Case No. **S225205**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JAZMINA GERARD, KRISTIANE McELROY, and JEFFREY CARL,
Plaintiffs and Appellants,

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant and Respondent.

ON REVIEW FROM THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G048039; ORANGE COUNTY SUPERIOR COURT, CASE NO. 30-2008-00096591, THE HONORABLE NANCY WIEBEN STOCK, JUDGE

AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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INTRODUCTION: INTEREST OF AMICI AND IMPORTANCE OF ISSUE

This case presents an important question of statutory interpretation — Did the legislature mean what it said and say what it meant[1] when it enacted laws governing when a second half-hour meal break may be waived by health care employees who work longer than 12-hour shifts, and conferred on the Industrial Welfare Commission (IWC) broad authority to adopt and enforce regulations pertaining to such meal breaks? Necessarily related to that question is the nature of the judicial remedy available to employees against employers found to be out of compliance with applicable meal break provisions, and whether that remedy, if applied retroactively as plaintiffs contend it should be, constitutes a penalty sufficient to implicate serious due process concerns.

[1] "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all." Lewis Carroll, *THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (Gardner ed.1960) 269, original italics.

Obviously the financial impact on employers of the appellate court's opinion here is potentially substantial. Left undisturbed, it will impose gargantuan, unanticipated liability on the health care industry and other professions that have operated for years understanding they were subject to, and in compliance with, industry specific versions of the Industrial Welfare Commission Wage Order 5's strictures on meal breaks. This is due to the opinion's unprecedented conclusion that Wage Order 5 as it applies to health care workers conflicts with a 15-year-old statute and is thus void, making every employee who worked a 12-hour shift and knowingly waived a second meal break during that time entitled to twice the normal hourly pay for those accumulated and missed meal breaks. (Labor Code § 511(b).)

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CalChamber)[2] welcome the opportunity to address these issues because of their importance to our joint interests and the administration of justice. Much confusion surrounds the scope and application of meal break and rest period laws for employees, a fact confirmed by an abundance of litigation on the subject.[3] Cutting through these mists of confusion in search of certainty and clarity in meal break employment disputes is of utmost importance to amici. CJAC, a 38-year-old nonprofit organization representing businesses, professional associations and financial institutions, is dedicated to educating the public about ways to make our civil justice

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[2] By application accompanying this brief, CJAC and CalChamber ask the Court to accept it for filing.

[3] See, *e.g.*, *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*); *Faulkinbury v. Boyd & Assoc., Inc.* (2013) 216 Cal.App.4th 220; *Safeway, Inc. v. Superior Court* (2015) 238 Cal.App.4th 1138; and *Jaimez v. DAIOHS USA, Inc.* (2010) 181 Cal.App.4th 1286.

laws more fair, economic, certain and uniform. Toward this end, CJAC regularly petitions the government for redress of grievances when it comes to determining who owes, how much and to whom when the wrongful acts of some occasion injury to others. This is just such a case.

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases, like this one, that have a significant impact on businesses.

SUMMARY OF ARGUMENT

When the pertinent statutes governing employee meal breaks are read in *pari materia* and harmonized with the IWC's long standing and uniformly applied Wage Order 5, the law is crystal clear — health care workers may voluntarily waive in writing one of two half hour meal breaks they are entitled to take if they work a shift in excess of 12 hours. This waiver can be revoked by the employee at any time with one day's notice to the employer.

The court of appeal's opinion to the contrary is wrong because it is based on a truncated interpretation of Labor Code § 516 as amended in 2000. That interpretation is not contextual, ignores well-settled canons of statutory construction and defies

common sense. If not reversed this decision will inflict tremendous financial hardship on defendant and all health care employers in California. It will also deprive health care workers of the freedom to choose when they wish to take or waive one of two entitled meal breaks and go home earlier with the same amount of pay as if they chose to take that second half hour meal break and work longer. If the opinion is affirmed, the losers will be the vast majority of health care workers, their employers and the general public who will be forced to pay even more for their health care. The winners? Class action lawyers representing plaintiffs who signed waivers, never revoked them and now want to have their cake and eat it too by getting paid double for meal breaks they knowingly chose to forego so they could leave work early.

