S 241655

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY, AND JEFFREY CARL,
Plaintiffs-Appellants

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,
Defendant-Respondent.

AFTER DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE,
CASE NO. G048039

FROM THE SUPERIOR COURT, COUNTY OF ORANGE
CASE NO. 30-2008-00096591, ASSIGNED FOR ALL PURPOSES
TO JUDGE NANCY WIEBEN STOCK, DEPT. CX 105

APPELLANT'S OPENING BRIEF ON THE MERITS

Unfair Competition Case, Service on Attorney General and
District Attorney required by Bus. & Prof. Code § 17209

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208, 8.488)

Pursuant to California Rules of Court, rules 8.208 and 8.488, the undersigned, counsel of record for Plaintiffs and Appellants Jazmina Gerard, Kristiane McElroy, and Jeffrey Carl, certify that the following entities or persons have a financial or other interest in the outcome of the proceedings that the justices should consider in determining whether to disqualify themselves pursuant to California Rule of Court 8.208(e)(2):

Jazmina Gerard, Kristiane McElroy, and Jeffrey Carl, natural persons;

Plaintiffs and Appellants know of no other entity or person that must be listed under Rule 8.208.

Respectfully submitted,

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I. ISSUES PRESENTED

1. Did the Legislature usurp the power of the Judiciary to interpret laws enacted and amended by a prior Legislature when it declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000?

2. When the Legislature declared in October 2015 that Industrial Welfare Commission Wage Orders 4 and 5 were valid and enforceable on and after October 1, 2000, did it retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay under Labor Code section 226.7 without due process of law?

II. INTRODUCTION

This action comes before the Court for a second time. The first appeal, in October 2015, (S225205) raised the question of whether the health care industry meal period waiver in section 11(D) of the Industrial Welfare Commission ("IWC") Order no. 5-2001 was invalid under Labor Code Section 512. Before the Court could consider the appeal's merits, the Legislature enacted SB 327, amending Labor Code section 516 specifically to validate the meal period waiver provision in Section 11(D) from the date of its enactment. On remand to consider the applicability and effect of SB 327, the Court of Appeal abandoned its earlier decision finding section 11(D) partially invalid and acceded to the Legislature's declared interpretation, finding Section 11(D) valid and binding on the parties since October 2000. This matter now returns to the Court

and raises questions as to whether the Legislative declaration of validity and intent in SB 327 encroaches onto the Court's province to interpret the law and, whether the Court of Appeal's acquiescence to the Legislature's interpretation ignored constitutional due process guarantees.

Fundamental to the separation of powers doctrine is the acceptance of the roles of the Legislative and Judicial branches. The Legislature makes the law; the Judiciary interprets the law. Despite this most basic and undisputed concept, with one stroke of the Legislative pen SB 327 impermissibly crossed the constitutional line separating the branches. And, with the lower court's abdication of its obligation to interpret the law, SB 327 retrospectively wiped out healthcare workers' vested rights to recover premium wages under Labor Code Section 226.7.

The court below initially found that IWC exceeded its authority in issuing Section 11(D) and that the Wage Order was inconsistent with the law and therefore void *ab initio*. (*Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285.) ("*Gerard I*") When it revisited its decision in light of the adoption of SB 327, (*Gerard v. Orange Coast Memorial Medical Center* (2017) 9 Cal.App.5th 1204) ("*Gerard II*"), the court below accepted the then-Legislature's declaration of what the law was in 2000, when a different Legislature enacted and then amended Labor Code Sections 512 and 516. However, the Court of Appeal failed to consider whether the retroactive application of SB 327 is a constitutionally impermissible violation of healthcare workers' right to due process.

This case presents the next logical step from the Court's decision in *Brinker Restaurant Corp. v. Superior Court.* In *Brinker*, while examining the timing of meal breaks, this Court noted that "the waiver provisions permit meal waivers even on shifts in excess of 12 hours and thus conflict with language in the standard subdivision regulating second meal periods in other wage orders that limits second meal waivers to shifts of 12 hours or less." This appeal raises issues as to what effect that conflict has and whether the Legislative branch can make that determination.

