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

OPENING BRIEF ON THE MERITS OF PLAINTIFFS/PETITIONERS

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REGULATIONS

CONSTITUTIONAL PROVISIONS

I.

ISSUES PRESENTED FOR REVIEW

1. Can and did a state employee union waive the California minimum wage and compensability standards of employees it represents in favor of less protective federal equivalents?

2. If the answer to issue 1 is no, are those employees entitled not simply to minimum wage for all "hours worked" under California's "employer control" test but to their contractual or statutorily agreed upon hourly wages (plus overtime where applicable)?

II.

INTRODUCTION

The Wage Orders of the Industrial Welfare Commission (the "IWC") give California State employees the right to be compensated for any work performed under the control of their employer. This Court has repeatedly held that those Orders are entitled to "extraordinary deference," "have the same dignity as statutes," and courts must therefore "seek to harmonize them" with other law, including federal law, with the mandate "to promote employee protection." (See, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840, 843.) The court of appeal nevertheless nullified their application, including even the right to

California minimum wage, to a large class of Petitioners in this case by concluding that Petitioners' Union waived their California wage and hour rights in favor of less protective federal law.

These Petitioners are California correctional peace officers who are represented by their union pursuant to the terms of the Ralph C. Dills Act (Gov. Code § 3512 et seq. ["Dills Act"]). Petitioners contend that the State did not compensate them for all time spent under its control, primarily so-called "pre and post-work activity" ("PPWA") when the officers are on prison grounds but before and after they assume their posts. Although the court of appeal agreed that a separate subclass of sergeants and lieutenants was entitled to seek additional compensation, it accepted the State's argument that the Union for the represented officers waived their right to any compensation required by the IWC's Wage Orders, and in particular Wage Order 4–2001 governing, among other things, California minimum wage. The court reached this radical conclusion solely on the basis that the Union entered into memoranda of understanding ("MOUs") with the State that referenced a single provision of federal law under the Federal Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA). This was error.

Neither the plain language of those MOUs, nor the bargaining history, supports the conclusion that the Union waived Petitioners' California wage and hour rights, primarily for the simple reason that it is undisputed neither the contracts nor the parties in their negotiations ever

discussed those rights. Moreover, even had the union tried to waive Petitioners' California minimum wage rights, it could not have done so because those rights are unwaivable. (Lab. Code, § 1194, subd. (a); *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455.) Consequently, the court of appeal's conclusion that the waiver was permissible because the Legislature ratified the MOUs fails because, under the Dills Act, the Legislature could only ratify what the parties agreed to, and as a matter of law the parties could not have agreed to waive Petitioners' right to California minimum wage.

With respect to the sergeants and lieutenants, the court of appeal properly reversed the trial court. Having harmonized the Wage Orders with federal overtime law, as it was required to do, the court ruled that the subclass could seek either California minimum wage or premium overtime wages under a breach of contract theory for uncompensated time. The court of appeal should have also harmonized state and federal standards to permit the correctional officer class to also pursue recovery on the same bases, as well as under California's Labor Code sections 222 and 223.

Harmonization is no more difficult for the officers than it is for the sergeants and lieutenants. The parties agree that the relevant IWC definition of "hours worked" – the employer "control standard" – is broader than the federal standard and would potentially include work performed that is not compensable under federal law. Harmonization simply allows

both classes to pursue payment for "hours worked" under California law that the employer treats as non-compensable under federal law.

The Court should therefore reverse the court of appeal's decision with respect to these officers and permit them to pursue payment for uncompensated hours they can show they worked under state law upon remand to the trial court. They should not be precluded from even attempting to make that showing by the erroneous rulings below.

III.

FACTS AND PROCEDURAL BACKGROUND

The Plaintiffs in this lawsuit are correctional peace officers employed by the State at 37 state-run correctional institutions. (3 AA at p. 603–604.) The Defendants are the State of California, the California Department of Corrections and Rehabilitation, the California Department of Mental Health, and the California Department of Human Resources ("CalHR") (formerly the Department of Personnel Administration). Plaintiffs, like the lower courts, will refer to them collectively as "the State."

The trial court certified two subclasses of Plaintiffs: a subclass of "Represented Employees" that is comprised primarily of correctional officers who collectively bargain over "wages, hours and other terms and conditions of employment" (Gov. Code § 3517), and a subclass of "Unrepresented Employees" that is comprised primarily of correctional

sergeants and lieutenants who do not collectively bargain. (1 AA at p. 231.) The California Correctional Peace Officers' Association is the union ("Union") that bargains with the State over the terms and conditions of employment for the Represented Employees under the Ralph C. Dills Act. (Gov. Code § 3512 *et seq.* ["Dills Act"].)

The Represented Employees filed the class action complaint in *Stoetzl et al. v. State of California et al.*, County of San Francisco Case No. CGC-08-474096 in April 2008. (1 AA at p. 1.) The Judicial Council later coordinated *Stoetzl* with two class actions filed by different members of the Unrepresented Employees (*Shaw et al. v. State of California et al.*, County of Kings Case No. 10C0081 ("*Shaw*") and (*Kuhn et al. v. State of California et al.*, County of Los Angeles Case No. BC450446 ("*Kuhn*"). (1 AA at pp. 67–68.)

The State prevailed in the trial court with respect to both subclasses, resulting in dismissal of all Plaintiffs' claims and entry of a final, appealable judgment in the action. (20 AA at pp. 5438–5444, 5447–5453, 5457–5461; Cal. Civ. Proc., § 904.1, subd. (a)(1).) On appeal, the First District reversed with respect to the Unrepresented Employees but affirmed in full with respect to the Represented Employees. Accordingly, this Opening Brief on the Merits is filed on behalf of the Represented Employees as Petitioners. The Unrepresented Employees are Respondents

to the State's contemporaneously-filed petition for review, which this Court also granted.

A. The Relevant Responsibilities Of A Represented Correctional Officer And Compensation Under The Terms Of The MOUs At Issue

The correctional facilities where petitioners work function 24 hours per day, seven days per week, year-round. Not all employee "posts" operate 24 hours per day, but most do. Those posts are typically staffed by employees on three eight-hour "watches." Employees staffing such positions cannot leave their post until relieved by the officer filling the post on the next shift. Consequently, a correctional officer scheduled to work first watch (typically 10 p.m. to 6 a.m.) in a watch-tower in a California correctional facility will spend significant time under her employer's control before she assumes her post and after she hands it off.

Petitioners seek to show at trial that from the moment she arrives at the facility until the moment she leaves, the officer may be required to respond to emergencies and is subject to search. (RT Vol. III 478:5–12.) She may not bring her phone, radio, reading material or other personal property through the facility's security gates. After waiting to pass through security, the officer must walk to a centralized location inside the correctional facility where she picks up, checks out, and performs safety checks to her tools and safety equipment. (See 1 AA at pp. 78–79; RT Vol. IV, 593:14–595:8.) This walk can be lengthy, and during it, the officer

may pass through additional security gates and undergo further searches. (1 AA at pp. 78–79.)

The employee must timely arrive at her post for her 10 p.m. shift to receive a briefing on the events of the day from the officer she is relieving (if late, she will delay the departure of that officer). At a time station placed along her route, she signs a shift log recording her *scheduled* start time (*not* the time she actually signs the log) in order to indicate that she has arrived on time. (1 AA at p. 78.)

After the shift, the officer must await her relief, brief the relief officer, sign out, and walk back through the prison and the security gates to drop off her tools and safety equipment. Then she must walk to the main facility exit on the same regulated route she entered on and wait for those security gates to release her to walk to her car. Only when an employee leaves prison grounds is she completely free from the employer's control.

As described in more detail below, since 1998 a series of collective bargaining agreements or memoranda of understanding ("MOUs") have compensated correctional officers for 12 minutes per day, over and above eight hours of compensated time at post, for such pre and post work activity ("PPWA"). (RT Vol. II, 241:25–242:4; 264:19–265:3; 267:23–268:1.) During a period between September 2007 and May 2011, no MOU existed but the same compensability rules were maintained under State policies called the "Implemented Terms." (RT Vol. II, 337:13–16; RT Vol. III,

446:12–449:6.) The State does not track or compensate time spent by individual officers inside state grounds or even inside the correctional facility itself. (RT Vol. II, 256:6–257:8.) Instead, all employees uniformly receive 12 minutes per day of compensated time no matter how long they spend under their employer's control.

Under Petitioners' theory of the case, if instead of 8 hours and 12 minutes per day under the employer's control, an employee spends 8 hours and 36 minutes performing the duties and tasks above, the employee would be entitled to be paid for the additional 24 minutes of uncompensated time at either the minimum wage rate, her regular hourly rate, or the premium overtime rate.

