NO. S073725

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JOSE MORILLION, ET AL.,

Plaintiffs/Appellants,

v.

ROYAL PACKING COMPANY,

Defendant/Respondent.

After a decision by the Court of Appeal of the State of California
Sixth Appellate District
Appeal No. H017212
Monterey County Superior Court Action No. 110399

[PROPOSED] BRIEF OF AMICI CURIAE ASIAN LAW CAUCUS, INC., EAST SAN JOSE COMMUNITY LAW CENTER, EMPLOYMENT LAW CENTER – A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO, LA RAZA CENTRO LEGAL, INC., AND WOMEN'S EMPLOYMENT RIGHTS CLINIC – GOLDEN GATE UNIVERSITY SCHOOL OF LAW IN SUPPORT OF APPELLANTS JOSE MORILLION, ET AL.

David Borgen, Bar #099354
Aaron Kaufmann, Bar #148580
Laura L. Ho, Bar #173179
SAPERSTEIN, GOLDSTEIN,
DEMCHAK & BALLER
1300 Clay Street, 11th Floor
Oakland, CA 94612
Tel: 510/763-9800
Fax: 510/835-1417

Attorneys for Amici Curiae

Hina Shah, Bar #179002
ASIAN LAW CAUCUS, INC.
720 Market Street, Suite 500
San Francisco, CA 94102
Tel: 415/391-1655
Fax: 415/391-0366

Attorney for Amicus Curiae
Asian Law Caucus, Inc.

LA RAZA CENTRO LEGAL, INC.
474 Valencia Street #295
San Francisco, CA 94103
Tel: 415/575-3500
Fax: 415/255-7593

Attorney for Amicus Curiae
La Raza Centro Legal, Inc.

Margaret Stevenson, Bar #112982
Mary J. Novak, Bar #138296
EAST SAN JOSE COMMUNITY LAW CENTER – A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO
1765 Alum Rock Avenue
San Jose, CA 95116
Tel: 408/254-0444
Fax: 408/254-7726

Attorneys for Amicus Curiae
East San Jose Community Law Center

Marci Seville, Bar #67491
Donna Ryu, Bar #124923
WOMEN'S EMPLOYMENT RIGHTS CLINIC -- GOLDEN GATE UNIVERSITY SCHOOL OF LAW
536 Mission Street
San Francisco, CA 94105
Tel: 415/442-6647
Fax: 415/896-2450

Attorneys for Amicus Curiae
Women's Employment Rights Clinic – Golden Gate University School of Law

Christopher Ho, Bar #129845
Michael Gaitley, Bar #141248
EMPLOYMENT LAW CENTER – A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO
1663 Mission Street, Suite 400
San Francisco, CA 94103
Tel: 415/864-8848
Fax: 415/864-8199

Attorneys for Amicus Curiae
Employment Law Center –a Project of the Legal Aid Society of San Francisco
Virginia Villegas, Bar #179062

TABLE OF CONTENTS

I. INTRODUCTION

California's wage orders provide employees with unique protections, distinct from and in addition to the protections of the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. section 201 et seq. For over fifty years, California has required that covered employees be paid for all "hours worked." The Industrial Welfare Commission ("IWC"), the state agency authorized to formulate regulations which govern employment in California, adopted an expansive definition of "hours worked" in 1947 ensuring that all covered employees would be compensated both for the time they spend subject to the employer's control, whether or not they are actually performing job duties, and for the time they are actually working, whether or not they are subject to the employer's control. (See IWC wage orders 1 through 15, 8 C.C.R. §§ 11010-11150 (1998), hereinafter "IWC wage order").

The Court of Appeal here, however, jettisoned California's traditional understanding of what constitutes "hours worked" and applied an unduly restrictive reading of the term. The court found that even assuming an employee's time is subject to an employer's control, that time is compensable only if the employee is at the same time suffered or permitted to work. (*Morillion v. Royal Packing Co.* (1998) ___ Cal.App.4th ___ [77 Cal.Rptr.2d 616, 622-24].) By interpreting "suffer or permit" as a limitation on "control," the Court of Appeal improperly conflated the two clauses of the definition of "hours worked," (*id.* at p. 624), rather than giving them each their independent meaning. The Court of Appeal's interpretation of "hours worked" belies the term's plain and common sense meaning, and ignores the regulatory framework of the wage orders. The Court of Appeal also inappropriately buttressed its misreading of the wage order by turning to inapplicable federal law, the Portal-to-Portal Act of

1947, 29 U.S.C. section 254, for which there is no state analogue. (*Morillion, supra*, 77 Cal.Rptr.2d at pp. 620-23.)

