Case No. S106718

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SAV-ON DRUG STORES, INC.,
Petitioner-Defendant,
v.
SUPERIOR COURT FOR LOS ANGELES COUNTY,
Respondent
ROBERT ROCHER, et al.
Real Parties In Interest-Plaintiffs.

Second District Court of Appeal No. B152628
LASC No. BC227551

BRIEF OF *AMICI CURIAE* IN SUPPORT OF REAL PARTIES ROBERT ROCHER, ET AL.

David Borgen, #099354
Joshua Konecky, #182897
Darci E. Burrell, #180467
GOLDSTEIN, DEMCHAK, BALLER, BORGEN, & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (fax)

Brad Seligman, #083838
THE IMPACT FUND
125 University Avenue
Berkeley, CA 94710-1616
(510) 845-3473
(510) 845-3654 (fax)

Attorneys for Amici Curiae The Impact Fund, California Rural Legal Assistance Foundation, The Legal Aid Society – Employment Law Center, Mexican American Legal Defense and Educational Fund, Asian Law Caucus, Asian Pacific American Legal Center of Southern California, La Raza Centrol Legal, Inc., Women's Employment Rights Clinic of Golden Gate University School of Law, Bet Tzedek Legal Services, East San Jose Community Law Center, Professor Gary Blasi, University of California, Los Angeles School of Law, Professor Joseph Grodin, University of California, Hastings College of Law

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I. INTRODUCTION

Amici Curiae are organizations, scholars and professionals representing low and moderate income individuals who often cannot safeguard their fundamental labor and antidiscrimination protections without the class action device. These workers frequently confront widespread minimum wage and overtime violations. For example, *amici* regularly encounter workers who are routinely required to work excessive hours without overtime pay because they have been misclassified as exempt by their employers. Despite these violations and others, *amici's* clients lack the financial and legal resources necessary to enforce their rights through individual lawsuits. For them, meaningful enforcement of broad, remedial statutes, such as California's minimum wage and overtime laws, depends upon the availability and flexibility of class action procedures.

The Court of Appeal below placed rigid and unprecedented restrictions on the authority of trial courts to employ these critical procedures in the adjudication of systemic employment policies. It did so under the mistaken presumption that California class action jurisprudence and this Court's decision in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 (*Ramirez*), require all class members to show that they have been uniformly denied their rights in order to maintain a class action.

Nothing in California class action law requires a showing that all class members be "uniformly" or identically affected by a defendant's allegedly illegal conduct. Rather, at the class certification stage plaintiffs must show that the class shares a community of interest in the questions of law or fact involved such that issues that must be litigated separately are not too numerous or substantial.

The Court of Appeal improperly assumed that class certification requires a showing that all issues for trial can be resolved on a common, uniform basis. In fact, it is well established that class certification is appropriate even where individual issues such as ultimate liability to specific class members, their entitlement to relief and extent of damages must also be adjudicated. Courts most commonly address such individual issues after resolving core class issues – such as the alleged existence of a common illegal policy or practice – at the initial liability stage of the action. In the second, or remedial stage, class members are entitled to a rebuttable presumption that they were subjected to the illegal practice and entitled to individual relief.

California and federal courts have repeatedly held that at the initial stage of the case, class liability can be established with representative, statistical, or other aggregate forms of evidence showing that a generally applicable policy commonly violates the rights of individuals in a class. In overtime exemption cases, this evidence can include representative testimony from workers and supervisors, generally applicable job descriptions and performance criteria, expert testimony, surveys, samplings or statistical analyses, and other forms of common proof, which demonstrate that an exemption policy generally applied throughout a job category has the effect of denying numerous workers in that category their entitlement to overtime wages.

As just one example, aggregate evidence might show a pattern that employees in a class spend more than 50% of their time performing non-exempt work, even if they do not spend identical amounts of time on their non-exempt tasks. Common evidence might also establish facts making it unnecessary to quantify or compare job duties at all, such as proof that the

employees work in a non-exempt "production" role for the employer, or that they do not meet the "salary basis test" to qualify for an exemption in the first place. Moreover, many overtime exemption cases turn on common legal questions which predominate through each class member's claim, such as which duties are exempt and non-exempt. The Court of Appeal's decision failed to account for these and the many other common questions of law or fact which often arise in overtime pay cases.

The Court of Appeal further erred when it read *Ramirez*, an individual case, to require a class plaintiff to meet an extraordinarily high "uniformity" standard, instead of merely showing a community of interest among class members. *Ramirez* was not a class action and did not purport to discuss class actions, much less establish the procedures for class certification of wage and hour claims or the management of class claims for overtime compensation. Nothing in *Ramirez* suggests that the established model and criteria for class actions do not apply, or that a heightened standard is required for class certification of overtime cases. No special class action rule flows from the "fact intensive" analysis articulated by the *Ramirez* court. Other types of cases, including fraud and discrimination claims, are just as fact intensive, yet the manner of proof in such individual cases does not dictate the approach to class certification or liability.

Contrary to the approach taken by the Court of Appeal, well established class action procedures and standards apply fully to violations of overtime laws. California's strong public policy for broad enforcement of its minimum wage and overtime protections also requires continued availability of the class action device. Accordingly, *amici* respectfully request that the trial court's class certification order be affirmed.

II. CLASS CERTIFICATION REQUIRES A COMMUNITY OF INTEREST AMONG CLASS MEMBERS, NOT A SHOWING THAT DEFENDANT'S CONDUCT AFFECTED ALL CLASS MEMBERS IDENTICALLY OR UNIFORMLY.

A. "Community of Interest" Entails Predominance of Common Questions, Typicality and Adequacy of Representation, Not Uniformity of Class Member Claims.

The Court of Appeal's decision relied on the erroneous legal assumption that a trial court cannot certify a class action unless the defendant's ultimate liability to each class member is identical:

> The fact that defendant has a common policy of treating all its OM's and AM's as exempt does not necessarily mean the common policy, when challenged in court, *is either right as to all members of the class or wrong as to all members of the class*. * * * Plaintiffs failed to sustain their burden to show, to the contrary, that the operations in defendant's stores and the amounts of time spent by OM's and AM's on exempt or nonexempt activities were so *uniform* as to be appropriate for class-wide determination.

