.

---

[15] Under the FLSA, "primary duty" means the principal, main, major, or most important part of the employee's work, even if the duties do not constitute a majority of the employee's working time. *See* 29 C.F.R. § 700(a). *Cf. Yosemite Water Co.*, 20 Cal. 4th at 797 ("primarily engaged" requires the employee to spend more than half of his or her working time engaged in exempt work). *See generally* CAL. LAB. CODE § 515(e).

b. The states in which Plaintiffs resided and primarily worked have significant interests in having their wage-hour laws applied to their residents; California, by contrast, has little if any interest in regulating business travelers, and indeed an interest in *not* doing so.

The second step of California's governmental interest test requires the court to examine "each jurisdiction's interest in the application of its own law under the circumstances of the particular case." *Kearney v. Salomon Smith Barney*, 39 Cal. 4th 95, 107-08 (2006).

(1) Both Colorado and Arizona have significant interests in regulating their resident employees.

This Court already has held that an employee's state of residence has a vital interest in covering the employment relationship of that employee. In *Tidewater*, this Court held: "If an employee resides in California, receives pay in California, and works exclusively, *or principally*, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of [California law]." 14 Cal. 4th at 578 (citation omitted; emphasis added). It logically follows that the reverse is true: Other states have

the same interest in governing the employment relationships of their residents who engage in business travel.

Plaintiffs' contention that "no foreign state has any interest in having their laws applied" to their business travelers leaving the state (Op. Br. at 15) is manifestly false. Colorado courts have said on multiple occasions that Colorado has the power to protect its employees temporarily working outside the state because of "the state's interest in the welfare and protection of its citizens." *Hathaway Lighting, Inc. v. Indus. Claim Appeals Office*, 143 P.3d 1187, 1190 (Colo. Ct. App. 2006) (recognizing that Colorado's Workers' Compensation Act can have extraterritorial effect for Colorado-based employees), *cert. denied*, 2007 Colo. LEXIS 253 (Mar. 26, 2007); *see also State Comp. Ins. Fund v. Howington*, 298 P.2d 963, 970 (Colo. 1956).[16]

Arizona also has a strong interest in regulating employment. "[T]he existence of the employer-employee relation

---

[16] The now-vacated Ninth Circuit panel opinion asserted that other states had no interest in their residents when leaving the state, citing language in the Colorado statute referring to the "boundaries" of the State of Colorado. 547 F.3d at 1185. That, however, is not materially different from the language of the Washington state statute at issue in *Bostain v. Food Express, Inc.*, 153 P.3d 846 (Wash. 2007), discussed above. That state statute applied only to "employment within the state of Washington," and yet the Washington Supreme Court held that Washington law followed Washington residents on business travel outside the state. *Id.* at 851.

within the state gives the state an interest in controlling the incidents of that relation . . . ." *DiMuro v. Indus. Comm'n of Ariz.*, 688 P.2d 703, 707-08 (Ariz. Ct. App. 1984) (affirming dismissal of a workers' compensation death benefits claim; the decedent, although an Arizona resident, had not been regularly employed in Arizona) (citation and internal quotation marks omitted).

Other states similarly have affirmed their interest in regulating employment relationships grounded within their borders, even when business travel occurs. *See, e.g.*, *State ex rel. Winzeler Excavating Co. v. Indus. Com. of Ohio*, 586 N.E.2d 1087, 1089 (Ohio 1992) ("[T]he state's interest in the employment relationship between an Ohio employer and his employees furnishes [a] valid basis for an employee [to collect a workers' compensation award] if his extraterritorial injury was caused by his employer's violation of a specific safety requirement."); *see also Vaughn v. Nelson Bros. Constr.*, 520 N.W.2d 395, 396 (Minn. 1994) (Minnesota law applies to an employee's out-of-state injuries; the focus is "where the employment relationship is centered").

Plaintiffs note, however, that Arizona has not enacted an overtime law that differs from the FLSA. They assert that Arizona's lack of an overtime law is evidence that Arizona has no interest in compensation for overtime worked. (Op. Br. at 11-12.) That mischaracterizes what Arizona has (and has not) done. The decision *not* to have a law is itself a legislative choice.