Moreover, by allowing the Legislature to dictate the interpretation of the law, the court failed to consider the due process issues involved. The retroactive application of SB 327 resulted in an unconstitutional taking of past due wages from potentially thousands of class members, wages that were earned the moment the meal break was missed. By failing to weigh the due process issues, the Court of Appeal committed reversible error.

III. BACKGROUND

A. The Parties

Appellants Jazmina Gerard, Kristiane McElroy and Jeffrey Carl ("Appellants") are healthcare workers formerly employed by Respondent Orange Coast Memorial Medical Center ("Respondent" or "OCMMC"). Appellant Gerard was hired by OCMMC as a Respiratory Therapist in February 2002. Appellant Carl was hired as a Registered Nurse in October 2005. Appellant McElroy was hired as a Registered Nurse in July 2008. All three

Respondents generally worked 12 hour shifts at OCMMC, but occasionally worked over 12 hours a day.

OCMMC has a written policy (the "Meal Period Waiver" policy) that allows employees who work more than eight hours to waive their second meal period. In addition, the Meal Period Waiver policy requires employees *regularly* scheduled for shifts over 12 hours to take a second break. But employees who *occasionally* work shifts in excess of 12 hour may waive one of the two meal periods. Appellants have all alleged they worked significantly over 12 hours on occasion without taking a second meal period, and under OCMMC's policy were denied the additional hour of pay provided for in Labor Code Section 226.7 for not receiving their meal periods.

On August 29, 2008, Appellants filed a class action Complaint against Respondent. Appellants' primary claim is that the hospital Meal Period Waiver policy based on Industrial Welfare Commission ("IWC") Wage Order 5 section 11(D) ("section 11(D)") illegally allowed healthcare workers to waive second meal periods on shifts longer than 12 hours.

B. The Court of Appeal's Decision in *Gerard I*

In 2015, the Court of Appeal, in *Gerard v. Orange Coast Memorial Medical Center* (2015) 234 Cal.App.4th 285 held that IWC Wage Order 5 section 11(D) was invalid to the extent it allowed healthcare workers to waive second meal periods on shifts longer than 12 hours.

After nearly seven years of litigation, Appellants were finally determined to have been damaged by violations of the

Labor Code when the Court of Appeal partially invalidated section 11(D). (*Gerard I,* 234 Cal.App.4th at p. 290.) After reviewing the legislative history of Labor Code sections 512 and 516, the court "conclude[d] the IWC order is partially invalid to the extent it authorizes second meal period break waivers on shifts longer than 12 hours." (*Gerard I,* 234 Cal.App.4th at p. 290.) The court further held, "Plaintiffs are entitled to seek premium pay under section 226.7 for any failure by hospital to provide mandatory second meal periods before today that falls within the governing three-year limitations period." (*Gerard I,* 234 Cal.App.4th at p. 302.)

The court reasoned that there is a conflict between section 11(D) and Labor Code § 512(a)[1], in that section 11(D) creates an unauthorized exception to the general rule set out in Section 512(a) prohibiting second meal period waivers where the total hours worked is more than 12 hours. (*Gerard I,* 234 Cal.App.4th at pp. 294-295, 298.)

In reaching its decision, the court reviewed the legislative history of Sections 512 and 516 and concluded:

> We see nothing in this legislative history to support hospital's argument the additional regulatory exception embodied in section 11(D) for shifts longer than 12 hours is consistent with the Legislature's intent. To the contrary, everything in this legislative history evidences the intent to prohibit the IWC from amending its wage orders in ways

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[1] All references to "Section 516", "Section 512", and "Section 226.7" refer to those sections of the California Labor Code.