Something looks wrong.

ARGUMENT

I. THE STATUTORY SCHEME PROVIDING WHEN MEAL BREAKS MAY BE WAIVED BY HEALTH CARE WORKERS MUST BE READ LITERATELY AND IN ITS ENTIRETY SO AS TO HARMONIZE ITS PROVISIONS AND FURTHER ITS PRIMARY PURPOSE OF PROTECTING THE HEALTH AND SAFETY OF WORKERS.

Numerous statutory provisions must be read and harmonized with each other to make sense of California's meal break laws. Chief amongst these is Labor Code sections 512, 516 and 517 and, pursuant to and in furtherance of these provisions, Wage Order 5 adopted by the Industrial Welfare Commission (IWC). These Labor Code sections find expression in three bills: AB 60 (1999), SB 88 (2000) and SB 327 (2015), and in repeated adoptions of Wage Order 5 by the IWC, all of which must be considered in parsing the meaning from their intersection.

A. AB 60 Enacted Three Provisions to the Labor Code that, when read together and Harmonized, Permit the IWC to Provide for the Voluntary Waiver by an Employee in the Health Care Industry of One of Two Meal Breaks for Shifts that Exceed Twelve Hours.

We begin with Assembly Bill 60 (AB 60), which added three sections to the Labor Code in 1999 – sections 512, 516 and 517. Section 512 provided "[a]n employer may not employ [one] for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

Section 516, however, authorized the IWC to "adopt or amend working condition orders with respect to . . . meal periods . . . for any workers in California." This expressly delegated power to the IWC was exceptionally *broad* in scope – *i.e.*, "[n]otwithstanding any other provision of law." Section 512 is "another provision of law" over which section 516 expressly takes precedence.

Section 517(a) further required the IWC to hold "a public hearing" by July 1, 2000, and "adopt wage, hours, and working conditions orders consistent with this chapter without convening wage boards" that "shall be final and conclusive for all purposes." Subsection (b) additionally specified that the IWC conduct a comparable review to that authorized by subsection (a) and within the same time frame for, *inter alia*, the "health care industry."

AB 60 also expressly reinstated Wage Order "5-89 as amended in 1993 . . . until the effective date of wage orders [adopted] pursuant to Section 517." (See Section 21

to AB 60, Stats., 1999, ch. 134.) That wage order, which applied to the health care industry, contained in subdivision 11(C) language later echoed in subdivision 11(D) of amended Wage Order 5 adopted by the IWC pursuant to Labor Code § 517's directive. Subdivision 11(D) reads as follows:

> Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least (1) day's written notice.

This subdivision clarifies that employees in the health care industry, the plaintiffs herein, can waive their second meal break for any shifts they work in excess of eight hours. In adopting Wage Order 5-2001 allowing health care workers to waive one of two meal breaks if they work more than a 12-hour shift, the IWC addressed the intersection with, and any purported conflict between, its Order and Labor Code § 512.

> The IWC received correspondence from members of the health care industry requesting the right to waive a meal period if an employee works more than a 12-hour shift. The IWC notes that Labor Code § 512 explicitly states that, whenever an employee works for more than twelve hours in a day, the second meal period cannot be waived. However, Labor Code § 516 authorizes the IWC to adopt or amend the orders with respect to break periods, meal periods, and days of rest for all California workers consistent with the health and welfare of those workers.

In other words, the broad delegation the Legislature conferred upon the IWC in section 516 to adopt regulations with respect to meal period breaks "[n]otwithstanding any other provision of law," trumps the 12 hour outside limitation period on meal breaks found in section 512.

