No. S244751

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KURT STOETZL, *et al.*

Plaintiffs, Appellants and Petitioners,

v.

STATE OF CALIFORNIA, *et al.*

Defendants and Respondents.

On Review From The Court of Appeal for the First Appellate District, Division Four, No. A142832

After an Appeal From the Superior Court for the State of California, County of San Francisco, Case No. CJC11004661, Hon. John E. Munter

Coordination Proceeding Special Title: CALIFORNIA CORRECTIONAL EMPLOYEES WAGE AND HOUR CASES

PLAINTIFFS'/PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL CASES

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

FEDERAL CODES

I.

INTRODUCTION

The State hinges its case on a narrow provision in memoranda of understanding ("MOUs") stating that union-represented employees ("Represented Employees") are "working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) [29. U.S.C. 201, *et seq.*]." This discretionary partial exemption to the otherwise mandated 40-hour federal overtime threshold is commonly known as the "7k exemption." The State implies that through this language and related provisions addressing the State's obligations under the FLSA, the union bound the Represented Employees to FLSA standards exclusively, including less-protective FLSA standards for determining when time worked must be compensated. As a result, the State argues, state rules promulgated by the Industrial Welfare Commission ("IWC") and California Legislature to protect all California employees, including minimum wage and compensability provisions, simply do not apply to state employees subject to the MOUs.

But the plain language of the MOUs cannot carry the freight the State loads onto it, particularly because this Court strongly disfavors depriving California employees of their state law wage and hour rights by implication. The plain language merely establishes how many hours an employee must work before the State's obligation to pay overtime under federal law kicks in. The related language that payment for four hours of

pre-and-post work activity ("PPWA") will generally satisfy the requirements of the FLSA has no bearing on whether additional time spent under the employer's control is compensable under California law. These contracts never discuss state law rights, including minimum wage, much less purport to deprive the Represented Employees of those rights. All of this is consistent with the timing, purpose and effect of the 7k exemption in these MOUs, as well as the State's own admission that paying for four hours of PPWA was simply meant to settle a dispute under the FLSA.

The State continues to resist harmonizing federal and state law here, even though this Court's jurisprudence mandates that result where possible. And the State cannot explain why such harmonization is not possible for the Represented Employees in the same fashion that the court of appeal demonstrated that it is possible for the Unrepresented Employees (those Plaintiffs not represented by a union in negotiations with the State under the Ralph C. Dills Act (the "Dills Act") [Gov. Code § 3512 *et seq.*]). Such harmonization respects Plaintiffs' state minimum wage rights while also respecting the parties' agreement that the federal 7k threshold governed when overtime pay was due.

The State's arguments against the Represented Employees' breach of contract claims fare no better. Since at least *Madera Police Officers Ass'n v. City of Madera* (1984) 36 Cal.3d 403, this Court has made clear that California employees have a breach of contract claim to recover

compensation for work actually performed, including overtime. That right is different from asserting a contract right to future benefits, such as pensions, which is what the courts addressed in the cases cited by the State.

The State's other arguments also fail, such as its argument that state rights were superseded even during the period when no MOU had been ratified by the Legislature, and that Labor Code sections 222 and 223 do not apply to Plaintiffs and their claims. Indeed, the State ignores many of the arguments in Plaintiffs' Opening Brief entirely by simply regurgitating the same arguments it made to the court of appeal. The State's failure even to try to rebut those arguments is telling, and is further reason why this Court should reverse those portions of the court of appeal's decision depriving the Represented Employees of their state law rights.

II.

THE MEMORANDA OF UNDERSTANDING SIMPLY ADOPTED AN OVERTIME FORMULA PERMITTED BY FEDERAL LAW; THEY DID NOT PURPORT TO SUPERSEDE BROADER STATE LAW GOVERNING CALIFORNIA MINIMUM WAGE

The State argues that two discrete clauses in union contracts – one of which merely changed overtime thresholds; the other of which added four hours of compensable time each 28 days because it was purportedly "generally sufficient" to comply with the FLSA – in effect nullified the application by the IWC of California minimum wage protections to the Represented Employees. But nothing in the language of those MOUs,

much less their timing, purpose, or effect, supports the State's radical interpretation. Nor is support for repealing the minimum wage protections found in anything the Legislature did when ratifying the MOUs, never mind during the four-year period when no Legislature-approved MOU was in effect.

