S248726

Case No. S248726

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, on behalf of others similarly situated, and on behalf of the general public,
Plaintiffs/Petitioners,
v.
DELTA AIR LINES, INC.,
Defendant/Respondent.

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

PETITIONERS' OPENING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

This Court has accepted certification of three questions regarding the scope of California's most fundamental wage-protection laws: 8 Cal. Code Regs. § 11090(4), which requires "[e]very employer" to pay the minimum wage "to each employee" "for all hours worked"; Labor Code section 204, which requires that all wages be timely paid; and Labor Code section 226, which requires accurate and complete wage statements documenting all hours worked and all pay provided.

As framed by the Ninth Circuit and this Court's order accepting certification, the three certified questions are:

1) Do California Labor Code sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?

2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? (*See* Cal. Labor Code, §§ 1182.12, 1194; [8] Cal. Code Regs., § 11090(4).)

3) Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? (*See Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314.)

INTRODUCTION

This is a putative class action brought by four flight attendants employed by Delta Air Lines, Inc. ("Delta"), each of whom regularly performed pre-flight and post-flight work on the ground in California.

Plaintiffs allege that Delta failed to pay them for that on-the-ground work, failed to pay them in timely fashion for that work, and failed to provide California-compliant wage statements for that work. The district court rejected Plaintiffs' claims in two summary judgment orders. The first order held that California law permitted Delta to pay flight attendants for their flight time only, with no separate payment for their California pre-flight or post-flight time, because those flight attendants' *average* hourly rate for *all* hours worked was higher than California's minimum wage. Excerpts of Record ("ER") 19-36. The second order, which preceded *Troester v. Starbucks* (2018) 5 Cal.5th 829 [235 Cal.Rptr.3d 820], rejected Plaintiffs' other claims on the ground that California labor law does not apply to the four plaintiffs because they worked only a "*de minimis* amount of time in California." ER 16.

The overarching question is whether California's labor law protects employees who work on a regular basis *in California*, at their employer's direction, for less than a full day at a time. The answer is yes, under the plain language of the Labor Code and the governing Industrial Welfare Commission ("IWC") Wage Order.

There are no issues of extraterritoriality in this case. The question is *not* whether (or the extent to which) California's worker-protection laws extend beyond the state's boundaries. Instead, the issue is whether employers that regularly schedule employees to work *in California* must comply with California's non-waivable Labor Code and Wage Order provisions with respect to that *in-state* work.

Delta's payment scheme violates California law with respect to Plaintiff flight attendants' on-the-ground work in California. California requires employers (1) to pay at least the minimum wage for all time they

suffer or permit their employees to work in the state, (2) to make timely wage payments for that time, and (3) to provide complete and accurate wage statements encompassing that time. Delta's defenses that its pay scheme results in an average hourly wage that exceeds the California minimum and that compliance with California law would be unduly burdensome have no legal basis and cannot excuse Delta's deliberate policy of not paying its flight attendants for the on-the-ground work it routinely requires them to perform in California.

STATEMENT OF PROCEDURAL AND FACTUAL BACKGROUND

I. Plaintiffs Presented Evidence That Delta Failed to Pay Wages for All Hours Worked in California

Plaintiffs Oman, Eichmann, Lehr, and Flores are current and former flight attendants employed by Delta. ER 10. They regularly fly (or flew) in and out of California airports, collectively working hundreds of pre-flight and post-flight hours on the ground at California airports. ER 807-978, 1256-1355. That California work was almost entirely unpaid and is the subject of this litigation.

Delta, while headquartered in Georgia, assigns flight attendants (including Plaintiffs Lehr, Eichmann and Flores) to be based at the San Francisco ("SFO") and Los Angeles ("LAX") airports. From 2011 through 2015, Delta employed more than 1,400 such California-based flight attendants. ER 1126-27. Delta's business model also requires it to schedule out-of-state-based flight attendants (like Plaintiff Oman) to fly into and out of California airports. ER 1141-44. In April 2015, for example, Delta's out-of-state-based flight attendants flew more than 24,400 flights in or out of California. *Id.*

The California market is critically important to Delta. Its JFK-LAX and JFK-SFO routes are "two of the busiest routes in the United States," and Delta prides itself on its "leading position" in the industry on these routes, offering "the most seats of any airline." ER 1115-16. Delta's recent $229,000,000 facilities investment at LAX and a new Delta Sky Club at SFO further evidence the importance of these in-state locations. *Id.*

A. Plaintiffs' Work Schedules

Delta flight attendants work a series of "rotations" throughout the month. "A rotation is a preplanned sequence of flights that a flight attendant is expected [to work]." ER 1165. Each rotation is made up of one or more "duty periods," which are treated like work days. ER 1166. A duty period consists of one or more flights. ER 1167, 70. Thus, one or more flights make up a duty period, and one or more duty periods make up a rotation. Time between two flights within the same duty period is referred to as "turn time." ER 1170. Flight attendants bid for work schedules based on a bid packet specific to their base airport. Supplemental Excerpts of Record ("SER") 442-43, 474. Each rotation generally begins and ends at the flight attendant's base airport. *See* ER 807-978.

Delta admits that its flight attendants are "on duty" for the duration of each "duty period." ER 1170-72. Delta requires its flight attendants to report for duty at least an hour before scheduled departure for domestic flights, and up to an hour and a half before scheduled departure for international flights. ER 726, 1175. After a preflight briefing and other work activities, flight attendants proceed to the gate for their flight. ER 702, 1181-87. Flight attendants must be at the gate at least 40 minutes before departure and must perform additional tasks before boarding begins.

ER 702-03, 726. Boarding begins at least 35 minutes before departure. ER 726.

Flight attendants also have work responsibilities after the plane lands, including deplaning passengers and performing safety checks. ER 706-07. They must remain on board until all passengers have deplaned, unless required to leave the plane to perform a safety-related duty. ER 1194. Not until the flight attendants complete their final flight in a duty period are they released for layover (mid-rotation) or home (at the end of a rotation).

B. Delta Paid Plaintiffs under Uniform Work Rules

Delta's flight attendant compensation policies are set forth in written Work Rules. ER 315-688. These Work Rules have been modified multiple times over the past several years. New versions are published periodically, and each page shows the date it was last modified. ER 1163.

1. Delta Paid Plaintiffs Almost Exclusively under its Flight Pay Formula, Which Does Not Pay for All Hours Worked

Delta compensates all flight attendants based on an hourly "Flight Pay" rate, ER 366, 607, 650, using a formula that compensates them at that "hourly rate for all hours *flown or credited*"—not for all hours worked during a duty period. ER 363, 604, 647, 686 (emphasis added).

Delta's "Flight Pay" formula is based on the flight attendants' scheduled (or if longer, actual) flight time, measured from the time a flight "blocks out" from the gate for departure until it "blocks in" at the arrival gate. ER 366, 1167-68, 1200. To calculate pay under the Flight Pay formula, Delta multiplies the number of block time hours by the flight attendant's hourly Flight Pay rate. ER 363, 366. That Flight Pay formula

does *not* include any time before block-out or after block-in, i.e., pre-flight or post-flight on-the-ground time, whether in California or elsewhere. ER 1200. Accordingly, the Flight Pay formula does not pay flight attendants for the one hour (or more) of work from reporting time to departure time (including boarding), or for any turn time or post-flight deplaning time.

Delta designs its route pairings to maximize the number of rotations paid under the Flight Pay formula, and thus to minimize the amount of additional compensation it must pay under its supplemental pay formulas (described below). ER 411, 1210. Delta's flight records confirm this practice. ER 807-978, 1256-1355.[1]

For example, Plaintiff Lehr worked 681 flights into or out of California between January 1, 2011 and May 1, 2015. ER 864-978, 1305-43. Delta paid him solely under the Flight Pay formula on 579 of those flights, meaning that on 85% percent of Lehr's California flights, he received Flight Pay only and was not paid for any of his on-the-ground work. *Id.* Plaintiff Eichmann worked 178 flights into or out of California in the same period and was paid only Flight Pay on 149, or 84% of his California flights. ER 807-62, 1278-94. Plaintiff Oman worked at least 27 flights into or out of California between November 24, 2011 and August 8, 2014 and received only Flight Pay on 23, or 93% of his California flights. ER 780-805, 1262-66.[2]

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[1] In Delta's flight records, any pay that supplements Flight Pay is shown in the "Duty Cred" or "THC Total" columns. The vast majority of the flights show zero in these columns, meaning the flight attendant received Flight Pay only. ER 807-978.

