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Case No. S248726

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, and on behalf of others similarly situated, and on behalf of the general public,
Plaintiffs/Petitioners,

v.

DELTA AIR LINES, INC.
Defendant/Respondent.

On Grant of Request to Decide Certified Questions from the United States Court of Appeals for the Ninth Circuit Pursuant to California Rules of Court, Rule 8.548,
Ninth Circuit No. 17-15124

APPLICATION TO FILE AMICUS BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT DELTA AIR LINES, INC.; PROPOSED BRIEF OF *AMICI CURIAE*

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APPLICATION FOR PERMISSION TO FILE

AMICI CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.520(f) of the California Rules of Court, proposed *amici curiae* Employers Group and California Employment Law Council ("CELC") respectfully request permission to file the enclosed *amici curiae* brief in support of Respondent Delta Air Lines, Inc. The proposed *amici curiae* brief offers a unique perspective on why the Court should conclude that incentive based compensation plans like Respondent's comply fully with California's minimum wage laws as interpreted under *Armenta v. Osmose, Inc.* (2005) 37 Cal. Rptr. 3d 460 and why the Court should conclude that Labor Code sections 204 and 206 do not apply to wage payment and wage statements provided by out-of-state employers to employees who work in California only episodically and for less than a day at a time.

Amici do not seek to merely repeat the arguments in Respondent's Brief. Rather, *amici* present additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

STATEMENT OF INTEREST

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal forums over many decades, the Employers Group is distinctively able to assess both the impact and implications of the issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in many significant employment cases, including *Duran v. U.S. Bank National Association*, 59 Cal. 4th 1 (2014); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004(2012); *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010); *McCarther v. Pacific Telesis Group,* 48 Cal. 4th 104(2010); *Chavez v. City of Los Angeles*, 47 Cal. 4th 970 (2010); *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272(2009); *Arias v. Superior Court*, 46 Cal. 4th 969 (2009);

Amalgamated Transit Union v. Superior Court, 46 Cal. 4th 993 (2009); *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937(2008); *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralphs Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. Superior Court*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal, USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446(2005); and *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004).

CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership includes more than 80 private sector employers, including representatives from many different sectors of the nation's economy (health care, aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ hundreds of thousands of Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, such as: *Duran*, supra, 59 Cal. 4h 1; *Brinker, supra*, 53 Cal. 4th 1004; *Harris v. Superior Court*, 53 Cal. 4th 170 (2011);

Chavez, *supra*, 47 Cal. 4th 970; *Hernandez*, *supra*, 47 Cal. 4th 272; *Jones v. Lodge at Torrey Pines Partnership*, 42 Cal. 4th 1158 (2008); *Murphy*, *supra*, 40 Cal. 4th 1094; *Green v. State of California*, 42 Cal. 4th 254 (2007); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317(2000); and *Armendariz v. Foundational Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000).

No current party in this case, or counsel for any current party in this case, authored the proposed *amici curiae* brief or any part of the brief. No person or entity other than the Employers Group or CELC contributed any money to fund the preparation or submission of this brief.

Accordingly, the Employers Group and CELC respectfully request that the Court accept the enclosed *amici curiae* brief for filing and consideration.

Dated: February 15, 2019

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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AMICI CURIAE BRIEF

I. PRELIMINARY STATEMENT

This case presents a much-needed opportunity for this Court to restore clarity and predictability as to how employers may incorporate incentives, commissions, piece rates and other activity-based pay into a compensation scheme for non-exempt employees without running afoul of California's requirement to pay at least minimum wage for all hours worked. It has long been common practice in many industries operating in California to compensate non-exempt employees in one of these manners, a practice explicitly recognized and affirmed in Labor Code section 200's definition of "wages" as "all amounts paid for labor performed . . . *whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.*" Despite this clear legislative recognition, recent decisions of the Courts of Appeal and federal district courts, all stemming from the ruling in *Armenta v. Osmose*, 135 Cal. App. 4th 314 (2005), have called into question whether any standard other a fixed hourly rate for each hour worked will comply with California law, as they reason that other standards – such as payment by the piece or payment by commission – is payment only for producing the piece (or commission), and hence leaves all other compensable activities uncompensated. That flawed reasoning has led to the case before the Court, where Petitioners

argue that a standard which fixes their compensation based on less than all hours worked (here "flight hours") leaves all other compensable hours uncompensated, even though the applicable compensation plan expressly guarantees that Petitioners will accrue compensation at least equal to the minimum wage for each hour devoted to compensable activities.