The State's arguments are a Trojan horse: presented as a protector of legislative power, but concealing an attack that guts the California minimum wage protections of thousands of state employees.

A. The MOU Language The State Relies On Does Not Establish That Federal Compensability Standards Were Exclusive

The State relies primarily on a single sentence in successive MOUs going back to 1998 to support its argument that the MOUs repealed state law protections that were first applied to state employees in 2001:

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

(State Ans. Br. at p. 33; see 3 AA at pp. 632, 637, 643, 664.) But neither this sentence nor any other MOU language supports the State's interpretation, particularly in light of this Court's repeated admonition that statutory language should be interpreted, wherever possible, to protect California employees' state law rights.

One would rightly expect the State to clearly connect this unremarkable MOU language to the remarkable proposition it asserts as its keystone: That the parties and the Legislature made federal compensability standards "exclusive" (State Ans. Br. at pp. 43-44), the "controlling legal standard" (*id.* at p. 32), and simultaneously preempted and repealed contrary state-law standards, including minimum wage. However, the MOUs never mention federal or state compensability standards. Nor do they discuss the federal or California minimum wage. And nothing in the plain language of the MOUs says that federal standards are "exclusive" or that state law standards are "repealed," "superseded," or "preempted."

The State simply cites the partial 7k exemption language and explains what standards determine whether work is compensable *under the FLSA*. (State Ans. Br. at pp. 33-37 ["[t]hese FLSA standards are inseparable from the 7(k) schedule"].) Yet the parties agree that, as with all such federal law standards, the State must comply with the FLSA. The heart of the parties' dispute is whether the State must *also* comply with state law compensability standards to meet its simultaneous obligations to Plaintiffs under state law, including state minimum wage. The Represented Employees agree they were "working under" the provisions of Section 207k of the Fair Labor Standards Act. (Pl. Op. Br. at p. 36.) But that simply means they were "working under" a 7k overtime scheme – i.e., overtime does not kick in until they have worked 168 hours (later

contractual terms lowered this to 164 hours) in a 28-day period as opposed to the regular overtime threshold of 40 hours in a 7-day period. But agreeing to "work under" a higher FLSA overtime threshold does not equate with agreeing to forego California minimum wage protections. As Plaintiffs have pointed out throughout their briefs, California employers routinely operate under both state and federal law. (See, e.g., Pl. Op. Br. at p. 40.)

Nor do the State's conclusions follow from the parties' agreement that four hours of time each 28 days would, after 1998, be treated as compensable pre-and-post work activity ("PPWA"), and that this "generally is sufficient time" for such activities. That such time is "generally sufficient" to satisfy FLSA compensability standards does not on its face mean it is always sufficient for that purpose. But even assuming this language could be read to preclude paying the Represented Employees for more than four hours of PPWA *under the FLSA compensability standards*, it does not mean four hours is "generally sufficient" under the state law compensability standards that the IWC applied to Plaintiffs in 2001.

The State's arguments about the MOU language fly in the face of a key tenet of this Court's minimum wage jurisprudence: the refusal "to import any federal standard, which expressly eliminates substantial protections to employees, *by implication*." (*Mendiola v. CPS Security*

Solutions, Inc. (2015) 60 Cal.4th 833, 843 [emphasis added, citation omitted].) And placed up against the presumptions favoring broad application of the wage orders (see, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027 [wage orders entitled to "extraordinary deference," are "accorded the same dignity as statutes,"]), and the absolute bar the Legislature itself has placed on the waiver of state minimum wage rights by any agreement (Lab. Code §§ 1194, 1197), Plaintiffs' state law rights under the wage orders cannot be superseded based on language merely stating that they are "working under" the 7k partial exemption for overtime and that some predetermined amount of PPWA time would generally satisfy *the FLSA* compensability standards.

