No. S279397

In the Supreme Court
of the
State of California

GUSTAVO NARANJO, et al.
Plaintiffs and Appellants,

v.

SPECTRUM SECURITY SERVICES, INC.,
Defendant and Appellant.

RESPONSE OF SPECTRUM SECURITY TO CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS CURIAE BRIEF

Review of a Decision from the Court of Appeal of the State of California
Second Appellate District, Division Four
Case No. B256232

Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. BC372146
The Honorable Barbara M. Scheper

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I. INTRODUCTION

Neither plaintiff Gustavo Naranjo (Naranjo) nor his amicus, California Employment Lawyers Association (CELA), make any effort to address a fundamental point supporting the Court of Appeal's decision below: when there is unsettled law, an employer cannot have *known* the law and *intentionally failed to comply*. The penalty provision in Section 226, by its plain terms, requires such knowledge and intent before it is triggered. Nor do CELA or Naranjo respond to the further point that where an employer asserts *objectively reasonable* defenses to an underlying alleged wage-and-hour violation—as was the case here and in all of the cases that comprise the federal majority view interpreting Section 226—there also cannot be a finding of a bad faith flouting of the law. Failing to engage on these key points, CELA and Naranjo both advocate for an inflexible strict liability interpretation of Section 226, an interpretation that is simply incompatible with the statute's "knowing and intentional" scienter requirement, and an interpretation soundly rejected by the overwhelming majority of courts to address the issue.

Section 226, as it existed at the time of the alleged violations here (2004-2007), was readily interpreted to require a showing of willful, bad faith conduct before the penalty provision attaches. (See, e.g., See, e.g., *Reber v. AIMCO/ Bethesda Holdings* (C.D. Cal. 2008) 2008 WL 4384147, *9 [recognizing "a good faith dispute" defense to §226(e) penalty provision].) While CELA criticizes federal courts for not engaging in substantial analysis in reaching this conclusion, there was no need to

because the words "knowing and intentional failure . . . to comply" in Section 226, subdivision (e) (1), readily convey willful, bad faith conduct. This Court recognized the natural link between "willful" and "knowing and intentional" conduct in *In re Trombley*, observing that both these scienter concepts describe the same bad faith conduct that can be defended by an employer "who disputes in good faith an employee's claim for wages." (*In re Trombley* (1948) 31 Cal.2d 801, 807-08 (*Trombley*).) The Legislature imported the "knowing and intentional" phrase and its judicially accepted meaning into Section 226 in 1976. (Lab. Code § 226(e).) There is no indication, as CELA asserts, that the Legislature meant to use "knowing and intentional" as what CELA labels a "term of art," untethered to its commonly understood meaning. (CELA Amicus Curiae Brief (CELA) p. 12.)

After subdivision (e)(3) was added to Section 226 in 2012 to make clear that a "knowing and intentional failure" "does not include…a clerical or inadvertent mistake," arguments emerged that the newly added language changed the liability standard and extinguished the previously recognized good faith dispute defense embodied in the "knowing and intentional failure" standard. Numerous federal decisions, most notably *Willner*, *Woods*, *Magadia*, and *Oman*, address that argument head on and reject it, explaining persuasively and collectively: (1) that if the legislature intended strict liability, it would simply have omitted the qualifier "knowing and intentional" before the word "failure"; (2) that adding a strict liability construction would impermissibly render the scienter phrase "knowing and intentional" surplusage;

(3) Section 226(e)(3)'s reference to consideration by the "factfinder" of factual issues concerning "compliance with a set of policies, procedures, and practices" is at odds with a strict liability rule; (4) the California courts of appeal have defined willful as intentional and thus the good faith dispute defense applicable to Section 203 (recognized long before regulation 13520 was implemented), should also apply to Section 226; (5) the Labor Code treats "willful" and "knowing and intentional" violations with similar weight, with violations of Sections 203 and 226 both leading to potential statutory penalties and misdemeanor convictions; (6) that it would be "ironic" for a good faith dispute defense to apply to Section 203 but not to Section 226, given that a failure to pay final wages would seem to warrant *less* tolerance than failing to provide accurate wage statements; (7) that this Court in *Trombley* viewed "willful" and "knowing and intentional" conduct as similar, and recognized a good faith dispute defense in that context; (8) that the general understanding of "knowing and intentional," as set forth in dictionary definitions of each conjunctive term, are scienter requirements requiring bad faith conduct, which is necessarily rebutted by a showing of good faith; and (9) that the "failure . . . to *comply with*" wording of Section 226(e) further supports the conclusion that a good faith belief in compliance precludes liability. (See *Willner v. Manpower, Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116, 1130-32; *Woods v. Vector Marketing Corp.* (N.D. Cal. 2015) 2015 WL 2453202, *3-4; *Magadia v. Wal-Mart Associates, Inc.* (N.D. Cal. 2019) 384 F.Supp.3d 1058, 1081-83,

1088-89; *Oman v. Delta Air Lines, Inc.* (N.D. Cal. 2022) 610 F.Supp.3d 1257, 1276-77.)