B. Summary Of The Relevant Employment Relationship From 1998 To 2013[1]

In 1998, the State and the Union negotiated the terms of a one-year MOU. (See RT Vol. II, 221:14–18; 223:4–9.) Prior MOUs provided for a 40-hour workweek, after which employees were entitled to overtime for additional hours worked. The 1998 MOU introduced an expanded 168-hour work schedule based on a 28-day period, which was premised on the State's discretion, under section 207(k) of the FLSA (29 U.S.C. § 207(k)) – known as "the 7k exemption" – to change the threshold for incurring

[1] The Represented Employees have attached a Timeline of Events as Appendix 1 to assist the Court in understanding the history of the parties' agreements or lack thereof.

federal overtime liability. (RT Vol. II, 231:19–233:8.) The 7k exemption is one of only a handful of sections of the FLSA that an employer has discretion to adopt. (Indeed, the parties' current MOU provides for premium overtime wages when the employee works more than 41 hours in a seven-day period.) Most of the FLSA is mandatory federal law. The practical effect of this change was that instead of accruing overtime wages after 40 hours worked in 7 days, an employee now had to work more than 168 hours in 28 days before she would begin to receive overtime wages.

Specifically, the 1998 MOU states: "CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor and Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees under the provisions specified herein." (3 AA at pp. 631–632.) The 1998 MOU scheduled employees for 160 hours at their post plus 4 hours of training plus 4 hours of PPWA, for a total of 168 compensated hours of work each 28-day period. (Slip Op. at p. 5.) The MOU stated "that generally this is sufficient time for all pre and post work activities during each work period, and that the compensation allotted for these activities *under this provision* is full compensation for all of these activities." (*Id.* [emphasis added].)

The MOU also stated:

> The State and CCPOA agree that they have made a good faith attempt to comply with all requirements *of the FLSA* in negotiating this provision. If any court of competent jurisdiction declares that any provision or application of this Agreement is not in conformance *with the FLSA*, the parties agree to meet and confer immediately . . . .

(3 AA at p. 634 [emphasis added].) In addition, the Union agreed "that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring suit in any court challenging the validity of this provision *under the FLSA*." (3 AA at p. 634 [emphasis added].)

As the trial court noted, however: "The parties agree that when the 1998–1999 MOU was executed there was only one compensability standard that could be applied – the FLSA's first principal activity test. In light of that, the parties' agreement in the 1998–1999 MOU to apply federal law is not surprising. Indeed, there was no other standard they could have referred to." (See 20 AA at p. 5427 [Statement of Decision].) As a result, as the court of appeal put it succinctly, "[d]uring the course of the negotiations, there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at p. 6.)

The successor 1999–2001 MOU "rolled over" (i.e., continued) the same provisions; consequently, "the bargaining history was rolled over as well." (Slip Op. at p. 6.)

On January 1, 2001 a change critical to the outcome of this case occurred. The California Industrial Welfare Commission ("IWC") amended the General Minimum Wage Order and Wage Order 4–2001 (which *both* parties and the lower courts agreed apply to the Represented Employees) to make the California minimum wage applicable to public employees of the State and its political subdivisions for the first time. Previously, public employees were exempt from the IWC Wage Orders (*compare* 2 AA at p. 525 *with* 2 AA at p. 527), explaining why, in the 1998 negotiations, "there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at p. 6.)

The successor July 1, 2001 – July 2, 2006 MOU adjusted the work schedule to eliminate the four hours of compensated training but otherwise maintained all of the FLSA and PPWA provisions quoted above. (Slip Op. at pp. 6–7.) Once again, the 1998 bargaining history with respect to these provisions still controlled because, as the trial court noted: "There were no discussions during negotiations between the parties that PPWA or the definition underlying PPWA should be changed from prior agreements. Similarly, there were also no discussions regarding the applicability of the State minimum wage or what constituted compensable work." (20 AA p. 5419.)

On September 18, 2007, after the State and the Union reached impasse in their negotiations, the State imposed its "last, best, and final

offer." (Slip Op. at p. 7.) The terms relevant to this case were essentially unchanged from the 2001 MOU. (*Ibid.*) Nothing in these "Implemented Terms" purported to exempt the Represented Employees from IWC Wage Order 4–2001 or any other wage order. Importantly, as the court of appeal expressly acknowledged, "[t]he Legislature did not approve or ratify these terms." (*Ibid.*)

On April 9, 2008, while these Implemented Terms were in effect, the Represented Employees filed the *Stoetzl* class action lawsuit, alleging they had not been adequately compensated under California law for all hours worked. (1 AA at pp. 1–14.) The Unrepresented Employees later filed the *Shaw* and *Kuhn* complaints, containing similar allegations, which were eventually coordinated with *Stoetzl*. (1 AA at p. 91–108; 1 AA at pp. 109–128; 1 AA at pp. 67–68.)

The State and the Union signed a new MOU on May 16, 2011, which extended to July 2, 2013. The MOU continued most of the FLSA language discussed above; however, it dropped the language stating that four hours was generally sufficient time for all PPWA. (Slip Op. at p.7.) The parties added a side-letter agreeing that no changes to the MOU language would have prejudicial effect on either side's arguments in this action. (*Ibid.*)

C. The Trial Court Proceedings

Once the three separately filed class action lawsuits were coordinated, the trial court certified two subclasses – the Represented Employees and the Unrepresented Employees. (Slip Op. at pp. 2–3.) No party challenged the class certification rulings on appeal; indeed, they stipulated to the subclasses. (*Id.* at p. 3.)

The causes of action alleged in the consolidated action were:

1. failure to pay contractual overtime under Labor Code sections 222 and 223;

2. failure to pay California minimum wage under Labor Code sections 1182.11, 1182.12, 1194, and 8 Cal. Code Regs. section 11000 et seq.;

3. failure to keep accurate records of hours worked under Labor Code section 1174; and

4. failure to pay overtime in breach of common law contract.

(Slip Op. at p. 2.)

Plaintiffs premised each of these claims on their contention that the "hours worked" for which additional compensation was due – whether at the California minimum wage, the regular hourly rate or the contractual overtime rate – was determined according to the definition of that term in IWC Wage Order 4–2001, which defines "hours worked" as "the time during which an employee is subject to the control of an employer, and

includes all the time the employee is suffered or permitted to work, whether or not required to do so." (5 AA at p. 1158 [Wage Order 4–2001, subd. 2(K)].) This is commonly known as the "control standard." (See Slip Op. at p. 3.)

The State, on the other hand, insisted that the compensability standard for both subclasses was governed exclusively by the FLSA's "first principal activity of the day" test. (29 U.S.C. § 201 *et seq.*; 29 U.S.C. § 254; Slip Op. at p. 3.) Plaintiffs do not dispute that federal compensability standards determine employees' entitlement to premium overtime wages under the FLSA. But they maintain that the state must still comply with California's more stringent control test. The State does not dispute that application of the control standard would potentially expand the number of compensable hours for the Represented Employees beyond what those employees were actually paid for during the time periods in question.

The trial court granted judgment on the pleadings in favor of the State on the first and third causes of action above. (Slip Op. at p. 3.) The parties stipulated that the trial of the remaining two causes of action would be phased, with Phase I deciding, among other things, whether either subclass had a right to seek California minimum wage, regular wage and/or overtime wage for allegedly uncompensated time. (See Slip Op. at pp. 3–4 [setting out in more detail the parties' stipulation].) Later phases would

determine compensability and the amount of any unpaid wages. (3 AA at p. 721)

The trial court ruled in favor of the State and against both subclasses on all Phase I issues. (Slip Op. at p. 9.) With respect to the Represented Employees (Petitioners here), the trial court concluded that the employees were not entitled to California minimum wage because the Union bargained away that right in the MOUs and legislative approval of those MOUs "chaptered them into law." (*Ibid.*) With respect to the Unrepresented Employees, the trial court concluded that the Legislature delegated to CalHR authority to override the Wage Orders by "applying the FLSA as the standard for measuring compensable hours." (*Ibid.*) The trial court also concluded none of the plaintiffs had common breach of contract claims because "the terms and conditions of public employment are controlled by statute and ordinance, rather than contract," and because "in any case, plaintiffs had not established the existence of an agreement between the State and plaintiffs to pay overtime." (*Ibid.*)

Concluding that its Phase I ruling precluded either subclass from any recovery of unpaid compensation owed, the trial court entered final judgments dismissing all three coordinated actions. (20 AA at pp. 5438–5444, 5447–5453, 5457–5461.)

D. The Court Of Appeal Proceedings

The First District Court of Appeal affirmed the trial court's rulings in full with respect to the Represented Employees but reversed and remanded with respect to the Unrepresented Employees on the second and fourth causes of action. (Slip Op. at p. 28.)

As explained in more detail *infra*, the court of appeal essentially agreed with the trial court's analysis of the California minimum wage claims of the Represented Employees, finding that the Union had effectively waived those claims when bargaining for the MOUs at issue, and that the Legislature could and did ratify that waiver. (Slip Op. at pp. 12–17.) Although the court of appeal disagreed with the trial court conclusion that Plaintiffs could not pursue common law breach of contract claims because they were public employees, it nonetheless affirmed on the basis that "[n]either the parties [n]or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's." (Slip Op. at p. 24.)