The Arizona legislature several times has considered — and rejected — more expansive overtime rules. Specifically, since 2000, three bills were introduced to allow certain classes of employees to receive overtime on a day when working in excess of the employee's regular work schedule. Each of these proposed overtime modifications failed. *See* H.B. 2405, 46th Leg., 1st Reg. Sess. (Ariz. 2003), H.B. 2122, 45th Leg., 1st Reg. Sess. (Ariz. 2001), H.B. 2642, 44th Leg., 2d Reg. Sess. (Ariz. 2000). Arizona's repeated and long-standing adherence to the FLSA's overtime rules reveals its legislative choice to synchronize its wage-hour obligations with those of federal law.

States have an interest in providing a sensible regulatory environment for the employers who provide work opportunities for the state's residents. *See generally* SMALL BUSINESS ADMIN., REPORT ON THE REGULATORY FLEXIBILITY ACT, FY 2006, at 45 (Feb. 2007) ("[The Regulatory Flexibility Act] is a win-win situation [in Colorado] for small business and for effective government. It's good practice to make sure regulations don't pinch our efforts to grow economically.") (quoting Peter C. Groff, Colo. Senate Pro Tem); ARIZ. STATE REP. BARBARA LEFF, CHAIRMAN'S REPORT: AD HOC COMMITTEE ON ARIZONA'S BUSINESS CLIMATE 7 (May 2002) ("State and local governments need to concentrate on making Arizona a place where companies . . . can grow. That begins with recognizing that companies look for . . . [a] regulatory climate that is not oppressive."). Arizona's decision not to create overtime rules conflicting with the FLSA, for example, plainly reflects a desire not to

burden employers with the duty to comply with a second set of laws on the same subject.

Arizona and Colorado have the same interest in applying their laws to residents of those states that this Court in *Tidewater* said that California had, for Californians temporarily leaving the state.

(2) California, by contrast, has little or no interest in regulating compensation of business travelers briefly entering the state.

The now-vacated Ninth Circuit panel opinion asserted that California has an interest in regulating the wages of business travelers. The assertion does not withstand analysis, and indeed California has a substantial interest in *not* doing so.

The Ninth Circuit panel's original rationale for extending California law to business travelers is that not doing so would have the effect of depressing local wages. 547 F.3d at 1184. No evidence supports that statement. In fact, Plaintiffs in this case never even articulated that theory in the trial court or on appeal, let alone introduced evidence to support it. Californians work hundreds of millions (perhaps billions) of person-hours each year. The notion that occasional work in California by business travelers materially affects the labor market wage rates for California residents is unsupported and unreasonable. Assessing the economic effect of business travel

on labor markets is uniquely within the province of the Legislature, not for a court to speculate about on a barren record.

If anything, California actually has a substantial interest in *not* regulating the wages of business travelers. California has an interest in not discouraging employers from sending employees to California on business travel. The California Restaurant Association (CRA) as *amicus curiae* supported rehearing *en banc* in the Ninth Circuit. The CRA pointed out that California's economy depends to a large degree on travel and tourism, and a substantial amount of that is business travel.[17] Hundreds of thousands of jobs exist in significant part by catering to conventions, off-site retreats, educational conferences and programs, and other business travel. If Plaintiffs' theory were the law, employers everywhere in the country will have to grapple with California's unique wage-hour laws every time such an employer sends an employee to California to attend a convention or conference.

Rather than undertake that grappling, many rational employers simply will not allow their employees to come. California has an important interest in not disincentivizing groups from selecting

---

[17] Business travel accounted for an estimated $37 billion of the $97 billion spent on travel in California in 2007 (meetings and events accounted for $16 billion). *See* Feb. 2009 Cal. Travel and Tourism Commission Res. Bull., *available at* http://tourism.visitcalifornia.com/media/uploads/files/editor/Research/2009_FebruaryBulletin.pdf (last visited June 15, 2009).

California sites for their events, the CRA pointed out. California-based hotels and restaurants — and the hundreds of thousands of persons they employ — will be the victim under the rule of law Plaintiffs propose, because employers will look to other states to host the kind of events that currently create jobs for Californians.

