No. S121552

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

MIGUEL MARTINEZ, et al.,
Plaintiffs/Appellants

vs.

CORKY N. COMBS and LARRY D. COMBS d/b/a COMBS DISTRIBUTION CO.; JUAN RUIZ; and APIO, INC., a Delaware Corporation,
Defendants/Respondents

Appeal from the Second Appellate District, Div. Six
Case No. B161773
Superior Court for San Luis Obispo County No. CV001029
Hon. E. Jeffrey Burke

APPELLANTS' REPLY BRIEF ON THE MERITS

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[California Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.) Service on the California Attorney General and on the District Attorney of San Luis Obispo County required by Bus. & Profs. Code, § 17209, Cal.Rules of Court, Rules 15(c)(3), 44.5(c)]

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I. RESPONDENTS ERR IN THEIR CONTENTIONS THAT IWC EMPLOYER DEFINITIONS CANNOT ESTABLISH LIABILITY IN PRIVATE CAUSES OF ACTION PURSUANT TO LABOR CODE SECTIONS 1194, 1194.2

A. The IWC's Promulgations Regulate Wages and Working Conditions Beyond the Scope of Common-Law Employment Relationships Through "Suffer or Permit to Work"

(1) The Legislature In 1913 Authorized the IWC To Regulate Wages and Other Working Conditions For Adult Women Beyond the Scope of Common-Law Employment Relationships

The 1913 Act,[1] establishing and authorizing the Industrial Welfare Commission (IWC) to "fix" wages, hours and working conditions, consists of 19 enumerated sections. (Stats. 1913, ch. 324, pp. 632-637.) The provisions most relevant to this appeal are: Section 3, subdivision (a); Section 6, subdivision (a); Section 11; and Section 13. However, Section 18, mandating that the Act and every "part or section thereof" should be liberally construed by the courts, is also pertinent. (Stats. 1913, ch. 324, § 18, subd.(a), § 637.)

Section 3, subdivision (a) required the IWC "to ascertain the wages . . ., hours and conditions of *labor and employment* in the various

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[1]The title of the enactment is, in part, "An act regulating the employment of women and minors and establishing an industrial welfare commission to investigate and deal with such employment, including a minimum wage; . . ." (Stats. 1913, ch. 324, p. 632.)

occupations, trades and industries in which *women* and minors are *employed* in the State of California. . ." (*Id.*, Stats. 1913, *supra*, p. 633, italicized emphasis added.)

Section 6, subdivision (a) provided:

> The commission shall have further power . . . to fix:
> 1. A minimum wage to be paid to *women* and minors *engaged in any occupation, trade or industry in this state* . . .
> 2. The maximum hours of work consistent with the health and welfare of *women* and minors *engaged* in any occupation, trade or industry in this state . . .;
> 3. The standard conditions of labor demanded by the health and welfare of the *women* and minors *engaged* in any occupation, trade or industry in this state.

(*Id.*, pp.634-635. Italicized emphases added.)

Two conclusions are unavoidable: the Legislature authorized the IWC to establish minimum-wage and other protections for adult women (as well as children); and, the Legislature did not differentiate among wages, hours and other conditions demanded by workers' health and welfare in authorizing the scope of the IWC's regulatory powers.

(a) The Legislature anticipated and authorized IWC to adopt "suffer or permit to work" to regulate minimum wages for adults

Respondents argue that the Legislature could not have intended to authorize the IWC to adopt *suffer or permit to work* either to protect adults or to regulate conditions including minimum-wage. Respondents' common

reasoning for both assertions is that, as of 1913, the *suffer* or *permit* doctrine of liability was restricted solely to *prohibiting children* from working or being present in dangerous conditions, and that *suffer* or permit" had not been used to *regulate* conditions where employment (for adults or children) was permitted.

Respondents err. Numerous jurisdictions adopted *suffer* or *permit* standards of liability prior to 1913 to regulate conditions of permitted work for *adults*, including males.

- New York (1886) regulated weekly hours of work for women through "knowingly employs or *suffers or permits*"; (Goldstein, Linder, Norton & Ruckelshaus, *Enforcing Fair Labor Standards In the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* (April 1999) 46 UCLA LAW REV. 983 ("Goldstein *et al.*"), pp. 1032-1033, *citing*, Act of May 18, 1886, ch. 409, § 4, 1886 N.Y. Laws 629, 629)
- Maryland (1888) regulated daily hours of workers in the manufacture of yarns, fabrics or domestics through, "require, *permit or suffer*; and again (1898), used "require, *permit or suffer*," to regulate daily hours of street railways employees; (Goldstein *et al.*, *supra*, p. 1032, *citing respectively*, Act of Apr. 5, 1888, ch. 455, § 1, 1888 Md. Laws 734;

Act of Mar. 24, 1898, ch. 123, § 1, § 793, 1898 Md. Laws, 241, 543)

