S279397

Case 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.

REVIEW OF A DECISION FROM THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR, CASE NO. B256232
LOS ANGELES SUPERIOR COURT · HON. BARBARA M. SCHEPER · NO. BC372146

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

Does an employer's good faith belief that it complied with Labor Code section 226, subdivision (a) preclude a finding that its failure to report wages earned was "knowing and intentional," as is necessary to recover penalties under subdivision (e)(1)?

INTRODUCTION

In *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93 (*Naranjo*), this Court held that missed-break premium pay is wages, the omission of which can support wage statement penalties when the relevant conditions for imposing such penalties are satisfied. On remand, the Court of Appeal was instructed to review the trial court's finding that Defendant Spectrum Security Services, Inc.'s failure to pay and report missed-break premium pay on wage statements was knowing and intentional, as required by Labor Code section 226, subdivision (e)(1). Rather than assess whether substantial evidence supported the trial court's award of wage statement penalties, the Court of Appeal altered the relevant conditions for finding a "knowing and intentional failure" by extending application of the "good faith dispute" exception set forth in regulation 13520 to preclude the imposition of wage statement penalties under Labor Code section 226.

The Court of Appeal's holding that regulation 13520's "good faith dispute" exception to section 203) applies equally to section 226 is unfounded. Courts in their interpretative capacity may not impose a reading that is inconsistent with the Legislature's expressed intention. Rather, courts must ascertain the Legislature's intent by engaging in well-established methods of statutory interpretation and construction, which the Court of Appeal did not do. When proper consideration of the relevant

conditions for imposing wage statement penalties is undertaken, it is apparent that the Court of Appeal's action constitutes improper judicial legislation, requiring reversal.

Regulation 13520 is an interpretive regulation promulgated as a rule of practice and procedure for hearings to recover wages and penalties before the Labor Commissioner. Given this context, the text of regulation 13520 expressly confines its validity to Labor Code section 203 and limits the preclusive effect of the good faith dispute exception to the imposition of waiting time penalties. Nothing in regulation 13520 evinces a connection to Labor Code section 226. As such, the Court of Appeal's conclusion that the force and effect of regulation 13520 extends markedly beyond Labor Code section 203 to alter another statute contravenes regulatory intent, usurps legislative function, and exceeds the interpretive role of the court.

This Court should employ a proper analysis of statutory construction and validate the intent of Legislature. Labor Code section 226 provides both the standard for imposing wage statement penalties and instruction for an adjudicator determining whether such penalties are warranted. The statutory language, legislative history, and objectives to be achieved by the statute all support a construction of "knowing and intentional" that imposes penalties for conscious acts done with awareness or understanding, while excusing clerical errors and inadvertent mistakes. Such a standard is consistent with legislative amendments intended to minimize the burden on employees who seek to recover from employers who flout the law. Accordingly, the opinion of the Court of Appeal must be reversed.

FACTS AND BACKGROUND[1]

Defendant Spectrum Security Services, Inc. (Spectrum) provides short-term custodial services to federal agencies. Spectrum security officers (officers) transport and guard prisoners and detainees who require outside medical attention or have other appointments outside custodial facilities. (*Naranjo*, *supra*, 13 Cal.5th at p. 102, citing *Naranjo v. Spectrum Security Services, Inc.* (2009) 172 Cal.App.4th 654, 660 (*Naranjo I*).) Representative Plaintiff Gustavo Naranjo (Naranjo) worked for Spectrum as an officer. During his employment, Spectrum prohibited officers from taking meal and rest periods. In fact, Spectrum was unaware that the wage orders existed and had no knowledge of the requirements regarding on-duty meal periods or duty-free rest periods. (12 RT 5430:1-19, 5442:5-16, 5447:21-25; 9 JA 1862:23-1863:5, 1989:17-1990:2.) Its policy stated: "This job does not allow for breaks other than using the hallway bathrooms for [a] few minutes." (2 JA 0221-0223, 0254-0256.) As a result, Spectrum did not provide officers with 30-minute off-duty meal periods or 10-minute duty-free rest breaks. (8 JA 1756; 8 RT 3307, 3652-3653.)

Spectrum terminated Naranjo because he left his post to take a meal period. (*Naranjo*, *supra*, 13 Cal.5th at p. 102, citing *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 453–454 (*Naranjo II*).) Naranjo filed a putative class action on behalf of Spectrum officers, alleging causes of action for meal and rest period violations and for violations of Labor Code sections 203 and 226.[2] (*Id.* at p. 103.) The complaint sought

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[1] Where applicable, the factual and procedural background is set forth as outlined by this Court previously in *Naranjo*, *supra*, (2022) 13 Cal.5th at pp. 102-104.

[2] All subsequent unlabeled statutory references are to the Labor Code.

damages and penalties prescribed by those statutes as well as prejudgment interest. (*Ibid.*) The trial court certified a class for adjudication of the meal period claim and related timely payment and wage statement claims. (*Ibid.*) The case proceeded to trial in three phases.

I. TRIAL PROCEEDINGS

In the first phase, the trial court heard evidence regarding Spectrum's various federal defenses. The trial court determined that Spectrum's asserted defenses were unsupported by the facts or law and found in favor of Naranjo and the class. (9 JA 1981-1985.)

The trial court empaneled a jury for the second phase to determine the merits of the meal period claim. The trial court directed a verdict in favor of the class for the period of June 4, 2004 through September 30, 2007, and awarded damages pursuant to section 226.7. (9 JA 1985-1987.)