[2] Flores was added as a plaintiff after the trial court granted summary judgment on Plaintiffs' minimum wage claim. Because Delta did not

2. Delta's Oher Compensation Formulas, When Triggered, Provide Additional Pay for Some, but Not All, Hours Worked

Before Delta calculates the final pay for a rotation, it compares the pay due under the Flight Pay formula to the amount that would be due under three supplemental pay formulas: Minimum Duty Period Credit/Average; Trip Credit; and 1-for-2 Credit. ER 363. These supplemental formulas sometimes provide additional pay for some (but not all) hours worked, although Delta only relies on the 1-for-2 Credit as a defense to minimum-wage liability in this case.[3]

Delta's 1-for-2 Credit provides flight attendants with one hour of pay for every two hours on duty, but it only applies to duty periods where the standard Flight Pay formula (hourly rate multiplied by block time) would provide less than one hour's pay for every two hours worked. ER 363, 367, 608, 652, 683. That rarely happens, because in the overwhelming majority of duty periods, the flight attendants' total block time (gate-to-gate) is more than half their total on-duty time. *See* ER 807-978, 1278-1343. In those unusual circumstances where its 1-for-2 Credit applies, Delta pays its flight attendants at their usual hourly rate, but only for half of their total on-duty hours. *See* ER 367 (example from Work Rules).[4]

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produce his records before the motion was filed, Flores is not included in this factual summary.

[3] Delta's Minimum Duty Period Credit/Average formula pays a minimum of 4 hours 45 minutes at the flight attendant's Flight Pay rate for each duty period in a rotation. ER 368, 1200-01. (Previous versions took the entire rotation into account. ER 609, 683, 1205.) Delta's Trip Credit formula pays "one hour [at the Flight Pay rate] for every 3.5 hours" of time "[f]rom the first report of the rotation until the last release of the full rotation." ER 369, 1201-02.

[4] Delta's corporate designee confirmed that, when triggered, the 1-for-2 Credit is calculated by adding one hour of pay for every two hours worked:

3. Delta's Application of the Flight Pay Formula Inevitably Results in Uncompensated Work in California

Delta's Flight Pay formula compensates flight attendants for their actual or scheduled flight time, not their mandatory on-the-ground time before take-off or after landing. ER 363, 366, 1167-68, 1200. As the Ninth Circuit recognized, "the Flight Pay calculation provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers...." *Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1078.

Delta's flight records confirm this practice. For example, on June 21, 2014, Plaintiff Lehr flew from San Francisco to Atlanta and back. Delta's flight records reflect the times of these flights as measured to determine compensation:

DATE	SEGMENT FROM	TO	REPT TIME	BLOCK OUT	BLOCK IN	ACTL TIME	SCHD/MKT TIME	DUTY CRED	THC/ TOTAL	HOLD TIME
21JUN	SFO	ATL	0620	0721	1511	0450*	0445	0000	0000	0000
21JUN	ATL	SFO		1757	2024	0527*	0516	0000	0000 1017	0000

> Q: And then what is the 1 for 2 Duty Period Credit?
>
> [objection omitted]
>
> A: . . . For every two hours on duty, **one hour will be credited and paid at the flight pay rate**.

ER 1201 (emphasis added). Although that designee later tried to change his testimony to assert that the 1-for-2 Credit instead paid for *all* hours worked at *half* the flight pay rate, ER 1211, when pressed for support he conceded that nothing in the Work Rules supports that characterization:

> Q. Can you show me where in the flight attendant work rules there is a reference to flight attendants being paid at half their flight pay rate?
>
> A. **There is no specific reference.**

ER 1211-12 (emphasis added).

ER 953.[5] As shown in this table, Lehr reported for duty at (or before) 6:20. His duty period ended at 20:39 (after he completed his post-flight duties, 15 minutes after the return flight blocked in). His total duty period was therefore 14 hours 19 minutes. His flight time, however, was only 10 hours 17 minutes (4 hours 50 minutes from SFO to ATL, and 5 hours 27 minutes from ATL back to SFO).

On this day, like most days, Lehr did not receive additional credits, meaning he was paid under Delta's Flight Pay formula, with no supplemental pay. Delta calculated his pay by multiplying his Flight Pay rate by his block time of 10 hours 17 minutes.[6] The pay rate for his hour of *pre-flight* work at SFO between 6:20 and 7:21 was therefore $0, and his pay rate for the time spent deplaning passengers at SFO at the end of the day was also $0. His duty period can be summarized as follows:

Time Period	**Total Time**	**Pay Rate**	**California Minimum Wage Not Paid for Hours Worked**
Pre-Flight	1:01	$0/ hour	$9.15
Flight from SFO – ATL	4:50	$51.46/ hour	-
Turn time in ATL	2:46	$0/ hour	-
Flight from ATL – SFO	5:27	$51.46/ hour	-
Post-Flight	0:15	$0/ hour	$2.25

[5] All times are local to the arrival or departure airport. Thus, the elapsed time from Lehr's 7:21 departure to his 15:11 arrival includes the three-hour time change between San Francisco and Atlanta.

[6] ER 955 ("Follow these steps to calculate what you were paid for the pay period: Example 71:39. Take minutes flown and divide by 60. For example, 39 minutes/60 minutes=.65 (fraction). Converted time=71.64. Next take the converted time multiplied by your pay rate for total dollars paid. 71.65 x $45.75 hr. = $3,277.99.").

The record contains many similar examples:

- On May 20, 2012, Lehr reported to SFO by 6:25, departed for Atlanta at 7:23, landed at 15:05, and was paid only for his 4 hours 42 minutes of flight time despite working 5 hours 40 minutes from report to landing. ER 897. He was not paid for any of his 58 minutes of pre-flight work at SFO.[7]

- On June 17, 2014, Eichmann flew from LAX to Salt Lake City. ER 832. He reported to LAX by 5:00, departed at 6:06, and arrived in Salt Lake at 8:58. *Id.* He was paid only for his 1 hour 52 minutes of flight time despite working 2 hours 58 minutes from report to landing. *Id.* He was not paid for his one hour six minutes of pre-flight work at LAX.

- On February 15, 2014, Oman flew from LAX to JFK. ER 794. He reported to LAX by 5:45, departed for JFK at 7:34, and arrived at 16:02. *Id.* He was paid only for his 5 hours 28 minute of flight time, despite working 7 hours 32 minutes from report through deplaning. *Id.* He was not paid for his one hour sixteen minutes of pre-flight work at LAX.

- Oman worked a similar schedule on February 17, 2014. ER 794. He reported to LAX by 5:45, departed for JFK at 6:46, and arrived at 15:27. *Id.* He was paid only for his 5 hours 41 minutes of flight time, despite working 6 hours 57 minutes from report through deplaning. *Id.* He was not paid for his one hour one minute of pre-flight work at LAX.

In each example, Delta paid Plaintiffs based only on the Flight Pay formula for their entire rotation, meaning it did not pay any additional credits.

The final two examples, showing Oman's LAX–JFK flights, are particularly instructive. Oman flew the same route, with the same flight number, two days apart. ER 794. On February 17, he worked 6 hours 57 minutes (5:45 report time until 15:42, which is 15 minutes after block-in) and was paid his hourly Flight Pay rate for 5 hours 41 minutes. *Id.* Only two days earlier, he worked 35 minutes *longer* due to a delayed departure but was paid (again, at his hourly Flight Pay rate) 13 minutes *less* because

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[7] In these examples, Plaintiffs also worked uncompensated time at the destination airport after landing and sometimes continued onto other flights. However, these destinations were outside California, and Plaintiffs do not seek payment for any of the time they worked outside the state.

the plane flew more quickly in the air. *Id.* Because Delta only paid Oman for his time in the air and not for his time on the ground, his extra 35 minutes of work on February 15 did not result in any extra pay—in fact, he received less pay.

Similar examples abound. Lehr worked more than 448 uncompensated on-the-ground hours in California between January 2011 and May 1, 2015—the equivalent of 56 full work days. ER 1305-43. Eichmann worked more than 129 uncompensated on-the-ground hours in California between 2011 and May 1, 2015. ER 1278-94. Oman worked more than 20 uncompensated on-the-ground hours in California between January 2011 and August 2014. ER 1262-66. Because Eichmann, Lehr, and Flores still work for Delta, they continue to work uncompensated on-the-ground hours in California. ER 214-19.

II. Plaintiffs Presented Evidence That Delta Failed to Provide Flight Attendants Who Worked in California with Wage Statements That Reflect Rates of Pay and Hours Worked

Although Delta routinely issues wage statements to its flight attendants, those wage statements do not comply with California law because they do not list the total number of hours worked in a pay period and do not list the applicable pay rates. ER 126-47, 195-99, 203, 208-10; *see* Lab. Code § 226. The "hours" and "rate" columns on the wage statements are empty. ER 126-47.[8] Instead of the required itemization of rates of pay and hours worked at each pay rate, Delta's wage statements list lump sum payments only. *Id.*

Delta admits that its flight attendants cannot determine their number

[8] This was not always the case. In 2012, Delta reported some hours and rate information on its paystubs. ER 149.

of hours worked, rates of pay, or hours worked at each rate of pay from the face of its wage statements. ER 197-99, 203, 208-10. Delta knows that its wage statements lack this information and intends that result. ER 199, 202-03, 206-07. Delta's failure to provide itemized wage statements is especially significant in this case, where it paid flight attendants at their Flight Pay rate for some work hours, but nothing for others.