While not every federal opinion comprising the majority view expressly makes each of these points, *Willner*, *Woods*, *Magadia*, and *Oman* are oft-cited in the decisions, and their reasoning has been clearly adopted. CELA's attack on federal jurists for failing to expand on cases cited as authority is unfounded.

The only thing missing from the decisions comprising the federal majority view, and also from the California appellate court decisions addressing the issue, is a review of Section 226's legislative history. Spectrum has now supplied this Court with such analysis, which further confirms an intent to penalize only those employers who deliberately disregard and flout the law—i.e., employers who are shown to have engaged in bad faith conduct. Because a "knowing and intentional failure to comply" with the law requires a bad faith showing, it necessarily follows that a good faith belief in compliance provides a defense. To hold otherwise would result in a strict liability provision which was clearly never the intent.

II. ARGUMENT

CELA acknowledges that the majority of federal courts to have considered the meaning of the phrase "knowing and intentional failure to comply" conclude that a good faith dispute concerning compliance precludes liability. (CELA p. 17.) But CELA contends the district court decisions comprising the majority view—nearly two dozen reflecting decisions by twenty

different judges—"merely parrot" other cases, contain "gaping analytical holes," and offer no "substantive analysis." (CELA p. 8, 10-11.) It is the cursory analysis of CELA, however, that is lacking.

A. The Analysis Contained in the Federal Cases Interpreting Section 226 is Compelling.

1. The Cases Decided Before the 2012 Amendment of Section 226 Interpreted the "Knowing and Intentional" Scienter Requirement to Require a Showing of Bad Faith Conduct.

Many of the federal cases comprising the majority view, including several cited by CELA, were issued before the 2012 amendments to Section 226 became effective on January 1, 2013, which added, inter alia, the "clerical or inadvertent mistake" example to the statute. (See, e.g., *Reber v. AIMCO/Bethesda Holdings* (C.D. Cal. 2008) 2008 WL 4384147, *9 [recognizing good faith dispute defense to §226]; *Harris v. Vector Marketing Corp.* (N.D. Cal. 2009) 656 F. Supp. 2d 1128, 1146 [same]; *Dalton v. Lee Publications, Inc*. (S.D. Cal. 2011) 2011 WL 1045107, *5 [same]; *Hurst v. Buczek Enterprises, LLC* (N.D. Cal. 2012) 870 F.Supp.2d 810, 829 [same]; *Pedroza v. PetSmart, Inc.* (C.D. Cal. 2012) 2012 WL 9506073, *5, fn.6 [same].) In each of these cases, the employer's decision to classify certain workers either as independent contractors or exempt employees presented issues of fact, based on the nature of the work performed. Because the employer's evidence in each case confirmed the employer had a good faith, objectively reasonable basis for its classification decision, the courts granted summary judgment on Section 226

claims, concluding that a "knowing and intentional failure to comply" under subdivision (e) could not be shown.

While CELA faults these courts for not engaging in a lengthy analysis of the meaning of the phrase "knowing and intentional failure to comply," the opinions' brevity on that topic confirms the phrase's ordinary meaning readily conveys willful or bad faith conduct. Because the words of the statute require a showing of bad faith, the courts had no problem concluding that a good faith (objectively reasonable) belief in compliance provides a defense. (See, e.g., *Pedroza*, *supra*, 2012 WL 9506073, *5 [noting that plaintiff "presents no evidence that [the employer's exemption affirmative defense] was presented in bad faith"]; *Wright v. Adventures Rolling Cross Country, Inc.* (N.D. Cal. 2013) 2013 WL 1758815, at *9 ["There is no dispute by the parties that there is a comparable good faith defense for § 226 which, similar to § 203, requires knowing and intentional conduct."]; see also CELC Amicus Curiae Brief pp. 11-13.) Because "knowing and intentional failure to comply" is effectively a bad faith standard, a showing of a good faith dispute concerning compliance necessarily rebuts it.