In the third phase, the trial court heard evidence and argument regarding the class's entitlement to penalties under sections 203 and 226 for meal period violations that occurred during the directed verdict period. The trial court found that penalties under sections 203 and 226 were legally available in cases based on a violation of section 226.7. (9 JA 1988.) With respect to section 226 wage statement penalties, the court found in favor of Naranjo and the class, noting that Spectrum's failure to report missed-break premium pay in its employees' wage statements was knowing and intentional and not inadvertent. (9 JA 1989.) As to section 203 waiting time penalties, the trial court found in favor of Spectrum, determining that its defenses had been presented in good faith thereby precluding a finding of willfulness pursuant to California Code of Regulations, title 8, section 13520 (regulation 13520). (9 JA 1990-1991.)

II. PREVIOUS APPELLATE PROCEEDINGS

Both Spectrum and Naranjo appealed. The Court of Appeal affirmed the portion of the judgment finding Spectrum liable for meal period violations and awarding damages under section 226.7. (*Naranjo*, *supra*, 13 Cal.5th at p. 104, citing *Naranjo II*, *supra*, 40 Cal.App.5th at pp. 457-463.) With respect to the applicability of sections 203 and 226, the Court of Appeal reversed the trial court's holding that a failure to pay meal break premiums could support claims under the wage statement and timely payment statutes, holding that "section 226.7 actions do not entitle employees to pursue the derivative penalties in sections 203 and 226." (*Ibid*; see also *Naranjo II*, *supra*, 40 Cal.App.5th at p. 474.)

This Court reversed the Court of Appeal and held the following: "Missed break premium pay is indeed wages subject to the Labor Code's timely payment and reporting requirements, and it can support section 203 waiting time penalties and section 226 wage statement penalties where the relevant conditions for imposing penalties are met." (*Naranjo*, *supra*, 13 Cal.5th at p. 125.) The Court remanded the matter for further proceedings to determine whether such penalties are available in this case. (*Ibid.*)

III. PROCEEDINGS ON REMAND

The parties submitted supplemental briefing to address relevant decisions issued after *Naranjo II*, and the Court of Appeal issued its opinion, affirming the trial court's denial of waiting time penalties under section 203 and *reversing* the trial court's award of wage statement penalties under section 226. (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 951–952 (*Naranjo III*).) With respect to waiting time penalties, the Court of Appeal found that "substantial evidence supports the trial court's finding that Spectrum's defenses were presented in good

faith, and were not unreasonable or unsupported by the evidence." (*Id.* at p. 948.) Therefore, it held that pursuant to regulation 13520, the trial court had properly denied waiting time penalties under section 203 based on the existence of a good faith dispute. (*Id.* at pp. 944-945, 948.)

With respect to section 226, the Court of Appeal held that the existence of a good faith dispute under regulation 13520 likewise precludes the imposition of wage statement penalties. (*Id.* at p. 949.) "'That finding [of a good faith dispute] not only precludes a 'willfulness' finding under section 203, but also a 'knowing and intentional' finding under section 226. The trial court therefore erred by awarding penalties under section 226 based on its conclusion that the omission of the premium pay on employees' wage statements was 'knowing and intentional' because it was 'not inadvertent[.]'" (*Id.* at p. 951.) The opinion was certified for publication and filed on February 27, 2023, and became final on March 29, 2023. The court granted Naranjo's Petition for Review on May 31, 2023.

ARGUMENT

Because this case involves questions of statutory and regulatory interpretation, this Court's review is de novo. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310.) At issue is the standard for determining a "knowing and intentional failure" to comply with section 226 and whether that standard properly incorporates regulation 13520. The Court of Appeal's holding that regulation 13520's "good faith dispute" exception to section 203 applies equally to section 226 is incorrect. None of the legal indicia—the administrative authority, statutory language, legislative history, or the objectives to be achieved—support a construction of section

226 that permits the appropriation of an unrelated regulation to limit the circumstances under which wage statement penalties are levied.

As no reference to "good faith" appears in the statutory text of either section 203 or section 226, the Court of Appeal's application of a good faith exception springs solely from regulation 13520, which expressly sets forth conditions that preclude the imposition of waiting time penalties under section 203 even when a willful failure occurs. (*Naranjo III*, *supra*, 88 Cal.App.5th at pp. 944–945, citing Cal. Code Regs., tit. 8, § 13520.) Referred to by the Court of Appeal as the willful "standard" (*id.* at pp. 949, 951), regulation 13520 comprises (1) a definition of willful for purposes of section 203, (2) an express exception that precludes the imposition of waiting time penalties, and (3) an explanation of the contours of that exception. (See Cal. Code Regs., tit. 8, § 13520 ["*However*, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203."][emphasis added].)

The Court of Appeal's discussion of this willful "standard" throughout the opinion refers to application of the good faith dispute exception in regulation 13520 as follows:

> The issue here therefore turns on whether the "willful" standard in section 203 is the same as the "knowing and intentional" standard in section 226, such that a "good faith dispute" defense should apply to claims for penalties under both sections. For the reasons discussed below, we conclude an employer's good faith belief that it is not violating section 226 precludes a finding of a knowing and intentional violation.

(*Naranjo III*, *supra*, 88 Cal.App.5th at pp. 949.) The appellate court justified its extension of regulation 13520 to section 226 based on the following reasoning:

- Subdivision (e)(3) notwithstanding, section 226 does not define "knowing and intentional." (*Id.* at p. 949.)
- In the absence of an express statutory definition, the phrase "knowing and intentional" connotes willfulness. (*Ibid.*)
- Given the connotations of "willfully fails" and "knowing and intentional failure," regulation 13520 should apply to both sections 203 and 226. (*Id.* at p. 950.)
- Therefore, an employer's good faith belief that it is not violating section 226 precludes a finding of a knowing and intentional violation. (*Id.* at pp. 949, 951.)