(Slip op. at p. 8 & 11, *SavOn Drug Stores, Inc. v. Superior Court* (2002) 97 Cal.App.4th 1070 [emphasis added].) This holding directly conflicts with well established criteria for deciding class certification motions. Class certification does not demand uniformity among class members, but instead evaluates whether common questions of law or fact predominate, whether the claims of the class representatives are typical of the class, and whether the class representatives can adequately represent the class. (*See, e.g.*, *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) This basic "community of interest" requirement focuses on whether class members share a common interest in the resolution of questions of law and fact, not

on whether class members are identically affected by defendant's conduct. (*Daar v. Yellow Cab Co., supra*, 67 Cal.2d at 706-707.)[1]

Under the established and flexible class certification standards, there can be factual or legal differences between class members so long as there is a generally applicable dispute which concerns the outcome of the litigation. (*Richmond v. Dart Industries Inc.* (1981) 29 Cal.3d 462, 473.) The ultimate question is whether the issue(s) which may be jointly tried are either so numerous, *or* substantial (or both), when compared to those requiring separate adjudication (and any class action has issues requiring separate adjudications), that class adjudication would benefit the judicial process and the litigants. (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 423 [232 Cal.Rptr. 602] [citing *Collins v. Rocha* (1972) 7 Cal.3d 232, 238]; *see also Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815-816 [stating the issue conversely as whether "the questions which must be litigated separately are not numerous or substantial"]; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707.) These benefits include the avoidance of re-litigating issues, reducing the risk of inconsistent judgments and removing the barriers to individuals asserting their rights. (*Vasquez v. Superior Court*, *supra*, 4 Cal.3d at 808, 809-810; *Richmond v. Dart*

[1] Apparently recognizing that the standard set by the Court of Appeal does not comply with established criteria, *SavOn's* Answer argues that the Court did not really mean what it wrote. (*See* Answer Brief on the Merits, at pp. 33-34.) The Court of Appeal's decision, however, uses the phrases "uniform" and "identical" throughout the opinion to describe its view of how similar the work activities of the putative class members must be to achieve class certification. (Slip op. at pp. 5, 11, 12, 13, 15, 16 & 17, *SavOn Drug Stores, Inc. v. Superior Court*, *supra*, 97 Cal.App.4th 1070.)

Industries, Inc., supra, 29 Cal.3d at 469; *Daar v. Yellow Cab Co., supra*, 67 Cal.2d at 715-716.)[2]

B. Class Action Criteria Recognize that Particularized Issues Pertaining to Individual Class Members Will Commonly Arise and Can Be Handled through Well-Established Procedures at Subsequent Stages of the Proceedings.

In the seminal *Daar* case, this Court observed: "The fact that each individual ultimately must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper." (*Id.* at p. 713.) Building on the principles announced in *Daar*, this Court has similarly held that class members need not seek common relief for the litigation to proceed as a class action. (*Richmond v. Dart Industries, Inc., supra*, 29 Cal.3d at 477 [citing *Daar, supra*, 67 Cal.2d at 707-13].) "[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. . . in most circumstances a court can devise remedial procedures which channel the individual determinations that need

[2] Citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 [115 Cal.Rptr. 797], Defendant argues that class certification is not appropriate because individual issues of liability abound. (*See* Answer Brief on the Merits, at pp. 29-30.) SavOn fails to put the *City of San Jose* case into context. This Court has previously observed the unusually individualized nature of the facts in that case, including the inherent uniqueness of real property parcels and several other complexities. (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 393 [134 Cal.Rptr. 388]; *City of San Jose v. Superior Court, supra*, 12 Cal.3d at pp. 460-462.) Moreover, "incorrect focusing [at the certification stage] on the number of substantial issues potentially involved or when they will arise may in doubtful cases serve to prematurely foreclose a legitimate class action which might more properly be limited or eliminated by decertification in later proceedings on the merits." (*Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1281 [242 Cal.Rptr. 339].)

to be made through existing administrative forums." (*Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266.)

Trial courts have the authority to certify a class action in order to evaluate the legality of a generally applicable policy even if the challenged policy ultimately violates the rights of only some of the class members. (*See, e.g., Reyes v. Board of Supervisors, supra*, 196 Cal.App.3d 1263.) In *Reyes*, the plaintiffs sought class certification to challenge a policy denying benefits to 15,000 general relief recipients, even though the policy violated the rights of only some of those members of the class. (*Ibid*. at pp. 1268, 1269 & 1277.) The defendant argued that certification was improper because "the validity of its actions as to any specific recipient must be individually factually determined and thus it [was] possible the challenged [] process may have been invalidly applied to only a few members of the broadly defined class." (*Ibid* at p. 1272.)

After finding an ascertainable class whose members could be identified through flexible procedures at the remedial stage (*id.* at 1276), the Court of Appeal concluded that there was a community of interest because the lawsuit addressed the legality of a single policy. (*Ibid.* at p. 1277.) The Court explained:

> Although we grant the likelihood that many within the presently defined class may have been properly sanctioned . . . we do not believe such a likelihood precludes class certification . . . the redefining and winnowing down of the class at the remedial stage [through tailored notice procedures] resolves any perceived inadequacy in the definition of the proposed class and any allegation of lack of commonality of interest as to law and fact.

(*Reyes v. Board of Supervisors, supra*, at p. 1278, n.9.)

A generally applicable policy forms the basis of a class action even where liability to each class member varies, because many individual questions (including those as fundamental as entitlement to relief) can be handled on a case-by-case basis later in the litigation. (*Reyes,* at p. 1278 ["[I]t is firmly established that a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages."] [citations and internal quotations omitted]; *see also Employment Development Dept. v. Superior Court* , *supra*, 30 Cal.3d at 256, 265-266; *Lazar v. Hertz Corp.* (1983) 143 Cal.App.3d 128, 141 [191 Cal.Rptr. 849] [evidence that some consumers did not purchase the product subject to defendant's alleged policy of overcharging did not affect commonality or even the presumption of class-wide reliance, but rather signified only that those customers would ultimately be excluded from the class].)[3]

In analogous federal decisions, the United States Supreme Court has made clear that trial courts may determine the existence of class wide liability even when the defendant presents evidence that the practices do not deprive particular employees within the class of their legal rights. (*International Brotherhood of Teamsters v. United States* (1977) 431 U.S.

[3] A standard requiring the plaintiffs to demonstrate that the policy affected each putative class member in a uniform or identical fashion would also force them to identify class members at the certification stage so that their claims could be evaluated. This would conflict with basic precedent postponing the identification of class members until a later phase in the litigation. (*Reyes,* 196 Cal.App.3d at pp. 1274-75; *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 419.) It would further require the court to evaluate the merits of the class member claims, in contrast to this Court's recent holding in *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 443.

