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.

On Review from the Court of Appeal for the Second Appellate District, Division Four
Civil No. B256232

After an Appeal from the Superior Court
For the County of Los Angeles, Case Number BC372146
Honorable Barbara M. Scheper

APPLICATION AND [PROPOSED] BRIEF OF AMICI CURIAE EMPLOYERS GROUP AND THE CALIFORNIA EMPLOYMENT LAW COUNCIL

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APPLICATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT

Amici curiae, Employers Group and the California Employment Law Council ("CELC"), who each have on many occasions appeared before this Court as amici curiae, offer the views of their numerous members, by addressing the potential implications of the issue before the Court, and by raising points not addressed in the parties' briefs. Pursuant to California Rule of Court 8.520(f)(1), these amici respectfully request permission to file the accompanying amicus brief in support of Defendant/Appellant.

CELC is a voluntary, non-profit organization that promotes the common interests of employers and the general public. Among other efforts, its primary purpose is to foster the development of reasonable, equitable, and progressive rules of California employment law. CELC's membership includes approximately 80 private sector employers who collectively employ more than half a million Californians. Given its statewide reach, CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases.[1]

Employers Group is the nation's oldest and largest human resources management organization for employers. The Group includes nearly 3,800 California employers of all sizes and in

[1] See e.g., *Donahue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858; *Frlekin v. Apple Inc.* (2020) 8 Cal. 5th 1038; *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829; *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal. 5th 542; *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal. 4th 1; *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal. 4th 1; and many others.

every industry – which in turn employ nearly three million employees. As such, Employers Group has a vital interest in seeking clear guidance on developments in employment law and is also uniquely able to address the impact of such changes. Because its purpose is to promote the predictability and fairness of employment laws affecting both employers and employees, it has appeared before this Court as an amicus in several significant employment cases.[2]

Each amicus has a significant stake in the outcome of this case, given their individual missions to ensure fairness and predictability for employers of all sizes and in all industries throughout California and the millions of persons they collectively employ. Further, the two groups' experience with and expertise in employment matters allows them to assist this Court in evaluating this appeal and the underlying trial court's decision. For these reasons, both Employers Group and CELC, jointly request leave to file the accompanying amicus curiae brief.

Pursuant to California Rules of Court 8.520(f)(4)(A)(i)(ii) and (B), amici declare that no party or party's counsel authored this brief, in whole or in part. No party or party's counsel funded this brief, in whole or in part, with any monetary contribution either. Finally, other than the amicus curiae, their counsel, and

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[2] See, e.g., *Donahue v. AMN Servs., LLC* (2021) 11 Cal. 5th 58; *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858; *Frlekin v. Apple Inc.* (2020) 8 Cal. 5th 1038; *Troester v. Starbucks Corp.* (2018) 5 Cal. 5th 829; *Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal. 5th 542; *Dynamex Operations W., Inc. v. Superior Court* (2018) 4 Cal. 5th 903; *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal. 4th 1; and many others.

members thereof, no person or entity participated in authoring, preparation, or submission of this brief.

Respectfully submitted,

DATED: November 13, 2023

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AMICUS BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT

I. SUMMARY OF ARGUMENT

Amici curiae Employers Group and the California Employment Law Council ("CELC") urge this Court to affirm the decision of the Court of Appeal, Second Appellate District, Division 4. Labor Code section 226, subdivision (e) requires a "knowing and intentional" violation prior to the assessment of any statutory penalties for wage statement violations. And, the terms "knowing and intentional" clearly denote that an employer must understand, know, and intentionally act in a way that violates the wage statement statute.

The Court of Appeal correctly held that "an employer's good-faith belief that it is not violating section 226 precludes a finding of a knowing and intentional violation." (*Naranjo v. Spectrum Security Services, Inc.* (2023) 88 Cal.App.5th 937, 949.) By contrast, the Plaintiff/Appellant urges this Court to impose retroactive penalties, going back to alleged violations from June 4, 2004. However, at the time of the alleged violations, from 2004 to 2007, the law did not prohibit the employer's conduct on a strict liability basis. At worst, the law was unsettled whether an unpaid meal or rest period "premium" pursuant to Labor Code section 226.7, was required to be shown on a wage statement. Whether unpaid meal and rest premiums must be shown on wage statements remained a disputed issue, dividing both state and federal courts, until this Court's opinion in this case on May 23, 2022. The claims here are an example, among many, of retroactive penalties imposed on employers who were attempting

in good faith to follow the law, based on reasonable interpretations of the law at that time, but later to be found liable due to contrary but disputed interpretations of California wage and hour law. This case, however, is simple: the statute, on its face, requires a "knowing and intentional" violation, and those words cannot possibly create a strict liability statute.