If affirmed, the Court of Appeal's narrow interpretation of the IWC wage order would upset the settled expectations of California workers and roll back protections of state law that have been in place for over fifty years. Not only would employees lose pay for travel time during which they are subject to the employer's control, but the Court of Appeal's reinterpretation of "hours worked" could be extended to other contexts where California employees have long been paid, such as on duty meal periods, rest periods, standby pay, and reporting time pay. This erroneous ruling compromises California's ability to enforce its own wage and hour scheme. Amici thus urge this Court to reverse the Court of Appeal's decision.

II. STATEMENT OF THE CASE

Appellants are current and past agricultural workers ("Appellants") employed by Respondent, Royal Packing Company ("Respondent"). (*Morillion, supra*, 77 Cal.Rptr.2d at p. 618.) Respondent has a rule that Appellants:

> . . .*will* show up at the departure point of his appropriate area at the time indicated by his/her supervisor or foreman and the employee *will* park his/her personal vehicle. Then, at this same place, the employee *will* take the appropriate crew bus which will take him/her to his/her place of work. In the afternoon, after the employee has completed his/her shift, the bus *will* take the employee back to the original departure point.

(*Id.*, emphasis added.)

If a worker fails to adhere to the rule, the worker will be "given a verbal warning the first time, ..." (*id.)*, and thereafter "the company will take the

necessary action to correct the problem and he/she will be sent home and lose the days [sic] work when this occurs." (*Id.*)

Appellants brought suit, seeking, among other things, payment of wages for

> (1) the time spent assembling at the departure point; (2) the time spent riding the bus to the fields; (3) the time spent waiting for the bus at the end of the day; and (4) the time spent riding the bus back to the parking lots or assembly areas.

(*Morillion, supra*, 77 Cal.Rptr.2d at p. 618.)

The trial court sustained Respondent's demurrer. (*Id.* at p. 618.) The Court of Appeal affirmed, finding that Appellants are not entitled to wages for those times. Appellants now appeal the Court of Appeal's ruling.

III. ARGUMENT

A. California's Right to Provide Workers More Protection Than Provided by the Federal Laws Must be Respected.

In enacting FLSA, the U.S. Congress expressly reserved for the states the right to provide workers greater protections than those offered by federal law:

> [n]o provision of this chapter . . . shall excuse noncompliance with any . . . State law . . . establishing a minimum wage *higher* than the minimum wage established under this chapter or a maximum workweek *lower* than the maximum workweek established under this chapter . . . .

(29 U.S.C. § 218(a) emphasis added.)

Accordingly, FLSA "mandates the enforcement of a state maximum hours/overtime provision more favorable to the employee than that set by the federal act." (*Skyline Homes, Inc. v. Department of Industrial Relations*

(1985) 165 Cal.App.3d 239, 252 [211 Cal.Rptr. 792].)[1] Thus, in interpreting a provision of state wage and hour law, "federal law does not control unless it is more beneficial to employees than the state law." (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal.App.3d 21, 34 [285 Cal.Rptr. 515]; see 29 Code of Fed. Regs. § 778.5 [where state legislation different from FLSA "and does not contravene the requirements of the Fair Labor Standards Act, nothing in the act, the regulations or the interpretations announced by the (U.S. Department of Labor) should be taken to override or nullify the provisions of these laws"].)