On this basis, the Court of Appeal denied the imposition of wage statement penalties under section 226 by reason of an administrative regulation interpreting different language (willful) found in an entirely different statute (section 203).

Courts have "no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed." (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633, citations omitted. (*California Teachers Assn.*)) Given the opinion of the Court of Appeal, the Issue Presented for Review comprises a two-part inquiry: (1) does regulation 13520 apply to the knowing and intentional standard set forth in subdivision (e)(1); and (2) if not, what is the appropriate standard for determining whether a failure to comply with section 226, subdivision (a) is knowing and intentional. As regulation 13520 was promulgated as a rule of practice and procedure for use during hearings before the Labor Commissioner, extending its application to interpret a different statute would constitute improper judicial legislation, an action

this Court should decline to take. After rejecting the Court of Appeal's misappropriation of regulation 13520, this Court should adopt a standard for "knowing and intentional" consistent with legislative instruction that imposes wage statement penalties when an employer knows that the challenged wage statements do not contain the required information, except as the result of a clerical or inadvertent mistake.

I. THIS COURT SHOULD NOT INCORPORATE REGULATION 13520 INTO THE KNOWING AND INTENTIONAL STANDARD SET FORTH IN SECTION 226

The Court of Appeal's opinion offers only a cursory analysis of the administrative regulatory framework when discussing the force and effect of regulation 13520, both as it applies to section 203 and whether it extends to section 226. Comprising two paragraphs, the Court of Appeal acknowledged the interpretative authority prescribed to the Division of Labor Standards Enforcement (DLSE) and asserted, without more, that "regulations 'have the force and effect of law.'" (*Naranjo III*, *supra*, 88 Cal.App.5th at p. 945, citing *In re Lomax* (1998) 66 Cal.App.4th 639, 643 [discussing regulations adopted pursuant to Penal Code section 2933].) Based in part on this premise, the Court of Appeal concluded that a "'good faith dispute' defense should apply to both sections [203 and 226]." (*Id.* at p. 949.) However, proper consideration of regulation 13520's breadth and weight requires deeper investigation into the "web" of administrative law. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha*) ["Although the web making up that jurisprudence is not seamless, on the whole it is both logical and coherent."].)

In *Yamaha*, this Court elucidated two categories of administrative regulations. The first type—known as "quasi-legislative" regulations—

represents a form of substantive lawmaking whereunder the Legislature expressly delegates to an agency the power to draft regulations with the "dignity of statutes." (*Id.* at p. 10; see also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799 (*Ramirez*).) The second type—interpretative regulations—involves an agency's interpretation of a statute or regulation and represents the agency's assessment of the statute's legal meaning and effect. (*Yamaha*, *supra*, 19 Cal.4th at p. 11; *Ramirez*, *supra*, 20 Cal.4th at p. 799.)

Two agencies which exemplify this dichotomy in regulatory authority are the Industrial Welfare Commission (IWC) and the DLSE. The IWC "'is the state agency empowered to formulate regulations (known as wage orders) governing employment in the State of California.'"[3] (*Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575, 581 (*Morillion*), citing *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561 (*Tidewater*).) In promulgating the wage orders, "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." (*Industrial Welfare Com.*, *supra*, 27 Cal.3d at p. 702.) As such, the IWC wage orders are construed in accordance with the principles of statutory interpretation. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026–1027.)

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[3] Section 1173, which empowers the IWC to promulgate wage orders, provides a noteworthy comparison of more expansive regulatory authority granted by the Legislature. (See Lab. Code, § 1173; Cal. Code Regs., tit. 8, § 11040.) The extension of the IWC's jurisdiction to all California workers is also reflected in article XIV section 1 of the California Constitution. (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701 (*Industrial Welfare Com.*).)

Conversely, the DLSE "is the state agency empowered to enforce California's labor laws." (*Morillion*, supra, 22 Cal.4th at p. 581, citing *Tidewater*, *supra*, 14 Cal.4th at pp. 561–562.) Its "primary function is enforcement, not rulemaking." (*Tidewater*, *supra*, 14 Cal.4th at p. 569.) Accordingly, the Labor Code does not "include special rulemaking procedures for the DLSE similar to those that govern IWC rulemaking."[4] (*Id.* at p. 570.) Yet, because enforcement involves some degree of interpretation, "the Legislature empowered the DLSE to promulgate necessary 'regulations and rules of practice and procedure.'" (*Id.* at pp. 570-571.)

Although administrative regulations "do not always fall neatly into one category or the other," (*Ramirez*, *supra*, 20 Cal.4th at p. 799), it is well-established that courts "play a greater role when reviewing the persuasive value of interpretive rules than they do in determining the validity of quasi-legislative rules." (*Yamaha*, *supra*, 19 Cal.4th at p. 13.) Whereas agency interpretation is entitled to consideration and respect, "the binding power of an agency's interpretation of a statute or regulation is contextual," and the weight it should be afforded is fundamentally situational. (*Id.* at pp. 7, 12.) A court assessing the value of an interpretation must consider the substantive legal issue before it and the particular agency offering the interpretation. (*Id.* at p. 12.) Here, the enabling statutes demonstrate that application of regulation 13520 must be appropriately circumscribed.

[4] The regulatory procedures applicable only to the IWC are analogous to the Administrative Procedure Act (APA). (*Id.* at p. 569.)