The IWC possesses broad authority to adopt orders affecting the wages, hours and working conditions of all employees in California. Article XIV, section 1 of the California Constitution declares: "The Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive and judicial powers." These expansive powers have been conferred by the Legislature on the IWC and expressly include the IWC's adoption and enforcement of wage orders and its interpretation of statutes pertinent thereto. "The IWC's wage orders are to be accorded the same dignity as statutes. They are 'preseumptively valid' legislative regulations of the employment relationship . . ., regulations that must be given 'independent effect' separate and apart from any statutory enactments . . .." (*Brinker*, *supra*, 53 Cal.4th at 1027.) Moreover, "the construction of a statute by officials charged with its administration . . . is entitled to great weight. . .." (*Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 724.) If a court concludes that the administrative construction is reasonable, it will generally defer to the agency's judgment and uphold its interpretation against challenge. (See *id.* at 729-730; *Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 917, fn. 15; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325.)

B. SB 88 Amends Section 516 to Substitute the Phrase "Except as Provided in Section 512" for the Phrase "Notwithstanding any other Provision of Law," which the Court of Appeal Interprets as Voiding Wage Order 5 as it Pertains to Health Care Workers.

After the IWC adopted Wage Order 5 as directed by AB 60 in Labor Code § 517, the Legislature passed SB 88 in 2000. Labor Code § 516 was amended in that bill to substitute the phrase "[e]xcept as provided in Section 512" for the phrase "[n]otwithstandiing any other provision of law."

SB 88 did not, however, amend AB 60's enactment of Labor Code § 517, which directed the IWC to conduct an investigation, hold hearings and *adopt* regulations by July 1, 2000, concerning "working conditions in the . . . health care industry . . .." This is what the IWC did in Wage Order 5 with respect to meal breaks *before* enactment of SB 88. Nor did SB 88 say anything about AB 60's reinstatement of Wage Order "5-89 as amended in 1993 . . . until the effective date of wage orders issued pursuant to Section 517."

Nonetheless, the appellate court seized upon the "[e]xcept as provided in Section 512" phrase that SB 88 substituted in Labor Code § 516 for the previous introductory phrase "notwithstanding any other provision of law" as the basis for its conclusion that "the IWC exceeded its authority" and "section 11(D) [of Wage Order 5-2001] is . . . invalid to the extent it authorizes health care workers to waive their second meal periods on shifts longer than 12 hours." (Slip Opinion, p. 12.)

C. Prompted by the Appellate Court's Opinion, the Legislature Enacts SB 327 to Clarify that Voluntary Waivers by Health Care Workers of One of Two Meal Periods for a Work Shift in Excess of Eight Hours is and was Valid from October 1, 2000.

When informed of how the appellate court in this case construed the Legislature's amendment in SB 88 to Labor Code § 516, the Legislature promptly enacted SB 327 as an urgency measure to amend that same section and clarify the intent and effect of its previous enactments to that section. That language says all that needs to be said about what the Legislature meant in its earlier iterations of Labor Code § 516:

> SECTION 1. The Legislature finds and declares the following:
> (a) From 1993 through 2000, Industrial Welfare Commission Wage Orders 4 and 5 contained special meal period waiver rules for employees in the health care industry. Employees were allowed to waive voluntarily one of

> the two meal periods on shifts exceeding 12 hours. On June 30, 2000, the Industrial Welfare Commission adopted regulations allowing those rules to continue in place. Since that time, employees in the health care industry and their employers have relied on those rules to allow employees to waive voluntarily one of their two meal periods on shifts exceeding 12 hours.
>
> (b) Given the uncertainty caused by a recent appellate court decision, *Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285, without immediate clarification, hospitals will alter scheduling practices.
>
> SEC. 2. Section 516 of the Labor Code is amended to read:
>
> 516. (a) Except as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.
>
> (b) Notwithstanding subdivision (a), or any other law, including Section 512, the health care employee meal period waiver provisions in Section 11(D) of Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, and continue to be valid and enforceable. This subdivision is declarative of, and clarifies, existing law.

II. THE AFOREMENTIONED CHANGES TO THE LABOR CODE SHOULD BE HARMONIZED TO PROVIDE THAT HEALTH CARE WORKERS CAN VOLUNTARILY WAIVE ONE OF TWO MEAL BREAKS FOR SHIFTS LASTING MORE THAN TWELVE HOURS; AND GIVING RETROACTIVE EFFECT TO A CONTRARY INTERPRETATION RAISES SERIOUS DUE PROCESS IMPLICATIONS.