On the other hand, the court of appeal reversed with respect to the Unrepresented Employees' California minimum wage and contractual overtime claims. The court rejected the trial court's conclusion that the California Pay Scale Manual, which sets forth compensation standards for Unrepresented Employees, displaced the IWC's wage orders. (Slip. Op. at p. 19.) The court proceeded to harmonize Wage Order 4–2001 with the

FLSA, concluding the Unrepresented Employees were entitled to California minimum wage for all hours worked under the control standard set forth in the Wage Order. (Slip Op. at p. 21.) By the same token, the court found the Unrepresented Employees could maintain their common law breach of contract action for all "hours worked" under the control standard "based on the overtime policies in effect at the time they performed that work[.]" (*Id.* at p. 24.)

The court of appeal affirmed the trial court's ruling dismissing the Labor Code section 222 and 223 claims. (*Id.* at pp. 25–27.)

Plaintiffs filed a petition for rehearing arguing that, under the court of appeal's own reasoning, the Represented Employees were at least entitled to seek payment for uncompensated time under the Wage Order during the three-year period when no legislatively-approved MOU existed. (Pet. for Rehearing (Sept. 15, 2017).) The court summarily denied that petition. (Order Denying Pet. for Rehearing (Sept. 21, 2017).)

E. The Proceedings In This Court

The Represented Employees and the State both filed petitions for review. This Court granted both petitions, with merits briefing to proceed on parallel tracks.

IV.

THE IWC'S WAGE ORDERS MUST BE GIVEN "EXTRAORDINARY DEFERENCE" AND HARMONIZED WITH FEDERAL LAW WHENEVER POSSIBLE

The California Constitution gives the Legislature the power to confer "legislative, executive, and judicial powers" on a "commission" for the purpose of "provid[ing] for minimum wages and for the general welfare of employees." (Cal. Const., art XIV, § 1.)

The California Legislature first delegated this "broad statutory authority" to the IWC over a century ago. (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 701.) Since then, the Legislature and people of California have expanded the IWC's power. (See, e.g., *Martinez v. Combs* (2010) 49 Cal.4th 35, 54 & fn.20 [describing the 1976 Constitutional amendment proposed by the Legislature and approved by voters that expanded the IWC's jurisdiction, which originally included only women and minors].) Labor Code section 1173 charged the IWC with "ascertain[ing] the wages paid to all employees in th[e] state."

The IWC pursued its mandate by drafting and issuing "industry- and occupation-wide wage orders specifying minimum requirements with respect to wages, hours, and working conditions." (*Brinker*, *supra*, 53 Cal.4th at p. 1026 [citation omitted].) These wage orders are "to be accorded the same dignity as statutes." (*Id.* at p. 1027.) They are

"'presumptively valid' legislative regulations of the employment relationship . . . that must be given 'independent effect'" and harmonized with any other arguably overlapping statute. (*Ibid.* [citations omitted].)

This Court has consistently rejected challenges to the IWC's authority to adopt relevant definitions in wage orders. In *Martinez*, for example, this Court gave effect to the IWC's deliberate choice to set the state law definition of employment relationships more expansively than the federal one. (49 Cal.4th at p. 68.)

The broad power the Legislature delegated to the IWC includes the authority to create laws that have a "direct relation to minimum wages" so long as they are "reasonably necessary to effectuate the purposes of the" delegation. (*Id.* at p. 62 [citations omitted].) Therefore, for terms like "hours worked," the judiciary defers to the IWC definition in wage orders. (*Ibid.* at p. 62, citing *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581–595.)

In 2001, the IWC issued two Wage Orders underlying the claims here: the General Minimum Wage Order–2001 (applicable to all employees except outside salespeople and family members) ("MW-2001"), and Wage Order 4–2001 (applicable to clerical and professional employees). Both Wage Orders removed express exemptions for public employees, with MW–2001, requiring "[e]very employer" to pay its employees specified wages "for all hours worked." (2 AA at p. 527 [MW–2001, § 2].) IWC

Wage Order 4–2001 for the first time explicitly applied specific sections of the Wage Order to public employees in "professional, technical, clerical, mechanical, and similar occupations." (5 AA at p. 1157 [IWC Wage Order 4–2001, § 1.B (applying §§ 1, 2, 4, 10, and 20.)]) These amendments had three main effects:

- they set the applicable hourly California minimum wage (5 AA at p. 1164 [§ 4]);
- they applied the "control test" to calculations of "hours worked" for purposes of the Wage Order (5 AA at p. 1158 [§ 2, subd. K]); and
- they applied these rules to public employees (5 AA at p. 1157 [§ 1, subd. B]).

V.

THE UNION DID NOT WAIVE THE RIGHT OF THE REPRESENTED EMPLOYEES TO CALIFORNIA'S MINIMUM WAGE, NOR COULD IT HAVE DONE SO HAD IT TRIED

Consistent with the law set forth above, the First District here agreed that the minimum wage protections offered by IWC Wage Order 4–2001 apply by their terms to all of the plaintiff class members, including the Represented Employees. The court of appeal nevertheless held that the Union effectively waived the Represented Employees' minimum wage rights through the MOUs it entered into with the State, which were approved by the Legislature. This was error.

A. The Union Did Not Agree To Waive The California Minimum Wage Rights Of The Represented Employees

This Court has repeatedly "cautioned against 'confounding federal and state labor law.'" (*Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 843, quoting *Martinez v. Combs* (2010) 49 Cal.4th 35, 68.) The Court has also repeatedly warned that "[w]age and hours laws are 'to be construed so as to promote employee protection.'" (*Id.* at p. 840, quoting *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340; accord *Augustus v. ABM Security Svs., Inc.* (2016) 2 Cal.5th 257, 262, 266.) And it has explained that "state law may provide employees greater protection than the FLSA." (*Morillion, supra*, 22 Cal.4th at p. 592.) Despite expressly recognizing these principles, the court of appeal confounded federal and state law to the *detriment* of California employees when it concluded that the Represented Employees impliedly waived their right to California minimum wage by agreeing to federal standards. As this Court recently re-emphasized, "we decline to import any federal standard, which expressly eliminates substantial protections to employees, *by implication*." (*Mendiola, supra*, 60 Cal.4th at p. 843, quoting *Morillion, supra*, 22 Cal.4th at p. 592 [emphasis added].) Yet that is exactly what the court of appeal did here.

1. The MOUs Do Not By Their Terms Waive California's Minimum Wage, and the Extrinsic Evidence Reveals Only That the State and the Union Never Discussed It

The MOUs at issue do not even mention minimum wage at all, much less state anywhere that the plaintiffs are giving up their right to it. The court of appeal nevertheless concluded that the parties did so by implication, primarily because the Union agreed to allow the State to exercise an alternative method for calculating federal overtime expressly authorized by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") – the so-called "7k exemption" – and to memorialize it in the MOU. The Union did so, in part, because it obtained additional compensation for employees for some pre- and post-work activity. This agreement need not nullify state law rights because the provisions of the parties' MOUs coexist with plaintiffs' right to a minimum wage for additional "hours worked," as defined by Wage Order 4–2001, which are not otherwise compensated under the MOUs.

A waiver is an "intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572.) The court of appeal studiously avoided the term "waiver," but the fundamental issue before the court was whether the Union had intentionally relinquished employees' right to California minimum wage. MOUs that never even mention minimum wage cannot have waived it.

Many fundamental employee rights cannot be waived by a collective bargaining agreement. (See, e.g., *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 51 [collective bargaining agreement cannot waive employee Title VII rights].) But even when California courts allow a collective bargaining agreement to waive fundamental employee rights, they do so "only if the waiver is clear and unmistakable." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1465 [citing cases].) Here, however, the waiver of California minimum wage rights claimed by the State here, and deemed decisive by the lower courts, has to be implied – a concept this Court has found abhorrent. (*Mendiola, supra*, 60 Cal.4th at p. 843 [disapproving the "eliminat[ion of] substantial protections to employees, by implication"].)

By the same token, the extrinsic evidence cannot not support a waiver when, as the court of appeal acknowledged, "[d]uring the course of the negotiations, there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at 6.) As explained *supra* at p. 19, the trial court repeatedly so found (20 AA at pp. 5419, 5427–5428), and indeed, the State's chief negotiator, David Gilb, explicitly conceded this point as to the 1998 MOU negotiations:

> Q: Do you recall there any being [sic] discussion whatsoever during the 1998 negotiations with respect to whether CCPOA was offering to or attempting on behalf of its members to waive any state wage and hour laws?

A: They were not.

Q: Do you recall any discussions during the 1998-1999 negotiations in which any representative of CCPOA made any concession or statement that you interpreted as a concession that state minimum wage law was either waived or otherwise agreed to not be utilized in determining the rights of CCPOA members?

A: They made no statements. The issue never came up in bargaining.

Q: So [sic] the extent that you do not recall any discussion of state wage and hour law, you would agree nobody at CCPOA made a statement or comment that was communicated to the State that you interpreted as an intent to waive any such wage and hour rights of the employees.

A: It did not.

(RT Vol. III 467:20–468:14.)