The same is true for many members of these amici: until this Court's May 23, 2022, decision in this case, there was a clear disagreement among the California Courts of Appeal and federal Districts Courts whether meal or rest premiums were "wages earned" and therefore necessary to be included on wage statements.[3] The weight of authority held that meal and rest premiums were not a wage, as this Court suggested in *Kirby v. Inmoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244.

Further, on May 11, 2005, the Division of Labor Standards

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[3] *See e.g.*, *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, 1261 (that a meal period premium "is measured by an employee's hourly wage does not transmute the remedy into a wage"), disapproved in *Naranjo*, 13 Cal.5th at 113; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 381 (meal and rest period premiums are "in the nature of a statutory penalty because it requires the employer to pay more than the value of the missed meal or rest period"), disapproved in *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 196 fn.8; *Jones v. Spherion Staffing LLC* (C.D. Cal. 2012) 2012 WL 3264081, **8-9 (legal violation underlying § 226.7 is not the non-payment of wages); *Singletary v. Teavana Corp.* (N.D. Cal. 2014) 2014 WL 1760884, *4 ("the wrong at issue in Section 226.7 is the non-provision of rest breaks, not a denial of wages"); *Pulido v. Coca-Cola Enterprises, Inc.* (C.D. Cal. 2006) 2006 WL 1699328, at *4 (meal and rest period premiums are a penalty, and not wages, consistent with the DLSE's position on this issue).

Enforcement ("DLSE") opined that the payment required under Labor Code section 226.7 was a "penalty because its purpose is to enforce the meal and rest period requirements and deter noncompliance rather than to compensate the employee." (*Hartwig v. Orchard Commercial, Inc.* (2005) (Cal. Div. Labor Stds. Enforcement, May 11, 2005, No. 12–56901RB.) There was also case law strongly indicating that items *not paid*, although arguably earned or owed to the employee, need not be shown on the wage statement, because the purpose of the wage statement is to indicate how the amounts paid were calculated and on what basis, rather than to identify things that should have been but were not paid. (*See Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 392.)

Many members of these amici are facing the same sort of retroactive penalty claim for conduct going back years, to a time when the law was unsettled, and where the employer reasonably relied on existing case authority or DLSE pronouncements from that time.

Where the statutory language is clear, there is no basis in law or policy to ignore or give a distorted meaning to commonly used words like "knowing and intentional." Those words preclude penalties where, as here, the employer was found by both the Trial Court and Court of Appeal to have acted in good faith. (*Naranjo* (2023) 88 Cal. App. 5th 937, 947–49.)

II. THE STATUE ON ITS FACE REQUIRES CONDUCT AMOUNTING TO BAD FAITH.

It is elementary that every word in a statute must be given

a meaning. *Dyna-Med, Inc. v. Fair Employment & Housing Com* (1987) 43 Cal.3d 1379, 1387.) But the argument for Plaintiff here would eliminate the well-established meaning of "knowing and intentional" in Labor Code section 226, subdivision (e). In essence, Plaintiff would create a strict liability statute when the plain language of the statute is expressly to the contrary. Had the Legislature intended to require a penalty for *every* wage statement violation, it would not have included the phrase "knowing and intentional."

The obvious conclusion based on the statutory language is buttressed by the Legislature's amendments to Labor Code section 226 in 2012, per Sen. Bill No. (2011–2012 Reg. Sess.). That bill defined the types of violations constituting the necessary "injury," along with knowing and intentional conduct, to support a penalty claim under subdivision (e). The Legislature provided that specific violations constitute "injury," without the need for proof of out-of-pocket or tangible loss. These new definitions of "injury" included, *inter alia*, failing to provide any wage statement at all, or failing to provide sufficient information so that the employee could not promptly and easily determine, from the wage statement alone, various items, such as gross or net wages paid and deductions made from the gross wages. But, in 2012, when in the process of amending the statute, the Legislature did <u>not</u> remove or amend the pre-existing statutory language at issue here: the requirement that a violation be "knowing and intentional."