A. Regulation 13520 is a Rule of Practice and Procedure Applicable to Berman Hearings

Administrative regulations must be bound by and consistent with the scope of authority conferred on the agency by the enabling statutes. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391-392 (*Association for Retarded Citizens*); see also Gov. Code, §§ 11342.1–11342.2.) Here, regulation 13520 was adopted under the authority of sections 55 and 98.8. (See Cal. Code Regs., tit. 8, § 13520.)

The first enabling statute—section 55—relates to the organization of the Department of Industrial Relations and the promulgation of rules governing its operation. Section 55 empowers the Director of Industrial Relations to "make rules and regulations that are reasonably necessary to carry out the provisions of [Division 1, Chapter 1] and to effectuate its purposes." (Lab. Code, § 55.) Along with neighboring provisions governing the general powers and duties of the Director, "[t]hese statutes establish a legislative intent to give the Director plenary authority to promulgate rules to enforce the Labor Code." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 989.)

The second enabling statute—section 98.8—is part of a "special statutory scheme codified in sections 98 to 98.8" that governs administrative hearings before the Labor Commissioner commonly known as "Berman" hearings. (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858 (*Cuadra*), disapproved on another ground in *Samuels v. Mix* (1999) 22 Cal.4th 1; see also *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115 (*Murphy*); *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350.) Section 98.8 states that "[t]he Labor Commissioner shall

promulgate all *regulations and rules of practice and procedure* necessary to carry out the provisions of [Division 1, Chapter 4]." (Lab. Code, § 98.8 [emphasis added]; see also *Cuadra*, *supra*, 17 Cal.4th at pp. 866-867.) These regulations governing Berman hearings are codified in sections 13500 to 13520 of title 8 of the Code of Regulations. (See Lab. Code, §§ 98, subd. (g), 98.8; *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 49-50, fn.10 ["Regulations governing Berman hearings have been adopted."]; Cal. Code Regs., tit. 8, §§ 13500–13520; MFJN 0640-0656.)

Courts must not "construe a regulation in isolation, but instead read it with reference to the scheme of law of which it is a part, so that the whole may be harmonized and retain effectiveness." (*Department of Industrial Relations v. Occupational Safety & Health Appeals Board* (2018) 26 Cal.App.5th 93, 101 (*Department of Industrial Relations*).) Consistent with the authority conferred by sections 55 and 98.8, the DLSE promulgated regulation 13520 as a rule of practice and procedure for hearings on actions to recover wages and penalties (i.e., Berman hearings). (See Cal. Code Regs., tit. 8, § 13520.) The placement of regulation 13520 within this regulatory hierarchy is undeniable:

> **Title 8.** Industrial Relations
> **Division 1.** Department of Industrial Relations
> **Chapter 6.** Division of Labor Standards Enforcement
> **Subchapter 6.5.** Hearings on Actions to Recover Wages . . .
> **Article 1.** Rules of Practice and Procedure
> **Section 13520.** Definition of "Willful"

(See MFJN 0656.)

Notwithstanding the express limitations of the enabling statutes and the DLSE's codification of regulation 13520 as a rule of practice and

procedure for hearings on actions to recover wages, the Court of Appeal disregarded regulation 13520's proper context and application. (See *Naranjo III*, *supra*, 88 Cal.App.5th at p. 945; *Yamaha*, *supra*, 19 Cal.4th at p. 14 [weight given to an agency interpretation turns on a legally informed, commonsense assessment of the regulation's contextual merit].) Instead, the Court of Appeal concluded that regulation 13520's force and effect extended markedly beyond section 203 to limit the imposition of penalties under an entirely different statute. Such action exceeds the proper interpretive function of the judiciary.

B. Applying Regulation 13520 to Section 226 Constitutes Improper Judicial Legislation

Whatever the force of administrative construction of a regulation may be, "final responsibility for the interpretation of the law rests with the courts." (*Association for Retarded Citizens*, *supra*, 38 Cal.3d 384, 391, citing *Whitcomb Hotel v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757 ["Administrative practice is a weight in the scale, to be considered, but not to be inevitably followed."].) In *Morillion*, this Court reviewed an appellate court's interpretation of the term "hours worked," and found it erroneous because the appellate court had substituted other words for the express language contained in Wage Order No. 14-80. (*Morillion*, *supra*, 22 Cal.4th at pp. 580, 585.) Characterizing such activity as "improper judicial legislation," this Court stressed that the judiciary has "no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Id.* at p. 585 [citations omitted]; see also *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, 1048 [declining invitation to engage in judicial legislation].)

The Court of Appeal similarly engaged in improper judicial legislation here. Rather than focusing solely on the express language characterizing "knowing and intentional" in section 226, subdivision (e)(1), the Court of Appeal improperly applied regulation 13520 to section 226 to limit the circumstances under which wage statement penalties are imposed. (See *id.* at p. 585 [citations omitted].) The Court of Appeal's opinion makes no attempt to ascertain whether the DLSE intended to promulgate a quasi-legislative regulation to alter the intentionality standard under section 226 or even had the authority to do so. The text of regulation 13520 expressly limits its interpretation to section 203. It does not reference section 226 nor define "willful" for any other statute. Moreover, the Legislature already enacted guidance for administrative enforcement of section 226 by the DLSE.

1. The language of regulation 13520 limits its application to section 203

The rules that govern the interpretation of statutes also govern the interpretation of administrative regulations. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097 (*Berkeley*); *Department of Industrial Relations*, *supra*, 26 Cal.App.5th at p. 100.) Therefore, this Court must begin with the language of regulation 13520, giving effect to its plain and commonsense meaning to ascertain and effectuate the intent of the DLSE. (*Berkeley*, *supra*, 60 Cal.4th at p. 1097; *Department of Industrial Relations*, *supra*, 26 Cal.App.5th at p. 100-101.)