- New York (1903) regulated women's hours of work through "suffer or permit"; (Goldstein *et al.*, *id.*, p. 1033)
- Congress (1907) regulated maximum, consecutive on-duty hours of common-carrier railway employees through "requiring or *permitting*" (*Id.*, p. 1066, *citing*, Act of Mar. 4, 1907, ch. 2939, § 2, 34 Stat. 1415, 1416)
- Oregon (1910) regulated hours of certain underground miners through "*permit* or require"; and again (1911), regulated maximum, consecutive on-duty hours of common carrier employees through "require or *permit*"; (Sumner and Merritt, CHILD LABOR LEGISLATION IN THE UNITED STATES, U.S. Dept. of Labor Children's Bureau (1915) ("Sumner and Merritt"), *respectively*, p. 946, *reprinting*, L O L 1910 § 5058; pp. 947-948, *reprinting*, LOL 1911 ch. 137, § 2)
- Arizona (1913) regulated daily and weekly hours of women employed in certain businesses and in same year further regulated seating conditions for women employees, both through "employed *or be permitted* to work"; (Sumner and Merritt, *id.*, *respectively*, p. 507, *reprinting*, R S 1913 Pen C Pt. 1 t 19 § 717; p. 500, *reprinting*,

R.S. 1913 Civ. C t 14 ch. 2, § 3115)

- Again, Oregon (1913) established a ten-hour day for all workers in specified occupations through, "require *or permit*"; (Sumner and Merritt, *id.*, p. 953, *reprinting*, 1913 ch. 102, §§ 1, 3)

Suffer or *permit* standards of liability were adopted even earlier and in more states to *regulate* the conditions under which minors were *permitted* to work. (Goldstein *et al.*, *supra*, p. 1030-1033, *citing*, statutes in Connecticut (1855), Maine (1857), Minnesota (1858); Maryland (1876), and New York (1886, and again in 1903).)

Other jurisdictions adopting *suffer* or *permit to work* standards of liability to regulate working conditions early in the Twentieth Century included: Congress (1908); (Act of May 28, 1908, ch. 209, § 8, 35 Stat. at 422, *cited in*, Goldstein *et al.*, p. 1068); Oregon (1910); (L O L 1910 § 5027, *as amended by* 1911 Ch. 138, sec. 6, *reprinted in*, Sumner and Merritt, *supra*, p. 943); and Arizona (1913). (R.S. 1913 Civ. C t 14 Ch. 2, § 3132, *reprinted in*, Sumner and Merritt, *id.*, p. 502.)

Indeed, the sister-state "suffer or permit" decisions cited in Appellants Opening Brief on the Merits ("AOBM"), applied statutes that not only prohibited certain work, but also *regulated* conditions in which minors *were permitted* to work. (*See*, *e.g.*, Commonwealth v. Hong (Mass.

1927) 158 N.E. 759, "G.L. c. 148, § 66 forbids . . . *permitting* [a girl under 21 years of age] to work in, about or in connection with any establishment named in section 60 . . . before 5 o'clock in the morning or after 10 o'clock in the evening." Emphasis added.)

Moreover, the California legislature itself had already adopted the *permit to work* standard in both regulating working conditions and in prohibiting certain types of work. ("An act regulating the employment and hours of labor of children . . .", Stats 1905, ch. XVII, § 2, p. 11.) The "permitted" language was retained in amendments to the act in 1909 (Stats. 1909, ch. 254, § 2, p. 387), 1911 (Stats. 1911, ch. 116, § 2, p. 283) and 1913. (Stats. 1913, ch. 214, § 2, p 365).)

(b) The Legislature intended IWC to regulate beyond common-law employment relationships

Respondents also argue erroneously that the Legislature could not have intended to authorize the IWC to adopt the *suffer or permit* doctrine to regulate beyond, or outside, the common-law concept of employment. Prior to the Act's adoption, the courts clearly understood that *suffer or permit* fell outside the common-law employment relationship. The Illinois Supreme Court, reviewing that state's 1903 Child Labor Act mandating that "[n]o child under the age of fourteen years shall be *employed, permitted or*

suffered to work at any gainful occupation . . ." in specified industries, rejected the defendant company's contention "that this act can only apply when the relation of master and servant actually exists. We cannot agree with this contention." (Purtell v. Philadelphia & Reading Coal and Iron Co. (Ill. 1912) 256 Ill. 110, 116 [99 N.E. 899, 902], emphasis added.) In People ex rel. Price v. Sheffield Farms-Slawson-Decker Co. (N.Y.Ct.Appls. 1918) 121 N.E. 474 - - which arose not as a tort case but from a state inspector's citation based upon his observations while on patrol[2] - - then-Judge Cardozo explained that liability under *suffer* or *permit*, "rests upon principles wholly distinct from those relating to master and servant". (*Id.*, 121 N.E., at 475.)

Section 6 authorized the IWC to regulate minimum wages on behalf of "women and minors *engaged* in any occupation, trade or industry in this state . . ." (Stats. 1913, *supra*, pp. 634-635, emphasis added.) . The Legislature gave the IWC a broad mandate to investigate and develop the full scheme of wage regulation including the fundamental responsibilities of determining who was to be protected and, as a direct counterpart, who was liable for compliance therewith. In contrast to the 1905 Act, *supra*, which

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[2](*cf.*, S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations (1989) 341 Cal.3d 341, 346, 348 fn. 4.)

directly regulated the hours of child labor, the Legislature did not directly regulate wages in the IWC Act, and it logically saw no need to spell out in the latter the precise scope of liability as it had in the former. Instead, it delegated that authority to the IWC using the broadest characterization possible. The best indicator of intent is the language of the provision, itself. (Williams v. Superior Court (1993) 5 Cal.4th 337, 350.)