2. The Minority "Strict Liability" Interpretation for Section 226 Only Emerged After the 2012 Amendment, and It Is Based on a Faulty Statutory Interpretation of the "Clerical or Inadvertent Mistake" Language—Which Also Does Not Apply Retroactively to Spectrum's 2004-2007 Conduct.

The split in California authority and the minority federal view on which Naranjo and CELA rely only emerged following

the 2012 amendment to Section 226. (See, e.g., *Novoa v. Charter Communications, Inc.* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1028-29; *Cabardo v. Patacsil* (E.D. Cal. 2017) 248 F.Supp.3d 1002, 1010.) But the "clerical or inadvertent mistake" and "factfinder" consideration of "policies, procedures, and practices" language that was added in 2012 does not serve as a new and exclusive definition of "knowing and intentional failure to comply," but instead simply illustrates examples where an employer is not liable. (See Spectrum's Answer Brief on the Merits (ABM) pp. 35-36.) Although Naranjo does not respond to this point in his reply, CELA acknowledges Section 226(e)(3) simply reflects "two examples" where the scienter requirement is not met. (CELA p. 14.)

Furthermore, CELA's arguments assume (like Naranjo) that the 2012 amendment adding Section 226(e)(3) retroactively applies to Spectrum's conduct in 2004-2007. It does not. (See ABM pp. 33-34.)

In his reply, Naranjo argues that Spectrum waived the "no retroactivity" argument by not raising it earlier. (Naranjo's Reply Brief on the Merits (RBM) pp. 33-34.) However, a respondent is always permitted to raise an alternative basis to affirm, particularly where it involves a pure legal issue. (See, e.g., *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610 ["If the decision of the lower court is correct on any theory of law applicable to the case, the judgment or order will be affirmed…"]; see also *Davey v. Southern Pac. Co.* (1897) 116 Cal. 325, 329.) Here, the fact the 226(e)(3) wording was not added until five

years after the class period ended provides an additional basis to affirm the Court of Appeal's decision rejecting the argument that the meaning of "knowing and intentional failure to comply" is limited to inadvertent or clerical mistakes for purposes of this case. Spectrum is permitted to raise the point because it presents "a question of law alone . . . on the facts appearing in the record." (*People v. Venice Suites, LLC* (2021) 71 Cal.App.5th 715, 724.)

Naranjo further responds that the 2012 amendment was merely a clarification that may be given retroactive effect even without an expression of legislative intent for retroactivity. While the "inadvertent or clerical mistake" example added in 2012 is certainly a clarification, that is not how Naranjo argues the point. Under Naranjo's (and the trial court's) view, the "clerical or inadvertent mistake" wording operates to replace "knowing and intentional," *changing* the phrase to mean *only* "not inadvertent." (Naranjo's Opening Brief on the Merits (OBM) p. 27-30.) To measure Spectrum's earlier conduct under this changed standard runs counter to *Myers v. Philip Morris* (2002) 28 Cal.4th 828, which holds that unless "there is an 'express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.'" (*Id.* at 841.)

3. The Majority of Post-2012 Amendment Cases Correctly Reject the Strict Liability View, Interpreting "Knowing and Intentional Failure to Comply" to Allow For a Good Faith Defense.

After the 2012 amendment adding Section 226(e)(3), plaintiffs began asserting that the new language served to change the meaning of a "knowing and intentional failure to comply" to mean simply "not inadvertent." Consequently, decisions issued after the amendment address that new argument and engage in more extensive analysis.

For example, the plaintiff in *Willner v. Manpower, Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116 argued that Section 226 imposes strict liability except for clerical mistakes or inadvertent errors. (*Id*. at 1129.) The district court rejected that argument, explaining (1) that if the legislature intended strict liability, it "could simply have omitted the qualifier 'knowing and intentional' before the word 'failure;" and (2) that adding a strict liability construction would impermissibly render the phrase "knowing and intentional" surplusage. (*Id*. at 1130-31.) The court further found Section 226(e)(3)'s reference to "factfinder" also supported this conclusion, as the consideration of factual issues concerning compliant policies, procedures, and practices further confirmed there was no intent to impose strict liability. (*Id*. at 1131.) Finally, the court analogized the phrase "knowing and intentional" to the "substantially similar" phrase "willingly and knowingly" in Labor Code section 1021.5, concluding that both phrases were intended to penalize an employer who "knew

that facts existed that brought its actions or omissions within the provisions" of the statute. (*Id*.)

