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.)

Labor Code section 516, as originally enacted, provided:

> Notwithstanding any other provision of law, 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.

(Stats. 1999, ch. 134 § 10.)

The IWC complied with the directive to adopt new wage orders and, pending completion of plenary review, adopted IWC Interim Wage Order – 2000. (Mar. 1, 2000). The interim wage order *mirrored* Section 512's language and *prohibited* second meal period waivers where the total hours worked exceeds 12 hours. (*Brinker*, 53 Cal.4th at p. 1045-46; fn. 24; Interim Wage Order – 2000 subdivision 9(B).) As stated in *Brinker*, "[h]aving received a legislative rebuke, the IWC sought to make its orders track Assembly Bill No. 60 (1999-2000 Reg. Sess.) as closely as possible and expressed hesitance about departing from statutory requirements." (*Brinker* 53 Cal.4th at p. 1049.) *After* the IWC prohibited second meal period waivers in shifts over 12 hours, *Brinker* explains what happened: "[t]hereafter, health care representatives persuaded the IWC to at least preserve expanded waiver rights for their industry, along the lines of those originally afforded in 1993. (See IWC, Statement as to the Basis (Jan. 1, 2001) pp. 19-20.)" (*Brinker*, 53 Cal.4th at p. 1047.) The IWC Statement as to the Basis describes this circumstance and the basis for Wage Order No. 5, subd. 11(D):

> The IWC received correspondence from members of the health care industry

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

(IWC, Statement as to the Basis (Jan. 1, 2001) ¶ 11 [emphasis added].)

Thus, at the behest of members of the health care industry, under the auspices of section 516, on June 30, 2000, the IWC adopted a wage order *that it knew explicitly conflicted* with Labor Code section 512. Wage Order No. 5 subd. 11(D) provides:

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

(Code Regs., tit. 8, § 11050, subd. 11(D).)

However, the legislature struck down this deviation from the law before it ever became effective. Sections 512 and 516 were amended shortly thereafter by urgency legislation intended to clarify AB 60 and which became effective September 19, 2000. (Sen. Bill No. 88 (1999-2000 Reg. Sess.); Stats. 2000, ch. 492.) The amendments to Section 512 did not modify the provisions permitting waiver of a second meal period for workers who worked more than 10 hours but less than 12 hours. But Section 516 was amended to read as follows:

> **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.

(Labor Code § 512 [emphasis added].) Thus, Section 516 confirmed that the IWC *had no authority* to adopt or amend wage orders at variance with Section 512 *before* Wage Order No. 5 subdivision 11(D) became effective. Furthermore, as discussed more fully below, the Senate third reading analysis for SB 88 confirmed that it was the Legislature's intent that the IWC *never had authority* to adopt or amend work orders inconsistent with the specific provisions of Section 512.

(c) The Legislature's 2015 Declaration of Intent and Validity is Inconsistent with the Legislative History

The legislative declaration in SB 327 provides little assistance to any court attempting to determine whether SB 327 changed or clarified the law. Fifteen years passed between

October 2000 and the enactment of SB 327. The 2015 Legislature cannot speak to the intent of the 2000 Legislature that enacted and amended Sections 512 and 516. A reviewing court must therefore look at the legislative history of Sections 512 and 516 authored by the legislators who enacted and amended those statutes to determine their intent.

In light of the Legislative history here – the impetus for the 2000 Labor Code amendments, the amendments to Sections 516 and 512, and the clarification of Section 516 by SB 88 - no conclusion can be drawn other than that the Legislature intended to ensure that the IWC could not once again use its rule making authority to erode worker statutory rights. But fifteen years after the IWC adopted Wage Order 5, in direct response to the Court of Appeal's decision in *Gerard*, the 2015 Legislature did just that. The effect of the Legislature's passage of SB 327 removed the limitations on the IWC. The bill amends Section 516 to read as follows:

> (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.

(Sen. Bill No. 327 (2015-2016 Reg. Sess.) Stats. 2015, ch. 506 [emphasis added].)

Section 516 and 512 were adopted specifically to remedy the IWC's relaxing of worker protections. (*Brinker*, 53 Cal.4th at p. 1037.) The IWC was directed to adopt new wage orders conforming to the law. "Troubled by this weakening of employee protections, the Legislature enacted the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, which restored daily overtime, nullified IWC-approved alternative workweek schedules, and directed the IWC to readopt *conforming wage orders*." (*Brinker*, 53 Cal.4th at p. 1037 (emphasis added).) Section 516 was amended 9 months later to clarify that the "conforming" meant conforming to Section 512 as well.