The needed corrective is to simply rearticulate the reasoning underlying *Armenta*'s holding and the corollary of that holding. *Armenta's* holding rested on the observation that Labor Code sections 221, 222, and 223, taken together, require the court to allocate wages to hours worked precisely as the parties themselves have agreed. Therefore, if the parties have agreed that a certain activity will be compensated at a specific rate, no part of the compensation for that activity may be applied to any other activity, for to do so would effectively reduce the compensation paid to the employee for the first activity. If the parties have also agreed that the additional activity will be compensated at less than minimum wage, or not compensated at all, then the employer has failed to pay minimum wage for that activity, as the only compensation which can be considered is the compensation expressly provided for that additional activity.

The corollary is that, in the absence of an agreement between the parties to compensate certain activities at a specific rate, Labor Code sections 221, 222, and 223 will not apply and therefore do not bar applying all compensation earned to all compensable activities performed when

determining whether the employer has paid at least minimum wage for all hours worked. This is all the more true where, as here, the parties have expressly agreed, and the compensation plan guarantees, that the employee will accrue at least the minimum wage for each hour worked, even if the precise amount of compensation will ultimately be fixed by a formula which counts less than all hours worked (or something other than simply total hours worked).

All of the precedential opinions following *Armenta* are consistent with this analysis, which provides a clear limit on *Armenta's* application – the rule of *Armenta* is grounded in the agreement of the parties as to how work will be compensated, to which courts must defer when assessing whether the employer has paid at least minimum wage for all hours worked.

As will be demonstrated below, Delta's compensation scheme for flight attendants complies with the rule of *Armenta*. Nothing in Delta's Work Rules promises to pay flight attendants a specified rate for any particular activity and the rules expressly provide that the employee will accur at least minimum wage for each and every hour worked. Therefore, deferring to the agreement of the parties, as the Court must, there are no activities for which compensation is not provided, or which are compensated at less than the minimum wage.

This case presents the Court with the opportunity to rearticulate that analysis, and in so doing, restore clarity and predictability as to how employers may incorporate incentive payments for hourly employees without running afoul of California requirement to pay at least minimum wage for all hours worked. For the reasons set forth below, *amici* Employers Group and CELC respectfully request that the Court affirm that incentive based compensation systems, which are based upon an agreement by the parties to compensate the employee for all hours worked and which provide at least minimum wage for each hour worked without applying compensation which the parties have assigned to one activity to a different activity, comply with *Armenta*.

This case also presents a significant issue for those out-of-state employers, such as trucking companies, airlines, delivery services, and sales forces whose workers are in California only periodically and for periods of less than a full day. California's wage payment obligations require that wages earned by an employee during a pay period must be paid precisely in accordance with Section 204. The timing of such payments varies and may depend upon the employee's classification, the industry in which the employee works, and how often the employee is paid. California's wage statement requirements under Labor Code 226 are similarly precise and require the inclusion of specific items of information regarding the employee's work period, hours and rates during the work

eriod, and other information. Meeting these wage payment and wage statement obligations for employees who may spend only a few hours in California during an entire month, or year, presents considerable, almost impossible challenges for out-of-state employers. Indeed, each of these statutory obligations contemplate inclusion of all hours worked in the pay period, which includes hours worked primarily outside of California and not just the small portion of work performed in California. Not unexpectedly, such misplaced obligations imposed on out-of-state employers have resulted in rampant class action litigation. As described more fully below, imposing such obligations on out-of-state employers under these circumstances is not supported by the controlling case law and furthers no compelling California interest. The Court should conclude that sections 204 and 226 do not apply to employees of out-of-state employers who work in California only sporadically and for periods of less than a day.