> that conflict with meal period requirements in section 512, including the proviso second meal periods may be waived only if the total hours worked is less than 12 hours.

(*Gerard I*, 234 Cal.App.4th at p. 296.)

The Court also noted, "we agree with *Bearden* 'section 516, as amended in 2000, does not authorize the IWC to enact wage orders inconsistent with the language of section 512.'" (*Gerard I*, 234 Cal.App.4th at p. 297) (quoting *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438.)

The court ultimately held that the retroactivity of its decision had to be litigated on remand, with the exception of Plaintiffs' premium wage claims based on Section 226.7. Finding that "plaintiffs' premium wage claims based on Section 226.7, subdivision (c) present an issue of law that has been fully developed [in *Bearden*, 138 Cal.App.4th at p. 443]," the Court found (1) that the meal period waiver provisions inconsistent with Section 516(a) were "void *ab initio*" and (2) that "Plaintiffs are entitled to seek premium pay under section 226.7 for any failure by hospital to provide mandatory second meal periods before today that falls within the governing three-year limitations period." (*Gerard I*, 234 Cal.App.4th at pp. 301-302.)

C. SB 327 is Enacted in Response to *Gerard I* and Purports to Be a "Clarification" of the Law

On May 20, 2015, this Court granted review on the issues of whether Wage Order No. 5, section 11(D) is valid and whether the Court of Appeal's decision partially invalidating section 11(D) should be applied retroactively. However, while the parties were

briefing the merits, the Legislature enacted SB 327. SB 327 added the following underscored language to Section 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.

(Labor Code § 516, effective October 5, 2015.)

SB 327 was enacted in direct response to *Gerard I.* Section 1 of SB 327 states in part: "(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."

On August 17, 2016, this Court transferred the pending appeal back to the Court of Appeal with directions to vacate its decision and to reconsider the case in light of the enactment of SB 327.

D. The Court of Appeal's Decision in *Gerard II*

In *Gerard II*, the Court of Appeal abandoned its prior decision, disregarded its prior examination of the legislative

history, and concluded that SB 327 represents a clarification of the law's validity and enforceability before the Court's decision in *Gerard I.* (*Gerard v. Orange Coast Memorial Medical Center* (2017) 9 Cal.App.5th 1204, 1210 ("*Gerard II*").) The underpinnings of the court's reasoning are twofold.

First, the Court of Appeal stated that its conclusion in *Gerard I* – that section 11(D) conflicts with Section 512(a) –was incorrect. Relying on what it termed "a subtle but critical distinction in administrative law" between when a regulation is "adopted" and when it is "effective," the court reversed itself and held that section 11(D) *was* effective when adopted:

> [T]he SB 88 amendment to section 516(a) took away the IWC's authority to *adopt* wage orders inconsistent with the second meal period requirements of section 512(a) as of September 19, 2000. But the IWC had already adopted section 11(D) on June 30, 2000, under the AB 60 version of section 516(a) which authorized the IWC to do so "notwithstanding" section 512(a). Thus, the SB 88 amended version of section 516(a) should have been irrelevant to our analysis in *Gerard I.* Instead, it became dispositive. We concluded section 11(D) is subject to the SB 88 amended version of section 516(a). It isn't.

(*Gerard II*, 9 Cal.App.5th at p. 1211.)

Second, having already concluded that "the IWC did not exceed its authority by adopting section 11(D), and hospital's second meal period waiver policy does not violate section 512(a)," the Court of Appeal accepted the Legislature's declared purpose

of SB 327 – to "clarify" rather than change the law. (*Gerard II*, 9 Cal.App.5th at pp. 1211-1212.)

E. The Labor Code Provisions and Wage Orders

In the 1999-2000 legislative session, the Legislature enacted the "Eight-Hour-Day Restoration and Workplace Flexibility Act" (Assembly Bill 60) which became Section 516 of the Labor Code, effective as of January 1, 2000. Section 516 states in pertinent part: "Notwithstanding any other provision of law, the [IWC] 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."