The lengthy, nationwide campaign to develop minimum wage for adult women that preceded California's 1913 Act, the integral role within this campaign of using *suffer or permit* to regulate work, and the connections between the principal national reform advocates and those within California, has been described in Appellants' Opening Brief on the Merits. ("AOBM", pp. 21-34, 49-54.) Extending to the IWC Act - - and particularly to Section 6's term "engaged" - - a judicial assumption of the common-law relationship that has originated in evaluation of other acts (Metropolitan Water Dist. v. Superior Court (2004) 32 Cal.4th 491, 500) would be inconsistent with this Court's historic recognition that this Act's provisions, "are to be liberally construed . . . not within narrow limits of the letter of the law, but . . . to promote the general object sought to be accomplished." (Industrial Welfare Com. v. Superior Court (1980 27 Cal.3d 690, 702.) Judicially-imposing a common-law construct upon the

IWC would be inconsistent with California's history in which Governor Hiram Johnson and a Progressive majority in the Legislature were crafting an entirely new approach to protecting labor. It would also now hold that California under its Progressive government was then moving in opposite the direction of the majority of the nation's states that were extending the scope of liability for worker protections.

(2) The IWC Intended, Through Its 1916 Adoption of "Suffer or Permit to Work" and 1947 Adoption of "Exercises Control" Employer Definitions, to Impose Employer Liability Beyond, the Scope of Common-law Employment Relationships

(a) The IWC Intended "Suffer or Permit to Work" to Extend Employer Liability Beyond Common-law Concepts

During the period between the 1913 enactment and the IWC's 1916 promulgation of Order No. 1, more jurisdictions continued to adopt *suffer* or *permit*. Congress in 1914, regulating the hours of female workers in the District of Columbia, used the *employed or permitted to work* standard. (Act of Feb. 14, 1914, ch. 28, §§ 2-3, 38 Stat. 291, 291.) By 1915 at least twenty states regulated hours of labor performed by children permitted to work using this expanded scope of accountability. (Goldstein, *et al.*, p. 1039.)

With the appointment of Katherine Edson, the drafter and chief

proponent of California's Act, to the initial membership of the Commission, and her subsequent role as Executive Officer from 1916 to 1931, respondents' suggestion that the IWC was unfamiliar with the *suffer or permit* liability standard to regulate working conditions defies reason. The Commission members visited other states including those with wage commissions, received visits from other states' commissions leaders of national advocacy groups promoting the model legislation, and studied the work of those groups. (AOBM, pp. 52-54; *see, also, id.*, pp. 21-34, 49-54.)

This Court has instructed that,

> . . . in fulfilling its broad statutory mandate, the IWC engages in a quasi-legislative endeavor, a task which necessarily and properly requires the commission's exercise of a considerable degree of policy-making judgment and discretion. * * * *
>
> . . . . [T]he judiciary has recognized that its review of the commission's wage orders is properly circumscribed. . . . "A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision . . .

(Industrial Welfare Com., *supra*, 27 Cal.3d, at 702.)

(b) California Has Enforced the IWC's "Suffer or Permit to Work" Standard Outside the Common-Law Employment Relationship

The Executive Branch, charged with enforcing IWC orders, has acted upon the understanding that the IWC possesses authority to promulgate remedies and corresponding liabilities more expansively than

those provided by statutes, subject to explicit legislative overrule. (AOBM, *supra*, 36-39.) Indeed, California's enforcement policy has been to apply the IWC *suffer or permit to work* employer definition outside the common-law employment relationships. (8 Ops.Cal.Atty.Gen. No. 46-96 (Aug. 1946), pp. 59-60, concluding that Order 10's definition of "employ" as "engage, suffer, or permit to work" makes skating rinks liable as "employers" required to pay minimum wage to minor boys who worked at rinks for tips helping patrons buckle their skates although, "the boys do not report to management . . . their hours are not controlled by management . . . . management keeps no records of these skate boys . . . . [but i]t is obvious that under the facts stated the proprietor of the skating rink at least suffers or permits the minor child to work at the skating rink.")

(c) The "Suffer or Permit to Work" Standard Does Not Impose "Strict Liability"

Respondents assertion that "suffer or permit to work" imposes strict-liability on employers is forcefully answered in Judge Cardozo's opinion:

> The employer . . . is chargeable with the sufferance of illegal conditions by the delegates of his power. . . . .Not every casual service rendered by a child at the instance of a servant is "suffered" by the master. If a traveling salesman employed by a mercantile establishment in New York gives a dime to a boy of 13 who has carried his sample case in Buffalo the absent employer is not brought within the grip of the statute. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire

> knowledge. . . . Whatever reasonable supervision by oneself or one's agents would discover and prevent, that, if continued, will be taken as suffered. . . .

(Sheffield Farms, *supra*, 121 N.E., at 476.)

This standard of objective reasonableness has continued to define the duty imposed by "suffer or permit":

> ". . . . [W]hile the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute." We find here that appellants knew or could have known by the exercise of reasonable care . . .[that the child was working for a licensee] and under such circumstances permitted or suffered plaintiff to work in violation of the statute."

(Gorczynski v. Nugent, (Ill. 1948) 83 N.E.2d 495, 499, *quoting*, Purtell, *supra*, (Ill. 1912) 256 Ill., at 117 [99 N.E., at 902].)