California wage and hour law is more protective of employees than the federal law in several areas. For example, prior to 1998, California law mandated the payment of daily overtime for all hours worked in excess of eight in one day, while federal law only provided for weekly overtime for all hours worked in excess of forty in one week. (Compare IWC wage orders 1 through 15, 8 C.C.R. §§ 11010-11150(3)(A) with 29 U.S.C § 207(1).) The difference meant that a covered employee in California working four ten hour days would be paid eight hours of overtime compensation under California law, but none under federal law. Another example of more favorable California law is the calculation of the regular

[1] *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573 [59 Cal.Rptr.2d 186], *cert. den.* (1997) 520 U.S. 1428 [117 S.Ct. 1862] disapproved *Skyline* only to the extent that it concluded that the DLSE policy being challenged was not a regulation subject to the Administrative Procedures Act. The *Skyline* court's statement regarding the federal law was not affected.

rate of pay of nonexempt salaried workers for purposes of calculating overtime. Under federal law, the regular rate is determined by dividing the weekly salary by the number of hours that salary is intended to compensate. (*Overnight Motor Transp. Co. v. Missel* (1942) 316 U.S. 572, 580 [62 S.Ct. 1216].) The regular rate for a salaried worker who works a fluctuating workweek thus varies from week to week, so the more hours that employee works the less her regular rate of pay is. (*Id*.) California, on the other hand, calculates the regular rate by dividing the fixed weekly salary by not more than forty hours. (*Skyline Homes, supra,* 165 Cal.App.3d at 248-49.) Accordingly, an employee is paid more under California overtime law than under federal overtime law for the same number of overtime hours. One reason for the more favorable California law is the "penal" purpose of California's overtime laws, (*id.* at 250), in contrast to the "compensatory" purpose of overtime pay under federal law. (*Hays v. Bank of America Nat. Trust & Savings Assn.* (1945) 71 Cal.App.2d 301, 304-05 *cert. den.* (1946) 328 U.S. 834 [66 S.Ct. 979].) A third example of more favorable California law can be found in standards for the executive and administrative exemptions. Under California law, an employee must be paid overtime worked if she spends more than one-half of her time in nonexempt work. (See, e.g., IWC wage order 1, 8 C.C.R. § 11010(2)(J).) Under federal law, however, an employee spending more than one-half of her time in nonexempt work may nonetheless be exempt. (See 29 Code of Fed. Regs. § 541.103.)

As discussed below, California's "hours worked" definition manifests a similar intent to treat employees more favorably than they are treated under federal law by requiring compensation for time that may not be compensable under federal law. Thus, the Court of Appeal's reliance on federal law to interpret "hours worked" ignores FLSA's mandate by

undermining California's right to provide employees greater protections than those offered by federal law.

B. The Plain Language of the IWC Wage Order Mandates that Time Spent Subject to the Control of an Employer is "Hours Worked" for Compensation Purposes, Whether or Not the Employee is "Suffered or Permitted" to Work.

California courts have long recognized that the IWC wage orders, which are remedial in nature, "are to be liberally construed." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702-04 [166 Cal.Rptr. 331] *cert. den. sub. nom.* (1980) 449 U.S. 1029 [101 S.Ct. 602] [quoting with approval from *California Grape & Tree Fruit League v. Industrial Welfare Com.* (1969) 268 Cal.App.2d 692, 698 (74 Cal.Rptr. 313)].) They "are to be given liberal effect to promote the general object sought to be accomplished." (*Industrial Welfare Com., supra*, 27 Cal.3d at 702.) The fundamental rule of construing a wage order is ascertaining the intent of the wage order so as to effectuate the purpose of the law. (*Aguilar, supra*, 234 Cal.App.3d at p. 28-29 [citing *T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 277 (204 Cal.Rptr. 193)].) To determine the intent, courts must give effect to the usual, ordinary import of the words of the regulation and avoid making any language mere surplusage. (*Aguilar, supra,* 234 Cal.App.3d at 28-29.)

All of the current California wage orders, including the one governing the agricultural industry, wage order 14, define "hours worked" with the same expansive language that was first adopted in 1947:

> "Hours worked" means 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.

(IWC wage order 1R-47 § 2(h) attached as Exhibit B.)[2]

On its face, the definition encompasses two distinct concepts of when hours are worked: (1) when an employee's time is subject to the control of an employer; and (2) when the employee is suffered or permitted to work, whether or not required to do so.[3] Because the travel time at issue here satisfies the first test of "control," the Court of Appeal had no reason to apply the "suffer or permit" test. Despite the independent concepts behind each clause, however, the Court of Appeal decided that in order to avoid ignoring the "suffer or permit" clause of the definition, it had to be read as a limitation on the "control" clause. (*Morillion, supra*, 77 Cal.Rptr.2d at pp. 623-24.)