B. Nor Do The Timing, Purpose, And Effect Of The 7k Provision Here, Much Less The Bargaining History, Support An Interpretation That Federal Law Standards Were Intended To Supplant Entirely State Law Protections

In addition to being unsupported by the plain language of the MOUs, the State's argument that the "7k" overtime partial exemption in successive MOUs and the Implemented Terms eliminated state minimum wage rights is also counter to the timing, purpose, and effect of that clause. (State Ans. Br. at pp. 32-42, 43-44.) Nor can the State find support in the bargaining history, because it is undisputed that state law wage and hour rights were never discussed, let alone waived.

First, the State's arguments make no temporal sense. The minimum wage provisions of Wage Order 4–2001 and the General Minimum Wage Order–2001 did not apply to state employees until January 1, 2001. (*Sheppard v. North Orange County Regional Occupation Program* (2010) 191 Cal.App.4th 289, 300-301.) That was three-quarters of the way through the July 1, 1999 to June 30, 2001 MOU. It was also six months before the July 1, 2001 to July 2, 2006 MOU took effect. So the State is in effect arguing that the wage orders were both preempted by the MOUs *before* they took effect and superseded *after* they took effect – all without saying so. If the parties had intended the MOUs to preempt or supersede the wage orders, it is reasonable to expect that, at least after January 1, 2001 (e.g., in the text of the 2001-2006 MOU, which took effect on July 1, 2001), they would have amended the agreement to say so.

Second, as Plaintiffs explained in their Opening Brief, the purpose and effect of the 7k exemption are not inconsistent with the state wage and hour law rights at issue in this case. When a public employer exercises its rights under 29 U.S.C. section 207(k), it simply selects a higher time worked threshold before it must pay premium overtime wages under the FLSA. (29 C.F.R. §§ 553.221, 553.230.) No part of designating an alternative work period necessitates selecting the federal over the state standard for determining when employee time constitutes compensable "hours worked."

Third, the bargaining history is not inconsistent with the plain language of the MOUs because, for one thing, everyone agrees that state law rights were never discussed at all. (See Pl. Op. Br. at pp. 31-35; Statement of Decision at p. 10 [20 AA at p. 5419]; State Ans. Br. at pp. 18-19.) The Answer Brief nevertheless extensively discusses the bargaining history of the 7k scheme, almost all of which occurred in 1998. (State Ans. Br. at pp. 16-23.) Strikingly, the State's description of the bargaining history makes clear the parties were addressing compensability under the FLSA, not state law, which is not surprising since the IWC wage orders did not yet apply to state employees. (*Id.* at pp. 17-19.) That the parties were trying to comply with federal compensability standards when they made PPWA compensable in 1998 does not mean they agreed that state compensability standards would not also apply if the law changed, which of course it did.

What the State alludes to in its Answer Brief, but does not elaborate on, is that it did not necessarily believe the FLSA required it to compensate the four hours of PPWA it agreed to. (State Ans. Br. at p. 36 ["Even when the parties have agreed in a labor agreement, such as the MOUs at issue here, that preliminary or postliminary activities shall constitute hours worked, this fact does not render them compensable hours worked pursuant to 29 U.S.C. § 254, subsection (a). Rather those hours become compensable solely based on the terms of the parties' labor agreement.

(29 U.S.C. § 254(b).)"].) In fact, as the State's negotiator Mr. Gilb testified at trial, the State included four hours of PPWA in the 7k formula to account for what was considered to be a compromise based on "a settlement *of an FLSA lawsuit* that resulted in what was known as the Rafferty settlement." (RT Vol. III, 427:13-428:1 [emphasis added].) Given that this was considered to be a "temporary settlement" regarding what the FLSA required and there remained an ongoing dispute, Mr. Gilb testified that in the MOU, "we could by negotiating an expanded workweek negotiate *under the FLSA* a solution to this problem." (*Id.* at pp. 428:2-14; 429:18-430:8 [emphasis added].) In other words, the four hours of PPWA agreed to clearly was only intended to account for the State's potential obligations *under the FLSA*, not under state law.

Electing to use a 7k partial exemption to decide when overtime kicks in and agreeing that four hours of PPWA is due under the FLSA is one thing, deciding to make federal compensability standards supersede state law standards altogether is another. The language of the 7k provision achieved the first but not the second.