II. ARGUMENT

A. The Rule of *Armenta* Rests On The Agreement Of The Parties That Certain Activities Will Be Compensated At Specified Rates.

1. *Armenta's* holding is premised on a compensation contract which expressly provided that only certain activities would be compensated.

In *Armenta*, the collective bargaining agreement classified employee hours as either "productive" or "nonproductive," and provided a specified hourly rate for the "productive" hours. 135 Cal. App. 4th 314, 317. At

trial, the court found that time spent on travel and daily paperwork was treated as "nonproductive," and had not been compensated. *Id.* at 320. The trial court then held that the wages paid for the "productive" hours could not be averaged over all hours worked to satisfy the employer's minimum wage obligations for compensable "nonproductive" time, relying on DLSE Opinion Letter 2002.01.29:

> As succinctly (and persuasively) advanced in the DLSE opinion letter, California Labor Code sections 221, 222, and 223 prevent [appellant] herein: [¶] 'from using any part of the wage payments that are required under [their] CBA or other contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit for satisfying minimum wage obligations for those activities that are compensated at less than the minimum wage under the CBA or contract . . ' (fn. omitted)

Armenta, 134 Cal. App. 4th at 320 (alterations and quotations marks in original) (quoting trial court's Statement of Decision).

The DLSE Opinion Letter, which the trial court found persuasive, explains this reasoning more fully, stressing that Labor Code sections 221, 222, and 223 require the Court to enforce the agreement of the parties as to the activities which will be compensated, and the rate(s) at which they will be compensated. If the parties agreed that certain activities will be compensated at specified rates, these statutes preclude the court from

averaging total compensation earned over all hours worked, as to do so would require applying compensation earned from one activity to a different activity, thereby reducing the rate paid for the first activity and increasing the rate paid for the second, all in contravention of the parties' agreement:

> These statutes prevent the [employer] or any other employer that might be covered by a CBA or other contract that expressly pays employees less than the minimum wage for certain activities that constitute "hours worked" within the meaning of state law, from using any part of the wage payments that are required under that CBA or other contract for activities that are compensated in an amount that equals or exceeds the minimum wage, as a credit for satisfying minimum wage obligations for those activities that are compensated at less than the minimum wage under the CBA or contract. Instead, all hours for which the employees are entitled to an amount equal or greater than the minimum wage pursuant to the previsions of the CBA or other contract must be compensated precisely in accordance with the provisions of the CBA or contract; and all other hours (or parts of hours) which the CBA or contract explicitly states will be paid at less than the minimum wage, but which constitute "hours worked" under state law, must be compensated at the minimum wage. Averaging of all wages paid

> under a CBA or other contract, within a particular pay period, in order to determine whether the employer complied with its minimum wage obligations is not permitted under these circumstances, *for to do so would result in the employer paying the employees less than the contract rate for those activities which the CBA or contract requires payment of a specified amount equal to or greater than the minimum wage, in violation of Labor Code sections 221-223.*

DLSE Opinion Letter 2002.01.29 at p.11 (emphasis added) *available at* https://www.dir.ca.gov/dlse/opinions/2002-01-29.pdf (last checked February 15, 2019).

On appeal, the Court of Appeal referred to the Opinion Letter's reasoning as "persuasive," *Armenta*, 135 Cal. App. 4th at 325, and repeated its central conclusion that, where the parties have agreed that certain activities will be compensated at an agreed rate, it would be unlawful to apply any of that compensation to other activities:

> Sections 221, 222, and 223 articulate the principal that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation . . . As the trial court noted, *adopting the averaging method advocated by respondents contravenes these code sections and effectively reduces respondents'* ***contractual*** *hourly rate.*

135 Cal. App. 4th at 323 (emphasis added).

Armenta's rejection of averaging thus stems not simply from state law, but rather the interaction of state law and the compensation agreement between the parties. Specifically, *where the parties have expressly agreed that certain activities will be compensated at a specified rate*, state law prohibits applying any of that compensation to the employer's minimum wage obligations for *other* activities. If the contract also provides that those *other* activities will be compensated at less than minimum wage (or will not be compensated at all), then the employer has failed to pay minimum wage for those *other* activities.