As the trial court pointed out (20 AA at pp. 5427–5428), it is not surprising that the parties would not specifically have discussed the California minimum wage in 1998 because it did not apply to public employees. At that time, the IWC Wage Order in effect governing minimum wage was Wage Order 4–1998, which expressly excluded all public employees from the right to minimum wage. As noted, it was only in Wage Order 4–2001 that the IWC for the first time made clear that it intended the California minimum wage to apply to public employees. (See *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 300–301 [holding that Wage Order 4–2001 applied minimum wage to "employees directly employed by the state or any

political subdivision of the state"]; see also *id.* at p. 300, fn. 7 [noting that predecessor Wage Orders broadly excluded State employees].)

The record does not reveal why California minimum wage, or State wage and hour law generally, was not addressed by the negotiators for subsequent MOUs, after the IWC determined that certain provisions of Wage Order 4–2001 applied to public employees. It is worth noting, however, that this Court decided only on March 27, 2000 that all time employees spend "subject to the control of an employer" are "hours worked" under California law, despite the narrower federal standard. (*Morillion*, *supra*, 22 Cal. 4th at p. 578.) It was not until December 29, 2005, that an appellate court held for the first time that that an employer could not meet the California minimum wage requirements by averaging the employees' total hours, further distinguishing California law from federal law on this issue. (*Armenta v. Osmose Inc.* (2005) 135 Cal.App.4th 314, 323.) And it was not until December 23, 2010 that an appellate court finally confirmed that the IWC actually had authority to apply its wage orders to public employees. (*Sheppard*, *supra*, 191 Cal.App.4th at pp. 298–299.)

But whatever the reason, the record is clear that the negotiators here never addressed these issues, such that, as the court of appeal noted, "when a provision was 'rolled over' from one MOU to the next, the bargaining history was rolled over as well." (Slip Op. at p. 6.) In other words, it was

the *absence* of any relevant discussion in the negotiating history that was "rolled over" from one MOU to the next.

The lower courts therefore erred in concluding that the Union had negotiated away the rights of the Represented Employees to the protections afforded by Wage Order 4–2001 because "the parties understood they were proceeding under the FLSA's standards and employees would not be entitled to compensation for the time they spent between entering the institution and picking up their equipment or the time after the equipment was returned." (Slip Op. at p. 17.) The court's own explanation makes clear that the Union agreed that employees would receive no more compensation for such activities "*under the FLSA's standards*." But the Union never agreed that the Plaintiffs were not entitled to compensation for such activities *under California law*.

2. The Agreement to Apply the Federal 7k Exemption Did Not Waive California Minimum Wage

Instead of finding any language in the contracts or negotiating history expressly waiving California minimum wage, the court of appeal accepted the State's argument that waiver could be implied from certain language in the MOUs exclusively addressing federal overtime law. This was error.

The court of appeal explained its rationale as follows:

> Each MOU contained a section entitled "7K Exemption," which recited that the employees were working under the

> provisions of Section 207(k) of the FLSA and that the State was declaring a specific exemption for them, and established a 164-hour, 28-day work period consisting of 160 hours for posted duty and four hours for pre- and post-work activities. In each of the MOU's except that formed in 2011, CCPOA and the State agreed that four hours was generally sufficient for all such activities, that they had "made a good faith attempt to comply with *all requirements of the FLSA* in negotiating this provision," and that "[i]f any court of competent jurisdiction declares that any provision or application of this Agreement is not in conformance with the FLSA, the parties agree to [m]eet and [c]onfer immediately."

(Slip Op. at pp. 16–17 [emphasis in original; footnote omitted]).

The State and court of appeal read far too much into the parties' adoption of the FLSA 7k exemption. The parties simply agreed that the plaintiffs are "working under the provisions of Section 207(k)," i.e., the 7k exemption. The 7k exemption is a partial exemption to the general federal overtime rules under which public agencies may implement a different overtime threshold for law enforcement personnel than the normal 40-hour workweek. Had that provision not been included, the employees would have continued to accrue overtime wages after working 40 hours in 7 days. (See RT Vol. II 230:16–232:20.)

Nowhere does the Union purport to waive California minimum wage protections for any hours worked that were not otherwise compensated by the MOU. Moreover, nothing in 29 U.S.C. section 207, subdivision (k) requires overriding any state law; on the contrary, the law is clear that "the FLSA does not preempt state regulation of wages, hours, and working

conditions." (*California Correctional Peace Officers' Ass'n v. State* (2010) 189 Cal.App.4th 849, 861, citing 29 U.S.C., § 218, subd. (a).) Indeed, the FLSA itself expressly so states with respect to minimum wage:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek established under this chapter.

(29 U.S.C., § 218, subd. (a).)

The Ninth Circuit's very recent decision in *Newton v. Parker Drilling Mgmt. Svs., Ltd.* (9th Cir. 2018) 881 F.3d 1078 is illustrative. An offshore oil driller filed a class action alleging violation of California wage and hour laws concerning overtime. The plaintiff's employment was governed by the federal Outer Continental Shelf Lands Act, which expressly invokes the laws of the neighboring state, "to the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations...." (43 U.S.C. § 1333, subd. (a)(2)(A).) Because FLSA was applicable federal law, the district court held this left no room for the application of California wage and hour law unless "necessary 'to fill a significant void or gap' in [the FLSA]." (*Newton, supra*, 881 F.3d at p. 1083.)

The Ninth Circuit rejected this approach and reversed, taking guidance from this Court's decision in *Mendiola, supra*, 60 Cal.4th 833. After quoting 29 U.S.C. § 218, subdivision (a), the Ninth Circuit explained

that the "FLSA 'establish(es) a national *floor* under which wage protections cannot drop'" (*Newton, supra*, 881 F.3d at p. 1097 [emphasis in original], quoting *Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1425.) The defendant cited *Mendiola* for the proposition that "California law is inconsistent with the FLSA," but the Ninth Circuit explained that *Mendiola* establishes "that California embraces a more protective standard for determining hours worked, not that California's standard in *inconsistent* with federal law." (*Newton, supra*, 881 F.3d at p. 1099 [emphasis in original].) Consequently, the Ninth Circuit held plaintiff could pursue his overtime wage and hour claims under the more protective California standards. (*Ibid.*) The same result should follow here.

The court of appeal here was also convinced that "the regulations governing compensable hours of work for employees subject to a 7k exemption provide that only the amount of time allowed by a contract or under the custom or practice need be counted." (Slip Op. at p. 17, citing 29 C.F.R. §§ 553.221(a), 875.9, subd. (a).) This once again illustrates that the court of appeal was improperly "confounding federal and state labor law," because "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced." (*Martinez, supra.*, 49 Cal.4th at p. 68, quoting *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798.) Rather, "[c]ourts must give the IWC's wage orders independent effect in

order to protect the commission's delegated authority to enforce the state's wage laws and, as appropriate, to provide greater protection to workers than federal law affords." (*Ibid.*)

The key issue in this case is the time spent by employees getting to and from their posts *while under the State's control.* Under the federal Portal-to-Portal Act, that time is typically not compensated whereas California law in the wage orders expressly rejects the Portal-to-Portal Act. (*Morillion*, *supra*, 22 Cal.4th at p. 594; *Armenta*, *supra*, 135 Cal.App.4th at p. 323.) The court of appeal erroneously interpreted the MOU so as to give effect only to federal law to the exclusion of state law that "provide[d] greater protection to workers than federal law affords." (*Martinez*, *supra*, 49 Cal.4th at p. 68.)

The court of appeal's improper reliance on the FLSA to find a waiver also explains the irrelevance of the fact that four hours of PPWA were compensated under the MOUs, as well as the trial court's finding that, "when negotiating the 1998-1999 MOU, the parties understood they were proceeding under the FLSA's standards and employees would not be entitled to compensation for the time they spent between entering the institution and picking up their equipment or the time after the equipment was returned." (Slip Op. at pp. 16-17) That the agreement compensated some PPWA "under the FLSA's standards," and that the parties understood they would not be entitled to compensation for other PPWA "under the

FLSA's standards," does not amount to a knowing relinquishment of compensation for *additional* "hours worked" under the standards set out in IWC Wage Order 4–2001.

As explained in more detail *infra*, the language adopting the 7k exemption for federal overtime is not inconsistent with the State being obligated to comply with California's minimum wage pursuant to Wage Order 4–2001. This reading places the State in no different position than any other California employer – private or public – which must comply with both state and federal law.

In sum, the plain language of the MOUs does not relinquish the Represented Employee' right to California minimum wage. Nor could the bargaining history establish such a waiver when it was undisputed that "there was no discussion of whether the State would have to comply with California wage and hour laws." (Slip Op. at p. 6.)

B. The Parties Could Not Have Agreed To Waive California Minimum Wage Rights Had They Tried, So The Legislature Could Not Have Ratified Such An Agreement Under The Dills Act

Even had the Union intended to relinquish the right of the Represented Employees to the California minimum wage, it could not have done so because the California minimum wage cannot be waived as a matter of law. (Lab. Code, §§ 1194, 1197; *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 455.) Because, under the Dills Act, the Legislature can

only ratify what the parties have agreed to in the MOU, the Legislature did not and could not have ratified a waiver of California minimum wage under the facts of this case.