III. Plaintiffs Presented Evidence That Delta Routinely Delayed Some Wage Payments to Flight Attendants by Up to Six Weeks

Delta has historically paid flight attendant wages on a delayed payment schedule. That schedule assumes a minimum of 45 credited hours per month, which Delta pays during the month that time is worked. ER 364. For example, a September 15 paycheck would include 22.5 September hours and the September 30 paycheck would include an additional 22.5 September hours. *Id.* Any credited hours exceeding the assumed 45 are not paid until the following month, half on the 15th and the other half on the last day. *Id.* Thus, if a flight attendant worked more than 45 credited hours in September, some of that September time would be paid on October 15 and the rest on October 31. Plaintiffs regularly worked and were credited for more than 45 hours in a month, leading to substantially delayed payments. ER 807-978.

Delta is capable of timely paying wages when it chooses. Indeed, Delta is currently revising its unlawful delayed-payment practice and will soon start paying all credited hours within seven days of the end of a pay period. *See* Lehr Decl. Ex. 1.

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IV. The District Court Upheld Delta's Payment Scheme as Permissible and Held that California Labor Law Did Not Apply to Time Worked in California

The district court's first summary judgment ruling (granting Delta's motion for partial summary judgment and denying Plaintiffs' cross-motion) held that Delta complied with California minimum wage law. ER 19-36. The district court's second summary judgment ruling (granting Delta's motion on Plaintiffs' remaining claims and denying Plaintiffs' cross-motion) held that Labor Code sections 204 and 226 do not apply to Plaintiffs because they only worked *de minimis* time in California. ER 7-17. The district court entered final judment on January 6, 2017. Plaintiffs filed a timely notice of appeal to the Ninth Circuit. ER 1-5.

V. The Ninth Circuit's Certified Questions

On May 9, 2018, the Ninth Circuit entered an order certifying three questions to this Court pursuant to California Rule of Court 8.548. This Court granted review on July 11, 2018.

ARGUMENT

California requires employers to pay at least the minimum wage to all employees for all hours they work in the state. That right, which is a cornerstone of California's wage-and-hour law protections, does not evaporate merely because an employee may have traveled to California earlier in the day or may have started the workday in California and ended it elsewhere. The state has a fundamental interest in ensuring that all employees performing work within its borders are paid for all hours worked, paid in a timely manner, and receive wage statements sufficient to determine whether they have been lawfully paid for all hours worked.

The underlying statutory issue is whether the term "employer," as defined in the California Labor Code and the IWC Wage Order, includes a

company like Delta that is headquartered out of state, but routinely requires flight attendants like Plaintiffs to perform work while physically present in California. Delta contends that, even though its business model requires its flight attendants routinely to fly in and out of California airports and to perform many hours of on-the-ground work in California, it is exempt from California's wage-and-hour law because its flight attendants on a given workday may only work an hour or so without pay in California. Under this Court's established precedents, though, the fact that employees may only work in California for an hour per workday—or a few hours every rotation or pay period—does not deprive those employees of their right to be paid for that time under California law. Nor does it deprive them of other rights under the Labor Code and Wage Order with respect to that California on-the-ground work.

Once this threshold issue is resolved (and with it, the first two certified questions), the remaining question is one of statutory application: Does an employer's pay scheme that, in most circumstances, provides *no* compensation for mandatory on-the-ground time worked in California, comply with the requirement that employers must pay their employees for each hour worked in the state? The answer is plainly no. Nor is Delta's unlawful scheme saved by a supplemental pay practice that only applies when the primary pay scheme results in half of the shift being completely unpaid—because that practice does *not* apply to roughly 85% of the flight attendants' duty periods and because, even when it applies, it only provides compensation for half of the on-duty hours actually worked.

I. California's Wage-and-Hour Requirements Are Intended to Protect Employees and Their Right to be Paid for All Hours Worked

The wage rights at issue arise under the Labor Code and the IWC's Wage Order, which is "'to be accorded the same dignity as [a] statute[].'" *Troester*, 235 Cal.Rptr.3d at 826 (quoting *Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal.4th 1004, 1027). "'When construing the Labor Code and wage orders, [this Court] adopt[s] the construction that best gives effect to the purposes of the Legislature and the IWC.... Time and again, [this Court] [has] characterized that purpose as the protection of employees.... In furtherance of that purpose, [the Court] liberally construe[s] the Labor Code and wage orders to favor the protection of employees.'" *Troester*, 826 Cal.Rptr.3d at 826 (quoting *Augustus v. ABM Security Servs., Inc.* (2016) 2 Cal.5th 257, 262 (internal citations omitted)); *Sav-On Drug Stores, Inc. v. Super. Ct.* (2004) 34 Cal.4th 319, 340.

The core right guaranteed by the Labor Code and Wage Order is the right to be paid at least the minimum wage for all hours worked. The IWC emphasized the "importance ... of ensuring that employees are fully compensated for *all* time spent in the employer's control." *Troester*, 235 Cal.Rptr.3d at 831 (emphasis added); *see also id.* at 833 (noting "Wage Order's ... directive to compensate employees for all time worked" and "its concern with small amounts of time"); 8 Cal. Code Regs. § 11090(4); Lab. Code § 1182.12(b)(3); *see also* Lab. Code § 1194 (minimum wage owed "[n]otwithstanding any agreement to work for a lesser wage").

The right to be paid at least the minimum wage for all hours worked is part of an integrated statutory scheme that includes the two other core protections at issue. Labor Code section 204, which makes wages due and payable twice a month, protects "[t]he public policy in favor of full and

prompt payment of an employee's earned wages[, which] is fundamental and well established." *Smith v. Super. Ct.* (2006) 39 Cal.4th 77, 82 (recognizing "timely payment of employee wage claims as indispensable to the public welfare"); *see also Davis v. Farmers Ins. Exch.* (2016) 245 Cal.App.4th 1302, 1331, *as modified on denial of reh'g* (Labor Code protections, including section 204, are "'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit'") (quoting *On–Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1085). Labor Code section 226 requires employers to provide non-exempt employees with a wage statement containing the detailed wage-and-hour information needed to determine whether the employer paid for all hours worked at the required rate. Lab. Code § 226(a), (j); *see also Raines v. Coastal Pac. Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 675; *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1149. Sections 204 and 226 are essential components of the Legislature's overall effort to provide maximum protection to employees and to the employees' right to be paid for their labor.

II. California Law Requires Employers to Pay at Least the Minimum Wage for All Hours Worked in California

The Ninth Circuit asks: "Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time?" The answer is yes, at least where, as here, the employer knows and intends for that work to be performed in California.

Certain basic principles cannot be disputed. California's minimum wage law applies to out-of-state-based employers no less than in-state-based employers, *see, e.g.*, *Troester*, 235 Cal.Rptr.3d 820; *Troester v.*

Starbucks Corp. (9th Cir. June 2, 2016) 680 Fed. Appx. 511 (certification order, identifying Starbucks as a "Washington corporation"), and to time worked in California by employees with out-of-state residences no less than those with in-state residences. *See Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1197.

This Court held in *Sullivan* that California's overtime protections "apply by their terms to all employment in the state, without reference to the employee's place of residence." 51 Cal.4th at 1197. Because *Sullivan* involved the daily overtime claims of employees who traveled to California to conduct trainings lasting more than eight hours per day (the minimum needed to trigger California overtime protections), the Court limited its holding to workdays of eight hours or more. Any shorter time period would not entitle the employee to California overtime. *Id.* at 1195. Minimum wage claims, by contrast, are triggered by *any* appreciable amount of unpaid in-state work, *see Troester*, 235 Cal.Rptr.3d at 824, and therefore must be compensated at the California minimum wage rate regardless of the amount of time involved.

Payment of the minimum wage is just as important under California law as payment of statutory overtime. Consequently, any employer that suffers or permits its workers to perform work in California must pay those workers at least the minimum wage for all hours worked in California, just as it must pay the statutory overtime rate for all hours worked in California exceeding eight in a day and 40 in a week.

A. By Its Terms, California's Minimum Wage Law Applies to Work Performed in California by Any Employee

As in *Sullivan*, this Court should begin its analysis with the plain language of the Labor Code and Wage Order. Like the overtime

requirement cited in *Sullivan*, which required compensation for "[*a*]*ny work* in excess of eight hours in one workday," 51 Cal.4th at 1197 (citing Lab. Code § 510 and adding emphasis), Section 4 of Wage Order 9-2001 requires payment of wages "for *all* hours worked." 8 Cal. Code Regs. § 11090(4) (emphasis added); *see also Armenta*, 135 Cal.App.4th at 323. *Sullivan* also relied on the civil enforcement provision in Labor Code section 1194, which provides that "*any employee* receiving less than the minimum wage or the legal overtime compensation applicable" is entitled to recover the unpaid wages in a civil action. 51 Cal.4th at 1197 (citing Lab. Code § 1194(a) and adding emphasis). That provision, by its express terms, applies to minimum wage claims as well as overtime claims. Similarly, the broad legislative findings and declaration relied on by the Court in *Sullivan*—that "[*a*]*ll* protections" of state law "are available to *all* individuals ... who are or who have been employed[] in this state," Lab. Code § 1171.5(a) (emphases added)—apply to claims for unpaid minimum wage just as they applied to the overtime claims in *Sullivan*.[9]

The Court in *Sullivan* relied on that language, which does not "distinguish[] between residents and nonresidents," in holding that California's core worker-protection laws "apply by their terms to all employment in the state, without reference to the employee's place of residence." 51 Cal.4th at 1197. The statutory language and public policy principles underlying the Court's analysis also necessarily apply to minimum wage claims, because "California has [] unambiguously

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[9] This Court explained in *Sullivan* that although section 1171.5 was enacted in part to protect undocumented workers, it "cannot reasonably be read as speaking only to undocumented workers, given that it was drafted and codified as a general preamble to the wage law and broadly refers to 'all individuals' employed in the state." 51 Cal.4th at 1197 n.3.

asserted[] a strong interest in applying" those core wage protections "to all nonexempt workers, and all work performed, within its borders." *Id.* at 1203.