Thus, the Ninth Circuit panel engaged in an incomplete analysis in its now-vacated opinion. It implied that California's sole interest is supporting employee wages by penalizing (through higher wages) business travel. But it did not take into account that California also has an important interest in *facilitating* business travel to the state — travel that creates California-based jobs in the first place. *Cf. Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 168 (1978) (declining to apply California law, even though the plaintiff was a California corporation; Louisiana law did not recognize the cause of action at issue, and Louisiana had a "vital interest in promoting freedom of investment and enterprise within Louisiana's borders"); *Arno v. Club Med, Inc.*, 22 F.3d 1464, 1468 (9th Cir. 1994) (applying French law to defeat, among other things, a claim for punitive damages; recognizing "an interest in encouraging local industry").

It should be for the Legislature (i) to decide when an employment assignment has sufficient permanence to become covered by California law, and (ii) to set a bright-line rule that is easily administrable and that does not complicate or chill routine interstate business travel.

That is what the Legislature has done when it intends to cover nonresidents. Consider, for example, the analogous context of drivers' licenses. Motorists cross state lines countless times a day. In doing so they do not obtain California drivers' licenses; they use the licenses of their state of residence. Only 10 days after such an individual "establishes residence" in California must he or she comply with California licensure rules. CAL. VEH. CODE § 12505(c).

Workers' compensation law provides another example. Labor Code section 3600(b) exempts from coverage employees who are temporarily in the state and their employers from coverage under California workers' compensation law if the employer has furnished workers' compensation coverage under the laws of another state, and if that state has reciprocal recognition of California's workers' compensation laws. The relevance of the workers' compensation statute is this: When the Legislature intends to extend employment rights to workers based elsewhere, it does so expressly.

Without clear direction from the Legislature, this Court should decline to assume that the Legislature intended to extend California overtime law to business travelers.

c. The Plaintiffs' home states' interest in their claims outweighs California's minimal interest.

The third step of the governmental interest test requires the Court to examine "which state's interest would be more impaired if its policy were subordinated to the policy of the other state [and then] appl[y] the law of the state whose interest would be more impaired if its law were not applied." *Kearney*, 39 Cal. 4th at 112 (2006) (citation and internal quotation marks omitted). The district court concluded that, for business travelers visiting California from elsewhere, "[t]he interests of the sister states outweigh that of California." (ER 87.) That conclusion was correct, for the reasons set forth above.

Plaintiffs here emphasize, however, that Oracle is headquartered in California. (Op. Br. at 12.) That is of no consequence; what matters is where *the employee* principally worked, not where others happen to work for the same employer. California has little if any interest in regulating the employment relationship of someone based elsewhere, even if the employing entity happens to have a California headquarters. As noted above, the now-vacated panel opinion supposed that California had an important interest in temporary work performed in California by nonresidents, because that work "will . . . substantially disadvantage[] [California residents] in the labor market by the cheaper labor that will thereby be made available." 547 F.3d at 1184. Oracle disagrees, but even if the panel

were right, the disadvantage to Californians does not vary based on whether the employer in question is "a California employer."

Consider an example used by one of the *amici* in the Ninth Circuit: the insurer that sent out-of-state adjusters into California to help with policyholder claims following the recent California wildfires. As the *amicus* demonstrated, it creates a world of complexity and practical difficulty for one's exempt status to change at all, let alone in the middle of a work week. That complexity and difficulty aside, it makes no difference for labor market purposes whether the insurer is a California-based company like 21st Century or Mercury, as opposed to an Illinois insurer like Allstate or State Farm. If the insurance adjuster's temporary work in California affects the California labor market in a way that California should care about, the identity of the employing entity is wholly irrelevant.

Consider two hypothetical manufacturing companies — call them Californiaco and Kentuckyco — based in Los Angeles and Louisville, respectively. Both companies operate nationally, manufacturing identical products. Each has an identical manufacturing plant in San Diego. Each company employs one of two twin brothers, Cal and Kent, respectively, as a quality control inspector. The brothers are based in Texas, but they travel around the country performing their duties. Let us assume that both brothers spend the same three days working in California at their respective employers' San Diego factories. If the result varies based on whether the employer is California-based, Californiaco must pay Cal under

California wage-hour law for those three days. Kentuckyco, by contrast, need not pay Kent that way. The result: Identical twins. Identical factories. Identical products. Identical work. Identical time. But the rule of law applicable in the two cases differs. That makes no sense as a threshold matter; a basic principle of law is to treat like cases alike. And that cannot possibly be the intent of the California Legislature, because the difference in treatment is antithetical to California's interest. The California-based employer — which California if anything would seek to support, even entice — is the one saddled with the competitive disadvantage.