The court in *Woods v. Vector Marketing Corp.* (N.D. Cal. 2015) 2015 WL 2453202 cited *Willner* and expanded on its holding, also concluding that a good faith dispute defense applies to Section 226 claims. (*Id*. at *3-4.) The court reasoned that application of a good faith dispute defense makes sense for the reasons articulated in *Willner* and also because: (1) "California courts have defined willful as intentional" (*id*. at *4, citing *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7-8 and *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201 (*Amaral*)); [1] (2) "the Labor Code itself treats 'willful' and 'knowing and intentional' violations with similar weight," with both leading to potential statutory penalties and misdemeanor conviction;[2] (3) it would be "ironic" for a good faith dispute

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[1] CELA incorrectly states that *Amaral* "did not mention" Section 226's "knowing and intentional" wording and "did not analyze section 226's language." (CELA p. 16.) In fact, Section 226 was at issue on appeal in *Amaral* (163 Cal.App.4th at 1194-1195), and the court quoted the operative "knowing and intentional" penalty requirement in 226 in the same sentence it quoted the "willfully" requirement in 203. (*Id*. at 1195.) The court went on to interpret Sections 203 and 226 as both containing "a 'willfulness' component," and affirmed the trial court's finding that there was no willfulness where the legal obligation imposed on employers by the city's living wage ordinance was "unclear" at time of violation. (*Id*. at 1194-96, 1201-04.)

[2] As Spectrum highlighted in its Answer Brief, while Labor Code section 216 imposes misdemeanor liability for a "willful" failure to pay wages, Penal Code section 487m, enacted in 2021, elevates such a failure to pay wages to a felony if the unpaid amount is

defense to apply to Section 203 but not to Section 226 given that a "failure to pay [final] wages would seem to warrant lesser tolerance of defenses than failing to provide accurate wage statements"; and (4) this Court in *Trombley* viewed "willful" and "knowing and intentional" conduct as similar. (*Id*. at *4.) For all these reasons, because the plaintiff in *Woods* failed to present evidence that the employer's defense to liability for the allegedly unpaid wages (sought for claimed compensable pre-hire training time) was "presented in bad faith," the court granted summary judgment on the Section 226 claim. (*Id*.)

Magadia v. Wal-Mart Associates, Inc. (N.D. Cal. 2019) 384 F.Supp.3d 1058 is similarly well reasoned, and reiterates many of the points from *Willner* and *Woods,* while adding yet more. The district court in *Magadia* concluded that the "knowing and intentional requirement of § 226 is akin to a willfulness requirement" and, accordingly, a good faith dispute defense applies to both Section 203 and Section 226 claims. (*Id*. at 1081.) The court based this conclusion on *Trombley* and *Amaral,* and on the point made in *Willner* that 226(e)(3) "explicitly gives [a factfinder] permission to consider the *circumstances* surrounding a § 226 violation." (*Id.* at 1083, emphasis in original.) The court then added that its holding was "consistent with the general understanding of 'knowing and intentional,'" as reflected in

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more than $950 per employee and if the conduct is both knowing and intentional. (ABM pp. 37-38, fn.8, quoting Penal Code § 487m(b).) Neither Naranjo nor CELA address this additional link between willful and knowing and intentional conduct.

dictionary definitions of each conjunctive term, both of which reflect scienter requirements. (*Id.*) Finally, the court reiterated the point made in *Willner* that a strict liability approach would "essentially read out any scienter requirement from 'knowing and intentional' and create tension with the commonly-understood legal meaning of these words." (*Id.*) The court then held that, given the uncertainty in the law that existed prior to its summary judgment decision in the case, Wal-Mart had not knowingly and intentionally violated Section 226 by providing an untimely wage statement. (*Id.* at 1088-89.)