324, 343, n.24 [97 S.Ct. 1843, 1858, n.24] (*Teamsters)*; *Franks v. Bowman Transportation Company* (1976) 424 U.S. 747, 772 [96 S.Ct. 1251, 1268] (*Franks*); *Vizcaino v. United States District Court* (9th Cir. 1999) 173 F.3d 713, 722 (*Vizcaino*) ["These persons are linked by this common complaint, and the possibility that some may fail to prevail on their individual claims will not defeat class membership."] [quoting *Forbush v. J.C. Penney Co.* (5th Cir. 1993) 994 F.2d 1101, 1105].) Indeed, basic principles of equity empower trial courts to wait until after resolving class-wide issues regarding an employer's generally applicable policies and practices, before evaluating on a case-by-case basis which individual employees are actually victims of the allegedly unlawful policy or practice. (*Teamsters, supra,* 431 U.S. at p. 372; *Franks, supra,* 424 U.S. at 772-773; *see also Thiessen v. General Electric Capital Corp.* (2001) 267 F.3d 1095, 1106-07 (*Thiessen*).)

C. Trial Courts Have Many Procedural Tools at Their Disposal To Effectively Adjudicate Common Issues on a Class Basis Despite Variations Among the Individual Class Member Claims.

This Court recently stressed that trial courts must be accorded the flexibility to adopt innovative procedures to adjudicate class actions which will be fair to the litigants and expedient in serving the judicial process. (*Linder v. Thrifty Oil Co., supra,* 23 Cal.4th 429 at pp. 440, 443; *see also Vasquez, supra,* 4 Cal.3d at 821.) To the extent that there are differences among class members – even ones which would be significant enough to create antagonism or conflict – trial courts must consider an array of procedural tools at their disposal to maintain the case as a class action before denying class certification outright. (*Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d at 471 [citing 7 Wright & Miller, Federal Practice and Procedure (1972) Civil, § 1768, pp. 638-639; *Developments – Class*

Actions (1976) 89 Harv.L.Rev. 1318, 1490-1492].) These procedural tools include separating class questions from individual issues, certifying limited issues rather than the entire case, dividing the class into subclasses, allowing the plaintiffs to represent a smaller class, allowing for intervention of the minority interests or employing other mechanisms. (*Id.*; *Vasquez, supra*, 4 Cal.3d at 821; *see also* Cal. Rule of Court 1855(b)[reflecting judicial authority to certify limited issues and subclasses]; *and see* Fed. R. Civ. P. 23(c)[analogous federal procedures permitting subclasses and conditional certification].)[4]

Given the continuing importance of the class action device to the enforcement of important statutory and other civil rights -- including the broad, remedial aims of the minimum wage and overtime laws (*see* Section VI.A., *infra*) -- and the wide array of procedural tools available to effectively maintain such actions, uncertainties concerning a motion for class certification should be resolved in favor of granting the motion. (*See, e.g., Vasquez, supra*, 4 Cal.3d at 810, 821; *Richmond v. Dart Industries, Inc., supra*, 29 Cal.3d at 473.)

[4] As this Court recognized over twenty years ago: "Most differences in situation or interest among class members . . . should not bar class suit. If the factual circumstances underlying class members' claims differ . . . the trial judge, through use of techniques like subclassing or intervention, may incorporate the class differences into the litigative process, and give all class members their due in deciding what is the proper outcome of the litigation." (*Richmond v. Dart Industries, Inc., supra*, 29 Cal.3d at 473 [citations omitted].)

III. COURTS HAVE DEVELOPED A BIFURCATED APPROACH TO CLASS ACTIONS WHICH FOCUSES THE INITIAL STAGE OF THE ACTION ON COMMON ISSUES

Trial courts can accommodate variations among class member claims and particularities by trying class actions in two or more phases. Under this framework, often referred to as the *Teamsters* approach, the first phase focuses not on whether any individual class members can prove that the challenged policy provides them with a meritorious individual claim, but on whether the defendant engaged in unlawful conduct on a class-wide basis. The *Teamsters* Court explained that this initial showing in a discrimination case requires a plaintiff "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure the regular rather than the unusual practice." (*Ibid.* at p. 336.) This initial stage does not require the plaintiff "to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." (*Ibid.* at p. 360.)

If plaintiffs make this showing, then the court "must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." (*Id.* at p. 361.) At this subsequent remedial stage, a rebuttable presumption arises that each class member was subject to the unlawful practice. (*Id.* at p. 359 & n.45 [citing *Franks*, *supra*, 424 U.S. at p. 772] [proof of discriminatory policy shifts burden to defendant to show particular individuals did not receive the job because they lacked qualifications or there was no vacancy]; *Thiessen, supra,* 267 F.3d 1095,

1106-1107 [same]; *cf. Vasquez, supra*, 4 Cal.3d at 813 [proof of standard selling practices raises rebuttable presumption of class-wide reliance]; *Lazar v. Hertz Corp., supra*, 143 Cal.App.3d 128, 140 [same].) [5]

The flexible, two phase approach permits trial courts to address class issues before considering whether individual class members are eligible for relief. (*Teamsters, supra*, 431 U.S. at p. 359 [citing *Franks, supra*, 424 U.S. at p. 772 [presumption of liability created without showing that individual class members qualified for the job or that a vacancy is available]; *Thiessen, supra*, 267 F.3d at p. 1106; *see also Stephens v. Montgomery Ward, supra*, 193 Cal.App.3d at p. 420; *Vasquez, supra*, 4 Cal.3d at pp. 808 & 815; *Daar v. Yellow Cab Co., supra*, 67 Cal.2d at pp. 707, 713.)

The remedial phase of the class action trial, which addresses actual liability to the class members, often is addressed through individual proceedings. (*See, e.g., Thiessen, supra,* 267 F.3d at p. 1106, n.7 ["The second stage of a pattern and practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiffs' favor."] [quoting *Newberg on Class Actions*, § 4.17 (3d ed. 1992)]; *Teamsters, supra*, 431 U.S. at pp. 371-372 [explaining that the

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[5] Without citation to authority other than *Ramirez*, Defendant's Answer blithely suggests that *Teamsters* is inapplicable here because evaluating an employee's job activities is more individualized than assessing an employee's job qualifications, or the many other particular factors relevant in an individual discrimination case. (*See* Defendant's Answer Brief on the Merits at 37-38.) There is no basis to presume one is more fact-specific than the other. Moreover, defendant fails to address that the *Teamsters* approach corresponds fully with the many California authorities distinguishing between the initial class wide determinations and the subsequent individual claims for relief. (*See* preceding text and Section II.B., *supra*.)

court's role during the second phase of the proceedings is to identify the victims of the unlawful practice, balance the equities and adjust the remedial interests]; *Richmond v. Dart Industries, supra*, 29 Cal.3d at pp. 471 & 473; *Daar v. Yellow Cab Co., supra*, 67 Cal.2d at p. 709 ["only at such final stage do the individual interests become critical…."]; 5 H. Newberg, *Class Actions* (3d ed. 1992) § 24.123, at pp. 24-414-416.)