C. The Legislature Did Not Override The IWC's Decision To Make California Minimum Wage Applicable To The Represented Employees

The State sees the Legislature's role in ratifying the MOUs under the Dills Act as the lynchpin of its argument that the MOUs waived unwaivable rights. (State Ans. Br. at pp. 10, 15, 20-23, 30-32, 37, 41.) It cites

Professional Engineers in California Government v. Schwarzenegger (2010) 50 Cal.4th 989 as proof of the Legislature's ultimate control over state employee salaries and points out that the Legislature ratified each MOU. (State Ans. Br. at pp. 30-32.) But neither point is contested nor relevant to determining whether the MOUs did, or could, eliminate state law protections under the circumstances of this case.

1. The Legislature Did Not Repeal the Wage Orders or Minimum Wage Statutes When it Ratified the MOUs

Plaintiffs explained in their Opening Brief how an MOU is ratified under the Dills Act, how the Legislature is bound by the intent of the parties, and how the legislative history of the cited MOUs, which is part of the record, offers no support for the proposition that the Legislature understood or intended that the MOU would supersede the wage orders. (Pl. Op. Br. at pp. 43-45.) Yet the State's Answer Brief fails to tackle any of those points.

Perhaps the most critical point the State ignores is that, while the legislative history of the MOUs establishes that the MOUs supersede some statutes, neither the wage orders nor the minimum wage statute itself (Lab. Code § 1182) are listed amongst the statutes that the MOUs superseded. Nor are they amongst those laws Government Code section 3517.61 permits the contracting parties to supersede without legislative approval. (See Pl. Op. Br. at pp. 44-45.) By January 1, 2001, the IWC had applied

the minimum wage provisions of the wage orders to state employees, but Senate Bill 65, which authorized the 2001–2006 MOU and lists multiple statutory amendments, additions and repeals necessary to effectuate that MOU (15 AA at pp. 3920–3948 [Pltfs.' Exh. EEE]), does not list the wage orders or minimum wage statutes as superseded. (See *Estate of McDill* (1975) 14 Cal.3d 831, 837-38, [an enacting body is deemed to be aware of existing laws in effect at the time legislation is enacted].) It is reasonable to expect, especially after being put on notice of the dispute by the side letter to the MOU, that had the Legislature intended to supersede the wage orders, it would have said so, not, as the State argues, done so *sub silentio*.

Ultimately, even assuming that the Legislature could have "ratified" an agreement waiving an unwaivable right – which is what the State contends – there is simply no evidence that it intended to do so here.

2. Protecting the Represented Employees' Minimum Wage Rights Does Not Rewrite the MOUs or Affect Appropriations of Funds

The State claims that Plaintiffs' interpretation of the MOUs is incorrect because it would rewrite the MOUs and require the payment of funds not approved by the Legislature. (State Ans. Br. at pp. 37-39.) But the State's own admissions demonstrate that these arguments do not withstand scrutiny.

The State equates the concept of it having to abide by state law compensability standards as Plaintiffs "rewriting the MOUs." Not so. The

Represented Employees are not seeking to change the rate of pay or add benefits. All that has changed is compensability standards, which have, in any case, always been external to the MOU – dictated by federal law or state law or (as Plaintiffs contend) both. And even if more time is determined to be compensable under California law, the MOUs need not be amended because their overtime provisions already provide the framework through which additional compensable time can be compensated.

With respect to costing, the State's argument is a red herring. The clearest rebuttal is the trial testimony of one of the State's own chief witnesses, former CalHR Director David Gilb, in which he admitted that the State always has an obligation to pay overtime that has been earned, whether or not the Legislature anticipated such overtime when it approved an MOU:

> Q. Irrespective of what the objections would be -- and I think we've established that you concur that there's no way to really know what overtime is going to be in a given year, the fact of the matter is overtime is earned if they have -- the State's got an obligation to pay it; isn't that correct?
>
> [Mr. Gilb] Yes.
>
> Q. So that when the legislature looks at whatever documentation it has in front of it, and it approves a calculation for the payment of overtime, it is acknowledging that it is -- and it is approving and ratifying the State's agreement to pay overtime whenever hours are worked that

are in excess of the time periods that are set forth in the MOU. That is correct, isn't it?