1. The "Control" Clause Covers Time Appellants are Subject to Respondent's Control, Even if They are not Suffered or Permitted to Work During that Time.

California's "hours worked" definition encompasses the time an employee is subject to an employer's control, even if the employee is not suffered or permitted or required to work, but in fact performs no work at all during that time. For instance, in *Aguilar, supra*, 234 Cal.App.3d at p. 30, the court held that hours worked "clearly includes time when an employee is required to be at the employer's premises and subject to the employer's control, even though the employee was allowed to sleep."

---

[2] As discussed *infra*, two of the wage orders that govern other industries supplement that general definition with explicit language providing exceptions to the "control" test. (See IWC wage orders 4 and 5, 8 C.C.R. §§ 11040, 11050.)

[3] Appellants' reading of the definition as two independent clauses is consistent with the grammatical rule that a comma be placed in front of a conjunction introducing an *independent* clause. (See Strunk and White, The Elements of Style (3d Ed. 1979) at p. 5.)

Similarly, employees who are required to remain on the employer's premises during their meal breaks must be compensated for that time. Even though an employee is relieved of all work duties for that time,

> [w]hen an employer directs, commands or restrains an employee from leaving the work place during his or her lunch hour and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control. According to [the definition of "hours worked"], that employee must be paid.

(*Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975 [38 Cal.Rptr.2d 549].)[4]

Additionally, in a myriad of other fact-specific circumstances the "control" test entitles employees to be paid for hours in which no work was suffered, permitted, or required. (See, e.g., Division of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual (October 1998) at p. 994.02.03-3 [opinion letter dated February 3, 1994 addressing changing time], at p. 1993.03.31 [opinion letter dated March 31, 1993 addressing "on-call" time -- beepers] attached to Appendix as Exhibit A.)[5]

---

[4] *Tidewater, supra*, 14 Cal.4th at p. 573 disapproved *Bono* only to the extent that it concluded that the DLSE policy being challenged was not a regulation subject to the Administrative Procedures Act. In the section of the *Bono* decision cited above, the court made an independent assessment of the commonly understood and obvious meaning of the language chosen by the IWC to define when an employee must be compensated.

[5] The DLSE's long-standing administrative interpretations of the "control" test in private party opinion letters may be entitled to judicial deference. (See *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 21 [78 Cal.Rptr.2d 1]; *Tidewater, supra,* 14 Cal.4th at 571.)

All of these examples fit into the common sense meaning of "control." The Random House Webster's Unabridged Dictionary (2nd ed. 1998) p. 442 defines "control" as "to exercise restraint or direction over; dominate; command." As the *Bono* court found, such dictionary definitions "are not obscure; they are meanings commonly attributed to the words chosen by the IWC to communicate the obvious—an employer must compensate an employee for the time during which the employer controls the employee." (*Bono, supra*, 32 Cal.App.4th at p. 975.) Plainly, Respondent exercises "restraint or direction over" Appellants, and "dominates" their travel time, by "directing" and "commanding" them, upon pain of discipline and lost wages, to assemble at a certain time and place, leave their personal vehicles behind, and ride Respondent's buses to the fields and back. Once confined to the buses, Appellants are not free, for example, to decide to take a detour to pick up breakfast before clocking in at the field, or to drop off personal mail at the post office before it closes at the end of the day. That they were only free to "engage[ ] in personal activities, such as reading," (*Morillion, supra*, 77 Cal.Rptr.2d at p. 623), and perhaps sleeping or looking out the bus window, hardly renders them free from Respondent's control. [6]

[6] Similarly, Respondent's reliance on Cal. Labor Code section 510 is misplaced. On its face, section 510 only exempts from a "day's work," "[t]ime spent commuting to and from the *first place at which an employee's presence is required by the employer shall not be considered to be part of a day's work*, when the employee commutes in a vehicle owned, leased, or subsidized by the employer used for the purpose of ridesharing . . . ." (emphasis added). The first place at which Appellants' presence is required by Respondent is at the gathering points where they must board Respondent's buses. Since the statute is clear as it is applied to Appellants, there is no reason to review the legislative history. (See *California Teachers Assn. v. Governing Bd. of Rialto United School Dist*. (1997) 14 Cal.4th 627, 634 [59 Cal.Rptr.2d 671].)