(d) The 1947 "Exercises Control" Employer Definition Was Also Intended to Extend Employer Liability Beyond Common-law Concepts

Common logic dictates that, whatever the IWC's understanding of the scope "suffer or permit", it intended in adding the 1947 disjunctive "exercises control" to expand the employer definition, *i.e.*, to reach additional parties. Effect and significance should be given to this language and the Court should avoid a construction that makes these words surplusage. (Garcia v. McCutchen (1997) 16 Cal.4th 469, 476; Moyer v.

Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230, 234.)

(i) Respondent RUIZ' individual liability has been plead and at issue through all stages of this litigation

Respondent RUIZ' assertion that Appellants have not previously advanced his liability under the "exercises control" doctrine of employer liability is explicable. At every stage of the pleadings and appeal, plaintiffs/appellants have alleged and argued RUIZ' individual liability under this doctrine. [App. 17-18, 19, 20-24, 1339-1340; Appellants' Second Request For Judicial Notice, Exhibit 17.[3]]

(ii) The "exercises control" definition was not in response to the federal Portal-to-Portal Act.

COMBS and RUIZ assert that the IWC's expansion its employer definition to include the additional, alternative "exercises control" definition in the 1947 orders was "in response to the [federal] Portal-to-Portal Act", and assert that this Court recognized that such was the case in Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 591. (COMBS/ RUIZ' Respondents' Answer Brief on the Merits, p. 41.) Both assertions

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[3]Appellants, in a contemporaneous, separately-submitted Second Request For Judicial Notice ("Second Judicial Notice") seek, pursuant to Evid. Code Section 452, subd. (d)(1), this Court's notice of excerpts from Appellants' Opening Brief in the court of appeal, below. Exhibit 17 attached to the Request consists of pages 4-5, 12 and 72-73 of that brief.

are erroneous.

The IWC issued its entire series of 1947 Orders (the R-series, replacing the former N.S.-series) on February 8, 1947. Congress enacted the Portal to Portal Act in May, *after* the IWC promulgated its orders. (29 U.S.C., Sec. 251, c. 52 Sec. 1, 61 Stat. 84 (May 14, 1947).) And in Morillion, this Court simply noted amicus curiae's argument that "the IWC revised the definition of 'hours worked' to correspond to the federal standard." (Morillion, *id.*, 22 Cal.4th, at 591.)

(iii) Plaintiffs presented triable issues of material fact that each respondent directly or indirectly or through another person exercised control over their wages or hours or working conditions

Respondents argue that, within any meaning of the IWC's alternative "exercises control" standard, they do not come within this employer definition. They rely on various conclusory and evidentiary assertions, virtually all of which are controverted by other evidence of record. Respondents cannot rely upon the "substantial evidence" test to support dismissal by summary judgment. (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476; Distefano v. Forester (2001) 85 Cal.App.4th 1249, 1258; Conn v. National Can Corp. (1981) 124 Cal.App.3d 630, 637.)

Appellants' Opening Brief on the Merits extensively reviewed the

evidence, citing the record in detail, from which the trier of fact could reasonably conclude that each respondent exercised control over the wages and/or hours of the strawberry workers. (AOBM, pp. 78-93 [APIO]; pp. 93-95 [COMBS]; pp. 95-97 [RUIZ].) Respondents' arguments simply do not cause this evidence to evaporate. Under any commonly-understood meaning of the word "control", and particularly under the common-sense meanings applied by this Court in decisions such as Borello, *supra*, (48 Cal.3d, at 346-349 ["all meaningful aspects of the business relationship"], 350, 352-353, 357 ["all *necessary* control over the harvest portion of its operations" (emphasis in original)]); and Metropolitan Water Dist. v. Superior Court (32 Cal.4th 491, 504 fn. 9 ["as experience and . . . decisions indicate, control over disbursement of funds may be exercised by persons other than those who actually write the checks."])

Respondents' characterization, without benefit of record citation, of Isidro MUNOZ as a "large, independent farming business", and/or a "large strawberry grower" merits reference to records of which this Court may take judicial notice.[4] Munoz defaulted in the current litigation and, during

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[4]Appellants, in our "Second Request For Judicial Notice", *supra*, seek, pursuant to Evid. Code, § 452, subd. (d)(2), this Court's notice of certain records of the United States Bankruptcy Court for the Central District of California in the Chapter 7 petition and discharge of Isidro [aka Ysidro] Munoz during the pendency of the present action.

its pendency, was discharged in bankruptcy. [Second Judicial Notice, *supra*, Exhibits 9, 16 (p. 5).] Munoz possessed no real property. [Second Judicial Notice, *id.*, Exhibits 10, 11.] His personal property had a market value of $70,100 of which approximately $69,000 was attributable to three 1999 Ford F-800 trucks and one 1999 Chevrolet Suburban [*id.*, Exhibits 10, 12 (4th and 5th sheets), 13], a value *less* than the secured claims on the same vehicles. [*Id.*, Exhibit 13.] Under oath, Munoz listed his occupation as "farm laborer". [*Id.*, Exhibit 15.] Respondents herein, although asserting that Munoz was indebted to them and further suggesting his failure to pay the plaintiff-workers herein was "inexplicable", filed no creditors' claims [*id.*, Exhibit 16 (Bankruptcy Court Docket Report), *cf.*, 11 U.S.C., 501, Fed.R.Bankr.P., § 3002]; undertook no examination of the debtor or others [*id.*, Exhibit 16, *cf.*, Fed.R.Bankr.P. § 2004); sought no determination of nondischargeability [*id.*, Exhibit 16, *cf.*, 11 U.S.C., § 523(a), Fed.R.Bankr.P. § 7001]; filed no objections to discharge [*id.*, Exhibit 16, *cf.*, 11 U.S.C., §§ 522, 727(c), Fed.R.Bankr.P. § 9014]; and filed no adversarial claims of any nature. [*Id.*, Exhibit 16, cf., 11 U.S.C., §§ 554(b), 725, Fed.R.Bankr.P. §§ 2017, 5005(a), 6002, 7001-7003.]