And even if "California employer" means "any company that employs a California resident," still Plaintiffs' position makes no sense. Consider two hypothetical competitor companies, Nev-Cor (based in Nevada) and Wash-Cor (based in Washington state). The companies make similar products, and in all respects are substantively identical, except one: Nev-Cor has a small California office with a few employees, and Wash-Cor does not. Both companies send a sales representative into California from time to time, but no sales representative lives in the state. Let us assume that the respective sales representatives perform the same duties in California for the same hours on the same days. Yet under Plaintiffs' theory the paychecks and paystubs must differ: Nev-Cor must comply with California law, but Wash-Cor need not.

For these reasons, the fortuity of whether the company is "a California employer" makes no difference.

In sum, Plaintiffs failed to show that "their claims predominantly arose here, and gave rise to a significant interest on the part of California in applying its laws to these . . . claims." *J.P. Morgan & Co. v. Superior Court*, 113 Cal. App. 4th 195, 221 (2004); *see also McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1422-23 (9th Cir. 1989) ("California's connections to the plaintiffs . . . are insufficient to create an interest in applying California law" because plaintiffs either never resided in California or abandoned their California residence prior to their injury.).

California instead should respect its sister states' rule of wage-hour law for employment relationships based on those states. As one oft-cited law review article put it:

> The free and unpenalized movement of people and goods from state to state, and freedom in commercial intercourse, are essential to the success of our federal system, and it is part of the law's task to assure them. Deference to sister state law in situations in which the sister state's substantial concern with the problem gives it a real interest in having its law applied, even though the forum state also has an identifiable interest, will sometimes usefully further this aspect of the law's total task.

Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 286-87 (1966) (footnote omitted).

B. California's UCL Does Not Expand The Reach Of The Labor Code.

Plaintiffs' second cause of action alleges a claim under the UCL based on the same Labor Code provisions at issue in the first cause of action. The second claim fails for the same reasons as the first. Since Plaintiffs cannot establish any violations of the Labor Code, they cannot establish a violation of the UCL derived from those (non)violations. According to the district court, "Plaintiffs' second cause of action for violation of [17200] fails because it is founded solely on alleged violations of the Labor Code." (ER 89.) The court emphasized that "[P]laintiff's contacts with California . . . simply are not sufficient to create state interests warranting application of . . . § 17200 to the little portion of their working time spent in California." (ER 91.) Here again the district court was correct.

C. California's UCL Does Not Apply To Actions Outside The State's Borders.

Plaintiffs' third cause of action, also under the UCL, alleges an entirely different theory. Here plaintiffs seek compensation under the UCL for (i) employees based outside of California, (ii) work performed outside of California. But California's UCL does not have extraterritorial effect, and no exception to that rule applies here.

1. The presumption is that the UCL, like other California statutes, does not apply extraterritorially.

It has been settled for nearly a century that California statutes are presumed to apply only within state borders. *See N. Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 4 (1916) ("Although a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries, the presumption is that it did not intend to give its statutes any extraterritorial effect."); *Churchill Village LLC v. General Electric Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000) (denying motion for preliminary injunction to stop alleged unfair competition and false advertising nationwide on ground that the laws were not intended to apply outside the state; "California law embodies a presumption against the extraterritorial application of its statutes."); *Speyer v. Avis Rent A Car Sys., Inc.*, 415 F. Supp. 2d 1090, 1099 (S.D. Cal. 2005) (California residents could bring a claim under the unfair competition law based on allegedly unfair car rental quotes received in California, but not based on alleged injuries resulting from unfair fees charged out of state), *aff'd*, 2007 U.S. APP. LEXIS 22367 (9th Cir. Sept. 14, 2007).

The party seeking extraterritorial application of a law has the burden of establishing that such application is "clearly expressed or reasonably to be inferred 'from the language of the act or from its purpose, subject matter, or history.'" *North Alaska*, 174 Cal. at 4

(citation omitted). Plaintiffs can point to no evidence that the UCL was intended to have extraterritorial application, and courts have stated otherwise. "[The UCL] contains no express declaration that it was designed or intended to regulate claims of nonresidents arising from conduct occurring entirely outside of California." *Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999).