Respondent's assertion that all manner of non-work-related activities would become compensable "hours worked" under the current definition (Resp. Br. at pp. 31-33) is hyperbolic and misses the point. An employer does not exert any type of "control" over its employees simply by virtue of the fact that employees commute to their worksite. Indeed, aside from the requirement to arrive at work by a particular time, employees are entirely free to choose when they begin their commute, the mode of transportation they use for it, their route, and the number, length, and type of activities they engage in during the commute. Consistent with this, the courts as well as the DLSE have made clear that there must be a more than de minimis employer restriction on employees' time before it may be considered "hours worked." (See *supra*, pp. 8-9.)[7]

2. The "Suffer Or Permit" Clause Functions Independently Of The "Control" Clause.

"Hours worked" also covers "*all* the time the employee is suffered or permitted to work" even when they are "not required" by the employer to work. (See IWC wage order 1, 8 C.C.R. § 11010(2)(H).) The Court of Appeal mistakenly reasoned that "[i]f IWC wage order No. 14-80 meant to compensate employees for any time during which they were subject to the employer's control, then there would be no need for the definition's second clause ["suffer or permit"] . . . ." (*Morillion, supra*, 77 Cal.Rptr.2d at p. 623.)

The "suffer and permit" clause has a purpose independent of the "control test." "Sufferance" or "permission" are distinct concepts from

[7] If employees were required by the employer to shave, shower, or change into work clothes on the employment premises, though, that time would be compensable. (See, e.g., DLSE Enforcement Policies and Interpretations Manual, *supra*, at p. 1994.02.03-3 [opinion letter dated February 3, 1994 addressing changing time] attached as Exhibit A.)

those of "control" or "require." According to the Random House Webster's Unabridged Dictionary (2d Ed. 1998) at p. 1901, to "suffer" in this context means "to tolerate or allow." To "permit" means "to allow to do something . . . to allow to be done or occur . . . to tolerate; agree to . . ." (*Id.* at p. 1443.) The "suffer and permit" clause thus addresses the situation where employees arguably are not subject to their employers' control because the employers have not "directed" or "commanded" them to perform work, or otherwise controlled the employees' freedom. For example, employees often work "unauthorized overtime." Such work may take place with the employer's tacit approval or encouragement despite an employer's policy that no employees may work overtime. (See 29 Code of Fed. Regs. §§ 785.11, 785.12 and cases cited therein.) Under the plain language of the wage orders, employers must still compensate employers for such work, having suffered or permitted, but not required, those employees to do the work.

Accordingly, in light of the remedial purposes of the wage orders, there can be only one "reasonable and common sense" interpretation, (*Aguilar*, *supra*, 234 Cal.App.3d at p. 28-29), of the wage orders' "hours worked" definition. Namely, that the IWC intended employees to be paid for time during which they are subject to the "control" of their employers, whether or not they are "suffered or permitted" to work during that time.

C. The History and Structure of the Wage Orders Show That the IWC Did Not Limit Compensable Time Only to When Work is Suffered or Permitted.

The Court of Appeal's ruling also runs counter to the history and structure of the IWC wage orders, which show that the IWC never intended covered employees to be paid only when they are actually performing their work duties. Rather, the IWC expressed its intent that all time subject to an

employer's control be compensated, unless the IWC enacted a specific exemption.

1. The 1947 Amendments to the 1942 Definition of "Hours Worked" Expanded Coverage to Time Subject to an Employer's Control and Retained Coverage for Time Actually Worked.

The IWC was created in 1937 and was authorized to issue regulations governing wages and hours that would apply to various industries and occupations. In 1942, the IWC adopted its first definition of "hours worked," which required that an employee be compensated when either one of the following two tests was met:

> (1) an employee is required to be on the employer's premises, or to be on duty, or to be at a prescribed work place; or
>
> (2) an employee is suffered or permitted to work whether or not required to do so. Such time includes, but shall not be limited to, waiting time.

(IWC wage order 1-42 § 2(f) attached as Exhibit C.)