The district court's analysis is *Oman v. Delta Air Lines, Inc.* (N.D. Cal. 2022) 610 F.Supp.3d 1257 is particularly significant because (like *Naranjo*) the law at issue only became settled during the course of the litigation. At issue in *Oman* was whether Section 226 applies to flight attendants who, although based out of California airports, work the vast majority of their flying time out of state. (*Id.* at 1265.) There was no dispute in the case that the wage statements issued to the plaintiffs did not list total hours worked or rates of pay for all hours worked given the complex way in which the attendants were paid. (*Id.* at 1263-64.) Although the district court initially agreed with Delta that Section 226 did not apply to the plaintiffs' employment, the Ninth Circuit certified that issue to this Court, which held that attendants are protected by Section 226 if they are based in California and do not spend the majority of their time working in any one state. (*Id.* at 1266, citing *Oman v. Delta Air Lines, Inc.* (2000) 9 Cal.5th 762, 773.) (A companion case, *Ward v. United*

Airlines (2020) 9 Cal.5th 732, reiterated that holding.) Based on this Court's *Oman* decision, the Ninth Circuit reversed the district court, further concluding that application of the *Ward* test did not violate the dormant commerce clause. (*Id*. at 1266.)

On remand, the district court in *Oman* applied the *Ward* test and found the attendants were entitled to compliant wage statements. (*Id*. at 1270.) It nonetheless largely rejected plaintiffs' Section 226 claim on the grounds that Delta held a good faith belief that it was not required to comply given the lack of clarity that existed in the law as the case was litigated, including uncertainty in application of the dormant commerce clause, which was not finally resolved until the U.S. Supreme Court denied Delta's petition for certiorari. (*Id*. at 1277 [good faith belief ceased and liability existed once certiorari was denied].) In adopting the good faith dispute defense to Section 226, the court reiterated the points made in *Woods* and *Magadia*, agreeing with their analyses. (*Id*. at 1274.) The court also emphasized that the "failure . . . *to comply with*" wording of Section 226(e) further supported the conclusion that a "good faith belief in compliance precludes liability." (*Id*., emphasis in original.)

Similarly, here, the evidence and procedural history of this case confirm that Spectrum did not know it had to pay meal period premiums to its officers until after a summary judgment win, an appeal, a trial, and a further appeal, all culminating in 2019, and therefore could not have intentionally failed to comply during the 2004-2007 class period. Also similar to *Oman*,

Spectrum did not know until the 2022 *Naranjo* decision that an unpaid meal period premium was "wages earned" (or that the associated "credited hour of work" was "hours worked") that had to appear on wage statements. (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121, 125 (*Naranjo*).) Because the state of the law was unclear, Spectrum cannot be charged with a knowing and intentional failure to comply. Critically, neither Naranjo nor CELA address this latter argument, and Naranjo's only response to the former argument concerning the viability of Spectrum's defenses is to improperly attack Spectrum for supposed new Labor Code violations neither alleged nor ever asserted in the case. (RBM pp. 19-22.)[3]

4. CELA's Attack on Federal Decisions that Do Not Include an Expansive Analysis of Cited Cases Is Meritless.

CELA criticizes various federal courts that comprise the majority view for citing to *Willner*, *Woods*, *Magadia*, and *Oman* and other authorities because the courts did not expressly

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[3] Naranjo acknowledges that Spectrum began, during the course of litigation, to include paid meal period premiums on wage statements. (RBM p. 24.) That Spectrum undertook that step has no bearing on whether it knew it had to include unpaid meal period premiums on wage statements in 2004-2007. Naranjo also raises a cryptic argument, based on an "Exhibit 13" from an unidentified "subsequent class action," that Naranjo claims shows unpaid premium pay in 2016. (RBM p. 24.) But the record cited ("MFJN 0657-0658") is not part of the *Naranjo* RJN record, which ends at MFJN-656. The claimed "Exhibit 13" also is not reflected anywhere in the May 11, 2016 Court of Appeal order granting judicial notice in this case.

reiterate the points made in those cases. But CELA's characterization of these courts as failing to "scrutinize[e] the underlying reasoning of the authority on which [it] relied," is weak and unsupportable. (CELA p. 17.) For example, the court in *Wellons v. PNS Stores, Inc.* (S.D. Cal. 2022) 2022 WL 16902199 cited both *Woods* and *Oman* in concluding that a good faith belief in compliance furnishes a defense to a Section 226 wage statement claim. That the court did not reiterate *Woods'* and *Oman's* reasoning in detail does not mean it simply "parroted" those cases, without its own analysis. Indeed, the *Wellons* opinion acknowledges the plaintiffs' reliance on *Kao v. Holiday* (2017) 12 Cal.App.5th 947 and *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, and distinguished them on the facts. (*Wellons*, *supra*, 2022 WL 16902199, at *22, n. 19.) As the district court explained, unlike in *Kao* and *Furry*, the affirmative defense in the exemption dispute in *Wellons* proffered by the defendant employer was objectively reasonable and supported a good faith belief in compliance, whereas the employers' defenses in *Kao* and *Furry* boiled down to pure ignorance of the law. (*Id.* at *22, n. 19.)[4]