The creation of specific exemptions from the state's minimum wage laws demonstrates that the Legislature deliberately chose *not* to "authorize an exemption ... on the basis of an employee's residence," *Sullivan*, 51 Cal.4th at 1197-98, or on the basis of an employer's requirement that the employee perform job duties in more than one state on a given day. The Wage Order expressly covers employees engaged in the transportation industry—which broadly includes "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water," 8 Cal. Code Regs. § 11090(2) (N), and contains no exception for transportation industry employees who routinely cross state lines, as railroad, trucking, air carrier, and shipping employees often do. While the Wage Order includes exemptions from *some* provisions for "employees who have entered into a collective bargaining agreement under and in accordance with the provisions of the Railway Labor Act," *id.* § 11090(1)(E), that exemption does not apply to the minimum wage requirement at issue here, *id.*, § 11090(1)(E), (4), and would not apply to Plaintiffs in any event because they are not covered by a collective bargaining agreement. "The Legislature knows how to create exceptions for nonresidents when that is its intent." *Sullivan,* 51 Cal.4th at 1197; *see also* Lab. Code § 245.5(a)(3) (exempting "flight deck" and "cabin crew" from California's sick leave law); 8 Cal. Code Regs. § 11090(3)(N) (exempting from overtime protection certain hours voluntarily worked by airline employees who request changed days off or trades days off).

California's minimum wage laws also draw no distinctions based on the location of the *employer*. The Wage Order and Labor Code define "employer" as "*any* person who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of *any* person." Lab. Code § 1182.12(b)(3) (emphases added); 8 Cal. Code Regs. § 11090(2)(F). Had the Legislature intended to exempt out-of-state employers, it would have done so. *See Sullivan*, 51 Cal.4th at 1197 (citing workers compensation exemptions for certain out-of-state employers). For these reasons, the plain language of the Wage Order and Labor Code does not permit any distinction to be drawn between resident and nonresident employees, or between resident and nonresident employers, for purposes of requiring employers to pay at least the minimum wage for all hours worked.

The strong public policies embodied in the minimum wage law require that the law be construed broadly and in furtherance of the Legislature's protective goals. Here, applying California's minimum wage protections to *all* work performed by employees in California bests furthers California's policy goals of "protecting the health and safety of workers and the general public." *Sullivan*, 51 Cal.4th at 1198. In contrast, "[t]o exclude nonresidents" or those who split their workdays between California and elsewhere (whether in the air or elsewhere on the ground) "would tend to defeat the[] [law's] purpose by encouraging employers to import unprotected workers from other states" or, as here, to assign pre-flight and post-flight job duties to traveling flight attendants like Plaintiffs rather than to full-time California employees (who would unquestionably be entitled to the minimum wage for that same on-the-ground California work if they never went airborne). *Id.*

As in *Sullivan*, there is nothing "improper" or "capricious" about California's choice "to regulate all nonexempt ... work within its borders...." 51 Cal.4th at 1198. California has "'broad authority under [its] police powers to regulate the employment relationship to protect workers within the State.'" *Id.* (quoting *De Canas v. Bica* (1976) 424 U.S. 351, 356). California also has a compelling interest "in protecting health and safety, expanding the labor market, and preventing the evils associated with overwork," all of which support its interest in requiring its statutory wage protections to all in-state work time. *Sullivan*, 51 Cal.4th at 1204; *id.* at 1203 (California "has unambiguously asserted[] a strong interest in applying its overtime law to all nonexempt workers, and all work performed, within its borders."). California's police power fully extends to out-of-state companies like Delta, because California, like any other state, "'may apply [its] policies to businesses that choose to conduct business within that state.'" *Id.* at 1205 (quoting *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 105). If Delta's business model requires it to have flight attendants perform hundreds of hours of pre-flight and post-flight duties on the ground in California every day to service flights in and out of California, it must "make itself aware of and comply" with California's laws. *Id.*

Sullivan also considered choice-of-law questions regarding *which* state's overtime laws should apply when out-of-state-based employees performed temporary work in California. No such question arises here. Delta does not argue that some *other* state has a greater interest in regulating the work performed by its flight attendants in California. Instead, it argues that *no* state has any interest in those flight attendants' in-California work time because most job duties are performed in federal

airspace, not on the ground in California or elsewhere. Delta Ninth Cir. Ans. Brief, ECF No. 22, at 12 of 66.[10]

Delta employs hundreds of flight attendants to work on the ground in California every day. It assigns flight attendants to hundreds of thousands of California flights every year, with each flight requiring on-the-ground work in California. *See* ER 1126-27; 1141-44. Nothing requires California to permit out-of-state employers such as Delta to ignore its laws while maintaining such consistent and regular employment in the state.

B. California's Minimum Wage Law Applies to the Work Performed by Delta's Flight Attendants on the Ground in California

The certified question asks if California's minimum wage law applies to an employee who works in California only "episodically" and "for less than a day at a time." Plaintiffs construe "episodic" to mean "occurring occasionally and at irregular intervals." Oxford Dict. of English (3d ed. 2010) at 590. The question suggests that there may be some amount of California work time that is either so infrequent, unexpected, or insignificant as to not warrant minimum wage protection. While Plaintiffs will attempt to provide the Court with a set of general principles for future cases arising under different facts, application of California minimum wage

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[10] There is no issue of interstate comity in this case either. As this Court explained in *Sullivan* (in addressing the employer's misplaced reliance on *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557), questions of interstate comity may arise where there is a dispute over the "extraterritorial application of California's employment laws," for example, when a resident employee claims the protections of California law when leaving the state temporarily. 51 Cal.4th at 1199. Here, Plaintiffs are only asking to be protected by California law for the time they work at the direction of their employer in California. Delta's argument that *no state's law* should apply to flight attendants working on the ground in California is not based on interstate comity, but on economic self-interest alone.

law to the facts of *this* case should not be controversial, because Delta could not operate its California routes without requiring the flight attendants assigned to those routes to perform mandatory pre-flight and post-flight work at Delta's direction and under Delta's control.

This Court's recent decision in *Troester* confirms that the California Legislature and IWC intended to require employers to pay for *all* time worked, including brief periods of off-the-clock or other time that might otherwise remain unpaid. *Troester* involved a Starbucks employee who was allegedly suffered or permitted to work off the clock for four to 10 minutes per day. 826 Cal.Rptr.3d at 823. Over that employee's 17 months of employment, his unpaid time totaled approximately 12 hours 50 minutes. *Id.* at 824. Starbucks argued that it did not have to pay for that work time because it was *de minimis*. This Court disagreed, concluding that despite the federal law rule that *de minimis* amounts of work time may be ignored, *California* law required employers to pay for all hours worked and for all work performed. *Id.* at 827, 831 (citing IWC Wage Order 5, 8 Cal. Code Regs. § 11050; Lab. Code § 510; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585).

The 12 hours 50 minutes of time at issue in *Troester* amounted to $102.67 in unpaid wages—which this Court properly recognized is not a "small thing" that the Labor Code would casually disregard. 235 Cal.Rptr.3d at 824. Here, each Plaintiff's aggregate California time far exceeds the 12 hours 50 minutes at issue in *Troester*.[11] Moreover, their on-

[11] Plaintiff Lehr worked more than 448 uncompensated on-the-ground hours in California, ER 1305-43; Eichmann worked more than 129 such hours, ER 1278-94; and Oman worked more than 20 such hours, ER 1262-66.

the-ground California work, like the off-the-clock work in *Troester*, occurred "on a regular basis" and "as a regular feature of the job," *id.* at 833—although Plaintiffs do not believe those should be requirements for minimum wage eligibility.[12] The time worked by Plaintiffs and other Delta flight attendants is not so trivial or happenstance as to allow Delta to "evade the obligation to compensate [its] employee[s] for that time." *Id.*

Delta tries to derive a new "job situs" test by selectively quoting from *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, while largely ignoring the Court's analysis in *Sullivan*. *Tidewater* unremarkably held that employees who primarily work within California's geographic boundaries are entitled to the protections of California labor law when working in the state. 14 Cal.4th at 578. Thus, when an "employee resides in California, receives pay in California, and works exclusively, or principally, in California, then that employee is a 'wage earner of California' and presumptively enjoys the protection of IWC regulations" for that California work time. *Id.*

Some federal district courts have read this language (which simply described the facts in *Tidewater*) as imposing a minimum requirement that employees must work "primarily" or "principally" in California to be entitled to California workplace protections. *See Ward v. United Airlines, Inc.* (N.D. Cal. July 19, 2016) 2016 WL 3906077, at *5; *Vidrio v. United Airlines, Inc.* (C.D. Cal. Mar. 15, 2017) 2017 WL 1034200, at *6. That is

[12] As explained *infra* at 32-34, Plaintiffs believe that employees are entitled to be paid for all work their employers suffer or permit them to perform in California, as distinguished from work the employer neither knows nor intends to be performed in California (e.g., an instruction to an employee to "complete this memorandum before next Tuesday" when the employer does not know where or when the employee will be traveling).

an incorrect reading. While the Court in *Tidewater* identified factors that would be *sufficient* to justify application of California law, it did not hold that any (or all) of these factors were *necessary* for California law to apply to work performed within the state's borders. In fact, this Court was careful to decide *Tidewater* narrowly, identifying but not answering the question raised by this case: whether the Legislature "intended IWC wage orders to govern out-of-state businesses employing nonresidents, though the nonresident employees enter California temporarily during the course of the workday." 14 Cal.4th at 578.