In 1947, the IWC amended California's definition of "hours worked" to the one at issue here. The IWC replaced the former part (1) of the definition with language specifying that "hours worked" covers any time an employee is "subject to the control of an employer." On its face, the new language is more expansive than the former, covering more situations than only where the employee is "required to be on the employer's premises, or to be on duty, or to be at a prescribed work place." The IWC also retained the language in former part (2) regarding "suffer or permit," while deleting the "waiting time" example.

The IWC thus not only expanded coverage under the first part of the California test, but it also maintained the two distinct tests from 1942. The

ruling below, that the only relevant test for compensable time is whether an employee is suffered or permitted to work, improperly renders the IWC's adoption of the "control" test surplusage. The change from the former first part of the "hours worked" definition to the current language regarding "control," shows that the IWC consciously expanded the first test for compensable time, rather than inadvertently made it superfluous. (See *Aguilar, supra,* 234 Cal.App.3d at pp. 28-29 [court must avoid a reading that makes any language mere surplusage].) Similarly, the fact that the IWC at the same time maintained the "suffer and permit" language as an independent clause, shows that the IWC intended to keep the second test as a distinct test of compensable time.

2. The IWC Stated Its Intention Explicitly Where It Intended a Test Other Than the "Control" or "Suffer or Permit" Test to be Used.

In certain wage orders, the IWC has expressly mandated that California's general "control" test is inapplicable, and that certain employees are entitled to be paid under a different test. In those orders, the IWC has added language to modify the general definition of "hours worked" discussed above. The wage order at issue here is *not* one of those orders.

In contrast to the wage order here, the IWC explicitly adopted federal law as part of the "hours worked" definition for employees in the health care industry. IWC wage orders 4 and 5, supplement the general definition of hours worked by adding: "Within the health care industry, the term 'hours worked' means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act." (8 C.C.R. § 11040(2)(H); 8 C.C.R. § 11050(2)(H).) The IWC thus explicitly limited health care workers' compensable time by omitting

California's "control" test, and by adopting FLSA's interpretation of "suffer or permit." Again, if the Court of Appeal's analysis of the general "hours worked" definition were correct, the IWC's inclusion of additional language for the health care industry would have been meaningless. (See *Aguilar, supra*, 234 Cal.App.3d at pp. 28-29.) If only the "suffer or permit" part of the California definition has operative effect, as the Court of Appeal found here, the IWC would not have needed to delete the "control" test in order for the health care industry to be governed only by the "suffer and permit" test.

The IWC also explicitly modified the "hours worked" definition that applies to employees required to reside on the employment premises. The general "hours worked" definition for these employees is supplemented with an additional clause, stating that "in the case of an employee who is required to reside on the employment premises, that time spent carrying out assigned duties shall be counted as hours worked." (IWC wage order 5, 8 C.C.R. § 11050 2(H).) Since an employer's residency requirement would likely provide the requisite "control" under the general "hours worked" definition, the IWC crafted a "special rule" providing that an employee under such a requirement only be paid for time actually performing work duties. (*Brewer v. Patel* (1993) 20 Cal.App.4th 1017, 1021 [25 Cal.Rptr.2d 65].) If the Court of Appeal here were correct, the IWC's explicit exception for resident managers would be a meaningless surplus.

The Court should infer that, because the IWC expressly limited the "control" test for some occupations and industries, the IWC intended not to do so in others, such as the agricultural industry.

3. The California Wage Order is Not Patterned on the Federal Portal to Portal Act of 1947, So Federal Law Is Inapplicable.

The Court of Appeal also improperly employed federal law to justify its rejection of California's "control" test. Ignoring FLSA's directive to

enforce more favorable state law, the Court of Appeal found the 1947 Portal-to-Portal Act's exceptions to compensable time under the Fair Labor Standards Act of 1938 to be instructive on the issue of whether travel time controlled by the employer may be considered "hours worked" for purposes of California law. While the Court of Appeal correctly recognized that federal and state wage and hour laws are not identical, (*Morillion, supra*, 77 Cal.Rptr.2d at p. 620) it simply elided those differences by referring generally to the "similar" thrusts of the laws. (*Id.*)