1. The Parties Could Not Have Agreed to Waive California Minimum Wage

Labor Code section 1197 is unequivocal: "The minimum wage for employees fixed by the [IWC] is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful." It is inconsequential that the court of appeal framed its ruling as an "agree[ment] to have the [Represented Employees'] compensable time measured by federal, rather than state, law" (Slip Op. at 16), rather than as a "waiver," because:

> *Notwithstanding any agreement* to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(Lab. Code, § 1194, subd. (a) [emphasis added].) Statutes prohibiting the waiver of minimum wage laws do so in recognition of "unequal bargaining power as between employer and employee." (*Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 706.)

"Labor Code section 1194 confirms 'a clear public policy ... that is specifically directed at the enforcement of California's minimum wage.'"

(*Gentry, supra,* 42 Cal.4th at p. 455.) "By its terms, the rights to the legal minimum wage and legal overtime compensation conferred by the statute are unwaivable." (*Ibid.*, quoting *Sav-On-Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.) Accordingly, rights accorded by Labor Code section 1194 "may not be subject to negotiation or waiver." (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1208.)

Flowers v. Los Angeles County Metropolitan Transp. Auth. (2015) 243 Cal.App.4th 66 is instructive. There the defendant public employer argued "that complying with state minimum wage requirements would restrict its ability to execute a collective bargaining agreement covering the wages, hours, and working conditions of its employees and to comply with the terms of such an agreement," as required by Public Utilities Code § 30750. (243 Cal.App.4th at pp. 79–80.) The court of appeal made short work of this argument by pointing out that "Labor Code § 1194 prohibits such an agreement by according employees the right to recover the unpaid balance of the applicable legal minimum wage '[n]otwithstanding any agreement to work for a lesser wage.'" (*Id.* at p. 80.) In other words, "employees may not agree to waive their entitlement to the minimum wage [citations], nor may a collective bargaining agreement waive that right." (*Id.* at p. 82.) So here, the MOUs at issue could not waive the Represented Employees' right to California minimum wage.

2. Accordingly, the Legislature Could Not Have Ratified an Agreement to Waive Minimum Wage

While the court of appeal did not disagree with any of the foregoing law, it nonetheless ruled that legislative authorization of these MOUs cured the waiver issue because "the MOU's were not only negotiated by CCPOA and the State, but they were also approved by the Legislature, signed by the Governor, and chaptered into law." (Slip Op. at p. 15.) But if the Union was prohibited by law from waiving California minimum wage rights, any purported agreement to do so was void *ab initio*; there was nothing to ratify.

Under the Dills Act, the Legislature's role in approving an MOU is expressly limited. (Gov. Code, §§ 3517, 19815.4, subd. (g).) Only provisions that require (1) the expenditure of state funds, or (2) enactment of a *new* statute to take effect, or (3) the amendment of any statute not listed in Government Code section 3517.61, need legislative approval. (See Gov. Code, § 3517.5 [MOU "presented, *when appropriate,* to the Legislature for determination"].) Provisions that supersede statutes listed in Government Code section 3517.61 take effect immediately, without legislative authorization. In short, legislative approval of an MOU is not the same as the enactment of a statute, under which the Legislature's powers are limited solely by the California Constitution and federal law. The Legislature is not acting off a blank slate.

Among other things, the Legislature is not free to substitute its intent for that of the parties. "[A]ll modern California decisions treat labor-management agreements whether in public employment or private as enforceable contracts (see Lab. Code, § 1126), which *should be interpreted to execute the mutual intent of the parties*." (*Retired Employees' Assn. of Orange County* v. *County of Orange* (2011) 52 Cal.4th 1171, 1183, quoting *Glendale City Employees' Assn. Inc. v. City of Glendale* (1975) 15 Cal. 3d 328, 339) [emphasis added].) The Legislature may decline to approve a tentative MOU (See Gov. Code, § 3517.5), but by approving the 1998, 1999, 2001 and 2011 MOUs, it could only authorize what the parties agreed to. Accordingly, if the Union could not legally agree to waive California minimum wage rights, the Legislature could not, *sua sponte*, do so either.

The Legislature *could*, if acting freely and not restricted by its role under Government Code section 3517.5, have repealed the applicability of the California minimum wage to Represented Employees simply by passing a statute to repeal the General Minimum Wage Order. But the Legislature has never done so. To the contrary, there is no evidence the Legislature ever intended to eliminate the California minimum wage protections that the IWC had extended to the Represented Employees. The legislative text of Senate Bill 65, which authorized the 2001–2006 MOU (and which was passed approximately one year after the IWC applied the California minimum wage to state employees) lists multiple statutory amendments,

additions and repeals necessary to effectuate that MOU. (15 AA at p. 3920–3948 [Pltfs.' Exh. EEE].) Nothing in the bill's legislative history purports to repeal the applicability of the minimum wage statutes or wage orders to the Represented Employees. (15 AA at p. 3920–4108 [Pltfs.' Exh. EEE].)

In sum, even if the Union had tried to waive the California minimum wage rights of the Represented Employees in the MOUs, "the parties were ... without authority to agree to any provision in violation of [the wage orders]." (*Grier v. Alameda-Contra Costa Transit Dist.* (1976) 55 Cal.App.3d 325, 335; accord *Flowers, supra,* 243 Cal.App.4th at p. 83.) The court of appeal erred in concluding otherwise.

C. The Court Of Appeal Erred By Failing To Reconcile The MOU Language With California Minimum Wage

In concluding that the Represented Employees members waived their right to California minimum wage, the court of appeal failed to harmonize the requirements of Wage Order 4–2001 with the language of the MOUs, and in particular their invocation of the federal 7k exemption. Had it properly done so, as this Court has required, the court of appeal could have given effect to the MOUs in a manner that did not deprive the Represented Employees of their right to California minimum wage. Indeed, the court of appeal properly harmonized the rights of the *Unrepresented* Employees to achieve just this result. But it erred in

concluding it could not or did not need to do so for the *Represented* Employees.

1. The Court of Appeal Recognized the Applicable Law But Failed to Correctly Apply It

The court of appeal, quoting this Court's decision in *Brinker Restaurant Corp. v. Superior Court*, supra, 53 Cal.4th at p. 1027, expressly recognized that "the IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms'" and "are to be accorded the same dignity as statutes." (Slip Op. at p. 10 [citations omitted].) Accordingly, "[t]o the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." (*Ibid.*) But the court nevertheless failed to do so here for the Represented Employees, simply rejecting state law and applying federal law.

With respect to the Unrepresented Employees, the court of appeal did "conclude it is possible to harmonize the California Pay Scale Manual and Wage Order 4, as we must seek to do under *Brinker*." (Slip Op. at p. 21.) Although the Pay Scale Manual, like the MOUs, referenced the federal overtime law, the court of appeal concluded that it could "reasonably construe the regulatory schemes to mean that entitlement to overtime compensation is controlled by the FLSA but that the meaning of 'hours worked' is governed by Wage Order 4." (*Ibid.*) As a result, the

court concluded, "the unrepresented employees are entitled to pay for all hours worked under the applicable California standard rather than the FLSA's standard," which, among other things, would include entitlement to California minimum wage as set out in Wage Order 4–2001. (*Ibid.*)

This same analysis should have been applied to find that the language of the MOUs could be harmonized with the minimum wage requirements of Wage Order 4–2001 to reach exactly the same result for the Represented Employees. The court of appeal apparently declined to do so because "the MOU's were not only negotiated by CCPOA and the State, but they were also approved by the Legislature...." (Slip. Op. at p. 15.) But this puts the cart before the horse. As discussed *supra* the Legislature approves what the parties' agree to in their MOUs, and if the MOUs are properly interpreted to harmonize their language with Wage Order 4–2001, the parties did not waive their right to minimum wage, even assuming the Legislature could have "ratified" such a waiver.

The court of appeal's other rationale for failing to give effect to Wage Order 4–2001 was that "the MOU's are more specific than the wage orders of general application promulgated by the IWC." (Slip Op. at p. 15.) To disregard the Wage Order as more "general" than the MOUs is the antithesis of reconciliation. While the court's application of the MOUs instead of the Wage Order might make some sense if the Wage Order and MOUs were clearly inconsistent, the whole point of reconciliation is to

determine whether there is a way to read both such that they are not inconsistent. The court of appeal demonstrated that such harmony is possible when it reconciled the State Pay Wage Scale Manual – which also incorporates certain federal compensability standards – with Wage Order 4.

2. Analogous Case Law Demonstrates the Court of Appeal's Error Here

The First District addressed a very similar issue in *Grier v. Alameda-Contra Costa Transit District*, *supra*, 55 Cal.App.3d 325 and reversed a trial court that had declined to apply Labor Code section 2928 to transit workers because of the purported exclusivity of the MOU. In *Grier*, an MOU under a Transit District Law (Pub. Util. Code, § 24501 *et seq.*) allowed an employer to dock a late-arriving employee's pay in an amount disproportionate to the time missed, whereas Labor Code section 2928 prohibited deductions "in excess of the proportionate wage which would have been earned during the time actually lost ...." (*Grier* at p. 329.) The trial court ruled that Labor Code section 2928 was inapplicable because the bargaining law was exclusive and so the MOU controlled. (*Id.* at p. 331.) The court of appeal reversed, finding "nothing in the express language of the Transit District Law indicates an intent for such exclusiveness," and therefore concluded that the regulations adopting the MOU must "be promulgated subject to the limitations and restrictions of other applicable laws." (*Id.* at pp. 331–333.) Nothing in the Dills Act "indicates an intent

for such exclusiveness" of the MOU; conversely, as a supersession statute, by design it contemplates the applicability of other laws.