The facts and analysis in *Sullivan* make clear that none of the three factors identified in *Tidewater* and relied upon by Delta are dispositive in determining when California wage laws should apply. First, *Sullivan* held that an employee need not be a resident of California to be entitled to the protection of its laws. 51 Cal.4th at 1197 ("California's overtime laws apply by their terms to *all employment in the state*....") (emphasis added). Second, none of the *Sullivan* plaintiffs worked "primarily" or "principally" in California. Indeed, none worked more than 20% of their total work days in California. *See Sullivan v. Oracle* (9th Cir. 2009) 557 F.3d 979, 981 (Sullivan spent no more than 13% of his work days in California, Evich spent no more than 20% of her work days in California, and Burkow spent no more than 8% of his work days in California). Third, the *Sullivan* plaintiffs were held entitled to California's overtime protections even though there was no evidence in the record of where they received their pay. *Sullivan*, 51 Cal.4th at 1191. In short, nothing in *Tidewater* supports Delta's argument that an employee must work "principally" in California to be protected by California law.

In its briefing below, Delta threatened that a ruling in Plaintiffs' favor would result in minimum wage liability for employers whenever an employee unexpectedly spent brief amounts of time in California and chose to perform some work during that time. Delta Ninth Cir. Ans. Brief, ECF No. 22, at 44 of 67. The reality is far more benign. In the first place, whether or not California's minimum wage law applies to a particular period of California work time, it can only be violated where (as here) the employer does not pay its employee for that time at the required hourly rate. An employer that pays for every hour that its traveling employees are working, at a rate that equals or exceeds the California minimum wage, faces no risk of violating California's minimum wage law—because it would be fully compliant with that law if it applied.

Second, California law has never required employers to pay for the time worked by an employee, unless the employer "suffers or permits" that work to be performed, *Dynamex Operations W. v. Super. Ct.* (2018) 4 Cal.5th 903, 959-60, or the employee is under the control of the employer, *Morillion*, 22 Cal.4th at 585. An employer suffers or permits work to be performed when it knows or reasonably should know that work is being performed for its benefit, yet fails to stop or prevent that work from being performed. *See Dynamex*, 4 Cal.5th at 937 (quoting *Martinez v. Combs* (2010) 49 Cal.4th 35, 69, and omitting italics) ("'A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.'"). If, as here, the employer knows that the work will be performed in California because it specifically assigned employees to perform that work here, California law should apply to that work. In the

hypothetical examples presented by Delta, where the employer does not know or care where or whether the work is being performed, California law does not apply because the employer neither controlled the work nor suffered or permitted that work *to be performed in California.*

This Court need not formulate a rule that will necessarily determine the outcome of future cases involving materially different facts. *See Troester*, 235 Cal.Rptr.3d at 829 ("Instead of prejudging these factual permutations, we decide only whether the de minimis rule is applicable to the facts of this case as described by the Ninth Circuit."). Here there is no dispute that Delta sends its flight attendants to work in California "on a regular basis" and "as a regular feature of the job." Those flight attendants' on-the-ground California work does not occur by happenstance and is not incidental to the flight attendants' other duties. California wage law therefore applies.

In federal court, Delta asserted a defense based on the dormant Commerce Clause, contending that application of California workplace law to non-resident employees who perform temporary, intermittent work in California would unduly burden interstate commerce. Delta Ninth Cir. Ans. Brief, ECF No. 22, at 44-55 of 67. That defense is not encompassed by any of the three certified questions, and will be resolved later, if necessary, by the Ninth Circuit. *See, e.g., Sullivan v. Oracle* (9th Cir. 2011) 662 F.3d 1265, 1271 (rejecting dormant Commerce Clause argument after this Court answered certified questions). There may be cases (although not this one) in which a state's imposition of a unique law that disparately burdens out-of-state residents violates the dormant Commerce Clause. *See Nat'l Ass'n of Optometrists & Opticians v. Harris* (9th Cir. 2012) 682 F.3d 1144, 1148. There may also be cases (again, not this one)

that seek to apply California wage-and-hour law in a truly unreasonable manner, based on a fleeting or ephemeral contact with California that is incidental to any core job duties and that occurs as an avoidable happenstance. *See Troester*, 235 Cal.Rptr.3d at 839 (Kruger, J., concurring) ("a properly limited rule of reason does have a place in California labor law"); *id.* at 834 (Cuéllar, J., concurring). But as Justice Kruger noted, "[t]he overarching rule is, and must be, that employees are entitled to full compensation for time worked, and employers must make every reasonable effort to ensure they have adequately measured or estimated that time." *Id.* at 839 (Kruger, J., concurring).

III. California's Timely-Pay and Wage Statement Protections Apply to All Work Performed in California

The Ninth Circuit also asks: "Do California Labor Code sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time?" The answer to this question, like the question regarding application of the minimum wage law, is controlled by the plain statutory language and the Legislature's underlying purposes.[13]

The district court in this case did not base its analysis on the statutory language and evident legislative purpose. Instead, it focused (pre-

[13] For most California-based flight attendants, on-the-ground work in California is frequent, predictable and essential, even if it may occur at "irregular" intervals during any given pay period. Plaintiffs Lehr, Eichmann, and Flores are based at California airports. SER 18, 285, 437. As a result, almost all their rotations start and end in California. *See* ER 807-978. Eichmann and Flores are also California *residents*, SER 135-36, giving them an even stronger argument for entitlement to the protections of California wage law for all of their California work.

Troester) on whether a particular flight attendant's on-the-ground work for Delta may be "*de minimis*" and not entitled to any protection. ER 7, 12-13, 15-16; *see also Ward*, 2016 WL 3906077 at *5 (employees not entitled to California-compliant wage statements unless they work "principally" in California); *Vidrio*, 2017 WL 1034200, at *1; *but see Bernstein v. Virgin Am., Inc.* (N.D. Cal. Nov. 7, 2016) 2016 WL 6576621, at *9 (rejecting reasoning in *Ward* as contrary to statutory language and legislative intent).[14] That approach rests on a misunderstanding of how the Legislature intended California's wage laws to operate for the benefit of employees who perform work in this state, whether on an episodic, occasional, irregular basis or, like Delta flight attendants, on a frequent and regular basis.

A. Sections 204 and 226 Apply to All Work Performed by Employees in California

By its express terms, section 226 covers *all* employees. Lab. Code § 226(a) ("*[a]n employer* shall ... furnish [a wage statement to] *to his or her employee*") (emphases added). Section 204 is even broader, requiring timely payment of "[a]ll wages ... earned by *any person* in *any employment*." Lab. Code § 204(a) (emphases added). This Court's holding in *Sullivan* that California law covers work performed in California relies on similarly broad language in Labor Code sections 510 and 1194. *See Sullivan*, 51 Cal.4th at 1197. And *Sullivan* buttressed its conclusion with the findings and declaration of the "preambular section of the wage law,"

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[14] *Bernstein* subsequently relied on Virgin America's ties to California to confirm the applicability of Section 226. *See Bernstein v. Virgin America, Inc.* (N.D. Cal. 2017) 227 F.Supp.3d 1049, 1060. However, the court did not hold that the presence of a "California employer" is a necessary condition to coverage. *See id.*

which applies equally to sections 204, 226 and to the overtime and minimum wage requirements, and which "confirms that [California's] employment laws apply to '*all individuals*' employed in this state." *Id.* (quoting Lab. Code § 1171.5).

As discussed *supra*, the Legislature and the IWC knew how to exclude certain employees or employers when that was their intent. *See, e.g.*, Lab. Code § 245.5(a)(3) (exempting "flight deck" and "cabin crew" from California's sick leave law); 8 Cal. Code Regs. § 11090(1)(E) (excluding employees covered by collective bargaining agreements under Railway Labor Act from some, but not all, Wage Order protections); 8 Cal. Code Regs. § 11090(3)(N) (excluding some airline employees' overtime hours). Moreover, the Legislature recently amended section 226 by exempting employees on commercial passenger fishing boats (which fish in federal waters) from the requirement that all hours worked must be reported. *See* Lab. Code § 226(j)(2)(F). By exempting that one category of employees, the Legislature manifested its intent to continue including other like categories of employees in the statute's coverage—presumably aware that flight attendants who regularly cross state lines while performing their daily job functions often perform work in California only episodically. *See Soto v. Motel 6 Operating* (2016) 4 Cal.App.5th 385, 391 ("When a statute omits a particular category from a more generalized list, a court can reasonably infer a specific legislative intent not to include that category within the statute's mandate.").