The DLSE's intention to limit regulation 13520 only to section 203 could not be clearer. It expressly confines its interpretation of willful "within the meaning of Labor Code Section 203" and limits the preclusive effect of a good faith dispute to the "imposition of waiting time penalties

under Section 203." (Cal. Code Regs., tit. 8, § 13520.) The regulation does not reference section 226, expressly or impliedly. The regulation does not interpret the phrase "knowing and intentional" within the meaning of section 226 or assert the existence a good faith dispute to preclude the imposition of wage statement penalties under section 226. The Court of Appeal's application of regulation 13520 to section 226 contravenes the expressed regulatory intent of the DLSE and usurps the role of the Legislature—an action that would be deemed void if it had been taken by the DLSE itself.

2. The Court of Appeal's misappropriation of regulation 13520 would be void if taken by the DLSE

In its capacity to enforce the Labor Code, the DLSE could not apply regulation 13520 to preclude the imposition of wage statement penalties under section 226. "[I]t is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321 (*Agnew*), citing *California Empl. Com. v. Kovacevich* (1946) 27 Cal.2d 546.) Stated another way, a state agency has authority to adopt only regulations within its scope that are reasonably necessary to effectuate the purpose of its enabling statute. (Gov. Code, §§ 11342.1-11342.2; see also *Agnew*, *supra*, 21 Cal.4th at 321.)

The DLSE has promulgated no regulation implementing or interpreting section 226. The Legislature, however, has instructed the DLSE on how to enforce section 226 in section 226.3, which states:

> In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in

> his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

(§ 226.3.) Notably, the Legislature did not instruct the Labor Commissioner to consider the existence of good faith dispute in imposing civil penalties for violations of section 226. It makes clear that the Labor Commissioner shall consider *only* inadvertence and may decline to impose penalties for first time violations resulting from clerical error or inadvertent mistake.[5]

Given the Legislature's statutory instruction to the DLSE on enforcing section 226, no regulation would be reasonably necessary to effectuate the Labor Commissioner's enforcement power of that statute. Moreover, if the DLSE applied regulation 13520 to implement section 226, that would exceed the authority of the enabling statutes—sections 55 and 98.8—insofar as that interpretation would contradict the Legislature's instructions delineated in section 226.3. (See *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 143-144 [To the extent an administrative rule is contrary to it referenced statutory provisions, "it is void, for an administrative agency has no authority to enact rules or regulations which alter or enlarge the terms of legislative enactments."].) The Court of Appeal similarly should be precluded from engaging in actions that exceed administrative authority.

[5] As discussed in Section II. below, the Legislature enacted a comparable instruction for court enforcement of section 226 in subdivision (e)(3).

II. THIS COURT SHOULD ADOPT A STANDARD FOR KNOWING AND INTENTIONAL CONSISTENT WITH THE LEGISLATURE'S INSTRUCTION BOTH TO COURTS AND TO THE DLSE

This Court has long held that statutes governing conditions of employment are to be construed broadly in favor of protecting employees. (*Sav–On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; *Ramirez*, *supra*, 20 Cal.4th 785, 794; *Industrial Welfare Com.*, *supra*, 27 Cal.3d 690, 724.) In rejecting the application of regulation 13520 to section 226, this Court should adopt a standard for determining a knowing and intentional failure consistent with section 226's statutory language, legislative history, and the objectives to be achieved.

Section 226, subdivision (e)(1) provides recovery to an employee suffering injury from a "knowing and intentional failure" to comply with the wage statement requirements delineated in subdivision (a). (§ 226, subd. (e)(1).) Subdivision (e)(3) specifies the intended interpretation of this phrase for purposes of imposing wage statement penalties:

> (3) For purposes of this subdivision, a "knowing and intentional failure" does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake. In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section.

(§ 226, subd. (e)(3).) Based on these statutory instructions, courts adjudicating section 226 consider "knowing and intentional" as a standard designed to protect only against the imposition of penalties for the sporadic failures one might expect in the administration of a business, such as

accidental omissions, isolated and unintentional payroll errors, or inadvertent clerical mistakes. The standard, however, is not intended to excuse widespread deficiencies resulting from ignorance or mistakes of law.

In *Kao v. Holiday* (2017) 12 Cal.App.5th 947 (*Kao*), the court found a knowing and intentional violation when the employer knew it had provided wage statements that did not contain hours worked or the rate of pay. (12 Cal.App.5th at p. 961.) "Liability is established even if [the employer] believed, in good faith, that [the plaintiff] was a nonemployee trainee outside wage statement requirements or an exempt employee with lesser wage statement requirements. Such a belief amounts to a mistake of law that is not excused under the statute mandating itemized wage statements." (*Id.* at p. 962, citing *Novoa v. Charter Communications, LLC* (E.D. Cal. 2015) 100 F.Supp.3d 1013, 1028-1029.)

Similarly, in *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072 (*Furry*), the court concluded that the employer's good faith belief that the employee was exempt from overtime did not constitute a viable defense to his claim under section 226. "The employee is not required to demonstrate that the employer knew its conduct was unlawful." (*Id.* at p. 1085, citing *Cabardo v. Patacsil* (E.D.Cal. 2017) 248 F.Supp.3d 1002, 1010.) The employer need only be aware of the factual predicate underlying the violations. (*Ibid.*) In considering application of a good faith exception, the reviewing court noted that "courts considering the issue have rejected a good faith defense to Labor Code section 226, because it stands contrary to the often-repeated legal maxim: 'ignorance of the law will not excuse any person, either civilly or criminally.'" (*Ibid.*)

More recently, in *Gola v. University of San Francisco* (2023) 90 Cal.App.5th 548 (*Gola*), the court affirmed a judgment finding the employer

liable for wage statement penalties because it "knew that facts existed bringing its actions or omissions within the provisions of section 226." (*Id.* at p. 557.) The court expounded "if the employer knew facts existed that triggered its obligation to issue a wage statement, then its failure to comply was knowing and intentional within the meaning of section 226, subdivision (e)(1) regardless of whether it believed it had to comply or whether its belief was reasonable." (*Id.* at p. 566, citing *Furry*, *supra*, 30 Cal.App.5th at p. 1085; *Kao*, *supra*, 12 Cal.App.5th at pp. 961–962.)