The UCL claim here has nothing to do with California or Californians. Plaintiffs in this cause of action allege violations of the FLSA for persons who lived in other states and worked in other states. This Court should hold that section 17200 simply does not apply in such circumstances.

In *Norwest*, plaintiffs brought a nationwide class action alleging that the defendant violated section 17200 by wrongfully charging borrowers for certain insurance costs in connection with their loans. The trial court certified a class consisting of three groups: (i) California residents who had purchased the insurance; (ii) non-California residents who had purchased the insurance in California; and (iii) non-California residents who purchased the insurance outside California. The appellate court reversed the order granting certification, holding as to the third group that the UCL definitely did not apply, and indeed that the Due Process Clause of the U.S. Constitution precluded applying the UCL to conduct occurring outside of California. The court remanded the case to apply a choice-of-law analysis to see whether the UCL potentially could apply even to the second group.

There is good reason why California would not incorporate, through the amorphous section 17200, an alleged FLSA violation occurring in another state. Congress in the FLSA thought through — and for decades has declined to change — the enforcement mechanism for violations: opt-in (not opt-out) classes, and liquidated (but not compensatory or punitive) damages. It is unreasonable to infer that section 17200, which simply refers generically to "unfair business practices," was designed to allow plaintiffs to borrow a cause of action from another statute without borrowing all of it. Plaintiffs here contend that they can borrow what portions of the FLSA they like, discard the rest, and put a "California law" label on the part they borrow. Section 17200 should not be extended so far. *Cf. Haro v. City of Rosemead*, 2009 CAL. APP. LEXIS 915, at *11, 17-18 (June 9, 2009) (declining to allow a wage-hour class action under section 382 of the Code of Civil Procedure; "[Plaintiffs] chose to bring their action under the FLSA. Having done that, they cannot discard the opt-in feature [the FLSA provides]."; "An FLSA action has to be litigated according to rules that are specifically applicable to these actions and if litigants do not like these rules, they should not [invoke] the FLSA.").

2. The cases on which Plaintiffs rely are inapposite, and are ripe for disapproval in any event.

Plaintiffs attempt to overcome the strong presumption against nationwide application of the UCL with what they call an

"emanated from" principle. (Op. Br. at 26.) Their contention is that, because Oracle is headquartered in California and the decision to classify Plaintiffs as exempt was partly made here, California law should apply. None of the cited cases establishes such a rule.

a. The cases cited by plaintiffs are inapposite because they involve misconduct occurring in California.

Plaintiffs principally rely on two inapposite cases. In *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605 (1987), plaintiffs sued for fraud and unfair competition, alleging that defendants charged customers for certain unanswered long-distance calls. Plaintiffs sought to expand the case into a national class. The trial court refused. *Id.* at 613. The court of appeal reversed because the misconduct at the heart of the lawsuit occurred in California, and that "California may have an important interest in applying its law to punish and deter the alleged wrongful conduct" occurring here. *Id.* at 615.

In *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224 (2001), similarly, at issue was a wrongful act — contract breach — that occurred in California. The contract comprised "brochures promising free telephone support [that] were prepared in and distributed from California." *Id.* at 242. "And the . . . change of

policy [comprising the breach] . . . was made" in California. *Id.* Thus, as in *Clothesrigger*, the wrongful act occurred in California.[18]

Those cases are inapposite here. Plaintiffs contend that the decision to classify Plaintiffs as exempt was made "primarily in California" (citing ER 69). But the section 17200 claim is derivative of the FLSA; the UCL claim exists only if there is an underlying FLSA violation. One must ask Plaintiffs, then: Exactly what wrong did Oracle commit — exactly what provision of the FLSA did Oracle violate — by classifying the instructors as exempt?