This two stage process highlights the efficiency of class wide adjudication of the defendant's liability for violating the law, while allowing individual determinations, if necessary. As we next explain, this approach is also wholly consistent with *Ramirez* – as well as the burden that decision places on employers to demonstrate the affirmative exemption defense.

IV. *RAMIREZ* DOES NOT CHANGE OR HEIGHTEN CLASS CERTIFICATION STANDARDS.

A. The Burdens of Proof Ordinarily Applicable to Claims and Defenses in Individual Cases Are Distinct from Those in the Class Liability Analysis.

Ramirez addresses the analysis for the outside sales exemption in an individual action. It does not address class issues, or suggest that class certification is either inappropriate, or subject to specialized standards in an overtime case. The structure and burdens of proof in the class liability phase of a class action are often wholly distinct from those applicable to individual lawsuits. While the focus of an individual case is on "individual employment decisions," the initial phase of a class action revolves around the alleged "pattern of [unlawful] decisionmaking." (*Thiessen, supra*, 267 F.3d at p. 1106 [quoting *Cooper Fed. Reserve Bank of Richmond* (1984) 467 U.S. 867, 876 (104 S.Ct. 2794)].)

In the employment discrimination context, for example, the plaintiffs do not need to satisfy the burden of proof for individual claims (including prima facie case requirements first articulated in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817]) to meet their burden of showing a prima facie case for class liability. (*Teamsters, supra,* 431 U.S. at pp. 357-358, 360-361 & n.46; *see also* 1 Larson *Employment Discrimination* § 8.01[4] (2d ed.); *and see Vuyanich v. Republic Nat. Bank* (N.D. Tex. 1981) 521 F. Supp. 656, 661 ["In a complex class action, utilizing statistical proof and counterproof, the value of the [*McDonnell Douglas*] sequence . . . is about as relevant as a minuet is to a thermonuclear battle."], *vacated on other grounds,* 723 F.2d 1195 (5th Cir.), *cert. denied* (1984) 469 U.S. 1073 [105 S.Ct. 567]; *see also Stephens v. Montgomery Ward, supra,* 193 Cal.App.3d at 421.) Similarly, consumer fraud cases can be tried as class actions under different burdens of proof for reliance than otherwise applicable to individual fraud cases. (*See, e.g., Vasquez, supra,* 4 Cal.3d at p. 813; *Lazar v. Hertz Corp., supra,* 143 Cal.App.3d at p. 140.)

The different burdens of proof between individual and class claims mean that trial courts need not require uniformity, or even commonality, in the affirmative defenses across the individual class member claims as a necessary prerequisite for class certification:

> Although it is true that defendants asserted 'highly individualized' defenses to each of the instances of individual discrimination asserted by plaintiffs, those defenses would not become the focal point until the second stage of trial and could be dealt with in a series of individual trials, if necessary.

(*Thiessen, supra*, 267 F.3d at p. 1107; *see also Teamsters, supra,* 431 U.S. at pp. 360-361 & n.46.) As in class actions for discrimination and fraud, there is no requirement that courts assess the employer's affirmative exemption defense on a case-by-case basis as to each class member before certifying a class action challenging the legality of a uniform policy to withhold overtime pay.

B. Nothing in *Ramirez* Limits the Methods of Proof Ordinarily Applicable to Class Actions.

As an individual action, *Ramirez* does not speak to and in no way limits the kind of proof which plaintiffs can submit to demonstrate a class-wide violation at the initial stage of an action. As discussed below, there is a variety of evidence relevant to class determinations, including: job surveys; case sampling; statistical analyses; company documents describing job duties, expectations and other policies; and representative testimony from employees, supervisors and management. (*See, e.g., Stephens v. Montgomery Ward, supra*, 193 Cal.App.3d at p. 421; *Reyes v. Board of Supervisors, supra*, 196 Cal.App.3d at p. 1279; *Teamsters, supra,* 431 U.S. at 337-340; *and see Vizcaino, supra*, 173 F.3d 713, 724 [observing that facts within the employer's knowledge permit "categorical judgments about the 'employee' status of claimants with similar job descriptions" in class action on behalf of independent contractors seeking status as common law employees] [citations omitted].) It is wholly consistent with *Ramirez* – and the other established authorities mandating broad enforcement of the minimum wage and hour laws, *see Ramirez, supra*, 20 Cal.4th at pp. 794-95 [citations omitted]; *and see* Section VI, *infra* – to permit workers and the courts the opportunity to employ these tools to evaluate systemic policies.

An employer's attempt to use its narrow exemption defense as a sword to defeat the community of interest showing conflicts directly with class action burden-shifting procedures as well as *Ramirez's* own burden of proof analysis. *Ramirez* teaches that employers must impose exemptions sparingly and only after evaluating the reasonable expectations of the job for which the exemption is applied. (*Ramirez, supra*, 20 Cal.4th at p. 802.) When an employer nonetheless imposes a broad exemption policy on all employees in a job category, without first individually analyzing their work activities, that employer cannot then argue that its failure to undertake an individualized investigation before implementing the policy makes it too difficult for the court to maintain a class action.

When the defendant in *Reyes* argued that it would be too complicated to determine through a class action which class members' rights were violated by a defendant's decision to implement a policy without first taking steps to ensure that it would be fairly applied to all class members, the Court observed:

> As the Plaintiffs aptly point out, it is precisely the County's sanctioning process which precludes the early determination of whether a past relief recipient was sanctioned for willful or nonwillful conduct because it never evaluated a recipient's conduct in those terms. Indeed, all terminated past recipients had the right to have legally proper standards apply.