California's labor laws serve crucial public policy goals that require those laws to be construed in the most protective practicable manner. *Troester*, 235 Cal.Rptr.3d at 824, 826; *Sullivan*, 51 Cal.4th at 1198. This is just as true for sections 204 and 226 as for California's minimum wage and

overtime protections. Section 204 protects "[t]he public policy in favor of full and prompt payment of an employee's earned wages[, which] is fundamental and well established." *Smith*, 39 Cal.4th at 82. The purpose of section 226 "is to document the paid wages to ensure the employee is fully informed regarding the calculation of those wages." *Soto*, 4 Cal.App.5th at 392 (emphases removed). The Legislature reinforced that public policy through the Wage Theft Protection Act of 2011 which mandates disclosure of "[t]he rate or rates of pay and basis thereof." Lab. Code § 2810.5(a)(1)(A); *see also id.* § 226.2 (adopted in 2015, requiring employers that pay based on a piece rate system to disclose "total hours" of "nonproductive time," and "rate of compensation").

This case illustrates the importance of the public policies underlying Sections 204 and 226 and their requirements that employers pay all wages due on a timely basis and provide wage statements documenting all hours paid and the applicable hourly rates. Delta regularly paid flight attendants a portion of their pay more than six weeks after that work was performed, and provided flight attendants working in California with wage statements that failed to identify the hours actually "worked" and the hourly rates paid for that work, making it exceedingly difficult for those employees to determine whether Delta had fully complied with California wage-and-hour requirements. Although the district court surmised that Delta paid its flight attendants for all duty hours "at a rate that is less than ... the flight pay [rate]," ER 40, there is no way for a flight attendant to confirm or rebut that statement (which Plaintiffs contend is untrue and unsupported by any evidence, *see infra* at 49-52) based on Delta's inadequate wage statements. Only by receiving a California-compliant wage statement that identifies hours worked and the actual rates of pay can Delta's flight attendants

evaluate whether they were paid in accordance with California law.[15] Thus, to satisfy the plain language of the statutes and the underlying remedial intent, this Court should conclude that sections 204 and 226 apply to all work performed in California (i.e., that the employer suffers or permits to be performed in California), even if that work is only episodic as to any particular flight attendant.

B. This Court Should Not Create a Judicial Exemption from Sections 204 and 226 on the Facts of This Case

Delta advanced three arguments below to avoid the unambiguous requirements of Labor Code sections 204 and 226. It contended that Plaintiffs have no right to timely wage payments or to complete and accurate wage statements covering the time they worked on the ground in California because: (1) Plaintiffs lack sufficient connections to California; (2) Plaintiffs do not primarily work in California; and (3) California has no interest in applying those statutory protections to Plaintiffs' work.[16] These arguments fail.

First, *Troester* eliminates the argument, relied on by the district court, that there should be an exemption to Sections 226 and 204 because the "plaintiffs only worked a *de minimis* amount of time in California...." ER 16-17. Nothing in the Labor Code, the Wage Orders, or this Court's prior decisions support the assertion that some minimum amount of "work"

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[15] The Ninth Circuit was correct in stating that "the Flight Pay calculation provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers...." *Oman*, 889 F.3d at 1078.

[16] Delta has also argued that application of Sections 226 and 204 would violate the dormant Commerce Clause, but that issue is not before the Court.

must be performed before the protections of California law (which apply to "all" and "any" work performed in the state) are triggered. In any event, the work time at issue in this case is substantial and not even close to *de minimis*. *See supra* at 29-31.

There is also no argument in this case, nor could there be, that Delta is an unwitting out-of-state employer subjected to unforeseeable violations of California's labor laws. Delta employs hundreds of full-time employees in California (e.g., ground crew), and regularly assigns flight attendants to perform work in the state that is essential to the operation of Delta's core business. That work is neither too fleeting nor too insignificant to excuse Delta from complying with California's requirements under sections 204 and 226. *Troester*, 235 Cal.Rptr.3d at 825; *Sullivan*, 51 Cal.4th at 1205 ("'a company that conducts business in numerous states ordinarily is required to make itself aware of and comply with the law of a state in which it chooses to do business'") (quoting *Kearney*, 39 Cal.4th at 105).

Second, nothing in the statutory text or purpose supports a "job situs" requirement (as imposed by the district court in *Ward*) that would exempt employees who are not "principally" employed in California. *See supra* at 31-32. Besides, such a requirement would be unworkable in practice. Imagine an employee assigned to work in California for her first three weeks of employment. That time would unquestionably be covered by California law. If the employee is then transferred to Nevada, is she retroactively stripped of her rights under California law for those three California weeks because she no longer works "principally" in California? And over what time period is an employee's "principal" job location measured anyway?

A percentage-based test is unworkable because it necessarily looks in the rearview mirror to determine state law coverage. Employers must be able to determine state law coverage in real time, not weeks, months, or years down the road. California protects each employee's rights to receive prompt pay for work done in California and information as to the basis of that pay, rights that are not dependent on whether the employee may subsequently be assigned to work in a different state.

Third, Delta has raised the specter of different states' payment and wage statement requirements, suggesting that another state's interest may be greater than California's, or that the potential for conflicting state interests means no state's laws should apply to the California work performed by Delta's flight attendants. Delta Ninth Circ. Ans. Brief, ECF No. 22, at 47-53 of 67. But on the facts of this case, involving flight attendants who customarily spend most of their time in the air, California is the only state with any significant interest in their *California on-the-ground time*, and that interest is sufficient to require application of sections 204 and 226 for that time.

The conflict-of-laws analysis in *Sullivan* raised (but did not answer) a question concerning "California's interest in the content of an out-of-state business's pay stubs." 51 Cal.4th at 1201. That question only arises, though, when considering whether to apply California law rather than the "conflicting law of the employer's home state." *Id.* Here, Delta has not argued the wage laws of Georgia (where it is headquartered) or Delaware (where it is incorporated) should control. Nor has it argued for application of the laws of each flight attendant's state of residence. Instead, Delta argues that *no* state's laws may dictate when it must pay or document wages for time worked in California, because its flight attendants do not

spend enough time in any one state to bring them within the coverage of any state law. Because Delta does not contend that any other state's laws should supersede California's laws with respect to California work time, no conflict-of-laws issue arises in this case.

Delta's speculation regarding the burdens of compliance (which it made below in the course of its dormant Commerce Clause defense) are equally meritless. *Cf. Pac. Nw. Venison Producers v. Smitch* (9th Cir. 1994) 20 F.3d 1008, 1015 (rejecting dormant Commerce Clause challenge because "the record lacks any indication of the *extent*" of the alleged burden). Plaintiffs are seeking the protections of California wage law for time they were assigned to work in California. As a practical matter, it may be most efficient for a company like Delta to promptly pay for *all* of its flight attendants' time (as it will soon be doing, *see supra* at 19), and to include *all* of its flight attendants' time and hourly rates on their wage statements, rather than creating separate wage statements for each state in which Plaintiffs perform on-the-ground work during any particular pay period. But the timing and documentation of the flight attendants' non-California time is no concern of California's. Delta's failure to timely pay and document its flight attendants' non-California time does not violate Labor Code section 204 or 226.

In sum, Delta has not articulated any legitimate reason why sections 204 and 226 should not apply on the facts of this case to any pay period in which its flight attendants perform on-the-ground work in California. As long as an employer suffers or permits its employees to perform work in California on at least an "episodic" basis (and, in fact, on a regularly scheduled basis), it must comply with Labor Code sections 204 and 226 with respect to that time.

IV. California's Minimum Wage Law Requires Payment for All Hours Worked

The Ninth Circuit's final question asks: Does the *Armenta/Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? The answer is again yes (although the question is confusing, given that Delta's pay formulas do not, in fact, "award[] credit for all hours on duty," *see infra* at 49-52).

California minimum wage law requires employers to pay at least the minimum wage for all compensable work (e.g., the on-the-ground time at issue here). An employer cannot defend against its failure to pay at least the minimum wage by asserting that the employee's "average" rate of pay over time exceeds the minimum wage rate. Where an employer "does not award credit [i.e., does not pay at least the minimum wage] for all hours [that its employees are] on duty" in California, it violates California's minimum wage law with respect to that unpaid on-duty time.