Among other things the legislation inscribed into law, in Section 512, were guaranteed meal breaks, during which an employee was to be relieved of all duties for an uninterrupted period of 30 minutes: "An employer may not employ an employee 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."

Just nine months later, on September 19, 2000, Section 516 was amended by urgency legislation, SB 88, to clarify that any orders adopted by IWC must be consistent with Section 512. The Senate third reading analysis included a statement that the bill clarified the provision of the Labor Code that took effect on

January 1, 2000, in particular Section 516: "This bill clarifies two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512."

In the meantime, the IWC had taken up the Legislature's charge to readopt conforming wage orders. On June 30, 2000, the IWC adopted Wage Order 5 section 11(D). Section 11(D) states: "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." Section 11(D) took effect on October 1, 2000.

IV. ARGUMENT

A. The Court Committed Reversible Error When It Allowed the Legislature to Dictate the Interpretation of the Law

1. Under the Separation of Powers Doctrine, the Judiciary Interprets the Law

From the time of *Marbury v. Madison,* the separation of powers has been clear: it is "the province and duty of the judicial department to say what the law is." (1803) 5 U.S. 137, 177.) The Legislative function is to make the law. As this Court has found: "[U]nder fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to

constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function." (*McClung v. Employment Dev. Dept.*, (2004) 34 Cal.4th 467, 470 ["*McClung*"] (emphasis in original).) "Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank v. Superior Court*, (1997) 15 Cal.4th 232, 244, ["*Western Security*"].)

In the over two hundred years of jurisprudence since *Marbury*, this fundamental principle remains unchanged.

2. The Legislature's Declaration of Intent Years After Passage of a Law Does Not Bind the Judiciary

Faced with the Court of Appeal decision in *Gerard I* partially invalidating section 11(D), the Legislature moved to override that decision by simple declaration that, contrary to the court's decision, section 11(D) was "valid and enforceable on or after October 1, 2000 and continues to be valid and enforceable" and a further statement that this amendment "clarifies existing law." This interpretation came 15 years after the adoption of Section 516 and section 11(D).

It is well settled that while a court may consider the expressed intent of the Legislature in discerning the meaning of a statute, it is only part of the court's examination of the Legislative history, and is not binding. "A statement that a statute is declarative of existing law *may* bear on the Legislature's intent. But it is not within the Legislature's bailiwick to interpret laws previously passed. At best such a declaration "is but a factor for a court to consider and 'is neither

binding nor conclusive in construing the statute.' "" (*City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 309, review denied (Apr. 22, 2015) (Citations omitted; emphasis added)). "[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." (*Western Security*, 15 Cal.4th at p. 244 [citing to *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, at pp. 213–214]). "Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered *together with other factors* in arriving at the true legislative intent existing when the prior act was passed." (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 (emphasis added).) Where, as here, the Legislature reached back 15 years to proclaim the intent of legislation, that pronouncement weighs less heavily on the scale. "There is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies." (*Western Security*, 15 Cal.4th at p. 244.) The Court of Appeal in *Gerard II* was not bound by the legislative declaration of validity, but choose to abdicate the validity determination to the Legislature.

3. The Court Incorrectly Disregarded the Authorizing Authority and the Legislative History of Section 516

In *Gerard I,* the court found a conflict between Section 516 and section 11(D) and looked to the Legislative history before

deciding section 11(D) was partially invalid. However, after passage of SB 327, the court below disregarded that history and focused instead on the language of SB 327. A thorough review of the Legislative history of Sections 516 and 512, along with section 11(D) and Wage Order 5, is necessary to analyze the impact, if any, of SB 327 and the court erred when it failed to do so. Such a thorough review shows that the intent of the Legislature in enacting Sections 516 and 512, and then adopting SB 88 was to clarify that Section 516 limited the IWC's authority to adopt Wage Orders so as to require compliance with Section 512.