The employer here properly and correctly cites to

legislative history of the 2012 amendments indicating the purpose of the changes was to penalize employers who "deliberately flaunt the law." (*See* Answering Brief, pp. 35–36). An employer does not "flaunt the law" by making a good faith decision, even if, in hindsight, years later, the decision is determined to be erroneous.

Nor does the Legislature's example of conduct that does not qualify as "knowing and intentional conduct" (i.e., a clerical error or inadvertent mistake) mean there can be no other examples of conduct that was not knowing and intentional. Neither the statutory language added in 2012 nor principles of statutory construction show that, by identifying one type of behavior that is not "knowing and intentional," the Legislature meant to exclude all other types of behavior. The Legislature could have provided that only clerical errors or inadvertent mistakes constitute violations that are neither knowing nor intentional, but it did not.

A. Both the Terms "Knowing and Intentional" In Section 226, Subdivision (e) and "Willful" In Section 203 require Knowledge of a Violation.

The parties debate whether the "willfulness" requirement in Labor Code section 203, which governs final pay, means that any penalty under section 226, subdivision (e) can be assessed only if the conduct is "willful." The two terms, although different, both clearly require scienter. Otherwise, the statutory term, whether it is "willful" or "knowing and intentional," is meaningless surplusage. And both terms indicate the legislative

intent that penalties under either statute could only be imposed if the employer had some knowledge it was violating the law. *In Re Trombley* (1948) 31 Cal. 2d 801, 808, this Court defined "willful," as used in Labor Code section 216 as "knowingly and intentionally" refusing to pay wages the "[the employer] knows are due." And, as the employer here notes, this Court in *Trombley* observed the similarity of the term "willful " in Labor Code sections 216 and 203 and held "in interpreting [section 203] it was recognized that a dispute in good faith as to whether any wages were due would be a defense to an action for such [section 203] penalties." *Ibid.* Whether the two terms are interchangeable is not really the point. Both require more than a mere "knowing and intentional" payment or the "knowing and intentional" issuance of a wage statement, that is, in hindsight, a violation.

III. THE LABOR CODE ALREADY PROVIDES AMPLE REMEDIES, AND THIS COURT SHOULD NOT CREATE A NEW REMEDY THE LEGISLATURE DID NOT AUTHORIZE.

A simple example demonstrates why Plaintiff's position here is both unfounded as a matter of statutory law and of public policy. There is no dispute that the payment of employee wages is important as a matter of policy both to the public at large and to the employee who is owed the wages. But employees who are not properly paid have multiple remedies, apart from any violations of a wage statement. Indeed, in the vast majority of cases, and in this case, wage statement violations are "derivative" of some other, underlying failure to pay wages.

In this case, the alleged violations at issue include the

failure to pay meal and rest premiums under Labor Code section 226.7. The wage statement violation is clearly a derivative claim because the amounts that this Court held here *should* have been shown on the wage statement were *not* paid. *Naranjo v. Spectrum Security Services* (2022) 13 Cal.5th 93, 119–120. The omission of amounts not paid could hardly mislead an employee into confusion about how he or she had in fact been paid, as shown on the wage statement.

A simple hypothetical will demonstrate the already existing and robust remedies for failing to pay a meal or rest period premium: suppose it is 2021 and an employee, in a lone instance, is not provide with a single timely or uninterrupted meal period six months before the employee resigns. And suppose the employee is earning $25 per hour. The employee never reports the "missed" meal period and resigns six months later. The employer is unaware, and during the pay period involved, neither pays the one-hour premium required by Labor Code section 226.7, nor does it report the unpaid premium on the wage statement – acting according to the legal precedent available at that time (see pp. 60–61 of the Answering Brief and authorities cited therein). Thereafter, eleven months later (seventeen months after the violation), the employee brings an action for the $25.00 payment, plus prejudgment interest of $2.29 (eleven months of prejudgment interest at 10% pursuant to Labor Code section 218.6), plus penalties under section 203 of the Labor Code amounting to $6,000 ($25 x 8 x 30), for a total claim of $6,027.29 for a $25 violation, not including the attorneys' fees to which the

employee is entitled under Labor Code section 218.5. The section 203 penalties are 240 times the amount of the violation. And, in most such cases, the employee also files the necessary pre-litigation notice under Private Attorneys General Act ("PAGA") and seeks PAGA penalties of at least $50 or $100 for 12 semimonthly pay periods during the six-month period in which the person was not properly paid. (Lab. Code § 558 subd. (a).) Further, the employee's attorney brings a class action purportedly on behalf of hundreds if not thousands of other employees who were supposedly similarly "shorted" and including PAGA penalties, under multiple Labor Code sections, for the entire group.