This Court has repeatedly recognized that the Legislature and the IWC intended California's wage-and-hour laws to be more protective of workers than the federal Fair Labor Standards Act ("FLSA"). *See, e.g.*, *Troester*, 235 Cal.Rptr.3d at 824, 826; *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 843; *Martinez*, 49 Cal.4th at 67-68; *Morillion*, 22 Cal.4th at 588-92; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795-799. Although the FLSA permits averaging for purposes of determining weekly minimum-wage compliance, *Douglas v. Xerox Bus. Servs., LLC* (9th Cir. 2017) 875 F.3d 884, 890, for at least the past 13 years California law has been clear that such averaging to achieve minimum-wage compliance is *not* permitted and that the Labor Code and Wage

Orders require employers to pay at least the minimum wage for each hour worked. *See, e.g., Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 98, 114, review denied (June 21, 2017); *Rhea v. General Atomics* (2014) 227 Cal.App.4th 1560, 1574; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872; *Gonzalez*, 215 Cal.App.4th at 51, review denied (July 17, 2013); *Armenta,* 135 Cal.App.4th at 324, review denied (Mar. 15, 2006); *see also* Lab. Code § 226.2 (codifying this principle and clarifying its application to "piece-rate" employees).

California's minimum wage law requires employers to pay their workers at the required rate for *all* time worked. Failure to pay (or failure to pay at least the minimum wage) for certain time cannot be justified by the employer's payment of other time at a higher-than-minimum-wage rate.

A. California Minimum Wage Law Requires Payment for All Time Worked, Regardless of What an Employee's Average Hourly Rate Might be

Armenta was the first case to reject federal "averaging" principles in the context of California's minimum wage guarantees. The court of appeal recognized that federal law "requires payment of minimum wage to employees who 'in any work week' are engaged in commerce," while the IWC's Wage Orders require payment of "'not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.'" *Armenta*, 135 Cal.App.4th at 323 (quoting Wage Order No. 4, 8 Cal. Code Regs. § 11040, whose language is identical to Wage Order No. 9 at issue here) (emphasis added in *Armenta*). Focusing on the material differences in language between state and federal law, the court concluded that the Wage Order's specific reference to payment for "all hours worked" necessarily

"expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked." *Id.*[17] Accordingly, it found that the employer violated California law when it paid its employees for "productive time" spent maintaining utility poles in the field, but not for "nonproductive time" spent traveling between work sites, loading and unloading vehicles, maintaining vehicles, and completing paperwork. *Id.* at 317. This was true even though the employees' *average* hourly rate was always greater than the minimum wage. *Id.* at 319.

The court in *Armenta* also found support for its conclusion in Labor Code sections 221, 222, and 223. *Id.* at 323. Section 221 prevents an employer from "collect[ing] or receiv[ing] from an employee any part of wages" paid to an employee. Section 222 provides that an employer may not "withhold from said employee any part of the wage agreed upon." Section 223 makes it "unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." As the court explained, "adopting the averaging method ... contravenes these code sections and effectively reduces [the employees'] contractual hourly rate" in violation of California minimum wage law. 135 Cal.App.4th at 323.

In *Gonzalez*, the court of appeal applied *Armenta* to a piece-rate compensation plan for auto mechanics with a minimum wage floor. *Gonzalez*, 215 Cal.App.4th at 41. Under the employer's "flag rate" compensation plan, each type of repair task was assigned a specific number of "flag hours," which the employer credited no matter how long the repair actually took. *Id.* The employer paid an hourly rate that greatly exceeded

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[17] This Court cited the same language in *Mendiola,* 60 Cal.4th at 839, in holding that on-call time must be paid.

the minimum wage for each "flag hour" the worker accrued. *Id.* As a back-up, the employer also "calculate[d] how much each technician would earn if paid an amount equal to his total recorded hours 'on the clock' multiplied by the applicable minimum wage." *Id.* If the piece-rate pay were greater than the "minimum wage floor," the employer paid the piece-rate pay only; if not, the employer paid the minimum-wage floor. *Id.*

Gonzalez held that this piece-rate compensation system violated California's minimum wage law, notwithstanding the guaranteed minimum-wage floor. *Id.* at 49. The court reasoned that "[a]veraging piece-rate wages over total hours worked results in underpayment of employee wages required 'by contract' under Labor Code section 223, as well as an improper collection of wages paid to an employee under Labor Code section 221." *Id.* at 50. The court provided the following example to illustrate why the employer's compensation plan was non-compliant:

> [A] technician who works four piece-rate hours in a day at a rate of $20 per hour and who leaves the job site when that work is finished has earned $80 for four hours of work. A second technician who works the same piece-rate hours at the same rate but who remains at the job site for an additional four hours waiting for customers also earns $80 for the day; however, averaging his piece-rate wages over the eight-hour work day results in an average pay rate of $10 per hour, a 50 percent discount from his promised $20 per hour piece-rate. The second technician forfeits to the employer the pay promised 'by statute' under Labor section 223 because if his piece-rate pay is allocated only to piece-rate hours, he is not paid at all for his nonproductive hours.

Id. at 50. The court held that the prohibition on averaging "applies whenever an employer and employee have agreed that certain work will be compensated at a rate that exceeds the minimum wage and other work time will be compensated at a lower rate." *Id.* at 51.

California courts of appeal have uniformly embraced the *Armenta*

and *Gonzalez* analysis. *See, e.g.*, *Vaquero*, 9 Cal.App.5th at 114 ("Like the compensation plans courts have found unlawful for failing to pay for nonproductive time, [the employer's] commission agreement did not compensate for rest periods taken by sales associates who earned a commission instead of the guaranteed minimum."); *Rhea*, 227 Cal.App.4th at 1574 ("California law does not permit employers to shift wages paid in one period to wages paid in another period, and ... therefore workers must receive the minimum wage for *each hour worked* during the payroll period.") (emphasis in original); *Bluford*, 216 Cal.App.4th at 872 ("rest periods must be separately compensated in a piece-rate system"). So has the Ninth Circuit and almost every district court applying California law.[18]

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[18] *See, e.g.*, *Fowler Packing Co., Inc. v. Lanier* (9th Cir. 2016) 844 F.3d 809, 812 ("piece-rate workers must also be paid for each hour of 'nonproductive time'—time in which a worker was at work but not completing a task"); *Vaquero v. Ashley Furniture Indus. Inc* (9th Cir. 2016) 824 F.3d 1150, 1154 ("California law also prohibits 'averaging' to meet minimum wage requirements."); *Troester*, 680 Fed.Appx. 511, 2016 WL 8347245, at *3; *Bernstein*, 227 F.Supp.3d at 1075 (flight pay formula similar to Delta's "does not separately compensate non-block ... time, which includes time when flight attendants are performing work"); *Wright v. Renzenberger, Inc.* (C.D. Cal. Mar. 8, 2018) 2018 WL 1975076, at *6 employer's practice of averaging non-driving hours "with the improperly paid piece-rate hours renders the entire system invalid"); *Ontiveros v. Safelite Fulfillment, Inc.* (C.D. Cal. Oct. 12, 2017) 2017 WL 6261476, at *4 ("although employers may compensate their employees based on the number of tasks completed, employees must receive at least minimum wage for every hour worked, whether or not they complete any compensable tasks during that hour"); *Sandoval v. M1 Auto Collisions Centers* (N.D. Cal. Sept. 23, 2016) 2016 WL 6561580, at *20 ("paying Plaintiffs for the actual time spent on each task is not the same as paying Plaintiffs for non-productive time at [autobody] shops, such as time spent waiting between tasks or on rest breaks"); *Villalpando v. Exel Direct Inc.* (N.D. Cal. 2016) 161 F.Supp.3d 873, 889 (employer may not "establish compliance with California's minimum wage law by showing that

The legislative history underlying Labor Code section 226.2 further confirms the Legislature's intent to require payment of at least the minimum wage for every increment of time worked. Citing *Gonzalez* and *Bluford*, the Senate Committee on Labor and Industrial Relations recognized, in discussing the proposed bill, that "[e]xisting court decisions require that nonproductive time ... must be compensated separately and distinctly at the minimum wage or more," and further stated that *Gonzalez* and *Bluford* "were in keeping with prior legal decisions and statutes in California." Petitioners' Mot. to Take Judicial Notice, Attach. at 2, 4, 12. These principles are now well-accepted as the law in California. *See, e.g.*, *Fowler Packing Company, Inc.*, 844 F.3d at 812 ("Assembly Bill 1513 [which became Labor Code § 226.2] codified the holdings in *Gonzalez* and *Bluford*.").

Plaintiffs' average wages for all hours worked (including drivers' pre-trip work in the morning) is at or above the minimum wage rate"); *Ridgeway v. Wal-Mart Stores, Inc.* (N.D. Cal. 2015) 107 F.Supp.3d 1044, 1052-53 (summary judgment for plaintiff truck drivers whose employer failed to separately compensate pre- and post-trip work); *Quezada v. Con-Way Freight, Inc.* (N.D. Cal. July 11, 2012) 2012 WL 2847609, at *6 ("California law does not allow an employer to 'build in' time for non-driving tasks into a piece-rate compensation system.); *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2012) 913 F.Supp.2d 1001, 1006 (rejecting company's minimum-wage guarantee when commission scheme did not pay for all hours worked); *Cardenas v. McLane FoodServices, Inc.* (C.D. Cal. 2011) 796 F.Supp.2d 1246, 1252 ("a piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes, even if, averaged out, it would pay at least minimum wage for all hours worked."); *Ontiveros v. Zamora* (E.D. Cal. Feb. 20, 2009) 2009 WL 425962, at *3. The only courts departing from the *Armenta/Gonzalez* minimum-wage analysis seem to be the district court in this case and *Booher v. JetBlue Airways Corp.* (N.D. Cal. Apr. 26, 2016) 2016 WL 1642929, which followed the district court's reasoning.