[Mr. Gilb] Yes, correct.

(RT Vol. III, 520:1-16.)

THE COURT: So you are saying that before the legislature approaches the MOU, it's already going to have projections of the overtime costs that are going to be involved in the MOU?

[Mr. Gilb]: Yes, sir, but that's not necessarily the end of the process, because the legislature can authorize deficiency appropriations. They can authorize extra appropriations. They can do a lot of different things after the budget is authorized to increase or decrease a department's budget.

THE COURT: Thank you.

Q. They will pay it, whatever it is, whether it's preapproved or not, if it's overtime compensation that has been earned by an employee, correct?

[Mr. Gilb] Yes.

Q. And if there's something that is not in the budget, they find a way to get it paid because they have an obligation to do it?

[Mr. Gilb] Yes, sir.

(RT Vol. III, 523:6-25.)

Finally, the State complains hyperbolically that this lawsuit "threaten[s] the integrity of the collective bargaining process." (State Ans. Br. at p. 9.) But in reality, it is a ruling in the State's favor that would pose a threat to collective bargaining – and to the general welfare of state

employees – because it would dissuade state employee unions from making any agreements pertaining to the FLSA and other federal laws for fear they might be construed to waive members' state law rights.

D. The Court Need Not Decide Between The MOUs And The Wage Orders, Which May Be Harmonized To Give Effect To Both

The State still refuses to countenance that state and federal compensability standards may coexist as they do for every other California employer – public sector and private. The Answer Brief largely ignores Plaintiffs' explanation of how the MOU and the wage orders can be read to coexist, an explanation very similar to the explanation the court of appeal provided for the Unrepresented Employee subclass. (Pl. Op. Br. at pp. 45-52, and especially pp. 51-52.) Instead, the State equates giving effect to the wage orders with "repudiating" the 7k scheme (State Ans. Br. at p. 37) and "rewriting" the MOUs (*id.* at p. 39) – arguments refuted above.

This case bears little similarity to the two decisions the State cites that vacated arbitration awards. In both *Department of Personnel Administration v. California Correctional Peace Officers' Association* (2007) 152 Cal.App.4th 1193 and *California Dep't of Human Resources v. Services International Union, Local 1000* (2012) 209 Cal.App.4th 1420, the basis for reversing the arbitration awards was that the arbitrator added financial terms to the MOUs, which neither arbitrator had authority to do. The first involved allowing more union release hours; the second, increases

to base salary levels. In both cases, the courts concluded that these benefits were adopted in ways extraneous to the legislative process.

In contrast, here, any additional rights acquired by the Represented Employees after the IWC applied its minimum wage provisions to state employees occurred through a specific legislatively-delegated process. Unlike the arbitrators, the IWC had express, delegated legislative authority to create minimum wage standards and to apply them to the State. (See Pl. Op. Br. at pp. 27-29, 33-34, citing *Martinez v. Combs* (2010) 49 Cal.4th 35, 54 & fn.20 and *Sheppard, supra*, (2010) 191 Cal.App.4th at pp. 300-301.) Plaintiffs are merely asking the Court to recognize how proper respect for IWC authority interacts with the plain terms of the MOUs; they are not asking the Court to "rewrite" the MOUs in any fashion.

The State tries to distinguish *Grier v. Alameda-Contra Costa Transit District* (1976) 55 Cal.App.3d 325, 335 (while altogether ignoring *Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66). (State Ans. Br at pp. 40-41.) *Grier* ruled that a collective bargaining agreement entered into under the Public Utility Code did not preclude application of provisions of the Labor Code that protected employee wages against forfeiture. (*Grier, supra*, 55 Cal.App.3d at pp. 335-336.) The State argues: "*Grier* stands for the proposition that a local public authority's MOU remains subject to the state Legislature's greater constitutional authority to enact general statutes governing employment in

the State." (State Ans. Br. at p. 40.) But it fails to explain why an MOU promulgated under the Dills Act does not also remain subject to the Legislature's constitutional authority, which it delegated to the IWC to promulgate rules governing the minimum wage through its wage orders.