(*Reyes v. Board of Supervisors, supra,* 196 Cal.App.3d at p. 1277, n.9.) Similarly, while an employer's potentially unlawful decision to classify an entire group of employees as exempt may by happenstance end up not violating the rights of all the members in the group, it can nonetheless help to create a community of interest among the class. (*Ibid.*) Under these circumstances, courts have the tools and flexibility to handle procedural

difficulties that may arise as a result of the employer's decision to implement the policy without first assessing its application to class members on an individualized basis. (*See, e.g.*, *ibid* at p. 1280; *Teamsters, supra*, 431 U.S. at pp. 371-372.)[6]

V. COURTS CAN DETERMINE WHETHER THERE IS AN UNLAWFUL POLICY OR PRACTICE AT THE CLASS LIABILITY STAGE BY RESOLVING COMMON LEGAL QUESTIONS AND CONSIDERING AGGREGATE PROOF.

The Court of Appeal's "wrong as to all members of the class" standard of uniformity incorrectly assumes that a class adjudication is nothing more than the sum of thousands of individual trials. At the initial phase of overtime exemption class actions, however, there are often many common legal questions and factual issues, amenable to common forms of proof, addressing whether the employer's practice of denying overtime results in violations which are routine, rather than isolated or sporadic.

A. Overtime Exemption Cases Often Have Common Questions of Law Which Are Substantial.

Some overtime exemption cases present common legal questions as to whether or not the duties at issue are exempt in nature. Indeed, before the trial court can determine whether or not the employer can demonstrate an exemption for any particular employee, it must first determine as a matter of law which activities are considered exempt and which are

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[6] If trial courts had to determine whether or not the application of the exemption defense would have the same result for each class member before certifying the class, they would find themselves in the unacceptable position of having to assess the merits of the individual claims during the class certification stage. Again, such a result would conflict with this Court's recent holding in *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th 429, that a trial court generally cannot require the plaintiffs to demonstrate the merits of the claims as a condition for class certification. (*Ibid.* at 443.)

considered non-exempt. (*Ramirez, supra*, 20 Cal.4th at p. 803, n.5.) The question of whether an exemption applies can in some cases be a pure question of law, and at the very least a mixed question of law and fact. (*Ramirez, supra,* 20 Cal.4th at p. 794 [citing *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888].) These questions can be resolved on a class-wide basis regardless of other particularities that might exist among the claims.

Beyond exemption classification cases, other practices which may violate minimum wage and overtime protections may also present legal questions lending themselves to class certification. (*See, e.g., Los Angeles Fire Police Protective League v. City of Los Angeles* (1972) 23 Cal.App.3d 6 [99 Cal.Rptr. 908] [holding that whether lunch periods constitute on-duty time given constraints generally applied to employees during those periods was a common question of law supporting class certification]; *Vizcaino, supra*, 173 F.3d at p. 722 ["ultimate success may turn on resolution of a disputed legal issue" concerning definition of "common law employee" applicable to class members.)

If the trial courts are not allowed to certify full or partial class actions based on common legal issues, such as which tasks are considered exempt under *Ramirez*, common legal issues pertaining to an employer's generally applicable practice will need to be litigated over and over again in a multitude of different lawsuits. Forcing separate actions in this manner would drain substantial resources from the courts, exponentially expand the risk of conflicting rulings, and further discourage already precariously positioned workers (including the marginalized workers represented by *amici*) from bringing meritorious claims. For those cases in which the common legal question, either by itself or when combined with other

common issues, would predominate throughout each class member's claim, these unfortunate results would directly conflict with the underlying purpose of the class action device.

B. There Are Numerous Common Factual Issues in Many Overtime Exemption Cases Which Lend Themselves to Representative Proof.

State and federal courts have repeatedly affirmed that plaintiffs can establish class-wide liability through the presentation of an array of common evidence, including: employer admissions; statistical analyses; surveys; job evaluations; expert witnesses; corporate documents; defense witnesses describing job duties and workplace expectations; and anecdotal evidence from a sampling of the plaintiffs and putative class members themselves. (*See, e.g., Reyes v. Board of Supervisors, supra*, 196 Cal.App.3d at p. 1279 [rejecting defendant's argument that legality of policy must be determined based on facts particular to each individual's case, and observing that class-wide liability can instead be proved by reviewing the defendant's policies, testimony of its employees regarding the standard practices, and a sampling of representative cases]; *Stephens v. Montgomery Ward, supra*, 193 Cal.App.3d at p. 419 [citations omitted].)

In overtime exemption and other employment cases, the employer's own job descriptions can often provide valuable information to assist the court in determining whether a practice of denying overtime to employees performing work within that job description might be presumed to violate minimum wage and overtime protections. (*See, e.g., Casas v. Conseco Finance Corp.* (D. Minn. 2002) 2002 WL 507059, *9 [job descriptions for a class of employees denied overtime pay used to evaluate administrative

exemption defense on a class-wide basis for nearly 2900 current and former employees in several locally run offices of the corporation].)

Furthermore, courts can often consider statistical or other expert evidence to evaluate whether a common practice might give rise to class-wide liability. (*Stephens v. Montgomery Ward*, *supra*, 193 Cal.App.3d at p. 419 [citing *Daar v. Yellow Cab Co.*, *supra*, 67 Cal.2d 695, 706 and other cases]; *Teamsters*, *supra*, 431 U.S. at pp. 337-340.) In *Stephens*, the plaintiff could demonstrate an ascertainable class and community of interest through statistical evidence, even though she could not identify other similarly situated employees at her deposition and did not provide declarations from other women aggrieved by the common discriminatory practice. (*Stephens v. Montgomery Ward*, *supra*, 193 Cal.App.3d at pp. 419, 422-423.)[7]

In addition to written job descriptions and expert evidence, testimony and other documents from the employer can further shed light on the extent to which a policy or practice might violate the rights of the different class members. In *Bell v. Farmers Insurance Exchange*, for example, the trial and appellate courts could resolve the legality of an administrative exemption on a class basis by reviewing the undisputed

[7] Other common factors supporting class certification in *Stephens* included the existence of a company-wide appraisal system, standardized criteria for hiring personnel, wage rates determined at the corporate level and other goals set at company headquarters. (*Id.* at p. 421.) Employers in overtime exemption cases often have many of these same centralized practices. Like in the employment discrimination field or any other class action, the trial court in an overtime exemption case should not be precluded from considering whether such corporate-wide practices, tendencies and expectations – obtained from statistical data, surveys or other representative testimony – create class-wide issues which would predominate over each class member's individual claim.

facts, written documentation, and testimony from the defendant's managers describing the nature of the employer's business and the role of its various employees. (*Bell v. Farmers Insurance Exchange* (2001) 87 Cal.App.4th 805, 824-828 [105 Cal.Rptr.2d 59] (*Bell*).)[8] Based on this representative evidence, the *Bell* courts were able evaluate the claims for overtime and the administrative exemption defense on a class basis without having to make a specific determination of whether the precise duties of the employees satisfied the additional requirements for establishing the administrative exemption under California law – that is, the primarily-engaged-in and/or the independent judgment and discretion requirements. (*Id.* at p. 829.) The *Bell* decision is no different than class actions in other substantive areas of law with respect to the use of corporate documents and testimony from the defendant's witness to establish class liability. (*See, e.g., Stephens v. Montgomery Ward, supra,* 193 Cal.App.3d at pp. 419, 421.)