No wrong occurred in California because nothing in the FLSA prohibits erroneous classifications. The FLSA in 29 U.S.C. section 215 lists the "prohibited acts" under the statute. So-called misclassification is nowhere among them. (The statute does not even use the term "misclassification," or even "classification.") The law requires only (i) that certain employees be paid a minimum wage, 29 U.S.C. § 206, and (ii) that certain employees sometimes be paid

---

[18] The other case cited by Plaintiffs, *Standfacts Credit Services v. Experian Information Solutions, Inc.*, 405 F. Supp. 2d 1141 (2005), if anything supports Oracle's position. That case reiterated that California's unfair competition law "does not apply to actions occurring outside of California that injure non-residents." *Id.* at 1148. Plaintiffs in that antitrust case contended, however, that the out-of-state acts could be linked to California because acts of an alleged co-conspirator allegedly occurred in California. The court refused to extend the law that far: "[T]he Non-Resident Plaintiffs cannot state a claim . . . ." *Id.*

overtime, *id.* § 207. The "wrong," when overtime is owed, is the failure to pay it — not the classification decision.[19]

An employer legally may classify an employee as salaried exempt or hourly nonexempt. It also may devise any other compensation scheme known to man. It is not the classification or the compensation scheme that is unlawful; it is the failure to pay overtime when due.[20] Thus, plaintiffs' repeated use of the term "misclassification" is an error of substantive wage-hour law under the FLSA. *E.g.*, *Walsh v. IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1461-62 (2007) (plaintiffs alleged that the defendant had engaged in "deliberate willful misclassification"; the court rejected the argument because the classification decision, without more, is not actionable; nothing in the law "suggest[s] that employers could be liable [simply] for classifying an employee").[21]

---

[19] In the trial court Plaintiffs were more candid on this point. Plaintiffs then admitted: "It is true that no statute prohibits misclassifying employees as exempt. . . . If Oracle had . . . misclassified these employees but paid them overtime anyway, no wrongful conduct would have occurred." (Plaintiffs' Reply Brief in Support of Motion for Partial Summary Judgment dated July 17, 2006, at 3:12-16.)

[20] At oral argument in the trial court Plaintiffs' counsel similarly conceded: "There is no law that says if you misclassify someone, you broke the law. You are perfectly within your rights to misclassify people. What's against the law is not to pay them." (Tr. of Oral Arg. 41:24-42:2.)

[21] *Accord, e.g., Dunbar v. Albertson's, Inc.*, 141 Cal. App. 4th 1422, 1427 (2006) ("[A]lthough Defendant has made a single policy

(*Continued* . . .)

Plaintiffs here are correct that the parties stipulated that the classification occurred "primarily" in California. (ER 69.)[22] That, however, is not a wrongful act. If there was a wrongful act — and Oracle disputes that there was[23] — it was the failure to pay overtime

---

decision to classify hundreds of [managers] as exempt, that single policy decision" is neither right nor wrong.; it may be improper as to some, but proper as to others); *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476, 484 (C.D. Cal. 2008) (Pregerson, J.) ("It is possible to have a classification policy that properly classifies some employees as exempt and improperly classifies others . . . . An exemption policy is different from a facially unconstitutional policy of discrimination . . . in that something more must be shown to establish that the policy was wrongful."); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (even if there were a "'plan' or 'scheme' [to] reduce[] or eliminate[] overtime compensation," such a plan or scheme is "[n]ot . . . improper on its face").

[22] That the classification did not occur *entirely* in California is relevant for another reason: In our global economy, "decisions" rarely have a single situs or single decisionmaker. Persons consult with one another, often by telephone or e-mail, to form consensus. Where is a decision "made" if, for example, a committee of five persons — one in New York, one in California, one in Texas, one in Shanghai, and one in London — "meets" via videoconference to reach consensus? Given the rule against extraterritorial application of section 17200, the Court should insist (at a minimum) on a substantial nexus to California, not just that a questioned decision be partially or even primarily made here.

[23] The instructors here were correctly paid as exempt under the teaching exemption to the FLSA, 29 U.S.C. § 213(a)(1). That the instructors later were reclassified as nonexempt, out of an abundance of caution to avoid further dispute, hardly demonstrates an erroneous (let alone bad-faith) original classification on Oracle's part. Paying an employee by the hour never can be wrong — no law says that an employer must invoke a wage-hour exemption simply because it can — and employers often err on the side of caution to avoid future disputes and litigation costs, as Oracle did here.

after it was due, in the individual's home state, where he or she is paid. The FLSA cause of action, if there was one, therefore arose outside of California, when — and where — overtime work occurred, and an erroneous paycheck issued. Section 17200 does not apply where, as here, the allegedly wrongful act occurred outside of California.