2. The precedential case law applying *Armenta* applies its holding to other contractual agreements, which similarly agree that certain activities will be compensated at specified rates.

Following *Armenta*, the Courts of Appeal have issued three precedential opinions applying its holding: *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36 (2013), *Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864 (2013); and *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal. App. 5th 98 (2017). In each, the parties had agreed that certain activities would be compensated at a specified rate, and that other activities would not be compensated, leading to minimum wage violations for those uncompensated hours.

In *Gonzalez*, the employer's compensation system paid the plaintiff auto repair technicians an agreed-upon hourly rate for each "flag hour",

representing the estimated time needed to perform a given repair task. 215 Cal. App. 4th 36, 41. Flag hours were calculated solely based on repairs performed. *Id.* Employees accrued no flag hours when required to remain on premises to wait for repair work, or when performing various non-repair tasks, such as obtaining parts, cleaning their work stations, attending meetings, traveling to other locations to pick up and return cars, reviewing service bulletins, and participating in training. *Id.* at 42. If, however, a technician's total compensation based on flag hours amounted to less than minimum wage for all hours worked, including waiting time and non-repair activities, the employer supplemented the technician's pay in the amount of the shortfall.

After discussing *Armenta* at length, the *Gonzalez* court concluded that *Armenta*'s reasoning was "equally applicable to employees compensated on a piece-rate basis." *Gonzalez,* 215 Cal. App. 4th at 49. In rejecting the employer's attempts to distinguish *Armenta*, the *Gonzalez* court quoted the same passage of DLSE Opinion Letter 2002.01.29, quoted above, and concluded that the DLSE's reasoning "applies whenever an employer and employee *have agreed that certain work will be compensated at a rate that exceeds the minimum wage and other work time will be compensated at a lower rate*." *Id.* at 51 (emphasis added). *Gonzalez* also provided the following illustration:

> Averaging piece-rate wages over total hours worked results in underpayment of employee wages required "by contract" under Labor Code section 223, as well as an improper collection of wages paid to an employee under Labor Code section 221, as illustrated by the following example: a technician who works four piece-rate hours in a day at a rate of $20 per hour and who leaves the job site when that work is finished has earned $80 for four hours of work. A second technician who works the same piece-rate hours at the same rate but who remains at the job site for an additional four hours waiting for customers also earns $80 for the day; however, *averaging his piece-rate wages over the eight-hour work day results in an average pay rate of $10 per hour, a 50 percent discount from his promised $20 per hour piece-rate.* The second technician forfeits to the employer the pay promised "by statute" under Labor section 223 because if his piece-rate pay is allocated only to piece-rate hours, he is not paid at all for his nonproductive hours.

215 Cal. App. 4th at 50 (emphasis added). As the above example makes clear, for *Gonzalez* as for *Armenta*, it is the re-allocation of wages from (a) the activities which the parties agreed would generate them to (b) other

activities which the parties left uncompensated that underlies the prohibited averaging, as Labor Code sections 221, 222, and 223 requires.[1]

In *Bluford*, the collective bargaining agreement governing the plaintiffs' employment as truck drivers provided for "activity based" compensation, with agreed-upon rates for miles driven, certain other tasks and delays. It was undisputed that none of these rates applied to rest periods. 216 Cal. App. 4th 864, 872. The court reasoned that the rest periods were therefore unpaid, in violation of state law, because including payment for expected rest periods in compensation assigned to other activities "is akin to averaging pay to comply with the minimum wage law instead of separately compensating employees for their rest periods at the minimum or contractual hourly rate." 216 Cal. App. 4th 864, 872. Once again, the "averaging" rejected by the court was the attempt to disregard the express agreement of the parties and re-allocate wages from the activities which the parties had agreed would generate them to other activities which the parties had left uncompensated.