This Court does not sanction such a superficial analysis before importing federal statutory language into California law. Where this Court has used federal labor law for interpretive guidance, the California law has been clearly "modeled" after, if not identical to, the relevant federal law. (See, e.g., *Building Material and Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 658 [224 Cal.Rptr. 688] [relevant language of Cal. Govt. Code § 3504 "was taken directly from the NLRA"]; *Englund v. Chavez* (1972) 8 Cal.3d 576, 589 [105 Cal.Rptr. 521] [Labor Code § 1117 and 29 U.S.C. § 158(a)(2) both prohibit an employer from financing, interfering with, dominating or controlling a labor organization]; see also, *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550-551 [227 Cal.Rptr. 453] [language in section 3(A) of wage orders "closely modeled after (although they do not duplicate), section 7(a)(1) of the Fair Labor Standards Act of 1938"]; *Hernandez v. Mendoza* (1988) Cal.App.3d 72 [245 Cal.Rptr. 36] [same].)

Accordingly, the Court of Appeal's blanket statement that "California's wage laws are patterned on federal statutes and that cases construing those federal statutes provide persuasive guidance to [California] courts," (*Morillion, supra,* 77 Cal.Rptr.2d at p. 620) is not supported by either *Building Materials* or *Hernandez.* Since neither case addressed the Portal-to-Portal Act, the Court of Appeal should have taken a

closer look at that federal law before using it as a basis for interpreting the wage order here. Indeed, closer analysis shows the wage order's definition of "hours worked" has *not* been patterned after 29 U.S.C. section 254, part of the 1947 Portal-to-Portal Act amendments to the FLSA. In 1947, California and federal law diverged regarding when employees should be compensated. The federal law acquired certain statutory exemptions, and, as discussed above, the state regulation became more expansive.

A comparison of the history of the state and federal laws illustrates that crucial divergence. When the FLSA was enacted in 1938, it did not define "hours worked," but it did define "employ" as "suffer or permit to work." (29 U.S.C. § 203(g).) In 1946, the U.S. Supreme Court held that, under FLSA, "work" covered "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace," including travel time on the work premises to the employees' work station. (*Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 690-91 [66 S.Ct. 1187].) In 1947, however, in direct response to the *Mt. Clemens* decision, the U.S. Congress enacted a statutory exemption for certain travel time from the general rule announced in *Mt. Clemens*. That exemption excludes from FLSA requirements any time spent "walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . ." (29 U.S.C. § 254(a).) That was the same year the IWC expanded the "hours worked" definition to cover any time an employee is "subject to the control of an employer."

As the IWC chose, in 1947, to use language completely different from that previously used by the *Mt. Clemens* Court, or adopted by the U.S. Congress in the Portal to Portal Act, the federal and state laws on

compensable time compared by the Court of Appeal are nothing alike.[8] No where in the California wage order does any language appear that is similar to the federal travel exemption. Nor is there any suggestion that the IWC's adoption of the "control" test was meant to mirror the Portal to Portal Act's travel exemption. The Court of Appeal's reliance on federal law is thus completely unwarranted and must be rejected.

Given the history and structure of the wage orders, it becomes even clearer that the Court of Appeal erred in its interpretation of "hours worked." The IWC's enactment of the expansive "control" test, and its specific exemptions to the "control" test in limited industries and occupations, belies the Court of Appeal's attempt to adopt inapplicable federal law as a restriction on the "control" test in general. The Court of Appeal's erroneous decision should not stand.

///

///

///

///

///

///

///

///

///

///

///

///

///

[8] As discussed *supra*, at pp. 14-15, federal law on compensable time applies to California law only in the health care industry.

IV. CONCLUSION

For the foregoing reasons, amici curiae respectfully urge this Court to reverse the Court of Appeal's decision.

Dated: _____

Respectfully submitted,

SAPERSTEIN, GOLDSTEIN, DEMCHAK & BALLER

By: _____

Laura L. Ho
CA Bar #173179

Attorneys for Amici Curiae
Asian Law Caucus, Inc.
East San Jose Community Law Center
Employment Law Center – a Project of the Legal Aid Society of San Francisco
La Raza Centro Legal, Inc.
Women's Employment Rights Clinic – Golden Gate University School of Law