Respondents COMBS/RUIZ attempt to bolster their description of Munoz as someone with sufficient, independent financial resources to

insulate the former from any "meaningful" control over the workers' wages, by characterizing as capable of "potential investment" of $21,000 to $23,000 per acre for the 96 acres under contract with respondents in 2000. (COMBS/RUIZ ARBM, pp. 7-8, *cf.*, App. 136, 839.[5]] What respondents characterize as "investment" in reality is sample costs calculated by University of California Cooperative Extension for an assumed farm of 88 acres [App. 367-383], and few of these costs required capital "up front". For example, over one-half of the sample costs were field labor [App. 376] for which Munoz was heavily dependent upon "advances" by respondents and unable to meet when respondents withheld his anticipated proceeds. [*See, generally*, AOBM pp. 81-87, and record citations therein.] Sample land rent was projected at $1,169 per producing acre [App. 372] which in Munoz' arrangement with APIO consisted entirely of a paper transaction requiring no cash from Munoz but indebting him to respondent for $909 per acre [App. 136-137] subsequently withheld by APIO from Munoz' gross proceeds (which produced no net for Munoz). [*See, generally*, AOBM, at pp. 79-87.]

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[5]APIO estimated that its growers' expenses varied between $7,000 and $8,000 per acre. [App. 1009.] In any event, Munoz' share of costs for the 32 acres contracted with Ramirez Brothers - presumed in COMBS/RUIZ' projection - is unclear.

The "investment" consisted overwhelmingly of costs advanced by APIO to be deducted from harvest proceeds (before Munoz received a cent), and the labor costs of which the majority were incurred during harvest and required the contemporaneous "Pick Pack" advances by APIO, debited against the future, never-to-be-paid net proceeds, and additional emergency advances by COMBS. [AOBM 81-89, 94.] Indeed, as of the week ending May 21, 2000, Munoz' indebtedness to APIO for these advances totaled over $194,000. [App. 1060, 2nd column from right.]

(3) Legislative "Confirmation" of IWC Employer Definitions Is Not Required

Contrary to respondents' urgings, Reynolds v. Bement (2005) 36 Cal.4th 1075 did not impose a new requirement that IWC orders must be subsequently confirmed by legislative enactment to be enforceable. Reynolds focused on a discrete question: whether the IWC's 1947 alternative "exercises control" employer definition imposed liability upon corporate directors. The Court searched for the IWC's intent and concluded that the definitional language is facially unclear in the face of the long-standing doctrine of corporate-director immunity. Furthermore, no promulgation history exists to otherwise demonstrate the IWC's intent. In the absence of *any* indication of IWC intent, and since the private plaintiffs asserted their wage claim under Labor Code Section 1194 (the codified

successor to former Section 13 of the Act providing private civil enforcement for violations of IWC orders), the Court then reviewed whether the post-promulgation amendments to that statute indicated that the Legislature had supplied what the IWC had failed to provide: judicially-cognizable legislative intent as to how the definition was to be applied against historically (and statutorily, *cf.*, Corp. Code § 309(a)(b)) protected persons. Again, finding no such indication, the Court concluded that it found inadequate manifestation that law-makers intended to displace the historic corporate-director immunity doctrine.

The key question in Reynolds was the law-makers' intent. Reynolds did not change the fundamental principle that judicial review of wage orders is limited to an examination of whether the IWC has exceeded its quasi-legislative authority (Industrial Welfare Com., *supra*, 27 Cal.3d, at 702) or whether the Legislature has expressly overruled the IWC. (Cal. Drive-in Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 291.) Nowhere in Reynolds does this Court even hint that it is overruling this principle, nor creating a new, unprecedented requirement of "statutory confirmation" for IWC promulgations. Unless the IWC's 1916 promulgation was outside its authorized powers, or unless the Legislature subsequently expressly repealed the definition prior to the 1937 codification, no further legislative

act was necessary post-codification to approve or confirm the validity of the IWC's earlier orders.

(4) The Legislature Has Not Overruled the IWC's Promulgations of Employer Liability

The 1937 codification "in so far as [its provisions were] substantially the same as existing provisions [of the Act] relating to the same subject matter . . . [was intended to be] construed as restatements and continuations thereof and not as new enactments." (Labor Code, § 2, Stats. 1937, Ch. 90, p. 185, § 2.) To the extent that former Section 6 authorized the IWC to adopt the "suffer or permit" employer definition to regulate wages outside common-law relationships, that authorization was continued following codification. (Labor Code, Section 2, Stats. 1937, Ch. 90, p. 185, Section 2.)