Indeed, the court of appeal in *Grier* addressed and properly rejected an argument very much like that put forth by the court of appeal here to reject harmonization. In *Grier*, "[t]he trial court reached its conclusion by applying the rule of construction that specific statutes control general statutes, and that specific provisions relating to a particular subject will govern general provisions which might otherwise, standing alone, be broad enough to include the subject to which the more particular provision relates." (*Id.* at p. 332.) The court of appeal rejected this argument, explaining: "In the instant case, however, this principle is of little assistance: it might be argued with equal force that the *specific* provision is that restricting wage deductions for tardiness (Lab. Code, § 2928), and the general provisions are those broadly governing the Transit District without reference to such details as oversleep regulations." (*Ibid.* [emphasis added].) So here, it is equally plausible to argue that the more specific provisions are those of Wage Order 4–2001 governing minimum wage, and the more general provisions are those of the MOUs, which nowhere purport to foreclose or even address State wage and hour laws, including minimum wage.

The Second District recently reaffirmed these same principles in *Flowers*, discussed *supra* at 42. Recognizing that "potentially conflicting

statutory provisions should be interpreted to harmonize and reconcile their respective elements so as to carry out the overriding legislative purposes of the statutory scheme," the court concluded "it is possible for the MTA to comply with the minimum wage law [as set forth in Wage Order 9 governing transportation employees] and to meet its obligations to bargain in good faith with a duly designated labor organization and to execute a collective bargaining agreement and comply with its terms [as required by Public Utilities Code § 30750]." (*Flowers, supra*, 243 Cal.App.4th. at p. 82.) Among other things, the court pointed out that the plain language of the Public Utilities Code "does not exempt the MTA from state minimum wage requirements" (*Id.* at p. 79), and when "liberally construed in favor of protecting workers" (*Id.* at p. 82), the Public Utility Code sections "do not exempt the MTA as a matter of law from minimum wage requirements imposed by the Labor Code and wage order 9." (*Id.* at p. 83).

3. Wage Order 4–2001 Is But One of Many Laws That Continue to Apply to Public Employees Subject to an MOU

As *Grier* and *Flowers* illustrate, California courts have long recognized that many laws remain applicable to public employees notwithstanding an MOU. Other sources of employment rights for the Represented Employees, the applicability of which nobody disputes, include the provisions of the State Civil Service Statutes (Gov. Code, § 18500 *et seq.*) [if not superseded by an MOU under Gov. Code,

§ 3517.61, they otherwise apply], retirement laws (Gov. Code, § 20000 *et seq.* [California Public Employee Retirement Law]), anti-discrimination laws (Gov. Code, § 12900 *et seq.* [California Fair Employment and Housing Act]; workers' compensation laws (Lab. Code, § 3200 *et seq.*) Following the IWC's action in 2001, the California minimum wage protections became part of this galaxy of rights.

Moreover, the record specifically reflects that the Legislature and CalHR understood that state wage laws would remain applicable to employees covered by an MOU. For example, a December 13, 2000 CalHR memorandum recognized that Assembly Bill 2410, which amended Labor Code section 220(a), had applied 18 additional wage and hour provisions of the Labor Code to the State, effective January 1, 2001. (10 AA at pp. 2790 – 2793 [Pltfs.' Exh. XX].) And when the Legislature has raised the California minimum wage, it has recognized its applicability to the State as an employer. (19 AA at pp. 5151–5154, 5176–5177 [Pltfs' Exh. JJJ, Legislative History of Labor Code §§ 1182.12 and 1182.13.)

4. Harmonization Is Not Difficult Here, as the Court of Appeal Itself Demonstrated With the Unrepresented Employees

Finally, and importantly, as the court of appeal itself demonstrated with respect to the Unrepresented Employees, reconciling the MOU provisions at issue here and the minimum wage rights granted California

public employees is not difficult to do. The following example should suffice to demonstrate:

- Melissa B., a Union-represented correctional officer, is scheduled to work 164 hours in a 28-day period but because of the location of her post in the facility, she spends 168 hours under her employer's control.
- Of those 168 hours, eight hours involve either pre- or post-work activity, where Melissa B. is under the State employer's control and hence qualify as "hours worked" under Wage Order 4–2001.
- Under the MOU, 164 of those hours, including four hours of pre- and post-work activity, are paid at the regular contractual wage.
- Reconciling the MOU and California minimum wage, the four additional hours of pre- and post-work activity must be compensated at least at the California minimum wage (and in fact, as explained in the next section, should be compensated at the overtime contractual wage (time and a half) under the terms of the MOU).

In sum, the court of appeal erred in concluding that the Union intentionally agreed to relinquish the Represented Employees' California minimum wage rights under Wage Order 4–2001. Neither the language nor the extrinsic evidence support that conclusion. Nor as a matter of law could they have agreed to do so, so the Legislature did not ratify such a waiver. These errors arose in large part because the court of appeal failed to properly exercise its obligation to harmonize the law so as to protect the employees' state law rights. For all these reasons, the court of appeal's decision with respect to the Represented Employees' right to California minimum wage should be reversed.

D. At A Minimum, The Represented Employees Were Entitled To Minimum Wage When No Ratified MOU Was In Effect

As explained, the court of appeal concluded that the Represented Employees were able to waive their California minimum wage rights in successive MOU's because those MOU's were "approved by the Legislature, signed by the Governor, and chaptered into law." (Slip Op. at p. 15.) But the court also expressly recognized that, when the State imposed its last, best, and final offer between September 18, 2007 and May 16, 2011, "[t]he Legislature did not approve or ratify those terms." (*Id.* at p.7.) The court also recognized that "plaintiffs' premise—that (unless superseded) the minimum wage provisions of Wage Order 4 apply to state employees—is correct." (*Id.* at p.19.) Hence, under the court of appeal's own analysis, the Implemented Terms no more superseded the minimum wage provisions of Wage Order 4–2001 than did the California Pay Scale Manual as applied to the Unrepresented Employees. (*Id.* at pp.19–21.)

The Represented Employees identified this defect in reasoning in their Petition for Rehearing, but the court of appeal denied that petition summarily. (Pet for Rehearing, pp. 6–8; Order Denying Pet. for Rehearing.) At a minimum, then, the court of appeal erred in failing to recognize that, under its own analysis, the California Minimum Wage applied to the Represented Employees at least between September 18, 2007 and May 16,

2011, when, as the court expressly recognized, "the Legislature did not approve or ratify" any MOU.

VI.

LIKE THE UNREPRESENTED EMPLOYEES, THE REPRESENTED EMPLOYEES HAVE AN ENFORCEABLE CONTRACTUAL RIGHT TO PAYMENT OF OVERTIME WAGES FOR SERVICES PERFORMED

Plaintiffs' breach of contract claims rely on the basic rule that, once services have been performed by a public employee, whether under statute, ordinance, regulation, or written contract, the right to compensation for the work "ripens into a contractual obligation of the employer and cannot be destroyed or withdrawn without impairing the employee's contractual right." (*Madera Police Officers Ass'n v. City of Madera* (1984) 36 Cal.3d 403, 413–414; accord *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 22 ["A claim for compensation owed by an employer for services already performed is contractual"]; *Glendale City Employees' Assn, Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 343 ["The usual remedy for failure of an employer to pay wages owing to an employee is an action for breach of contract[.]"].) As this Court explained in *White v. Davis* (2003) 30 Cal.4th 528, 570–571, 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."

Madera is instructive. Plaintiffs were local police officers who argued they were entitled to overtime compensation for scheduled meal time because they remained subject to significant employer control. (36 Cal.3d at pp. 407–408.) Noting that "[t]he right to overtime compensation is set by the law applicable at the time the services are rendered" (*id.* at p. 412), and that city regulations mandated overtime for work performed in excess of normal schedules (*id.* at p. 413), the Court held that a contractual right to overtime pay was created, even in the absence of a written agreement among the parties:

> [T]o the extent services are rendered under statutes or ordinances then providing mandatory compensation for authorized overtime, the right to compensation *vests upon performance of the overtime work, ripens into a contractual obligation of the employer and cannot thereafter be destroyed or withdrawn without impairing the employee's contractual right....* The [additional time] was work in excess of the eight-hour day, and *the employees' right to overtime compensation, mandated by the city regulations, vested upon performance.*

(*Id.* at pp. 413–414 [emphases added].)

White v. Davis, *supra*, reaffirmed that this basic contractual right extends equally to state employees. *White v. Davis* involved whether state employees could receive their regular pay during a budget impasse. (30 Cal.4th at pp. 534–535.) This Court held that, while state employees were not entitled to actual payment of wages (except pay mandated by federal law) until a legislative appropriation was made, ultimately, state employees maintained a contractual right to be paid (*ibid.*): "[*P*]*ublic employment*

gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned." (*Id.* at p. 565, emphasis in *White*, internal quotation marks omitted.)