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[1] The holding of *Gonzalez* has since been codified in Labor Code section 226.2. However, that codification has no impact on the analysis here, as Labor Code section 226.2 applies only to employees who are compensated on a piece-rate basis, and no party contends that Delta's compensation scheme constitutes a "piece-rate" within the meaning of the statute. Morever, the issue before the court is: "Does the *Armenta/Gonazlez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty?" As the court is not called upon to construe or apply Labor 226.2, it has no relevance to the question before the Court.

In *Vaquero,* plaintiffs were paid pursuant to a commission plan whereby they earned commissions for selling the employer's products. If plaintiffs failed to earn sufficient commissions to earn at least $12.01 for each hour worked, the employer paid a "draw" against future commissions in the amount of the shortfall. The draw would be recovered from future earned commissions, but only to the extent those commissions exceeded the guaranteed minimum pay. The commission agreement did not provide separate compensation for any non-selling time, such as time spent in meetings, on certain types of training, and during rest periods. *Vaquero*, 9 Cal. App. 5th 98, 103. The court reasoned that taking a rest period could not possibly lead to a sale, 9 Cal. App. 5th 98, 112, and, consistent with *Armenta* and its progeny, refused to apply any portion of the sales commissions to compensate rest periods. Therefore, the court concluded, the employer had not provided *paid* rest breaks. 9 Cal. App. 5th 98, 115-16.[2]

In each of these cases, the reasoning is the same as in *Armenta* – "averaging" compensation to satisfy the employer's minimum wage obligations (or obligation to provide paid rest breaks) would contravene the *express agreement* of the parties as to which activities will be compensated,

[2] *Vaquero* dismissed the employer's argument that the draw against future commissions could be considered payment for rest breaks reasoning that the draw was not compensation at all, as it was subject to recovery in future pay periods. 9 Cal. App. 5th 98, 115-16.

and at which rates. Significantly, however, it is not "averaging" total compensation over all hours worked which is prohibited. Rather, what is prohibited is disregarding the parties' agreement as to the activities to be compensated and the rates at which they will be compensated when assessing whether the employer has properly compensated the employee for all hours worked.[3]

B. Delta's Compensation Scheme Does Not Conflict With *Armenta* And Its Progeny.

As detailed above, *Armenta* and its progeny are rooted in the agreement of the parties that certain activities will be compensated at certain rates, and the provisions of the Labor Code which prohibit using any of that compensation as a credit toward the compensation of other activities. Accordingly, the first step in assessing compliance with California's minimum wage requirements must always be evaluating the

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[3] *Jimenez-Sanchez v. Dark Horse Express, Inc.*, ___Cal. Rptr. 3d ___, 2019 WL 626349, issued February 14, 2019, reinforces this conclusion, although without citing *Armenta*. Instead, it analyzes *Gonzalez*, and distinguishes it on the grounds that, in *Gonzalez*, "in order for the employees to be paid as agreed for the repair work, the piece-rate payment had to apply only to the repair time." *Id.* at *9. In the case before it, however, "there are factual issues regarding what tasks were directly compensated by the piece rate, which were not present in *Gonzalez*." *Id.* Those issues arose because "questions concerning whether time spent on items such as inspections, completing paperwork, waiting at dairies or creameries, and returning to the yard constituted 'nonproductive time' must be answered by reference to the employment agreements between defendant and the drivers." *Id.* Hence *Jimenez-Sanchez*, like *Armenta, Gonzalez, Bluford* and *Vaquero*, holds that it is the agreement of the parties which controls how compensation is allocated to the activities performed by the employee.

compensation agreement of the parties, and determining whether it establishes an agreed upon rate for certain activities. If so, then one must next analyze whether the compensation agreement provides that other activities will not be compensated, or will be compensated at less than the minimum wage.

Delta's Work Rules differ from the compensation schemes at issue in *Armenta, Gonzalez, Bluford* and *Vaquero* precisely in that they do not promise to compensate *any* particular activity or group of activities at a particular rate of pay. Rather, the promise is to compensate the employee for the "duty period," which, as Plaintiffs acknowledge, includes all activities that constitute "hours worked" under California law. That compensation, in turn, is calculated by applying three distinct formulae, and paying under whichever formula produces the greatest compensation to the employee.