Assessing the test applied by the *Gola* trial court, the appellate court reviewed the statutory guidance provided in subdivision (e)(3), concluding that the trial court's considerations appropriately reflected the intent of the Legislature. "These clarifications indicate that the Legislature intended to exclude only truly errant or mistaken violations from the reach of section 226's penalty provisions, not competing legal interpretations." (*Ibid.*) In rejecting a good faith exception, the appellate court commented on the statutory language used by the Legislature. "Unlike section 203, the Legislature did not use the word 'willful' in section 226, subdivision (e)(1); instead, it chose the words 'knowing and intentional,' indicating a different scienter test." (*Id.* at p. 567, citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.)

Applying subdivision (e)(3)'s instruction here, Spectrum's policy and practice were not in compliance with subdivision (a)'s requirements. (*Naranjo*, *supra*, 13 Cal.5th at p. 105 [It is "undisputed that Spectrum neither paid [ ] premium pay nor reported it as earned on employee wage statements."].) Its failure was not isolated, unintentional, or inadvertent. Spectrum's widespread policy and practice unlawfully denied officers meal periods. Spectrum recorded only active working hours on wage statements,

while omitting premium pay earned by officers for working without meal periods. (See 12RT5415:24-5418:4, 5418:13-16, 5421:14-27.) Spectrum knew that its wage statements reflected only active working hours; it denied officers statutory meal periods and intended not to remunerate or record premium pay for those missed meal periods. (See *id.*) To Spectrum, this is all the wages officers were due. (*Naranjo*, *supra*, 13 Cal.5th at p. 115 [arguing that premium pay was "only due if and when a court determines meal and rest break violations have occurred."].)

Any interpretation of a "knowing and intentional failure" that excuses ignorance of section 226's wage statement requirements defies subdivision (e)(3)'s guidance to courts on the proper interpretation of subdivision (e)(1). Spectrum did not adopt policies and procedures in compliance with the law and its long-term violation of section 226 cannot be deemed inadvertent under subdivision (e)(3). The statutory language, legislative history, and objectives of section 226 define these failures to be knowing and intentional.

A. The Language of Section 226 and a Parallel Statute Indicate That "Knowing and Intentional" Refers to Conscious Acts Done with Awareness or Understanding

In construing a statute, the fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) In this regard, reviewing courts "must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'" (*Murphy*, *supra*, 40 Cal.4th at p. 1103 [citations omitted].)

Notwithstanding the legislative instruction provided in subdivision (e)(3), the Court of Appeal made no attempt to determine the Legislature's

intent in using the phrase "knowing and intentional failure" in section 226, subdivision (e)(1). Rather, the Court of Appeal turned to a decision from this Court in *In re Trombley* (1948) 31 Cal.2d 801 (*Trombley*) for guidance. (*Naranjo III*, *supra*, 88 Cal.App.5th at p. 949.)

In *Trombley*, a case that considered the constitutionality of section 216, this Court used the phrase "knowingly and intentionally" to describe the criminality of an individual who willfully refuses to pay wages after a demand for payment is made. (*Trombley*, supra, 31 Cal.2d at pp. 807-808.) The Court of Appeal's opinion alleged that "the *Trombley* court linked the 'knowing and intentional' standard to a 'willfulness' standard," and then used this supposed correlation to extend regulation 13520 to section 226. (*Naranjo III*, *supra*, 88 Cal.App.5th at p. 949.) This analysis is both inaccurate and inappropriate.

The Legislature employed the phrase "knowing and intentional" for the first time in 1976. (See Stats.1976, ch. 832, § 1; MFJN 0213-0215.) This Court decided *Trombley* nearly 30 years earlier in 1948. It is impossible that this Court purposefully *linked* the "knowing and intentional" standard to a "willfulness" standard before the former phrase existed. Nor would any purported linking justify applying an administrative regulation that would not be drafted for another 40 years.

Courts must ascertain the intent of the *Legislature* to interpret statutory language, not the considerations of other courts. (*California Teachers Assn.*, *supra*, 14 Cal.4th 627, 632.) "It cannot be too often repeated that due respect for the political branches of our government requires [courts] to interpret the laws in accordance with the expressed intention of the Legislature." (*Id.* at p. 633.) Here, proper interpretation shows the purpose of section 226 is effectuated when penalties are levied for conscious

acts done with awareness or understanding, while clerical errors and inadvertent mistakes may be excused.

1. The dictionary definitions of "knowing" and "intentional" inform the Legislature's decision to use that distinct phrase

"[W]here the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning." (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 725 (internal quotations and citations omitted).) Notably, section 226 is the *only* statute in the Labor Code that employs the phrase "knowing and intentional." (See § 226, subd. (e)(1).) Whereas "willfully" is used profusely. (See, e.g., Lab. Code §§ 90, 91, 93, 98.6, 98.74, 108.2, 152, 203, 203.5, 206, 216, 222, 226.8, 227, 230, 230.1, 230.3, 230.5, 230.8, 247, 976.) Given that many of the statutory provisions which utilize "willfully" concern the same subject matter and are codified in the same area as section 226—Article 1 (General Occupations) of Chapter 1 (Payment of Wages) of Part 1 (Compensation) of Division 2 (Employment Regulation and Supervision)—one must presume that the Legislature's use of the distinct phrase "knowing and intentional" was intended.