The trial court disregarded this settled law on the basis that public employee compensation is exclusively a creature of statute. (20 AA at pp. 5433–5434) The court of appeal rightly rejected this view (Slip Op. at pp. 22–23) but with respect to the Represented Employees nonetheless upheld the trial court's dismissal of their breach of contract claims in their entirety:

> With respect to the subclass of represented employees, we agree with the trial court that plaintiffs have not established a contract that would support their claim. We have already concluded that the State and CCPOA agreed to have their compensable time measured by federal, rather than state, law. Each MOU provided that it "set[] forth the full and entire understanding of the parties regarding the matters contained herein . . ." And each was approved by the Legislature. There is no basis to conclude that either the parties or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's. (See *Retired Employees, supra,* 52 Cal.4th at p. 1177; *Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 415 ["an implied term may not be found where it would contradict the express terms of the contract"].)

(Slip Op. at p. 24.)

Conversely, the court of appeal reversed the trial court's dismissal of the Unrepresented Employees' breach of contract claims and allowed them to proceed:

> We reach a different result as to the subclass of unrepresented employees. We have already concluded they are entitled to compensation for all hours worked under California's broader standard. And *Madera*, *White*, and *Sheppard* teach that a breach of contract claim may be based on earned but unpaid wages. (*Madera*, *supra*, 36 Cal.3d at pp. 413-414; *White*, *supra*, 30 Cal.4th at pp. 570-571, *Sheppard*, *supra*, 191 Cal.App.4th at pp. 311-313.) To the extent the unrepresented employees are entitled to additional compensation for hours worked, based on the overtime policies in effect at the time they performed that work, they may assert those claims in a cause of action for breach of contract.

(*Ibid.*)

The court of appeal's ruling with respect to the Unrepresented Employees is correct and echoes Plaintiffs' arguments. The court of appeal's error was to fail to reach the same conclusion for the Represented Employees.

A. The Source Of The Contract Claims For The Represented Employees

The Represented Employees rely for their breach of contract claims on overtime provisions in various MOUs and employer-promulgated policies, including under the State's Implemented Terms when no MOU was in effect. (1 AA at p. 25–27.) The *Stoetzl* action was filed in 2008. No MOU existed at the time, but the State's Implemented Terms continued to provide that employees were entitled to additional compensation for hours worked beyond their regular schedules. (4 AA at p. 838.) The Implemented Terms were State-imposed policies, just like the policies that applied to the Unrepresented Employees.

If a four-year statute of limitation applies to the breach of contract claims (Code Civ. Proc. § 337), the claims reach back to 2004, before imposition of the Implemented Terms, when the 2001–2006 MOU was in effect (which extended to September 2007 by operation of Government Code section 3517.8).

Just as the court of appeal concluded that the Unrepresented Employees could pursue breach of contract claims for additional compensation under the State's policies for work they claim to have performed beyond their regular schedule, it should have reached the same conclusion for the Represented Employees. They are identically situated except that (because the State only applies the 7k exemption to Represented Employees) they had differing threshold numbers of hours that had to be worked in a given time period before the State was required to pay overtime.

B. The Court Of Appeal Erred In Dismissing The Breach Of Contract Claims Of The Represented Employees

The court of appeal's first basis for dismissing the Represented Employees' breach of contract claims – "that plaintiffs have not established a contract that would support their claim" (Slip Op. at p. 24) – is disproven by the court's own conclusion regarding the contract claims of Unrepresented Employees. For the entirety of the claims period (i.e., since 2004), essentially the same overtime policies have applied to both groups,

albeit, as noted, with different thresholds before overtime kicked in. *Madera* teaches that breach of contract claims may be premised on an employer's overtime policies. And if the policies described above support overtime claims for Unrepresented Employees under *Madera*, *White*, and *Sheppard*, as the court of appeal concluded (Slip Op. at p. 24), it follows they must also support overtime claims for Represented Employees.

The fact that different overtime threshold provisions existed in successive MOUs does not change this result. Plaintiffs accept that, as bargained-for provisions under the Dills Act, the MOU provisions would trump *inconsistent* employer policies. But the policies and the MOU provisions are substantively consistent aside from the thresholds. The key is that a commitment existed by the employer—through either a contract or a policy—to pay additional overtime compensation for hours worked beyond regularly scheduled work hours. Having established such a commitment through contract terms *and* State policies, the Represented Employees need establish no more to proceed on their contract claims.

The court of appeal's second basis for rejecting the Represented Employees' contract claims was its earlier conclusion that "the State and CCPOA agreed to have their compensable time measured by federal, rather than state, law." (Slip Op. at p. 24.) This statement is wrong for all the reasons explained in Section V concerning California minimum wage. But Plaintiffs believe there are other reasons for rejecting the court of appeal's

analysis on this point. 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. In other words, because, as established above, there *was* a contractual commitment to pay overtime for additional compensation, disputes about which standard would apply to measure whether the additional time was time worked do not defeat the underlying right to make the claim, which ultimately, at Phase I of the litigation, was all Plaintiffs needed to establish.

The third argument offered by the court of appeal fares no better. The court of appeal pointed to the fact that "[e]ach MOU provided that it 'set[] forth the full and entire understanding of the parties regarding the matters contained herein . . .'" (Slip Op. at p. 24) as a basis for dismissing the contract claims of the Represented Employees. This clause is what is commonly known in labor law as an "entire agreement" clause. Its purpose is simply to make clear that the written agreement between the parties overrides claims that statements or representations made during contractual negotiations constitute additional terms of the agreement. (*Oakland Unified Sch. Dist. v. Pub. Employment Relations Bd.* (1981) 120 Cal. App. 3d 1007, 1010–1011.) The court of appeal seemed to believe that because each MOU after 1998 agreed to pay four hours of PPWA, no other time attributable to PPWA could be compensated. But that is like arguing that,

because the 2001–2006 MOU agreed to compensate only 160 hours of an employee's time at her post, no more time at post could ever be compensated, even if it was worked. Either argument is undone by the mere existence of the overtime provisions in the MOU. These provisions contemplate, on their face, that additional work *may* be performed and *may* be compensated. As stated above, disputes about which compensability standards apply could ultimately defeat the claim but they do not defeat the right to make the claim.

Finally, the court of appeal concluded that "[t]here is no basis to conclude that either the parties or the Legislature intended to create an implied right to compensation in addition to that agreed to in the MOU's." (Slip Op. at p. 24, citing *Retired Employees, supra,* 52 Cal.4th at p. 1177; *Chisom v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 218 Cal.App.4th 400, 415.) The court of appeal's point appears to be that, because the MOU expressly provided for four hours of PPWA, the entitlement to any additional compensation would necessarily need to be premised upon implied contract terms. Not so. Plaintiffs' claims are not premised on implied terms but on the express terms of the MOU overtime provisions and the State's overtime policies. There is nothing implied about any of Plaintiffs' claims.

In sum, this Court should reverse the court of appeal and permit Represented Employees to present breach of contract claims at Phase II of a trial court proceeding.

VII.

CLASS MEMBERS SHOULD BE PERMITTED TO SEEK ANY UNPAID WAGES AT THEIR REGULAR HOURLY RATE PURSUANT TO LABOR CODE SECTIONS 222 AND 223

On remand, this Court should instruct the trial court to permit Plaintiffs to pursue their claims that their employer violated Labor Code sections 222 and 223. Plaintiffs are not asking this Court to hold that the State violated these sections. They merely seek a finding that the lower courts erred by prohibiting Plaintiffs from making these claims as a matter of law.

Labor Code section 222, which Plaintiffs argue applies whenever an MOU existed, states:

> It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either wilfully [sic] or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon.

Labor Code section 223, which Plaintiffs argue applied throughout this litigation, states:

> Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.

This Court should reverse the court below and hold that these sections can apply to public employees whose employer operates a compensation plan that functionally forces them to accept less than the wages owed.

A. The Protections In Sections 222 And 223 Apply To Public Employees

The trial court erred in deciding at the pleadings stage that sections 222 and 223 do not apply to public employees. (Slip Op. at p. 25; 3 AA at p. 575.) The court of appeal avoided this question. (Slip Op. at p. 27.)

The statutory context within which sections 222 and 223 reside belies this conclusion. Labor Code section 220(a), titled "Public Employees," created the same year as sections 222 and 223, explicitly identifies a number of sections within Labor Code Division 2, Part 1, Chapter 1, Article 1 that do not apply to state employees:

> (a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

Sections 222 or 223 are not listed amongst those that do not apply to state employees. (*Ibid.*) The Legislature amended section 220 in 2000 and 2008. (Stats. 2000 ch. 885 § 1; Stats. 2008 ch. 169 § 5.)