The fact that one of these three formulae (the Flight Pay Formula) is calculated based on flight time (which does not include all activities constituting "hours worked" under state law) does not amount to a *contractual agreement* to pay a specific rate for flight time. Nothing in the Work Rules promises to pay the employee his or her "Flight Pay Rate" for each hour of flight time (as defined in the Work Rules). Rather, the Work Rules clearly provide that the employee earns "credits" (measured in hours) based on the expected flight time, which are then compared to credits

calculated based on other variables (such as the elapsed time of the entire duty period), to determine which formula provides the greatest number of credits to the employee. Those credits are then multiplied by the employee's rate of pay per credit (the Flight Pay Rate). This is not an agreement to pay a specified rate for flight time, but rather an agreement to compensate the *entire duty period* according to whichever of several formulae produces the greatest number of credits (and consequently the greatest pay) to the employee.

Delta's Work Rules differ from the compensation systems at issue in *Armenta, Gonzalez, Bluford* and *Vaquero* in that, in Delta's case, there is an express agreement to compensate the employee for *all* activities that constitute hours worked under California law. None of the restrictions in sections 221, 222, or 223 is implicated. First, the Work Rules define the compensation not for "flight time" but for the "duty period," which, as noted above, includes all activities which constitute hours worked under state law. Second, one of the formulae (the "Duty Period Credit") expressly assigns one-half credit for each hour worked in the duty period. Thus, employees are earning at least half of their Flight Pay Rate for each and every hour worked, including non-flight time and paid rest breaks, and there is no activity that the parties have agreed will be compensated at less than the minimum wage, or for which no compensation has been provided.

Petitioners erroneously leap from the observation that, for the vast majority of duty periods, flight attendants are paid under the Flight Pay Formula, where credits are calculated based on flight time alone, to the conclusion that non-flight time has not been compensated. As the above discussion of *Armenta* and its progeny reveals, however, it is the agreement of the parties that determines whether an activity is compensated. Here, Petitioners point to nothing, nor could they, that the parties *agreed* that flight time would always be compensated at the Flight Pay Rate, or that non-flight time would not be compensated. To the contrary, the Work Rules define compensation not for flight time, but for the "duty period." Moreover, the fact that, for approximately 15% of duty periods, flight attendants were paid under an alternate formula proves the absence of an agreement to pay for flight time at a specified rate because, in these instances, the flight attendants were paid based on the length of their duty period or some other variable, and their flight time had no impact on their compensation. If that can happen, as it indisputably did, then obviously the parties have not agreed that flight time will always be compensated at the Flight Pay Rate, and the essential premise for the rule of *Armenta* and its progeny is absent.

The absence of an express agreement to compensate only certain activities at a specified rate is precisely what distinguishes Delta's Work Rules from the compensation scheme held unlawful in *Gonzalez*, to which

they bear a superficial resemblance. In *Gonzalez*, compensation was calculated based on "flag hours" (the estimated time of a repair), similar to "flight hours" for Delta's flight attendants. If flag hours multiplied by the technician's hourly rate failed to provide at least minimum wage for all hours worked, the employer supplemented the technician's compensation in the amount of the shortfall. 215 Cal. App. 4th 36, 41-42. *Gonzalez*, however, rejected this approach as the employer could satisfy its minimum wage obligations for the non-flag hours only if some of the compensation for flag hours were re-allocated to the non-flag hours, thereby reducing the technician's promised hourly rate for the flag hours, which Labor Code sections 221, 222, and 223 prohibit. In Delta's case, however, even where the attendant is compensated under the Flight Pay Formula there is no need to re-allocate compensation from one activity to a different activity because (i) the Work Rules do not promise that flight time will always be paid at the Flight Pay Rate, and (ii) under the Work Rules, attendants are always earning one-half credit for each hour on duty and hence are always earning at least minimum wage for all hours worked, as even half of their Flight Pay Rate easily exceeds California's minimum wage.

C. This Court Should Re-Assert The Limits Of *Armenta*, To Prevent Further Attacks On Compensation Systems Which Have Long Been Accepted In California.