Former Section 6 of the Act, empowering the Commission to fix minimum wages, maximum hours and conditions of labor required for the general welfare, was codified as Section 1182, and continued to authorize the Commission to fix minimum wages "to be paid to women and minors *engaged* in any occupation, trade or industry . . . ." (*Id.*, p. 215, § 1182, subd.(a). Emphasis added.) [footnote 37 below] (AOBM, pp. 44-45.) The term "engage" was retained through subsequent amendments to Section 1182, (Stats 1947, ch. 1188, p. 2671; Stats. 1972, ch. 1122, pp. 2152, 2154;

repealed, Stats. 1980, ch. 1083, p. 3464, 3466, § 11; see, Calif. Grape Etc. League v. Industrial Welfare Com. (1969) 268 Cal.App.2d 692, 697; AOBM, p. 45, fn. 37.)

The current Section 1182, subd.(a) continues to authorize the IWC amend or rescind existing orders or promulgate new orders, but no longer expressly references to whose benefit. The current language provides no basis for assuming applicability only to common-law relationships. This language similarly provides no basis for finding the act "irreconcilable, clearly repugnant" to former Section 6. (Cal. Drive-in Restaurant Assn., *supra*, 22 Cal.2d, at 292.)

B. The Private Right of Action Under Labor Code Section 1194 Continues to Incorporate the IWC Definition of Employer Liability

(1) The Legislature In 1913, Authorized Persons To Bring Private Causes of Action To Fully Enforce the IWC Regulations Including Employer-Liability Definitions

Former Section 11's first clause confirmed beyond question that the minimum wage established by the IWC was the *legal* minimum wage within California and that payment of a lesser wage was unlawful. (Stats. 1913, ch. 324, Sec. 11, p. 636.)

The Act's following provisions supplied three methods for enforcing the IWC's orders. These provisions should be to harmonized and applied

as a logical whole; construction which results in conflicting or contradictory or illogical applications should be to avoided. (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387, 1391.)

Section 11's second clause (together with supplemental language in Section 12) provided for criminal prosecution:

> . . . [E]very employer or other person who, either individually or as an officer, agent, or employee of a corporation or other person, pays or causes to be paid to any such *employee* a wage less than such minimum, shall be guilty of a misdemeanor . . .

(*Id.*).

Section 13 provided private civil right of action:[6]

> Any *employee* receiving less than the *legal minimum wage applicable to such employee* shall be entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage, together with costs of suit, notwithstanding any agreement to work for such lesser wage.

(Stats 1913, supra, Sec. 13, p. 637.)

Finally, Section 14 empowered the IWC to pursue civil proceedings to enforce its established wages.

> Any person may register with the commission a complaint that the wages paid to an *employee* for whom a . . . rate has been established, are less than that rate, and the commission shall investigate the matter and take all proceedings necessary to enforce the payment of a wage not

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[6]Section 13 was codified as Section 1194 in the 1937 adoption of the Labor Code.

less . . .

(Id., Sec. 14, p. 637.) All three provisions reference "employee".

All three provisions were part of the Act. Section 13 was not a separate, contemporaneous or coincidental statute as respondents repeatedly suggest. Indeed, Section 13's provisions, and those of its companion sections, would have been meaningless outside the other provisions of the Act. The "legal minimum wage applicable to such employee" did not exist except for the Act - - no other such wage existed under California law. The three statutory enforcement provisions became effective or operational only to the extent that the IWC took future action, i.e., promulgated orders - - and these enforcement provisions of necessity incorporated those future IWC promulgations. If the IWC declined to issue an order covering workers engaged in agriculture, those workers had no rights that could be enforced penally under Section 11, through a private right of action under Section 13, or through a civil action pursued by the Commission.

There was no need for the IWC to "incorporate" Section 13 (or the other accompanying enforcement provisions) into its future orders–such a provision would have been of no effect. And there was no need for the Legislature to return to the issue and "incorporate" the IWC's subsequent orders into these enforcement provisions–such action would have been

redundant.

Respondents' arguments that "employee" as used in Sections 11-12, 13 and 14 was intended to incorporate only the common-law relationship, would mean that payment of less than the minimum wage fixed by the IWC could be remedied under any of the penal, IWC civil enforcement or civil private right of action only for those women whose work fell within the common-law definition of "employee" - - even though the IWC was equally obliged under Section 6 to fix the wages for those "engaged" - - whose occupations fell outside the common-law definition of employment. To put otherwise, respondents' position that "employment" and "employees" within the Act are confined to their common-law meaning results in making the IWC 's statutory *duties* to determine and fix minimum wages for women occupied outside the common-law concept of employment nullities - - of no legal effect or consequence whatever.

A provision must be given a reasonable and common sense interpretation consistent with apparent purpose and intention of the lawmakers. (Golden State Homebuilding Association v. City of Modesto (1994) 26 Cal.App.4th 601, 608.)

There is a corollary: defining which workers are protected of necessity requires defining who is liable: otherwise the establishment of the

"right" is an empty act - - a legal nullity. If the IWC was empowered through Section 6 to establish rights for workers engaged outside the common-law concept of employment, the Commission of necessity was empowered to establish the liabilities commensurate with those rights.