b. <u>The Court should disapprove the cases permitting extraterritorial application of the UCL.</u>

Cases like *Clothesrigger* and *Wershba* are factually inapposite, but the Court may elect to disapprove them or limit them to their facts because they are being cited as authority for extreme and inappropriate extraterritorial claims. In *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 2007 U.S. DIST. LEXIS 60551 (N.D. Cal. Aug. 13, 2007), *appeal pending*, No. 08-15355 (9th Cir. Feb. 28, 2008), for example, Judge Patel held that section 17200 applied to conduct occurring entirely out of state, because the company policy at issue was reviewed (and left unchanged) by one in-house lawyer who happened to be in California. *Id.* at *12-15. Such decisions should be disapproved, lest California arrogate to itself the rule of decision for affairs predominantly grounded in other states.

VI. CONCLUSION

The Court should answer "no" to the first two certified questions because California's wage-hour regime does not apply to business travelers visiting the state. The California Legislature manifested no intention to apply state wage-hour law to such persons, and for good reason. Other states have a greater interest in regulating the employment relationships of their citizens. Any other rule would wreak havoc on the payroll systems of employers struggling to comply with a crazy-quilt of conflicting state laws. California's wage-hour laws should be held to protect California-based employees, not any business traveler who happens to work across state lines for as little as a single day. Plaintiffs' proposed rule would create myriad administrative problems and violate the Commerce Clause of the U.S. Constitution.

The Court also should answer "no" to the third certified question. California's UCL does not apply extraterritorially to employment relationships based, and work performed, out of state.

DATED: June 22, 2009 PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: Paul W Cane

Paul W. Cane, Jr.

Attorneys for Respondent
ORACLE CORPORATION

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I certify that the Answer Brief on the Merits by Respondent Oracle Corporation is proportionately spaced, has a typeface of 14 points, and contains 13,510 words (as determined by Microsoft Word, the Firm's word processing system), inclusive of footnotes, but exclusive of the Caption Page, the Table of Contents/Table of Authorities, and this Certificate of Compliance.

Dated: June 22, 2009

Respectfully submitted,

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: Paul W Cane

Paul W. Cane, Jr.

Attorneys for Respondent
ORACLE CORPORATION

LEGAL_US_W # 61854032.6

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in the City and County of San Francisco, California. I am over the age of 18 years and not a party to the within-entitled action. My business address is 55 Second Street, Twenty-Fourth Floor, San Francisco, California 94105-3441.

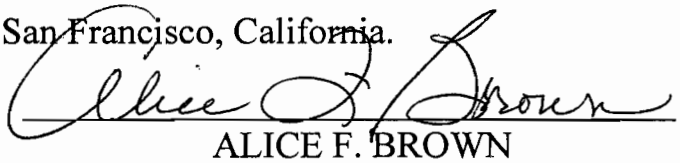
On June 22, 2009, I served the foregoing **ANSWER BRIEF ON THE MERITS OF RESPONDENT ORACLE CORPORATION** via United States mail, postage fully paid, addressed as follows:

Robert W. Thompson, Esq. Charles S. Russell, Esq. CALLAHAN, MCCUNE & WILLIS, APLC 111 Fashion Lane Tustin, California 92780-3397 Telephone: (714) 730-5700 Facsimile: (714) 730-1642 E-Mail: robert_thompson@cmwlaw.net charles_russell@cmwlaw.net	Attorneys for Petitioners *Donald Sullivan*, *Deanna Evich*, and *Richard Burkow* (2 copies)
Honorable Alicemarie H. Stotler U.S. District Court Central District of California 411 W. Fourth Street, Room 10-A Santa Ana, California 92071-4516	C.D. Cal. Case No. CV-05-00392-AHS (1 copy)
Office of the Clerk U.S. Court of Appeals for the Ninth Circuit 95 Seventh Street San Francisco, California 94103-1526	Ninth Circuit Case No. 06-56649 (1 copy)

I am readily familiar with Paul, Hastings, Janofsky & Walker LLP's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that the foregoing is true and correct under penalty of perjury under the laws of the State of California. I further declare 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 June 22, 2009, at San Francisco, California.



ALICE F. BROWN