As in *Bell*, there are many administrative and executive exemption class action scenarios which do not require an analysis of the individual job

[8] The Court of Appeal in *Bell* affirmed summary adjudication in favor of a class of claims adjusters on the issue of whether the employer had met its burden of showing that they fell within the exemption for "persons employed in administrative, executive, or professional capacities." (*See Bell, supra,* 87 Cal.App.4th at 808.) The Court based its decision on the administrative/production worker dichotomy, which it found dispositive given the record, for purposes of determining whether the employees in that case were engaged in a non-exempt production role rather than in an "administrative capacity." (*Ibid.* at pp. 819-823 [citing cases employing comparable analysis].) That dichotomy generally defines administrative employees (exempt from overtime) as those performing work directly related to management policies or general business operations, and production employees (nonexempt) as those who primarily produce the goods or deliver the services the employer's enterprise exists to produce. (*Ibid.* at p. 820 [citations omitted].)

duties on a case-by-case basis in order to determine whether the exemption policy is unlawful as applied to the class. For instance, there may be cases in which the salary requirements for establishing the administrative exemption are not met by workers subjected to a common policy of not paying overtime. (*See, e.g., Belcher v. Shoney's, Inc.* (M.D. Tenn. 1998) 30 F.Supp.2d 1010; *In re Wal-Mart Stores* (D. Colo. 1999) 58 F.Supp.2d 1219.) Even where courts quantify and compare exempt and non-exempt tasks on a class basis, the question is not whether all class members spend all their time on the same tasks, but rather whether there is a practice or pattern of class members spending more than 50% of their time on non-exempt duties. These class questions are amenable to various forms of representative proof.

Finally, the federal courts have also recognized that the job duties and activities of employees within a class can be determined on an aggregate basis using common forms of proof. (*See, e.g., Casas v. Conseco Finance Corp., supra*, 2002 WL 507059 at pp. 10-11 [court able to reject outside sales and administrative exemption defenses for a class of nearly 2900 employees based on testimony of senior vice president concerning job duties and activities of the employees]; *Harris v. Dist. of Columbia* (D.D.C. 1990) 741 F. Supp. 254 [court adjudicated, on an aggregate basis, the job duties of numerous employees in a particular job category by considering only representational evidence from a subset of employees and generalizing from this evidence to rule that the entire group of employees in the job category was non-exempt]; *Dalheim v. KDFW-TV* (5th Cir. 1990) 918 F.2d 1220 [court assessed the exempt status of four different job categories based on representational evidence from a subset within each group]; *Donovan v. Burger King Corp.* (1st Cir. 1982) 672 F.2d 221 [affirming

lower court's decision to evaluate federal executive overtime exemptions through evidence limited to a small subset of the employer's restaurant chain and a limited number of witnesses from each of those restaurants]; *Secretary of Labor v. DeSisto* (1st Cir. 1991) 929 F.2d 789, 792-793 [Secretary of Labor can rely on testimony and evidence from representative employees to prove violations]; *and see* overtime exemption cases cited in note 11 *infra*.)

The foregoing cases represent only a sample of the kinds of aggregate evidence which trial courts can use to assess class liability not just in overtime exemption cases, but also in other minimum wage and overtime matters, as well as in a wide variety of class actions in entirely different areas of substantive law. With respect to overtime exemption cases in particular, such aggregate evidence can, depending upon the facts of the case, resolve any number of issues common to the class, including by way of example:

1. Whether the class of employees generally works overtime hours;

2. Whether the class of employees generally does not receive overtime pay;[9]

3. Whether there is an exemption policy which is generally or uniformly applied;

4. The basis of whatever good faith defense the employer might make (if there is a uniform exemption policy the question of

[9] The initial fact that class members are similarly situated by virtue of working overtime hours without overtime pay itself creates a common question which, although perhaps not in itself sufficient to establish a "predominance," can nevertheless weigh heavily in favor of finding a community of interest. (*Los Angeles Fire Police Protective League v. City of Los Angeles, supra*, 23 Cal.App.3d at p. 74.) After all, this remains the only issue on which the plaintiffs carry the burden of proof.

whether the employer conducted the required investigation to support a good faith defense of this policy would revolve around common evidence and a common legal analysis);

5. Whether the job descriptions or postings describing job duties and qualifications are common to the class;

6. Whether class members are employed in a common role, such as a "production" role;

7. Whether class members are subject to common performance review criteria;

8. Whether class members receive their pay through common compensation programs;

9. Whether the pay to class members satisfies the salary basis test;

10. What duties are exempt or non-exempt;

11. The extent to which the employer performed studies or surveys to determine the amount of hours its employees actually worked or actually spent on exempt v. non-exempt work;

12. The extent to which the employer trained class members or their supervisors about when they should be performing exempt versus non-exempt work;

13. Whether the employer has expressed similar expectations to the different class members concerning their job duties and activities;

14. Whether the employer has centralized oversight and supervision of employees;

15. The existence of records regarding hours and tasks worked, and the extent to which the employer fulfilled its legal obligation to keep them.

None of the foregoing factors alone is dispositive in the adjudication of a class action or the determination of whether common questions predominate. As in other class actions, many overtime exemption cases

contain multiple common issues, including those listed above. Ultimately, the trial court needs the flexibility to determine the extent to which there is common evidence available to adjudicate common issues of sufficient quantity or importance to the case. If the court finds there is, then certifying either the entire case or part of it would fulfill the purpose of the class action device, including judicial economy and the effective enforcement of broad, remedial laws.