As this case demonstrates, compensation schemes which have long been accepted and standard practice in many industries are under increasing

attack based on misunderstandings of the rule of *Armenta* which, in turn, derives from Labor Code sections 221, 222, and 223. Without a clear reaffirmation of the principles underlying *Armenta* and their limits, the only compensation immune to attack will likely be a simple fixed hourly rate for all hours worked, perhaps with incentives (such as commissions, bonuses, or payments for the piece) payable in addition to the basic hourly wage. Yet such a regime would greatly restrict employers from proposing, and deprive employees from being offered, compensation schemes that motivate and reward productivity. Nothing in the Labor Code or wage orders suggests a legislative intent to upset compensation schemes well-known to those who promulgated these statutes and regulations, and expressly countenanced by them.

In addition to continued disruption of long-accepted pay practices, rejection of Delta's "greater of" approach would not achieve any public policy objectives. Rather than using its current "greater of" approach, Delta could restructure its Work Rules to pay (i) half of the attendants' Flight Pay Rate for all hours worked during the duty period ("Hourly Base Pay"), plus (ii) a bonus equal to the difference, if any, between (a) the amount payable under the current Flight Pay Formula and (b) the Hourly Base Pay (as just defined). That alternate formula would yield the exact same monetary payment to the flight attendant in each instance, and is substantively identical to the "greater of" compensation scheme in the

Work Rules. It is also indisputably compliant with *Armenta* and its progeny as it expressly pays compensation at or above the minimum wage for each and every hour worked, with additional amounts as a bonus. If Delta's "greater of" approach is not compliant, then compliance will depend entirely on semantics, and the intricacies of drafting, a result which benefits no one. Developing a compensation system that incentivizes and rewards industrious employees should not be that hard.

In sum, Delta's formula-based compensation programs and other incentive based compensation systems, which are based upon an agreement by the employer and employee to compensate the employee for all hours worked and provide at least minimum wage for each hour worked without applying compensation which the parties have assigned to one activity to a different activity, comply with California's wage and hour laws under *Armenta* and its progeny.

D. Applying the Reasoning Considered in S*ullivan V. Oracle Corporation*, This Court Should Hold That Labor Code Sections 204 and 226 Do Not Apply To Wage Payments And Wage Statement Issued By Out-Of-State Employer To Employees Who Work In California Only Episodically.

Petitioners seek to apply the principles regarding overtime set forth in *Sullivan v. Oracle Corporation* (2011), 51 Cal. 4th 1191, to sections 204 and 226 of the Labor Code. Such efforts are unavailing and stretch *Sullivan* and other case authority beyond any extension they can bear. In *Sullivan,* this Court issued a narrow ruling holding that the state's overtime law

applied to non-resident employees working for a California employer "for entire days and weeks worked in California, in accordance with the statutory definition of overtime." 51 Cal. 4th at 1199-1200 (emphasis added). "That California would choose to regulate all nonexempt overtime work within its borders without regard to the employee's residence is neither improper nor capricious," the Court reasoned, in light of the fact that overtime laws protect "the health and safety of workers," and the "right to overtime compensation [is] unwaivable." *Id.* at 1198. Further, employing a conflict-of-laws analysis, the Court concluded that California's interests would be more impaired than that of the resident states if it had "[t]o permit nonresidents to work in California without the protection of our overtime law." *Id.* at 1199-1200.

Sullivan left open several important questions, including whether "California's interest in the content of an out-of-state business's pay stubs, ... may or may not be sufficient to justify choosing California law over the conflicting law of the employer's home state." *Id.* at 1200 (emphasis added). The Court should resist any efforts to extend the protections identified in *Sullivan* to the wage payment and wage statements at issue here. An analysis of the Court's reasoning in *Sullivan* supports persuasively the conclusion that when an employee of an out-of-state employer works in California only episodically and for less than a full day

at a time, such an employee is not entitled to the wage payments and wage statement protections set forth in Labor Code sections 204 and 226.