(a) Wage Orders are Quasi-Legislative and Review is Limited to Scope and Reasonable Necessity

Wage and hour claims are governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the Industrial Welfare Commission.[2] (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1026 ["*Brinker*"].) "We apply the usual rules of statutory interpretation to the Labor Code, beginning with and focusing on the text as the best indicator of legislative purpose." (*Id.*) "[G]iven the Legislature's remedial purpose, 'statutes governing conditions of employment are to be construed broadly in favor of protecting employees.'" (*Brinker,* 53 Cal.4th at p. 1027 [quoting

[2] Although the IWC was defunded in 2004, its wage orders remain in effect. (*Mendiola v.* CPS *Security Solutions, Inc.* (2015) 60 Cal.4th 833, 839 fn. 6.)

Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 702].) When the validity of a wage order is challenged, it is not entitled to "deference." Rather, the standard rules of statutory interpretation apply. "We construe wages orders, as quasi-legislative regulations, in accordance with standard rules of statutory interpretation." (*Bearden v. U.S. Borax, Inc.* 138 Cal.App.4th 429, 435 (2006) ["*Bearden*"].) "To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes." (*Brinker*, 53 Cal.4th at p. 1027.)

When a statute empowers an administrative agency to adopt regulations implementing the legislation, the agency acts in a "quasi-legislative" capacity, having been delegated the Legislature's lawmaking power. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 ["*Yamaha*"].) Judicial review of quasi-legislative actions is limited to the determination of whether the regulation is (1) within the scope of the authority conferred and (2) reasonably necessary to effectuate the purpose of the statute under which it is enacted. (*Yamaha*, 9 Cal.4th at pp. 10-11; *Woods v. Superior* Court (1981) 28 Cal.3d 668, 679.)[3]

(b) The IWC's Authority to Adopt Meal Period Waivers was Limited

As to the scope of authority, it is well established that the

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[3] If the "validity and application [of a wage order] are conceded and the question is only one of interpretation, the usual rules of statutory interpretation apply." *Brinker*, 53 Cal. 4th at p. 1027. Such is not the case here; the validity of section 11(D) is at the core of this litigation.

authority of an administrative agency to adopt regulations is limited by the enabling legislation. (Gov. Code, § 11342.1.) "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov. Code, § 11342.2.)" (*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321.) "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11.) "A ministerial officer may not, however, under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*First Indus. Loan Co. of Cal. v. Daugherty* (1945) 26 Cal.2d 545, 550.)

As explained in *Bearden,* 138 Cal.App.4th at pp. 433-434, the IWC was a five-member appointive board established by the Legislature in 1913, authorized to formulate wage orders governing employment in California. But "[T]he broad powers granted to the IWC do not extend to the creation of additional exemptions from the meal period requirement beyond those provided by the Legislature." (*Bearden,* 138 Cal.App.4th at p.

440.)

In 1999, in response to the IWC's elimination of daily overtime rules in certain industries, the Legislature passed—and the Governor signed—Assembly Bill No. 60 (1999-2000 Reg. Sess.), the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. (Stats. 1999, ch. 134 ("the Act").) Among other things, this legislation restored the eight-hour workday (Labor Code § 510) and mandated that the IWC conduct public hearings and "adopt wage, hours and working condition orders consistent with this chapter" (Labor Code § 517, subd. (a)), including orders pertaining to meal and rest periods (Labor Code § 516).[4] The Act established a new statutory scheme governing hours of labor and overtime compensation for all industries and occupations.

Section 512 was also enacted as part of the Act. As originally enacted, it provided in pertinent part:

> An employer may not employ an employee 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.

(Stats. 1999, ch. 134 § 6, emphasis added.)

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[4] The directive to adopt wage orders "consistent with this chapter" in section 517 was a directive to adopt wage orders consistent with the 1999 Act. (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1138.)