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[4] Naranjo also relies on *Kao* and *Furry* to argue that an employer's exemption defense in a misclassification case amounts to a "mistake of law" that can never establish an objectively reasonable good faith belief in compliance. (RBM pp. 14-15.) But the facts of *Kao* and *Furry* are nothing like the facts of the numerous misclassification cases that comprise the federal majority view on Section 226, all of which involved very fact intensive inquiries as to whether the test for exempt status was met, confirming the objective reasonableness of the employer's

B. CELA Downplays the Importance of *In re Trombley*.

CELA also attacks the federal court decisions that rely on this Court's decision in *Trombley, supra,* 31 Cal.2d 801, characterizing such reliance as "suspect." (CELA, pp. 11, 14.) According to CELA, *Trombley* should be ignored because: (1) the phrase "knowing and intentional" meant something different in 1948 (when CELA contends it was used only "colloquial[ly]" by this Court in *Trombley*), than it did in 1976 (when CELA contends the Legislature used the phrase as a "term of art" in Section 226); and (2) the fact "willful" and "knowing and intentional" were viewed by this Court as synonymous only bears on the meaning of "willful" and not vice versa. (CELA pp. 12-13.) CELA's speculative and self-serving analysis does not withstand scrutiny.

As to CELA's first point, CELA overlooks that when the phrase "knowing and intentional" was used by the Legislature in 1976 in Labor Code section 226, subdivision (e), it carried with it the meaning given that term in California caselaw, especially cases interpreting the Labor Code, and particularly California Supreme Court decisions interpreting the Labor Code. (See

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position. (See, e.g., *Boyd v. Bank of America Corp*. (C.D. Cal. 2015) 109 F.Supp.3d 1273, 1278-1304 [though ultimately rejecting the defendant's exemption defense, the court nonetheless concluded the employer's classification decision was objectively reasonable, based on an extensive analysis of the facts, and thus precluded liability under the "knowing and intentional" requirement in Section 226].)

People v. Scott (2014) 58 Cal.4th 1415, 1424 ["It is a settled principle of statutory construction that the Legislature 'is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.'" citation omitted].) The idea that the Legislature intended to use the phrase "knowing and intentional" in Section 226 as what CELA labels a "term of art," untethered to its ordinary meaning as articulated in *Trombley,* is without support and runs counter to statutory construction rules. (See *Assoc. for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2023) 94 Cal.App.5th 764, 779 [explaining that, under the "Fixed-Meaning" canon of construction, "[w]ords must be given the meaning they had when the text was adopted"].) There is no indication in the legislative history that some other meaning for "knowing and intentional," other than its ordinary meaning, was intended. Rather, the legislative history confirms the opposite, as Spectrum has already highlighted. (ABM pp. 26-30.)

As to CELA's second point, *Trombley's* significance is not limited only to interpretation of the word "willful," as CELA insists. That this Court viewed the terms "willful" and "knowing and intentional" as carrying the same meaning should apply in interpreting *either* phrase within the Labor Code. As *Trombley* confirms, the phrase "knowing and intentional" carried with it an ordinary and fixed meaning (*i.e.*, willful and in bad faith) and

that is the meaning imported into Section 226 in 1976 by the Legislature.[5]

Like Naranjo, CELA attempts to limit the significance of *Trombley* because it does not fit their view that "knowing and intentional" in Section 226 is "unique wording," without prior meaning in California caselaw. (CELA p.10; OBM p. 31.) The legislative history of Section 226 also does not bear out Naranjo's position that the "knowing and intentional" scienter requirement in Section 226(e) was not essential to passage of the amended statute. (RBM pp. 17-18.)