B. California's Minimum Wage Law Applies Even When the Challenged Pay Structure Results in Higher Pay

In answering the third certified question, this Court should reaffirm that *all* employees are entitled to at least the minimum wage for *each* hour worked in California, and that an employer's failure to pay for some segments of compensable work time violates California law regardless of how much the employer pays for other segments of compensable work time. *See, e.g.*, *Armenta*, 135 Cal.App.4th at 321; *Gonzalez*, 215 Cal.App.4th at 46; Lab. Code §§ 221-223.

Like the Plaintiffs here, the employees in *Gonzalez* and *Armenta* were paid at hourly rates greatly exceeding the state minimum wage (up to $20 per hour in *Armenta*, 135 Cal.App.4th at 317, and up to $32 per flag hour in *Gonzalez*, 215 Cal.App.4th at 41). Those hourly rates meant the workers could earn more than the minimum wage averaged across all hours worked, but did not resolve whether the employers violated minimum wage law. Instead, those courts inquired whether the employers' pay schemes ever resulted in unpaid work, and concluded that any amount of unpaid work—regardless of the total pay received—violated California law.

Gonzalez directly answers the third certified question. Even though the employer guaranteed that its employees would never receive less than the number of hours on duty times the state minimum wage rate, its piece-rate scheme did not *pay* for all hours worked, and two employees who produced the same number of "pieces" at the same "flag rate" would be paid the same, even if one worked many more hours than the other. 215 Cal.App.4th at 41-42. In instances where some time was unpaid, the piece-rate scheme violated the law even though it paid more total compensation

than would have been due under the alternate minimum-wage-guarantee formula.

C. Delta's Compensation Plan Fails to Pay for All Work Hours

Delta's compensation plan violates the principles of *Armenta* and *Gonzalez* because the Flight Pay formula fails to pay for all hours worked. Roughly 85% of all flight attendant duty periods are paid based *only* on the Flight Pay formula. For those duty periods, Delta pays *nothing* for on-the-ground California time. While Delta argues that in some instances its flight attendants receive supplemental pay in the form of the 1-for-2 Credit, that Credit does not cure the violation any more than the "minimum wage floor" cured the faulty flag-rate plan in *Gonzalez*. In both cases, specific time worked remains uncompensated.

1. Delta's Flight Pay Formula Fails to Pay for All Hours Worked

Delta's Flight Pay formula tracks and pays for flight time but not on-the-ground work time. As the Ninth Circuit recognized, the Flight Pay formula "provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers...." *Oman*, 889 F.3d at 1078.

This Court's starting point, therefore, must recognize that the pay formula that calculated Plaintiffs' pay for the vast majority of their duty periods did not pay them for all work time and therefore violates California law. *See Bernstein v. Virgin Am., Inc.* (N.D. Cal. Jul. 9, 2018) 2018 WL 3344316, at *5 ("Virgin fails to compensate its flight attendants for all hours worked because Virgin's formula does not separately compensate flight attendants for duty time that is not block time or deadheading time.").

2. Delta's 1-for-2 Credit Does Not Cure the Violations Inherent in the Flight Pay Formula

Because the Flight Pay formula necessarily fails to pay for all hours worked, Delta tries to justify its non-payment of California ground time by asserting that the 1-for-2 Credit has the effect of paying flight attendants at least half of their Flight Pay rate for all of their on-duty time. That argument fails for two reasons.

The first reason is that in the vast majority of duty periods, Delta's flight attendants are paid only under the Flight Pay formula, which does not pay anything for on-the-ground time. The fact that the 1-for-2 Credit is potentially available cannot change that fact. As in *Gonzalez*, the employer's promise to raise employees' average hourly pay to the minimum-wage "floor" is no defense to that employer's use of a pay formula that does not compensate all work time. *See also Balasanyan*, 913 F.Supp.2d at 1006 (rejecting defense based on minimum-wage guarantee); *Safelite*, 2017 WL 6261476, at **4-5 (employer must "insure that minimum wage is paid *on an incremental basis*.... "The fact that [the employer's] system is more generous than required in some respects does not relieve [the employer] of the requirement to pay at least minimum wage for every hour worked."). Under California law, a policy relying on a "minimum wage floor" to establish compliance is no different than a policy relying on the federal averaging approach to justify underpayment.

An example from the record illustrates why Delta's 1-for-2 Credit does not cure the Flight Pay formula's shortcomings. Oman flew the same flight two days apart, but on one of the days he worked 35 minutes more but was paid 13 minutes less, simply because his extra work time was spent on the ground rather than in the air. ER 794. These facts match the hypothetical from *Gonzalez*, where two employees work the same number

of flag rate hours, but one continued to work without pay while the other went home. 215 Cal.App.4th at 50. Under California law, it makes no difference whether an alternate formula runs in the background against the illegal formulas. Where the minimum wage floor does not take effect, one employee works longer than the other without earning additional pay. California does not permit this result.

3. Delta's 1-for-2 Credit Does Not Pay for All Hours Worked

The second reason why Delta's 1-for-2 Credit does not cure its minimum wage violations is because even when that Credit is applied (to pay a flight attendant one hour of Flight Pay for every two hours worked), it only provides supplemental pay for half of the flight attendant's California on-the-ground hours.

Delta determines flight attendant compensation first by calculating what it owes under the Flight Pay formula, i.e., multiplying the block time by the flight attendant's Flight Pay rate. In the unusual case where a flight attendant's duty period (covering all time worked) is more than twice that flight attendant's block time, Delta instead pays the flight attendant one hour of pay at the Flight Pay rate for every two on-duty hours. Delta's Work Rules provide the following illustrative example:

> **Example**: You are scheduled for a turnaround worth 6:00 block time with a scheduled duty period length of 10:00 [which would normally be compensated as 6:00 block time hours times the flight attendant's Flight Pay rate]. Due to an operational delay, your duty period is lengthened to 14:00. You will be paid 7:00 for the turnaround [i.e., 7:00 hours times the Flight Pay rate], comprised of 6:00 block time and 1:00 of 1 for 2 duty credit (14:00 divided by 2).

ER 367; *see also* ER 363 (describing interplay between formulas).

The Ninth Circuit's order suggests that Delta's 1-for-2 Credit could be construed as, "in effect, guarantee[ing] a flight attendant half her hourly wage rate per hour on duty...." *Oman*, 889 F.3d at 1078. But as the example makes clear, that is not how the Credit works. The 1-for-2 Credit only provides an hour of compensation for every two hours worked, and only if the duty period is twice the block time. It does not provide half-pay for all hours, even though the aggregate total may be the same. *See* ER 1201 ("For every two hours on duty, one hour will be credited and paid at the flight pay rate.").

Under California law, it is not enough for an employer to "'account[] for' or 'track[]' hours worked...." *Vaquero*, 9 Cal.App.5th at 116. For a compensation scheme to be valid under California law, it must "directly compensate[]" employees for all time worked. *Id.* at 114; *see also Gonzalez*, 215 Cal.App.4th at 41-42 (finding pay scheme unlawful because it paid only for piece-rate work and not for other time under employer's control, even though resulting pay was greater than minimum wage per hour). The 1-for-2 Credit therefore fails for this second, independent reason that it does not pay for all hours worked.

CONCLUSION

For the reasons stated, plaintiffs request that this Court answer yes to all three certified questions.

Dated: September 10, 2018

Respectfully submitted
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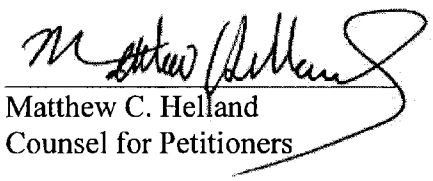

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used, I certify that the foregoing Petitioners' Opening Brief, contains 13,747 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: September 10, 2018

Respectfully submitted
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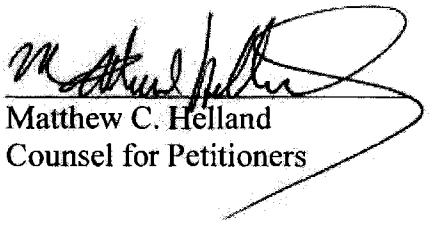

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PROOF OF SERVICE

Case: *Oman v. Delta Airlines, Inc.*,
California Supreme Court No. S248726
(U.S. Court of Appeals for the 9th Circuit, No. 17-15124)

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On September 10, 2018, I served the following document(s):

PETITIONERS' OPENING BRIEF

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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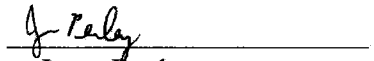
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this September 10, 2018 at San Francisco, California.



Jean Perley