The Court of Appeal deemed "knowing and intentional" an undefined term despite the guidance provided in subdivision (e)(3). (*Naranjo III*, *supra*, 88 Cal.App.5th at p. 949.) Where a statutory term "is not defined, it can be assumed that the Legislature was referring to the conventional definition of that term." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1176.) Thus, the words chosen by the Legislature

"are to be given their plain and commonsense meaning." (*Murphy*, *supra*, 40 Cal.4th at p. 1103.)

Courts appropriately refer to the dictionary definitions of words when attempting to ascertain the meaning of statutory language. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 83 (*Heritage*).) Here, common definitions for "knowing" include: **"[h]aving or showing awareness or understanding; well-informed"** and **"[d]eliberate; conscious."** (See Black's Law Dictionary (11th ed. 2019), knowing; see also Merriam-Webster, *Regular* (2023) <https://www.merriam-webster.com/dictionary/knowing> [as of June 21, 2023].) Intentional is defined as something: **"[d]one with the aim of carrying out the act."** (See Black's Law Dictionary (11th ed. 2019), intentional; see also Merriam-Webster, *Regular* (2023) <https://www.merriam-webster.com/dictionary/intentional> [as of June 21, 2023].) Combined, the commonsense, plain meaning of "knowing and intentional" comprises a conscious act (or omission) done with awareness or understanding of its occurrence.[6] Neighboring provisions of the Labor Code also support this construction.

[6] Completing the term used, "failure" is defined as **"[a]n omission of an expected action, occurrence, or performance."** (See Black's Law Dictionary (11th ed. 2019), failure; see also Merriam-Webster, Regular (2023) <https://www.merriam-webster.com/dictionary/failure> [as of June 21, 2023].)

2. A parallel provision of the Labor Code supports an interpretation of "knowing and intentional" that stems from the dictionary definitions

Statutory language must also be construed both in the context of the statute as a whole and with respect to the overall statutory scheme, giving "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) As such, statutes must be construed "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222.) Here, neighboring section 226.3 provides support for interpreting section 226, subdivision (e)(3) as establishing a specific standard for imposing wage statement penalties.

Section 226.3 establishes additional civil penalties for violation of section 226, subdivision (a) when enforced by the Labor Commissioner. (§ 226.3.) Although section 226.3 does not employ the phrase "knowing and intentional," similarities do exist in the provisions that inform an adjudicator considering penalties. Both sections identify clerical errors and inadvertent mistakes as excusing violations. (Compare § 226, subd. (e)(3), with § 226.3.) With respect to section 226.3, however, the Legislature instructs the DLSE to consider whether the violation was "inadvertent," and empowers the Labor Commissioner to forgo penalizing a first violation if it is determined that the violation "was due to a clerical error or inadvertent mistake." (§ 226.3.)

"In legal authorities, the meaning of the term 'inadvertent' typically is explained by way of contradistinction to its antonyms, such as deliberate and intentional, or its near antonyms, willful and knowing." (*Heritage*,

supra, 192 Cal.App.4th at p. 83.) As explained in *Heritage*, the applicable standard under section 226.3 does not require any particular mental state, and a purported "good faith but mistaken belief about the law's requirements" is not a defense to noncompliance. This intent is consistent with section 226's long-standing legislative history.

B. The Legislature Has Repeatedly Amended Section 226 to Minimize the Burden on Employees for Recovery

The legislative history of a statute and the wider historical circumstances of its enactment and/or amendment often aid in divining the Legislature's intent. (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 841.) Here, two amendments to section 226 offer additional insight into the Legislature's intent in adding strict enforcement provisions.

Section 226 was amended in 1976 by Assembly Bill No. 3731 (1975-1976 Reg. Sess.) (Bill No. 3731), which was introduced by Assemblymember Bill Lockyer to, among other things, add a penalty provision for noncompliance. As introduced, Bill No. 3731 amended section 226 to provide recovery to employees suffering injury as a result of a knowing failure by an employer (MFJN 0213-0214), but the relevant provision was later amended by Assemblymember Lockyer to provide recovery when employees suffer injury as a result of a "knowing and intentional" failure. (MFJN 0213-0217, 0225-0226.)

The purpose in amending section 226 to require greater wage stub information and provide a remedy provision was to ensure employees are adequately informed of their compensation and not shortchanged by their employers. (MFJN 0227, 0229, 0238.) Proponents of Bill No. 3731 noted that the law did not supply workers with an effective remedy against

violating employers and should permit them to recoup their losses from an employer who flouts the law. (MFJN 0243.)

The Legislature again amended section 226 in 2012 through a series of bills, most notably Senate Bill No. 1255 (Bill No. 1255), to correct drafting errors which, if left uncorrected, would allow employers to require a greater showing from employees before wage statement penalties were levied. (MFJN 0167, 0185.) In addition to clarifying the standard for "injury" with the addition of subdivision (e)(2), the Legislature added guidance for determining a "knowing and intentional failure" with the addition of subdivision (e)(3). (MFJN 0163, 0172, 0181.) These measures were necessary after a wave of court decisions interpreting section 226 demanded that employees satisfy higher standards than the Legislature intended sufficient for recovery.