A. A Literate Reading of the Pertinent Provisions of the Labor Code and Wage Order 5 and their Complementary Purpose Warrants Allowing Voluntary Waivers by Health Care Employees of One of Two Meal Breaks for Shifts they Work of more than Twelve Hours.

The linchpin of plaintiffs' argument and the appellate court's opinion is the amendment made in SB 88 to section 516 that substituted "[e]xcept as provided in Section 512" for "[n]otwithstanding any other provision of law" in AB 60 as the introductory phrase to the same text contained in both measures. Clearly and indisputably, the "notwithstanding" language from AB 60 means "in spite of" or "regardless of" other provisions the interpretation and explanation given to AB 60 by

the IWC in adopting Wage Order 5. But, it is not axiomatic that the "except as provided in Section 512" from SB 88 means that section 512 takes precedence over or restricts the rest of the language in section 516. The use of such language may well mean the IWC can "adopt or amend working condition orders with respect to . . . meal periods" *unless* section 512 applies. (See, *e.g.*, *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689.) Whether section 512 or section 516 applies, however, is the question to be answered, not the answer to the question. The solution is found by reading section 516 as amended by SB 88 in context and in *pari materia* with other sections of meal break laws. "This calls for literate, not literal judges." (Roger Traynor, *Reasoning in a Circle of Law* (1970) 56 *VA. L. REV.* 739, 749.)

1. *The Common Purpose of the Meal Break Laws is Furthered by Allowing Health Care Workers to Waive a Second Meal Break During a Long Shift.*

When, as the differing views of the same applicable meal break laws by the trial and appellate court here evinces, there is ambiguity about the meaning of a statutory word or phrase, courts may consider various extrinsic aids, including the *purpose of the statute . . ..*" *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 (italics added).) After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose.* A statute merely declaring a rule, with no purpose or objective, is nonsense." Llewllyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed* (1950) 3 *VAND. L. REV.* 395, 400 (italics added), reprinted in Singer, *STATUTES AND STATUTORY CONSTRUCTION* §48A:08, p. 639 (2000 ed.).

Here, the common purpose of all three statutes and the bills enacting and amending them, along with Wage Order 5, is to protect the health and safety of workers, specifically those employed in the health care industry. That the forced taking of two meal breaks for shifts of more than 12 hours does not further the health, safety and welfare of these workers is demonstrated in several ways.

First, the decision whether to take or waive a second meal break rests entirely with individual workers. Once a waiver is requested and signed by a worker, it may be revoked by that person at any time by giving the employer one day's notice. Employees who waive the second meal break benefit by being able to leave work earlier than they would be able to if forced to take the second meal break. All plaintiffs here requested and signed individual waivers with defendant and did not revoke them at any time, instead opting to file suit in the hope of having their cake and eating it too — obtaining premium back pay for the meal breaks they voluntarily waived. Vesting the worker with the decision whether to waive a second-meal break recognizes the importance and superiority of individual autonomy over the state's interest in prescribing how many meal breaks an employee must take within a given period of time.

Second, as defendant points out, there is no danger that plaintiffs or any workers will be over-worked or somehow pressured to waive a meal break they would prefer to take. "A valid alternative workweek schedule in the healthcare industry is limited to a 'regular schedule' of no more than 12 hours. Thus, shift schedules are limited to 12 hours, and the special meal period waiver rules cannot permit regularly occurring shifts longer than 12 hours." (Opening Brief on the Merits (OBM), p. 15.)

Third, there is a financial incentive to assure workers are not overworked by their employers. Labor Code § 511(b) provides that if health care employees work more than their scheduled shift of 12 hours they must be paid an "overtime rate of no less than double the regular rate of pay . . .."