(2) The Legislature Has Neither Withdrawn Nor Repealed This Authorization To Privately Enforce the IWC Regulations, Now Codified in Labor Code Section 1194

In 1937, former Section 13 was incorporated as Section 1194 of the new Labor Code but the provision was modified to provide that,

> [a]ny *woman or minor* receiving less than the legal minimum wage applicable to such woman or minor is entitled to recover in a civil action the unpaid balance of the full amount of such minimum wage . . .

(Stats 1937, Ch. 90, p. 217, Sec 1194.) The private cause of action and the scope of corresponding liability continued to be tied directly to the Commission's order(s) establishing minimum wages. (Stats. 1937, ch. 90, p. 217.)

Assuming that use of the term "employee" in Section 13 - as in companion enforcement sections 11-12 and 14 - was intended to protect any worker falling within the scope of the IWC's orders, *i.e.*, any "woman or minor" "employ[ed] or suffer[ed] or permit[ted] . . . to work"], the codification to Section 1194 could not logically constitute a restriction on

the IWC's authority or intent. (Labor Code, § 2, Stats. 1937, Ch. 90, p. 185, § 2.) Before and after codification, the IWC was authorized to regulate conditions for women and minors; and it had so exercised its authority. (Industrial Welfare Com., *supra*, 27 Cal.3d, at 700.) To conclude that codification narrowed prior authority would violate Labor Code Section 2 and the principle promulgations disfavoring repeal by implication that this Court has applied specifically to IWC. (Cal. Drive-in Restaurant Assn., *supra*, 22 Cal.2d, at 292.)

Evaluation of the present scope of Section 1194's authorization then turns to the 1972 amendments to the Labor Code which in numerous provisions, including Section 1194, changed "any woman or minor" back to "any employee". (Stats. 1972, ch. 1122, p. 2156, § 13.) Those amendments, in response to the Requirements of Title VII of the Civil Rights Act of 1964 have already been ruled by this Court as, "restat[ing] the commission's responsibility in even broader terms." (Industrial Welfare Com., *supra*, 27 Cal.3d, at 701-702; AOB, at p. 46.) To conclude that the Legislature's use of "employee" in 1972-1973 manifested its intent to retrench to a common-law concept would be to ignore the history of those amendments and again to violate the doctrine proscribing repeal by implication.

This Court confirmed that IWC orders retain their validity in the face of subsequent, seemingly-inconsistent legislation unless the two acts are, "irreconcilable, . . . so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both . . ." (Cal. Drive-in Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 292; AOBM, *supra*, 39-41.) Under this standard, the 1972 amendment to Section 1194 cannot be understood to restrict the IWC's orders to the confines of the common law.

2. APIO ERRS IN ITS CONTENTION THAT APPELLANTS ARE NOT THIRD-PARTY BENEFICIARIES OF ITS CONTRACT WITH MUNOZ

APIO does not deny that its form contract required Munoz, in order to satisfy the agreement, to hire plaintiffs and co-workers to cultivate, harvest and deliver the strawberries. APIO does not, and could not, deny that plaintiffs and their co-workers are the intended beneficiaries of California's minimum-wage law. To avoid liability, APIO attempts to make two somewhat-related arguments: *first*, that its contractual language requiring Munoz to, "comply with all provisions of . . . state . . laws applicable to its farming operations, including, without limitation, labor . . ." [App. 148, ¶ 14.D] did not obligate Munoz to comply with the minimum-wage law; and, *second*, that its intent in this provision was not to

benefit appellants. Its arguments are unsustainable.

APIO argues that Munoz was not obligated under the form language of respondent's agreement because APIO received no consideration for the promise inasmuch as Munoz was under a prior existing duty to comply with the statutes. That argument fails to acknowledge that the provision added a new, contractual duty running to APIO, which it did not previously enjoy, and providing it a right to enforce (or at its unilateral option, the right to terminate both the contract and the sublease), and is inconsistent with basic California contract law. (Civil Code, § 1614; Martin v. World Savings (2001) 92 Cal.App.4th 803, 809.) Neither Capitelli v. Sawamura (1954) 123 Cal.App.2d 169 nor Alhino v. Starr (1980) 112 Cal.App.3d 158 cited by APIO are contrary: both found no consideration for subsequent agreements modifying prior existing *contractual* duties to the promissee. (Capitelli, *supra*, 123 Cal.App.2d, at 174; Alhino, *supra*, 112 Cal.App.3d, at 168.)

Somewhat inconsistently, APIO also erroneously asserts that the absence of specific wage rates in its contract with Munoz "allowed MUNOZ to exercise his sole discretion in making decisions on wage rates." (APRIO RABM, at 78.) Of course, California law did not permit Munoz either unilaterally nor jointly and severally pursuant to his contract with

APIO to pay employees less than the applicable minimum wage, just as California law does not permit contracting parties to pay less than the minimum, prevailing wage on public works projects. (The Union v. G & G Fire Sprinklers, Inc. (2002) 102 Cal.App.4th 765; Tippet v. Terich (1995) 37 Cal.App.4th 1517.)

APIO's second argument regarding intent is illogical. The immediate beneficiaries of minimum-wage compliance required by the contract, as well as the immediate victims of non-compliance, are appellants - the class of workers defined in the IWC order. The extent to which APIO itself might benefit as a result of compliance, or suffer as a result of non-compliance through a wage claim, is secondary and derives from Munoz' performance benefitting the workers. APIO does not argue that, in the absence of its own status as employer, it would have been injured by Munoz' non-compliance.