Plaintiff's burden at class certification is to show that there is a community of interest among class members in having common factual and legal issues resolved. (*Daar v. Yellow Cab Co., supra*, 67 Cal.2d at p. 706.) Plaintiffs make this showing by identifying the common questions, and indicating the availability of representative forms of proof. How such common questions should be or would be resolved at trial is a merits determination that the Court should not address at class certification. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 443.)

VI. CLASS ACTIONS REMAIN NECESSARY TO ENFORCE CALIFORNIA'S BROAD WORKPLACE PROTECTIONS AND TO REMEDY EPIDEMIC OVERTIME PAY VIOLATIONS.

A. The Class Action Device is Necessary to California's Longstanding Commitment to Broad Enforcement of the Minimum Wage and Overtime Protections.

California has a long history of protecting the rights of its workers and has enacted comprehensive wage and hour laws for the primary purpose of protecting its employees from oppressive working conditions. (1 Wilcox, *California Employment Law* (2002), § 1.01, p. 1-6.) The State's courts and Legislature have repeatedly affirmed that the wage and hour laws must be enforced broadly to effectuate this purpose. (*See, e.g., Ramirez, supra*, 20 Cal.4th at p. 794; *California Grape and Tree Fruit*

League v. Industrial Welfare Commission (1969) 268 Cal. App. 2d 692, 703; *see also* Cal. Lab. Code § 90.5(a)(West 1989); *Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(g).)

By requiring premium pay for overtime, California has acknowledged the profound impact of overtime on workers and their families. Employees who regularly work large amounts of overtime experience a diminution in their quality of life. (*See* Livingston, *Overdosing on Overtime; Workers See Companies Increase Their Hours Instead of Workforce*, Cleveland Plain Dealer (Oct. 2, 1994) p. 1A.) Studies have also indicated that excessive overtime leads to stress, as well as more accidents and injuries. (*See Eight Hour Day Restoration and Workplace Flexibility Act of 1999*, 1999 ch. 134, § 2(d); Smith, *Mandatory Overtime and Quality of Life in the 1990s* (1996) 21 Iowa J. Corp. L. 599, 601; Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act* (1994) 70 Chi.-Kent L.R. 157, 161.)[10]

Despite the harsh impact of excessive overtime on employees, employers have continued to violate the wage and hour laws. For example, the U.S. Department of Labor in 1999 found that over 60 percent of

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[10] Another goal of overtime laws is to increase employment by spreading the amount of available work. (*Gould v. Md. Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1148 [37 Cal.Rptr.2d 718] [citation omitted].) "Thus, overtime wages are another example of a public policy fostering society's interest in a stable job market." (*Ibid.*) This goal is particularly important in our present economy. The slowing economy and the accompanying corporate downsizing have directly coincided with increased overtime. (Smith, *Mandatory Overtime and Quality of Life in the 1990s* (1996) 21 Iowa J. Corp. L. 599, 601.) This pattern has enormous social costs, primarily in the form of unemployment. (*Ibid.* at p. 602.) "As workers continue to work unprecedented amounts of overtime, over seven million Americans, 5.6% of the labor force, remain unemployed." (*Ibid.* at p. 602-03.)

employers in California's garment industry were in violation of minimum wage and overtime laws and in 1997 found that nearly a third of nursing homes and personal care facilities remained out of compliance with the FLSA. (Elmore, *State Joint Employer Liability Laws and Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to a National Crisis* (2001) 49 UCLA L. Rev. 395, 398; Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?* (1999) 20 Berkeley J. Emp. & Lab. L. 74, at p. 107.)

More generally, studies from the General Accounting Office (GAO) in 1985 and 1992 had already confirmed continuing, widespread employer non-compliance with minimum wage and overtime laws in a variety of industries. (Walsh, *supra*, at p. 106.) These studies followed a GAO report in the late 1970s characterizing employer non-compliance with the record keeping, minimum wage and overtime provisions of the FLSA as "a serious and continuing problem" and finding that "many employers willfully violated the act." (*Ibid.* at p. 106.) In light of these disturbing and continuing violations, it is not surprising that there remains an "obvious legislative purpose of giving special treatment to claims for unpaid overtime compensation," and "a clear public policy . . . that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of the workers." (*Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1427, 1429-30 [95 Cal.Rptr.2d 57] (*Early*).)

The employer-employee relationship, however, is inherently one of an unequal bargaining position. (*NLRB v. Robbins Tire & Rubber Company* (1978) 437 U.S. 214 [98 S.Ct. 2311].) Thus, many employees with legitimate claims for back overtime wages may not pursue their remedies for the very real fear of retaliation and coercion. (*Scott v. Aetna*

Services, Inc. (D.Conn. 2002) 210 F.R.D. 261, 268 [concluding class action to be superior method to resolve overtime exemption case because, *inter alia*, "class members may fear reprisal and would not be inclined to pursue individual claims."].) Class actions are designed to ensure that those who cannot reasonably be expected to confront their employer can nevertheless have their rights protected. (*See Horn v. Associated Wholesale Grocers Inc.* (10th Cir. 1977) 555 F.2d 270, 275.)

Moreover, individual overtime claims are often not significant enough for employees to sue individually and face employers who can marshal resources for lengthy fights over discovery, trial and appeals. (*See Scott v. Aetna Services, Inc., supra*, 210 F.R.D. at p. 268.) Courts have traditionally recognized this practical dilemma as another important factor in favor of class actions. (*See Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d at p. 469 [important purpose of class action is to provide "claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation"] [citing *Eisen v. Carlisle & Jacquelin* (2d Cir. 1968) 391 F.2d 555, 560]; *Vasquez, supra*, 4 Cal.3d at p. 808 [amount of individual recovery insufficient to justify relying on individual actions [citations omitted]; *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385-386 [modest individual recoveries combined with substantial time and expense required to achieve them militates in favor of class action].)

It is for such reasons that California has a public policy of encouraging the use of the class action device. (*Richmond v. Dart Industries, Inc., supra,* 29 Cal.3d at p. 473.) "Courts long have acknowledged the importance of class actions as a means to prevent a

failure of justice in our judicial system." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 434.) As this Court observed in *Vasquez*:

> Modern society seems increasingly to expose men to . . . group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of sanctions which underlie much contemporary law.