Fourth, as the IWC reported when originally adopting Wage Order 5 in 1993, "[t]he vast majority of employees testifying at public hearings supported the . . . proposal with respect to such a waiver, but only insofar as waiving 'a' meal period or 'one' meal period, not 'any' meal period. Since the waiver of one meal period allows employees the freedom of choice combined with the protection of at least one meal period on a long shift, . . . the IWC . . . adopted [the waiver]." (*IWC's Statement as to the Basis of the 1993 Waiver in Wage Order 5*.) *Brinker* also recognizes that Wage Order 5 was adopted "in response to a health care industry petition to permit its employees to waive a second meal period on longer shifts in order to leave earlier." (*Brinker, supra*, 53 Cal.4th at 1047.)

2. The Meal Break Laws at Issue Here Should and Can be Construed so as to Keep All in Effect and Harmonized.

Plaintiffs and the appellate opinion would have us believe that Labor Code § 516 as amended by SB 88 is inconsistent with that same section as previously enacted by AB 60; and that section 11(D) of Wage Order 5 conflicts with section 516 as amended by SB 88. (Answer to Pet. For Rev., p. 3.) But if it is reasonably possible to harmonize these provisions so that they "stand together," that is what the law requires. "[Statutes] must be harmonized, both internally and with each other, to the extent possible. [Citations.] Interpretive constructions which render some words surplusage . . . are to be avoided. [Citations.]" (*California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d

836, 844.) Apparent inconsistencies can be avoided by a logical and grammatical construction of the related provisions of AB 60 and SB 88.

For instance, the Legislative Counsel's Digest[4] for SB 88 states that if enacted it "would prohibit the [IWC] from adopting a working condition order that conflicts with those 30 minute meal period requirements." (Stats. 200, Ch. 492.) This reference is plainly to future prohibitions (*i.e.*, "from adopting") and inapplicable to "30 minute meal requirements already adopted" by the IWC. Wage Order 5 at issue here was *adopted* by the IWC *before* SB 88 became law.

Moreover, no language in SB 88 or any of the Committee Analyses accompanying that bill states or suggests that the amendment to section 516 was intended to repeal Wage Order 5 as it stood when SB 88 was enacted. The Legislature knows how to repeal existing laws if it so intends; and also is presumed to know that implied repeals of existing laws are not favored. Indeed, the presumption against implied repeal is so strong that, "To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.)

Further, since the enactment of SB 88, the Legislature has amended Labor Code section 512 numerous times to provide exceptions to the meal period requirements for other industries without any attempt to change or repeal subdivision 11(D) in Wage

[4] Courts often look to the Legislative Counsel's Digest to ascertain legislative intent. (See, *e.g.*, *People v. Superior Court* (1979) 24 Cal.3d 428, 434; see also *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1158, fn. 6.)

Order 5. During this same period, the IWC amended Wage Order 5 six times, reiterating the meal period waiver in subdivision 11(D). (OBM 19.) The presumption against repeal of subdivision 11(D) is strongest when, as here, the construction placed upon section 516 by a department of government charged with the duty of acting under it is combined with legislative acquiescence in its operation by failing to take any action toward its repeal. (See generally *El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739.)

Finally, SB 327 confirms that the legislature never intended by its passage of SB 88 to repeal Wage Order 5 or sections 516 and 517 enacted through AB 60 a year before SB 88. SB 327 was introduced and enacted promptly after the appellate opinion is this case was decided. "[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213-214.)

> An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, *where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute* . . .. [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.

(*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.)

III. IF THE APPELLATE DECISION IN THIS CASE IS UPHELD, IT SHOULD BE GIVEN PROSPECTIVE EFFECT BECAUSE TO ACCORD IT RETROACTIVE EFFECT IMPLICATES SERIOUS DUE PROCESS CONCERNS.

Plaintiffs urge the court to affirm the decision of the appellate court invalidating

section 11(D) of Wage Order 5 and give it retroactive effect. (Answer Brief on the Merits, p. 24.) But that would require the court to find that the appellate opinion's construction of Labor Code § 516 as amended by SB 88 fifteen years ago "only elucidates and enforces prior law" or addresses "an issue not previously presented to the courts." (*Id.*, citing and quoting *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36-37.) For reasons aforementioned, that reading of pertinent laws and reasoning of the appellate decision ignores the legislative intent quarried from the harmonized provisions of three related meal break statutes (AB 60, SB 88 and SB 327) and a consistent line of Wage Orders from the IWC. It also raises serious due process concerns.