The timing of the Legislature's amendment to section 226 vis-à-vis the enactment of regulation 13520 is illustrative. Regulation 13520 did not exist when the Legislature enacted the "knowing and intentional" standard in 1976. Regulation 13520 was later promulgated in 1988 and had been longstanding when the Legislature introduced subdivision (e)(3) in 2012.

The Legislature is presumed to be aware of the administrative construction of a statute "if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-1018.) Regulation 13520 had been operative for 24 years at the time subdivision (e)(3) enacted. The Legislature could have incorporated a good faith dispute exception to section 226 when it enacted subdivision (e)(3). It did not. Rather, the Legislature amended section 226.3 two years later in 1990 to instruct the Labor Commissioner and on

how to enforce section 226. (See Stats.1990, ch. 838, § 1; ["In enforcing this section, the Labor Commissioner shall . . . ."].) And in 2012, the Legislature extended similar considerations for determining a "knowing and intentional failure" with the addition of subdivision (e)(3). These amendments are consistent with section 226's objectives to ensure employees are paid properly.

C. The Objectives of Section 226 Are Distinct from Section 203 and Warrant a Different Standard

In addition to the statutory language and legislative history, this Court may look to additional extrinsic aids, including the objectives to be achieved by the statute and the evils to be remedied. (*Murphy*, *supra*, 40 Cal.4th at p. 1105, citing *People v. Jefferson* (1999) 21 Cal.4th 86, 94.) In applying regulation 13520 to section 226, the Court of Appeal did not consider the objectives to be achieved by section 203 or section 226, respectively. Rather, the Court of Appeal deferred to the perceptions of several district courts, which have justified the application of regulation 13520 to section 226 as follows:

> It would seem ironic if the good faith dispute defense applied to Section 203, which involves failure to timely pay wages, but not to Section 226, which involves inaccurate wage statements. If anything, failure to pay wages would seem to warrant lesser tolerance of defenses than failing to provide accurate wage statements.

(*Naranjo III*, *supra*, 88 Cal.App.5th at p. 950, fn. 6, citing *Woods v. Vector Mktg. Corp.* (N.D. Cal. 2015) 2015 WL 2453202, at *4, fn. 3; see also *Oman v. Delta Air Lines, Inc.* (N.D.Cal. 2022) 610 F.Supp.3d 1257, 1275; *Arroyo v. International Paper Co.* (N.D.Cal. 2020) 611 F.Supp.3d 824, 840.) The opinions of the district courts and the Court of Appeal that discuss a

perceived irony in not applying regulation 13520 to section 226 simply miss the point.

Indeed, the wage and hour jurisprudence of this State does not tolerate a failure to *pay wages*, but regulation 13520 addresses defenses that would preclude the imposition of *penalties*, not absolve an underlying failure to pay wages. As stated by the regulation, "[t]he fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (Cal. Code Regs., tit. 8, § 13520.) Therefore, a violating employer would still have to pay the wages, but might not have waiting time penalties levied against it. The Court of Appeal's inapt comparison excites no irony and disregards the distinct objectives to be achieved by section 226, which are different but as important as section 203's.

The purpose of section 203 is "to incentivize employers to pay end-of-employment compensation when it is due, rather than forcing employees to seek administrative relief or to go to court." (*Naranjo*, *supra*, 13 Cal.5th at p. 110, citing *McLean v. State of California* (2016) 1 Cal.5th 615, 626; *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400; *Smith v. Superior Court* (2006) 39 Cal.4th 77, 82.)

In comparison, the purpose of section 226 is "to enable employees to verify they have been compensated properly, without shortchanging or improper deduction." (*Naranjo*, *supra*, 13 Cal.5th at p. 119, citing *Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 752.) In *Naranjo*, this Court determined that the purpose of section 226 would be frustrated if distinctions were drawn between different kinds of wages owed based upon how employees became entitled to those wages. (*Ibid.*) Similarly, the purpose of section 226 is not served by incorporating regulation 13520, which would excuse noncompliance based on an employer's belief that the

wage statements reported all the wages the employer believed it owed. "A statement that conceals amounts earned, on the ground that they also were not paid, is not an accurate statement, and it does not comply with the statute." (*Ibid.*) Similarly, an employer's *belief* that it did not have to pay wages in the first instance should not preclude a finding that the wage statement omitting the required information was "knowing and intentional." Allowing such an argument to be made, as the opinion does, "impedes employees' ability to verify they have been paid properly and," undermines "administrative enforcement of wage and hour protections." (*Ibid.*) Further, it excuses any California employer's insufficient attention to the State's wage and hour laws as applicable to its employees, negligence that should not be tolerated.

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CONCLUSION

Regulation 13520 does not apply to Labor Code section 226 such that a good faith dispute precludes the imposition of wage statement penalties. The opinion of the Court of Appeal must be reversed. This Court should hold that the standard for determining a "knowing and intentional failure" comprises a conscious act or omission done with awareness or understanding of its occurrence. This construction is consistent with the express Legislative instruction offered in Labor Code section 226, subdivision (e)(3), and Labor Code section 226.3, and is further supported by the historical amendments to Labor Code section 226 that seek to minimize the burden on employees, who like Gustavo Naranjo and his fellow officers, have been shortchanged by their employer, Spectrum Security Services, Inc.

Dated: June 27, 2023

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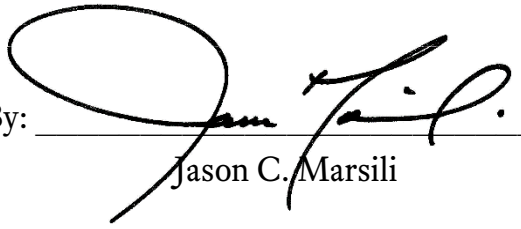
By: 

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