First, unlike overtime performed by an out-of-state worker in California, which is measured on a daily or weekly basis and where California has a strong and longstanding public interest in vindicating that minimum labor standard for "*any work*" by "*any employee*" (*Id.* at 1197, citing the applicable Labor Code provisions governing overtime), California has little interest in regulating the conduct of an out-of-state employer with respect to the timing of payment of wages and/or the content of wage statements. Such obligations can involve periods of time often longer than one or two weeks, where the overwhelming majority of the hours at issue under both statutes are based on work performed *outside* of California.

Second, the compelling public policy reasons cited in *Sullivan* for extending California's overtime protections to out-of-state employees working full days or full weeks in California do not apply to sections 204 and 226. In *Sullivan*, the Court identified the several public policy goals served by enforcing California's overtime requirements in favor of out-of-state employees working in California for full days or full weeks, including (1) protecting the health and safety of workers and the general public; (2) protecting employees in a relatively weak bargaining position from the evils associated with overwork; and (3) expanding the job market by giving

employers an economic incentive to spread employment throughout the workforce. *Id.* at 1198. None of those fundamental public policies reasons applies to California's wage payment and wage statement laws.

Further, for California to impose its wage payment and wage statement laws under these circumstances would subject out-of-state employers to a patchwork of simultaneously applicable and potentially conflicting state employment laws. Nearly every state has a wage payment law like section 204 establishing a minimum frequency for paying employees.[4] Many state wage payment laws require payment either semi-monthly (twice a month) or bi-weekly (every other week), but other state wage payments require weekly or monthly payment. California wage payment requirements are among the most onerous mandating weekly, bi-weekly, semi-monthly, and monthly pay dates depending on such circumstances as the occupation and length of the pay period.

III. CONCLUSION

For the reasons stated above, this Court should hold that incentive based compensation systems, like Delta's formula-based system, which are based upon an agreement by the parties to compensate the employee for all hours worked and which provide at least minimum wage for each hour worked without applying compensation which the parties have assigned to

[4] The United States Department of Labor has summarized the varying obligations under state law concerning the timing of payment of wages at *https://www.dol.gov/whd/state/payday.htm*.

one activity to a different activity, do not violate *Armenta*. This Court should also hold that Labor Code sections 204 and 206 do not apply to wage payment and wage statements provided by out-of-state employers to employees who work in California only episodically and for less than a day at a time.

Respectfully submitted,

Dated: February 15, 2019

OGLETREE, DEAKINS, NASH,
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By: ______________________
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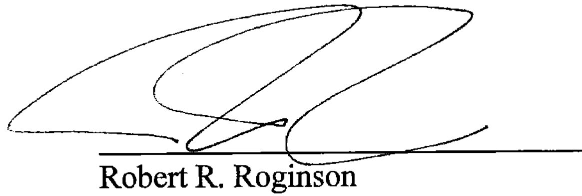
CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* the Employers Group and the California Employment Law Council certifies that the "word count" on the Microsoft Word program used to prepare the brief determined the text of the brief consists of 6,381 words, exclusive of the title page, tables, this certificate, and proof of service, pursuant to California Rule of Court 8.204(c).



Dated: February 15, 2019

Robert R. Roginson

CERTIFICATE OF SERVICE

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Los Angeles in the office of a member of the bar of this court at whose direction the service was made. My business address is 400 S. Hope Street, Suite 1200, Los Angeles, California 90071.

On February 15, 2019, I served the following document(s):

APPLICATION TO FILE AMICUS BRIEF OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT DELTA AIR LINES, INC.; PROPOSED BRIEF OF *AMICI CURIAE*

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as stated on the attached mailing list.

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in Los Angeles, California, for collection and mailing to the office of the addressee of the date shown herein.

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☐ **BY FACSIMILE** by transmitting a facsimile transmission a copy of said document(s) to the following addressee(s) at the following number(s), in accordance with:

☐ the written confirmation of counsel in this action:

☐ [State Court motion, opposition or reply only] in accordance with Code of Civil Procedure section 1005(b):

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☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 15, 2019, at Los Angeles, California.

Elizabeth Mendoza	
Type or Print Name	Signature

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