After AB 3731's scienter requirement was amended by the author (Assemblyman Lockyer) from "knowing" to "knowing and intentional" (MFJN-1215), it was referred to the Assembly's Committee on Labor Relations and emerged May 20 without opposition. (MFJN-226 ["Ayes 7. Noes 0."].) While opposition did subsequently crop up (from the California Manufacturers Association, the Construction Industry Legislative Council and the California Conference of Employers Association) as AB 3731 worked its way through the Assembly and Senate (MFJN-235, 238), it was the scienter requirement that ultimately won the day. This point is explained in the August 30, 1976 letter from the bill's original sponsor (California Rural Legal Assistance) to Governor Brown urging signature: "Though employer interests,

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[5] *Trombley* also confirms, contrary to Naranjo's repeated insistence, that application of a good faith dispute defense does not amount to "judicial legislation;" it is simply applying the plain meaning of "knowing and intentional." (*Trombley, supra*, 31 Cal.2d at 807-808; RBM pp. 25-26, 28-29.)

at first, opposed the bill, we persuaded them that an employer who deliberately failed to provide wage information should be liable for the consequences of his or her act to an employee who had labored in good faith, and they withdrew their opposition." (MFJN-243; see also MFJN-246.)[6]

True, as Naranjo correctly points out, the opposition from the employer groups was prompted by a dispute as to whether deductions on the wage statements needed to be itemized or could be aggregated instead. (RBM p. 17; see MFJN 213-214, 221-222, 238-39.) But the concern identified by the employer groups was in avoiding a "trap for small employer[s]" created by a "conflict" between Section 226 and a new set of IWC regulations concerning deductions. (MFJN-233.) The fact that this concern was *dispelled* when the proponents of AB 3731 reminded the employer opposition groups that the statute contained a knowing and

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[6] Naranjo points out in his reply that the terms "flout" and "flaunts" are both used in the Legislative history. (RBM p. 17, fn.4.) "Flaunts" was used in the original 1976 letter explaining the purpose of the Section 226(e) penalty provision to the Governor (MFJN-243), and is repeated in subsequent Legislative material quoting the letter. (MFJN-164, 182, 188, 194, 207, 211.) "Flout" was used in a 2012 letter (from CELA) addressing the "suffering injury" definition added that year to 226(e) (MFJN-203), and "flout" is repeated in subsequent materials referencing that letter. (MFJN-158, 175.) But looking at the 1976 letter, we agree with Naranjo that the term "flaunts" is used more like "flout," in the sense of contemptuous disregard. (RBM p. 17, fn.4.) Certainly the 1976 letter's example of the employer tearing off the pay stub information in front of the employee and handing the worker only the check indicates a contemptuous disregard. (MFJN-243.)

intentional violation requirement such that it would apply only to "an employer who deliberately failed to provide wage information" (MFJN-243), underscores the *shared* understanding that the scienter requirement was intended to embody a good faith component. In other words, the scienter requirement assured that the statute would *not* impose a strict liability "trap" for employers arising from uncertainties in the law. CELA's and Naranjo's strict liability interpretation of 226(e), which would hold employers to "know" unsettled law and "intend" to violate it, is contrary to this shared understanding and, in fact, would create the very trap for employers that the Legislature sought to avoid.

C. Sections 203 and 226 Should Be Harmonized.

CELA also overlooks the need to harmonize Sections 203 and 226, given the similarity in penalties each statute imposes and the incongruity that would result if a failure to pay wages was subject to a good faith dispute defense, but a wage statement violation was not. This point was made in both *Woods* and *Oman*, as well as by the Court of Appeal here. (*Woods*, *supra*, 2015 WL 2453202, *4; *Oman*, *supra*, 610 F.Supp.3d at 1275; *Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 950, n.6 (*Naranjo III)*.)

Like Naranjo, CELA mischaracterizes the federal courts' reliance on a need to harmonize Sections 203 and 226 as a mistaken application of regulation 13520 to Section 226. (CELA p. 13.) But it is undisputed that regulation 13520 expressly defines "willful" in section 203. What CELA (and Naranjo) refuse

to acknowledge, however, is that the good faith defense recognized in 13520 did not spring from the regulation, but instead reflects California law in existence long before the 1988 regulation was promulgated. (See *Naranjo III*, 88 Cal.App.5th at 945-46, 949-50, citing *Trombley*, 31 Cal.2d at 807-08; *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274-75; *Barnhill*, *supra*, 125 Cal.App. at 7-8; *Amaral*, *supra*, 163 Cal.App.4th at 1201 ["*Barnhill*'s holding was memorialized in [§] 13520."].) [7]

Naranjo also makes the further dubious argument that Section 226 is far more important than Section 203 because a wage statement serves as an "enforcement mechanism" and is a "keystone statute," according to Naranjo, on which "all the other associated compensation statues depend." (RBM pp. 32-38.) Because of Section 226's "keystone" importance, Naranjo's argument continues, the statutory wording should be cast aside