APIO's reliance on Walter v. Marler (1978) 83 Cal.App.3d 1 is unavailing, as that decision turned on whether the promissee intended to secure a benefit to the third person. (*Id.*, at 32-33.) Here, the very promise that APIO sought - - payment of minimum (and other) legal wages inextricably and unavoidably directly benefitted the workers.

Although the contract was not made to benefit Appellants alone, they

may enforce those promises made for their benefit. (Murphy v. Allstate Ins. Co. (1976) 17 Cal.3d 937, 943; Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal.2d 232, 245-247; Johnson v. Holmes Tuttle Lincoln-Merc. (1958) 160 Cal.App.2d 290, 297.) As third party beneficiaries, Appellants may enforce the contracts "not only as to the expressly delineated benefits, but also in an appropriate case may enforce the implied covenants as well." (Hartman Ranch, *supra*, 10 Cal.2d, at 242, 244-247.)

Steinberg v. Buchman (1946) 73 Cal. App. 2d 605 held that the plaintiff real-estate broker lacked third-party status with respect to a purchaser's agreement to deposit funds in escrow, where the purchaser neither retained the broker nor agreed to pay a commission. (*Id.*, at 608-609.)

Finally, to the extent that APIO's form language could be construed as leaving uncertain whether appellants are intended beneficiaries, the language should be interpreted most strongly against respondent. (Civil Code, § 1654; 1 Witkin, CAL. LAW (10th ed. 2005) "Contracts", § 757, pp. 848-850.)

Whether a defendant should be held liable to a person not in privity is a "matter of policy" which involves a balancing of various factors including the extent to which the transaction was intended to benefit

plaintiff, the foreseeability of harm to him, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury and the policy of preventing future harm. (Lucas v. Hamm (1961) 56 Cal.2d 583, 588.) Here, California's strong public policy in favor of ensuring that workers receive all wages when due strongly favors a finding that APIO should be held liable for the unpaid wages owed to Appellants.

Gordon Bldg. Corp. v. Gibraltar Savings & Loan Assn. (1966) 247 Cal. App. 2d 1, 9-10 is similarly inapplicable: the court found that a loan agreement expressly limited its protection to the lender and general contractor and expressly excluded rights or relations to others including the plaintiff in his capacity as either a former general contractor or as a subcontractor who failed to show any performance or contribution. (Id., at 7-10.)

APIO relies on Zahn v. Canadian Indemnity Co. (1976) 57 Cal. App. 3d 509, for the notion that workers who are owed wages, must be deemed to have assumed the same risks of non-payment or breach that were assumed by APIO in entering into a contract with Munoz. APIO's argument essentially converts these workers into the insurers of both APIO and Munoz, in direct contravention of well-established public policies against

such forced indemnification of business expenses by employees found in the California Labor Code, IWC Wage Orders, and related statutes.

CONCLUSION

The Act's historic purposes and language sustain plaintiffs' action pursuant to Section 13's successor - Labor Code Section 1194 - establishing respondents' liability. This Court forcefully emphasized in S.G. Borello & Sons, Inc. v. Department of Industrial Relations that remedial employment statutes should be construed with "particular reference to the 'history and fundamental purpose' of the statute." (*Id.* (1989) 48 Cal. 3d, at 351, 353 ("consideration of the remedial statutory purpose"), 353, 354 ("'history and fundamental purposes' of the statute"), 355, 358 ("class of workers to whom the protection of the Act is *intended* to extend"), 359.) Accordingly, this Court should reverse the court of appeals' affirmance of the dismissals.

DATED: June 9, 2006 Respectfully submitted:

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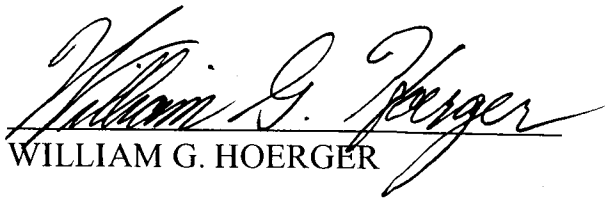
RULE 14(c)(1) CERTIFICATION

I, WILLIAM G. HOERGER, certify that I am appellate counsel for Appellants in the instant appeal; that I have prepared the foregoing Appellants Reply Brief on the Merits in this appeal using WordPerfect version 12.0, and that the word count for this brief including text and footnotes is 6,700, as generated by the appropriate word-count command to the WordPerfect program.

DATED: June 9, 2006



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PROOF OF SERVICE
(CCP, § 1013(a); Rules of Court Rule 15(c))

I, GLADYS BRISCOE, declare that I am employed by California Rural Legal Assistance, Inc., at 631 Howard Street, Suite 300, San Francisco, California 94105. I am over the age of 18 years and not a party to the within action or appeal.

I am readily familiar with California Rural Legal Assistance, Inc.'s practice of collection and processing of documents for mailing with the United States Postal Service, being that first-class mail will be deposited in the ordinary course of business with the U.S. Postal Service on the same day with postage thereon fully prepaid at San Francisco, California. 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 this declaration.

On June 9, 2006, I served the attached APPELLANTS' REPLY BRIEF ON THE MERITS by first-class mail upon the interested persons by placing true copies thereof in sealed envelopes addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on June 9, 2006, in the City and County of San Francisco, California.

GLADYS BRISCOE