The State claims that the MOUs are not subject to "inconsistent labor laws of general application." (State Ans. Br. at p. 41, citing Slip Op. at p. 16.) But as explained, the MOUs are not inconsistent with either state or federal labor laws, and the court of appeal therefore erred by finding that the MOU and the wage orders could not be harmonized to give effect to both.

III.

UNDER THE STATE'S OWN RATIONALE, THE WAGE ORDERS APPLIED DURING THE LBFO PERIOD

In countering the Represented Employees' argument that the Wage Orders applied to them during the pendency of the Last Best and Final Offer period ("LBFO"), when their compensation was governed by the State's "Implemented Terms," the State's simplistic response is that when the LBFO took effect, practically speaking, nothing changed – the same terms still applied because the Legislature had *previously* authorized them. (State Ans. Br. at p. 48.)

But this argument sells short the legal effect of the expiration of the MOU in 2007 under the State's own arguments, which the court of appeal

adopted. To the court of appeal, legislative approval of the MOUs was critical to its decision that the MOUs superseded the wage orders: when "they were also approved by the Legislature, signed by the Governor, and chaptered into law," they became "laws specifically governing the terms and conditions of plaintiffs' employment." (Slip Op. at p. 15.) In contrast, the court ruled in favor of the Unrepresented Employees' minimum wage claims because "unlike the MOU's, the [CalHR promulgated] Pay Scale Manual is not a legislative enactment." (Slip Op. at p. 19.)

The latter also is true for the Implemented Terms. They could not have superseded the wage orders during the three-and-a-half-year period they were in effect because, as the court of appeal itself succinctly put it, "[t]he Legislature did not approve or ratify those terms." (Slip. Op. at p. 7; see also 3 AA at p. 611:8-10 [State stipulating as such].) Hence, by authorizing the State to impose the Implemented Terms, the Dills Act does not, as the State contends, authorize the State to rescind unwaivable employee rights.

At a minimum, then, with respect to the LBFO, the State cannot "have its cake and eat it too."

IV.

THIS COURT SHOULD PERMIT REPRESENTED EMPLOYEES TO PRESENT BREACH OF CONTRACT CLAIMS AT PHASE II OF A TRIAL COURT PROCEEDING

The gravamen of the Represented Employees' breach of contract claims is that public employees provide valuable consideration at the time they perform work for the state; they therefore obtain a vested right to the "payment of salary that has been earned." (*White v. Davis* (2003) 30 Cal.4th 528, 570-571; *Madera Police Officers Ass'n, supra,* 36 Cal.3d at pp. 413-414; Pl. Op. Br. at pp. 54-62.) These claims are identical to the Unrepresented Employees' breach of contract claims; yet, whereas the Court of Appeal reversed the trial court and permitted the Unrepresented Employees' claims to proceed, it held that the Represented Employees' claims were barred as a matter of law. (Slip Op. at p. 24.) The State's arguments fail to support this inconsistent result.

A. The Pension Cases Cited By The State Do Not Bar Plaintiffs' Breach Of Contract Claims

The State argues that *Retired Employees' Association of Orange County* v. *County of Orange* (2011) 52 Cal.4th 1171 and *Sonoma County Association of Retired Persons v. Sonoma County* (9th Cir. 2013) 708 F.3d 1109 "clarified" *Madera Police Officers Ass'n* in a way that undermined Plaintiffs' reliance on it here. (State Ans. Br. at pp. 49-50.) The State is wrong.

Retired Employees and *Sonoma County* neither "clarified," marginalized, nor otherwise undermined decades of Supreme Court precedent encapsulated in *Madera Police Officers Ass'n* and which this Court reiterated in *White, supra,* 30 Cal.4th at pp. 570-571, a decision the State conveniently ignores. Neither *Retired Employees* nor *Sonoma County* even mentioned *Madera Police Officers Ass'n* nor involved the right to payment for hours worked – the issue in this case. Rather they involved vested future retirement benefits, which differ from payment for overtime already worked, which is what is at issue here.