This scenario is not hypothetical or fanciful. It has occurred to many of the members of these amici and is commonplace in the California Courts. In fact, employees file PAGA notices on similar fact patterns every day. According to the California Department of Industrial Relations PAGA Case Search, more than 6,600 PAGA notices were filed in the first ten months of 2023. And while this averages to 21 filings per day, on a single day (November 7, 2023) there were 43 filings alone. PAGA Case Search, *Department of Industrial Relations,* https://cadir.my.salesforce-sites.com/PagaSearch/PAGASearchResults?ed=2023-11-08&sd=2023-01-01.

In most Labor Code or wage hour class action lawsuits, the claims for penalties under section 203 dwarf the actual wage loss to the employees. As stated in the hypothetical, a $25 wage violation can yield a penalty of up to $6,000—240 times the

amount of alleged violation. And the "missed" meal period may be only a short or interrupted meal period – not the actual denial of an entire period. Of course, the violation must be "willful" to authorize a penalty under section 203. Again, however, the Legislature has not seen fit to require an automatic penalty, as indicated by its use of the word "willful" in section 203. And to avoid the penalty under section 203, Plaintiffs would argue that the employer must show that there was a good faith dispute that anything was owed, not merely that the employee overstated or inflated his or her claim. 8 Cal. Code Regs. tit. 8, § 13520.

As this Court is aware, in most Labor Code and PAGA claims, multiple forms of penalties are sought for what amounts to a single violation. Those penalties pyramid and compound the amount claimed and dwarf the actual loss. The Code remedies create an incentive for the filing of marginal claims with the omnipresent demand for attorneys' fees, even if many of the alleged violations are eventually shown to be minor or nonexistent. This Court has authorized claims for unpaid meal or rest premiums to be subject to a three-year statute of limitations (and this extends to four years when read in conjunction with the unfair competition laws). (*See* Murphy v. Kenneth Cole Productions Inc. (2007) 40 Cal.4th 1094, *but see* Cal. Bus. Prof. Code § 17200.) This often results in difficult problems of proof, much like that in *Murphy*, where the "class period" is, by the time the case is litigated, five or more years in length; during which the law was often unsettled and changing, and during which the employer in many cases changed payroll systems, not to mention

supervisors, employee handbooks, and other fundamental policies for recordkeeping and payroll purposes.

Because of the enormous potential exposure, even for relatively small actual losses (as in the foregoing hypothetical), almost no wage/hour class action or PAGA representative case ever proceeds to trial. As these amici can attest, there is a large and growing cottage industry of professional mediators whose job it is to negotiate settlements, often at the very outset of the case. This is because the employer either already cured the violation and seeks to move on, or lacks the resources to defend the case without going out of business, or lacks the ability to satisfy a potentially crippling judgment.

The Plaintiff's position here would reinforce this system by ignoring or distorting ordinary words in the statute. Further, there is no policy reason to impose penalties on employers, such as the employer in this case, or on other, many members of these amici, who in good faith attempted to abide by the law, only to find, often years later, that court opinions or DLSE pronouncements which they relied on turned out to be mistaken. Employers are neither clairvoyant nor omniscient. The proposed interpretation of section 226, subdivision (e) would require both.

IV. CONCLUSION

These amici urge the Court to affirm the judgment of the Court of Appeal.

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(l), I certify that this Application and [Proposed] Brief of Amici Curiae contains 3,205 words, including footnotes, but not including the tables of contents and authorities, the caption page, the signature blocks, any attachments, any Certificate of Interested Entities or Persons, or this certification page, according to Microsoft Word's word-count functions.

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Case No. S279397

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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 Diego, State of California. My business address is 101 West Broadway, Ninth Floor, San Diego, CA 92101-8285.

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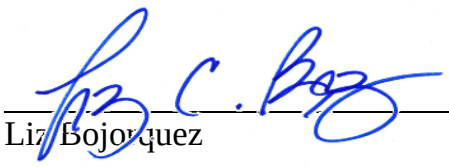

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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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/s/George Howard

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