While court decisions are generally given retroactive effect, departures from this practice occur when considerations of fairness and public policy are implicated. (See, *e.g.*, *Claxton v. Waters* (2004) 34 Cal.4th 367, 368; *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 653.) Courts may decline to give retroactive effect to decisions when they would "unfairly undermine the reasonable reliance of parties on the previously existing state of the law." (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 983.) Certainly that is the situation facing defendant and other similarly situated parties who have, until the appellate opinion here, justifiably relied on the consistent, uniform application of Wage Order 5 for the past 20 years.

Wage Order 5, as previously mentioned, is to be accorded the same dignity as statutes. It is a " 'presumptively valid' legislative regulation of the employment relationship . . ., [a] regulation that must be given 'independent effect' separate and apart from any statutory enactments . . .." (*Ante* at p. 7, citing *Brinker.*) Now, solely as

a result of the appellate court's unique interpretation of the import of Labor Code § 516 on meal breaks and Wage Order 5, that justifiable reliance by defendant and other health care organizations has been shattered. Defendant's interests impaired by according retrospective effect to the appellate decision here are every bit as substantial as those affected by a decision denying the statutory extension of time after service by mail for filing a petition challenging an administrative appeals board ruling. (*Camper v. Worker's Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 688-690 (prospective application imposed because contrary law had been followed unquestionably for seven years and WCAB regulations could be interpreted to support contrary view).) Similarly, requiring a decision abolishing the "Royal Globe bad faith" cause of action against insurers to be applied prospectively supports similar treatment here. (*Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 305; see also *Woods v. Young* (1991) 53 Cal.3d 315, 327-331; and *Moss v. Superior Court* (1998) 17 Cal.4th 396, 428-430.)

Chevron Oil v. Hudson (1971) 404 U.S. 97 is instructive here because it adopted a discretionary approach to adjudicative retroactivity in the civil context. The Court permitted a judicially enunciated rule to operate prospectively whenever the new rule of law had the effect of "overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." (*Id.* at 106.) As the Court explained in *Bouie v. City of Columbia* (1964) 378 U.S. 347, "If a state legislature is barred by the *Ex Post Facto* Clause from passing . . . a [retroactive] law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Id.* at 353-354.) *Bouie's* rationale rested on core due process concepts of *notice*, *foreseeability*,

and, in particular, the right to *fair warning* as those concepts bear on the constitutionality of attaching severe penalties to what previously had been innocent conduct. (See, *e.g.,* 378 U.S. at 351, 352, 354-355.)

Plaintiffs contend that defendant and other health care employers have been on notice ever since SB 88 amended section 516. But this claim flies in the face of Wage Order 5 and the reasonable construction of that section when read in *pari materia* and harmonized with the other provisions governing meal breaks for health care workers. (See discussion *ante* at pp. 10-14.)

CONCLUSION

For all the reasons aforementioned, the Court should reverse the opinion of the court of appeal and hold that Wage Order 5, subdivision 11(D), permits health care workers to waive a second meal period for shifts longer than 12 hours. In the alternative, should the Court affirm the appellate court decision's construction of Labor Code § 516, it should order that the opinion only applies prospectively, not retroactively.

Dated: January 7, 2016

Respectfully submitted,

/s/

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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 5,275 words.

Date: January 7, 2016

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PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On January 7, 2016, I served the foregoing document(s) described as: *Amici Curiae* Brief of the California Chamber of Commerce and the Civil Justice Association of California in Support of Defendant and Respondent in *Gerard, et al. v. Orange Coast Memorial Medical Center*, S225205 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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Clerk, California Court of Appeal
Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701
Appellate Court

Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701
Trial Court

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

Executed this 7th day of January 2016 at Sacramento, California.

/s/
David Cooper