The Legislature's decision to explicitly exclude certain sections from applying to state employees indicates that those not so identified are

presumed to apply under the canon of *expressio unius*. (See, e.g., *Augustus*, *supra*, 2 Cal.5th at p. 266.) The fact that Labor Code section 220 is not excluded and appears within the same article as both sections 222 and 223 distinguishes this case from the authority relied on by the trial court. (3 AA at p. 575, citing *California Corr. Peace Officers' Ass'n v. State* (2010) 188 Cal.App.4th 646, 652 [addressing applicability of section 220 to sections 226.7 *and* 512].)

B. The Protections In Section 223 Do Not Apply Only To Kickback Schemes

In modern circumstances, courts have correctly interpreted sections 222 and 223 as prohibiting conduct that uses a mechanism or arrangement to functionally underpay employees. In this case, the lower courts erred by requiring Plaintiffs to prove the existence of a "kickback" scheme before being able to maintain a cause of action under section 223. (Slip Op. at pp. 25–26; 3 AA at p. 576.) The correct interpretation of these laws, based on this Court's instructions that Labor Code sections are to be interpreted broadly to the benefit of the employee (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103), is found in the recent cases of *Armenta v. Osmose, supra*, 135 Cal.App.4th 314 and *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36.

In *Armenta,* the employer's unconcealed refusal to pay employees for travel time contravened Labor Code sections 222 and 223. (135

Cal.App.4th at p. 323.) The employer's activity was sufficiently "secretive" to fall within the zone of forbidden conduct even though it never hid its practice of averaging employee wages.

The issue here is indistinguishable. The employer in *Armenta* violated sections 222 and 223 by not paying its employees for, *inter alia*, time traveling in the employer's vehicle from the pickup location to the worksite. Here, Plaintiffs argue that the employees were not compensated for time spent traveling under the employer's control, albeit on foot, to their worksite on employer property. The question of whether employers attempted to hide their behavior or elicit kickbacks is not dispositive in either situation. *Armenta* supports giving Plaintiffs an opportunity to prove that such conduct violated sections 222 and 223.

Likewise, in *Gonzalez*, the court of appeal reaffirmed *Armenta*'s expansive interpretation of section 223. (215 Cal.App.4th at pp. 48–50.) The Court found that the defendant violated Labor Code section 223 by operation of a piece-rate compensation policy. (*Id.* at p. 50.) No one alleged that the employer concealed the behavior or elicited kickbacks from employees. (See *id.* at pp. 48–50.) The mere act of putting into place a policy that undercompensated employees violated the statute.

The court of appeal here incorrectly required Plaintiffs to introduce facts showing that the State received a kickback in order to support a violation of section 223. This reads the word "secretly" in the statute too

narrowly, and undermines this Court's instructions that statutes drafted for the protection of employees are afforded maximum employee-protecting effect. (See *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 667.)

The older cases that the court of appeal relied on in order to limit the scope of section 223 were never intended to be exclusive. In *Sublett v. Henry's Turk & Taylor Lunch* (1942) 21 Cal.2d 273, 274, this Court did not even apply section 223 because the activity at issue predated the passage of that statute. And in *Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 328–329, the court looked to the *Sublett* Court's dicta in order to prove that the employer's deductions policies are "conditions of employment" within the jurisdiction of the IWC.

This Court eschews formalisms that frustrate the public purpose of employment laws meant to protect employees (*Murphy, surpa,* 40 Cal.4th at p. 1103), and it should reaffirm that principle by holding that an employer does not need to hide the inner workings of its payment plan to functionally violate Labor Code section 223.

C. Plaintiffs Are Merely Seeking The Ability To Pursue These Claims On Remand

Plaintiffs ask this Court not to decide whether the State *violated* sections 222 and 223, but merely to hold that Plaintiffs are not barred from pursuing these theories. Specifically, Plaintiffs will seek to prove that

during the time when MOUs were in place, Labor Code section 222 will apply to violations of the obligation to pay the rate in the collective bargaining agreement. And during the entirety of the time at issue, Labor Code section 223 will apply to the state's actions causing Plaintiffs to be paid less than the statutory or contractual amount promised.

VIII.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand with respect to the issues raised in this Petition so that the trial court can enter orders consistent with this Court's decision and proceed to address the remaining issues in *Stoetzl* and the other coordinated cases.

DATED: March 5, 2018

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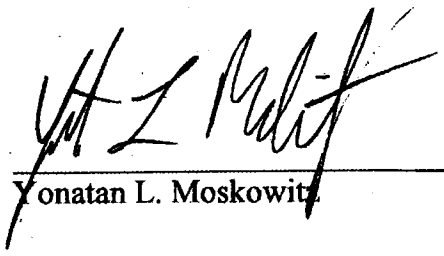
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

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 13,523 words.

DATED: March 5, 2018



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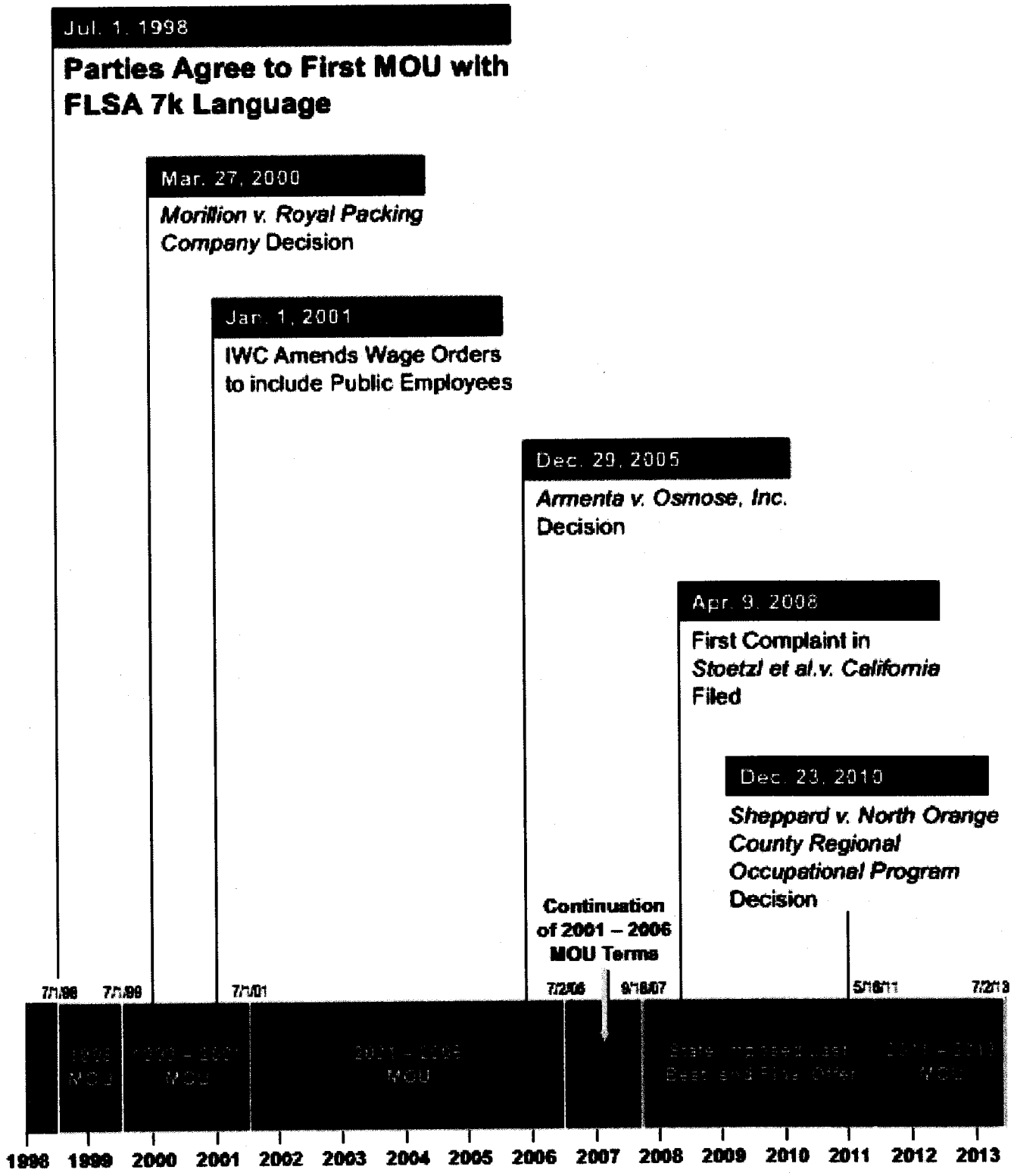
Appendix 1


Jul. 1, 1998
Parties Agree to First MOU with FLSA 7k Language
Mar. 27, 2000
Morillion v. Royal Packing Company Decision
Jan. 1, 2001
IWC Amends Wage Orders to include Public Employees
Dec. 29, 2005
Armenta v. Osmose, Inc. Decision
Apr. 9, 2008
First Complaint in Stoetzl et al.v. California Filed
Dec. 23, 2010
Sheppard v. North Orange County Regional Occupational Program Decision
Continuation of 2001 – 2006 MOU Terms
7/1/98
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1998 – 2001 MOU
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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 March 5, 2018, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS OF PLAINTIFFS/ PETITIONERS** on the interested parties in this action as follows:

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Executed on March 5, 2018, at San Francisco, California.

Janine Oliker