(*Vasquez, supra*, 4 Cal.3d at p. 807 [quoting Kalven and Rosenfield, *Function of Class Suit* (1941) 8 U.Chi.L.Rev. 684, 686].) Thus, the class device is an important means of redressing wrongs that might otherwise escape redress. (*Earley, supra*, 79 Cal.App.4th at pp. 1434-35; *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385-386.)[11]

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[11] In light of these considerations, it is not surprising that California and federal courts have consistently recognized the need for class actions to enforce minimum wage and overtime laws. (*See, e.g.*, *Los Angeles Fire & Police Protective League v. City of Los Angeles*, *supra*, 23 Cal.App.3d 67 [certifying class consisting of 19 sub-groups with different assignments and ranks to challenge common policy of denying compensation during constrained meal periods]; *Bell v. Farmers Insurance Exchange*, *supra*, 87 Cal.App.4th 805 [class adjudication of whether employees perform administrative or production work]; California Judge Approves Class of Laborers To Pursue Pay Claims Against Labor Ready," *BNA Daily Labor Report* (July 18, 2002); *see also Scott v. Aetna Services, Inc*, *supra*, 210 F.R.D. at 264-267 [certifying class action challenging employer's "executive, administrative and professional" exemption policy and citing other federal cases doing same]; *Kelley v. SBC, Inc.* (N.D. Cal. 1998) 5 Wage & Hour Cas. 2d (BNA) 16 [1998 WL 928302][certifying diverse class asserting state law misclassification claims]; *and see Bradford v. Bed Bath & Beyond* (N.D. Ga. 2002) 184 F. Supp. 2d 1342; *Saur v. Snappy Apple Farms, Inc.* (W.D. Mi. 2001) 203 F.R.D. 281; *De Asencio v. Tyson Foods, Inc.* (E.D. Pa. 2002) 2002 WL 1585580.)

B. Class Actions are Vital to Protecting the Rights of California's Most Vulnerable Workers.

Although the risks and difficulties of pursuing overtime violations on an individual basis confront employees throughout multiple industries and income brackets, they remain especially poignant for the workers *amici* represent – low wage workers who are often monolingual or limited English speakers and/or unfamiliar with their legal rights. They are particularly vulnerable to retaliation due to their dependence on each pay check and their tendency to work in low-skilled jobs where employers consider them expendable. These workers, who disproportionately include women and minorities, are all too often victims of minimum wage and overtime violations. (*See* Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation* (1994) 103 Yale L.J. 2179, at p. 2182 (Foo); Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel* (2001) 24 Harv. Women's L.J. 89, at pp. 91.)

The problem is compounded by the fact that low-wage, immigrant and other vulnerable workers are often unfamiliar with their entitlement to minimum wage and overtime pay. (*See* Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry* (2001) 8 Asian L.J. 111, at p. 122 (Ha).) Others, who may be aware of their rights generally, remain unsure how to pursue their complaints. (*See ibid.*) Even those who wish to pursue their claims for unpaid wages find few places to turn for support and assistance. They are unlikely to be represented by labor unions and unable to afford or identify private counsel willing to represent clients with wage claims amounting to

a couple of thousand dollars at the most. (*See Ibid.* at p. 123.) While small claims court may be an option, many employees are discouraged by court fees and fear that they will be unable to represent themselves adequately. (*See ibid.*) [12]

Employees who turn to the Labor Commissioner to address these issues may find long delays both in the resolution of their claims and in collection of any unpaid wages. (*See id.* at p. 124.) Similarly, the California Division of Labor Standards Enforcement (DLSE) does not have the staff or resources to file workforce-wide enforcement actions in the hundreds of cases referred there every year. Months and even years go by before complaints are reviewed, and the DLSE files only a handful of cases each year. As California faces its current budget crisis, it is likely that these already limited resources will be cut or re-directed. [13]

For these reasons, the class action device is vital to enforcing statutory rights to overtime pay, particularly for low-wage and immigrant workers. It also remains critical for remedying wrongs that might otherwise escape redress if individual workers were required to bring their own claims. (*Earley, supra,* 79 Cal.App.4th at pp. 1434-35.) As in other

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[12] Some individuals who find themselves in this situation have the option of turning to *amici curiae* for assistance. However, due to limited resources and the high demand for their services, *amici* can only hope to represent a fraction of the workers who are faced with wage and hour violations. Additionally, *amici* are disproportionately located in high-population, urban areas and are unable to assist workers in small towns or rural settings.

[13] Many immigrant workers who file wage claims abandon them along the way because they cannot endure the long delay, cannot understand the letters they receive or are unable to travel to attend the hearings. (*Ibid.*) Studies reveal that nearly a third of the immigrants who have filed wage claims have become discouraged and given up their claims. (Lee, *Easy Prey: Exploiting Immigrants* (Jan. 13, 1997) at p. A1.)

areas of law where an entity can unjustly enrich itself by wrongfully charging or withholding money from large numbers of vulnerable people, the class action is often the only effective way to halt and redress such exploitation. (*Linder v. Thrifty Oil Co., supra*, 23 Cal.4th 429, 446 ; *see also Blue Chip Stamps v. Superior Court, supra,* 18 Cal.3d at 385-386 [class actions appropriate "when denial of class relief would result in unjust advantage to the wrongdoer."].)

VII. CONCLUSION

For all the reasons stated above, *amici* respectfully request this Court to reinstate the trial court's class certification order.

Dated: February ___, 2003

Respectfully submitted,

By: _____
Joshua Konecky

DAVID BORGEN, CA Bar No. 099354
JOSHUA KONECKY, CA Bar No. 182897
DARCI E. BURRELL, CA Bar No. 180467
GOLDSTEIN, DEMCHAK, BALLER, BORGEN & DARDARIAN
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
(510) 835-1417 (fax)

Brad Seligman, CA Bar No. 083838
THE IMPACT FUND
125 University Ave.
Berkeley, CA 94710-1616
(510) 845-3473
(510) 845-3654 (fax)

Attorneys for Amici Curiae

The Impact Fund
California Rural Legal Assistance Foundation
The Legal Aid Society – Employment Law Center
Mexican American Legal Defense and Educational Fund
Asian Law Caucus, Inc.
Asian Pacific American Legal Center
East San Jose Community Law Center
La Raza Centro Legal, Inc.
Women's Employment Rights Clinic at Golden Gate University School of Law
Bet Tzedek Legal Services
Professor Gary Blasi – UCLA School of Law
Professor Joseph Grodin – Hastings Law School

BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 14(c)(1) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 14(c)(1) of the California Rules of Court I certify that Amicus Brief In Support Of Real Parties Robert Rocher, et al. is proportionately spaced, has a typeface of 13 points or more and contains 9,249 words.

Dated: February ___, 2003

_____
Joshua Konecky