Retired Employees considered whether, under California law, an implied contract could confer upon employees vested rights to future health benefits from a public agency. (52 Cal.4th at p. 1176.) The Plaintiffs argued that the county's longstanding practice of pooling active and retired employees healthcare premiums, which reduced the cost of premiums to retirees, created an implied contract that was protected by the vested rights doctrine against alteration. (See, e.g., *Betts v. Board of Admin.* (1978) 21 Cal.3d 859, 863.) This Court concluded such implied vested rights "can be implied under certain circumstances from a county ordinance or resolution." (52 Cal.4th at p. 1194.) But it stressed that, due to the significant *future* obligations potentially created, a "clear showing" must be established that a public agency intended to create *vested pension benefits*. (*Id.* at pp. 1187-1188.) The Court's concern about establishing future rights

arose because vested pension benefits are strictly protected against change. (*Betts*, *supra*, 21 Cal.3d at p. 863.)

The law governing Plaintiffs' contract claims here is significantly different. A public agency's overtime policies can be freely changed such that employee rights are vested only in the sense that they are entitled to the pay mandated by the overtime policy that existed at the time their service was performed. (*Madera Police Officers Ass'n*, *supra*, 36 Cal.3d at pp. 413-414.) So long as the overtime policies were authorized – notwithstanding whether they arose under a policy, ordinance, statute or contract – this suffices to create enforceable contract rights. (*Id.*; *White,* 30 Cal.4th at pp. 570-571; see Pl. Op. Br. at pp. 54-57.)

Madera Police Officers Ass'n, and cases like it, remain good law.

B. The MOUs And The State's Overtime Policies Provide Sufficient Foundation For The Represented Employees' Breach Of Contract Claims

The State mischaracterizes Plaintiffs' claims as premised on "implied" terms. (State Ans. Br. at pp. 50-52; Slip Op. at p. 24.) Not so; Plaintiffs are not trying to imply more terms into the MOU or Implemented Terms. The overtime provisions are *expressly* stated and they provide a right to overtime pay if employees work beyond their regular schedule, e.g., 168 hours in a 7-day period. (See *Retired Employees*, *supra*, 52 Cal.4th at 1178 ["The terms of an express contract are stated in words" whereas "[t]he

existence and terms of an implied contract are manifested by conduct."], citing Civ. Code §§ 1620, 1621.)

This brings the issue back to the root of the parties' dispute: separate from the State's obligation under the FLSA, which compensability standard applies to determine whether Plaintiffs in fact worked beyond the overtime threshold in the MOU? Yet, as Plaintiffs explained at pages 58-60 of their Opening Brief, whatever standard applied – federal or state – the Represented Employees should still have been permitted to show that they were working uncompensated time under that standard and were entitled to payment for it. The State does not respond to this point.

Finally, the State cites the court of appeal's reliance on the "full and entire understanding" clause (State Ans. Br. at p. 50, citing Slip Op. at p. 24), without any further elaboration of the point. Again, however, Plaintiffs tackled that argument head on at pages 60-61 of the Opening Brief. This clause merely is intended to ensure that neither party tries to create contractual promises based on verbal representations made during negotiations that were not memorialized in the resulting MOU. The State leaves those arguments unrebutted.

V.

ON THESE FACTS AND ALLEGATIONS, LABOR CODE SECTION 220 CONFIRMS THAT LABOR CODE SECTIONS 222 AND 223 APPLY

The State argues that *California Correctional Peace Officers' Association. v. State of California* (2010) 188 Cal.App.4th 646, resolves whether Labor Code sections 222 and 223 apply here. But that case concerned whether Labor Code section 512 applied to the State – a statute located in a different Article from section 220. The court there rejected only the contention that section 220 made "the entirety of chapter 1 generally applicable to public entities." (*Id.* at p. 653, emphasis added.)