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[7] It is not surprising that "willful" was specially defined in 13520. A problem with the term, as this Court recognized in its analysis of Insurance Code § 533 (which excludes "loss caused by the *willful* act of the insured"), is that the meaning of willful can sometimes be viewed simply as "'the mere intentional doing of an act," something akin to "'a voluntary contraction of the muscles, and nothing more….'" (See *J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 52 Cal.3d 1009, 1020-21 & fn. 11, quoting *Fire Ins. Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1019 and Prosser & Keeton, The Law of Torts (5th ed. 1984) § 8, pp. 34-35.) Whether dispelling this uncertainty in the term "willful" was part of DLSE's motivation behind regulation 13520 is not known, as the rulemaking materials for 13520 have not been located. (MFJN-638-639.) The term "knowing and intentional" is not subject to similar uncertainty.

and a strict liability standard should attach to a Section 226 violation. (RBM p. 39.)

In support of this implausible argument, Naranjo cites *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858. But *Ferra* in no way supports the imposition of strict liability for an inaccurate wage statement. Rather, it supports the *opposite*.

The employer in *Ferra* paid its employees meal and rest period premiums. The issue in the case was the rate at which those premiums needed to be paid. The employer used the employee's base hourly rate to calculate the premium pay, while the plaintiff contended the premiums must be based on the employee's "regular rate of pay," factoring in non-discretionary incentive payments too. (*Id*. at 864.) The trial court granted the employer's motion for summary adjudication, concluding the base hourly rate was the proper rate to use, and the Court of Appeal affirmed. (*Id*.) This Court reversed, concluding the phrase "regular rate of compensation" as used in Labor Code section 226.7(c) means the same thing as "regular rate of pay" as used in Labor Code section 510(a) and encompasses not only hourly wages but all non-discretionary payments for work performed by the employee. (*Id.* at 878.)

Although the *Ferra* opinion does not mention wage statements, Naranjo speculates that Ferra's wage statement is what tipped Ferra off to the fact that her meal and rest period premiums were paid at what later turned out to be the wrong rate. But the point that Naranjo overlooks is that the information that was of utility to Ferra in the wage statement

was the *failure* to include the full amount of the premium *earned*. In other words, Ferra's wage statement was accurate based on what she was actually *paid*. That wage statements are of utility to employees (and to their counsel) because of earnings that are *omitted* does not support the imposition of strict liability. Rather, it confirms that an employer's imperfection (as ultimately adjudged and confirmed many years after the fact) is of utility and should not be strictly punished with no meaningful available defense.[8]

The procedural history of *Ferra*, and many other wage-and-hour cases like it, where employers have been sent mixed messages from the courts on unclear statutory wording, also does not support strict liability. It is one thing to hold that an employer's misinterpretation of a statute results in retrospective liability for the unpaid difference in premium pay owed (as this Court held in *Ferra*) and that the unpaid amount should have appeared on the wage statement (as this Court held in *Naranjo*). But it is entirely different to deem that the employer *knew* these mandates many years prior, and *intentionally* failed *to comply* (flouted) the law, such that statutory penalties and potential criminal repercussion are warranted. This Court should not so

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[8] This appears to be why the Legislature carved out from the injury presumption of Section 226(e)(2)(B) instances where gross and net wages *earned* are omitted. (Lab. Code § 226(e)(2)(B)(i); see *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336-37.) What Naranjo appears to now concede is that a wage statement that *omits* information about earned wages can be of use to an employee and does not cause injury.

hold for all the reasons articulated by Spectrum and by *amici curiae* Employers Group, the California Employment Law Council, the U.S. Chamber of Commerce, and California Chamber of Commerce.

III. CONCLUSION

Contrary to CELA's position, the federal majority view and the Court of Appeal's decision here persuasively explain why a "knowing and intentional failure to comply" with Section 226 cannot exist in the context of unsettled law, and/or objectively reasonable defenses to the underlying alleged violations. Because Section 226 requires a showing of bad faith conduct, it necessarily follows that a good faith dispute defense applies. The legislative history of Section 226 bears this out. The Court of Appeal's decision should be affirmed.

Dated: December 14, 2023

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Dated: December 14, 2023

/s/ Paul J. Killion
Paul J. Killion

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Supreme Court of California

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