Plaintiffs' contention here is that section 220 helps to determine whether Labor Code sections 222 and 223 apply to the State. Because section 220 abuts sections 222 and 223, in the same Article, it is the primary aid in interpreting whether sections 222 and 223 apply to the State. (*People v. Cole* (2006) 38 Cal.4th 964, 980-981 [where statute exempts application of certain provisions within an Article, a legislative intent to apply non-exempted provisions in the same Article is evident].) For the reasons explained in Plaintiffs' Opening Brief at pages 63-64, section 220 plainly contemplates sections 222 and 223 applying to the State.

Citing cases involving meal breaks and the Home Rule Doctrine (State Ans. Br. at pp. 54-55), neither of which are implicated here, the State protests that Labor Code sections 222 and 223 do not "expressly" apply to

public agencies. It is true that few sections in the Labor Code section 200 series expressly apply to public agencies. But consistent with Plaintiffs' reading of section 220, subdivision (a), cases decided under subdivision (b) – which addresses application of Article 1 to political subdivisions of the State – apply provisions not specifically exempted. (See, e.g., *Social Services Union, Local 535 v. Board of Supervisors of Tulare County* (1990) 222 Cal.App.3d 279, 286-287 [applying Lab. Code § 224]; *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 474 [Lab. Code § 227.3 prevents forfeiture of public employees' paid leave benefits]; *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1499-1501 [applying Lab. Code §§ 221, 223, and 224].) Furthermore, the conclusion that the provisions of Article 1 apply to the State unless expressly exempted is buttressed by other sections that partially exempt the State. (See Lab. Code §§ 201, subd. (b); 202, subd. (b); 213; 219, subd. (b); 226, subd. (h); 230.3, subd. (c).) There would be no need to partially exempt the State from these sections unless the Legislature understood that Article 1 otherwise applied.

Finally, Respondents cite cases for the proposition that sections 222 and 223 should be read narrowly to apply only to "kickbacks." (State Ans. Br. at pp. 56-57.) Perhaps because of the specific facts of those cases – none of which mirror this case – those courts appeared to favor a narrower reading of sections 222 and 223. Yet the State does not confront *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, and *Gonzalez v. Downtown*

LA Motors, LP (2013) 215 Cal.App.4th 36, two cases that mirror the allegations in this case, as discussed in Plaintiffs' Opening Brief. On these facts, and with these allegations, the Court should find that these statutes apply.

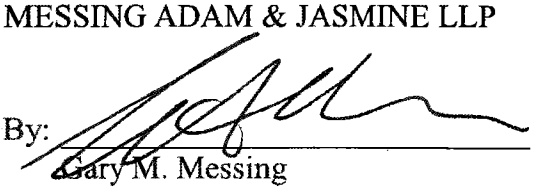
VI.

CONCLUSION

The court of appeal incorrectly deprived the Represented Employees of important state law rights that it correctly accorded to the Unrepresented Employees. This Court should therefore reverse the decision of the court of appeal with respect to the Represented Employees' claims to California minimum wage and for breach of contract, while it should affirm with respect to those claims brought by the Unrepresented Employees. The Court should also reverse the court of appeal's decision with respect to claims of the Represented Employees under Labor Code section 222, and with respect to all Plaintiffs' claims under Labor Code section 223.

DATED: June 29, 2018

MESSING ADAM & JASMINE LLP

By: 

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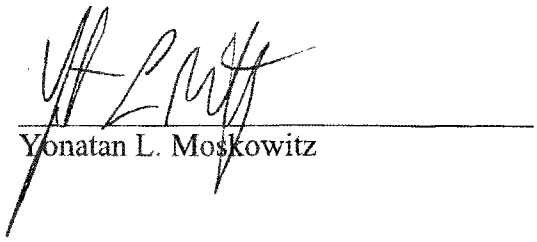
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 5,730 words.

DATED: June 29, 2018



Yonatan L. Moskowitz

PROOF OF SERVICE

Stoetzl, et al. v. State of California, Dept. of Human Resources, et al.
Case No. S244751

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 235 Montgomery St., Suite 828, San Francisco, CA 94104.

On June 29, 2018, I served true copies of the following document(s) described as **PLAINTIFFS'/PETITIONERS' REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Messing Adam & Jasmine LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 29, 2018 at San Francisco, California.

Janine Oliker