Section 512 was also amended in the 1999-2000 Legislature session to codify the right to meal periods that had previously been within the IWC oversight. "As part of its response to the IWC's rollback of employee protections, the Legislature wrote into the statute various guarantees that previously had been left to the IWC, including meal break guarantees." (*Brinker*, 53 Cal. 4th at pp. 1037–38.)

Thus, the Legislative history supports only one conclusion: at the time Sections 512 and 516 were originally enacted, the Legislature did *not* intend that the IWC have authority to authorize meal period waivers inconsistent with Section 512. In deciding *Gerard II,* the court incorrectly ignored this history.

(d) Any Review of the Legislative History Should Have Considered the Amendment to Section 516 in September 2000 and its Effect on the IWC's Authority to Enact section 11(D)

In *Gerard II*, the Court of Appeal embraced the 2015 Legislative designation of SB 327 as a "clarification" of existing law, finding section 11(D) was valid and enforceable. But neither the court nor the Legislature gave the same weight and effect to the 2000 clarification of Section 516.

In September 2000, Section 516 was amended by SB 88 to clarify that the Legislature intended to expressly require the IWC to comply with Section 512. As noted in both *Bearden*, 138 Cal.App.4th at p. 438 and *Lazarin v. Superior Court* (2010) 188 Cal.App.4th 1560, 1571, the Senate third reading analysis for SB 88 states:

> 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. ...*

(*Bearden*, 138 Cal.App.4th, at p. 438 [bold emphasis added, italics added by the *Bearden* court].) The use of the word "clarifies" is significant. The Senate third reading analysis for SB 88 denotes

a legislative intent that Section 516 as then amended reflected the law as it always was, *i.e.*, when Sections 512 and 516 were *originally* enacted. That means the Legislature never conferred upon the IWC authority to adopt or amend wage orders inconsistent with Section 512.

A statute that clarifies the law "may be applied to transactions predating its enactment without being considered retroactive" because it "is merely a statement of what the law has always been." (*Riley v. Hilton Hotels Corp.* (2002) 100 Cal.App.4th 599, 603.) While the court below viewed SB 327 as a clarification and gave it retroactive application, it erred when it failed to apply that same retroactivity to SB 88's clarification of Section 516.[5] Had it done so, the inquiry would have come to an end. Any wage order inconsistent with Section 512, regardless of the date of enactment, was void *ab initio*.

4. Allowing the Legislature to Interpret the Law Also Eliminates Any Ability of the Court to Harmonize the Two Conflicting Statutes

A fundamental precept of judicial statutory interpretation holds the statutes in conflict should be harmonized by the court whenever possible. "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 two statutes touch upon a common subject, they are to be construed in reference to each other, so as to 'harmonize the

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[5] SB 88 has stood as a clarification for 17 years and has not been challenged in this action.

two in such a way that no part of either becomes surplusage.' [Citations.] Two codes 'must be read together and so construed as to give effect, when possible, to all the provisions thereof.' [Citation.]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, pp. 778-779.) For instance, Section 512(a) guarantees employees a second meal period after 10 hours of work. In *Brinker*, the Court held that same timing requirement applied to Wage Order No. 5 subdivision 11(D), even though omitted from the wording of the regulation, in order to avoid such language in other wage orders being rendered surplusage. (*Brinker*, 53 Cal.4th at p. 1048 fn. 27.)

In the present case, Section 512(a) provides that the second meal period may be waived if an employee took a first meal period and the total hours worked is no more than 12 hours. Wage Order No. 5 subdivision 11(D) provides that health care workers who work shifts in excess of 8 hours may waive one of their two breaks. However, the wage order is *silent* as to whether the upper 12-hour limit in Section 512(a) applies. The Court should conclude that Section 512(a)'s 12-hour limit on waivers applies to subdivision 11(D) to avoid rendering that language in section 512(a) surplusage. Thus harmonized, Wage Order No. 5 subdivision 11(D) must include the same 12 hour limit as in section 512(a).

This interpretation makes sense based on the plain language of the wage order in light of Section 512(a). But the Legislature does not appear to have considered harmonizing the conflicts. Had the court not allowed the Legislature to dictate the

interpretation of section 11(D) the court could have – and should have – considered the possibility of harmonizing Section 512 and section 11(D). By allowing the Legislative to interpret the Labor Code section and the Wage Order, the court relinquished any chance of harmonizing the two.

B. The Court Committed Reversible Error When It Adopted the Legislature's Retroactive Interpretation of SB 327 Without Considering the Constitutional Implications

Under fundamental principles of separation of powers, the Legislature can change laws, but it cannot legislate what the law was in 2000 because interpreting the law is a judicial function. (*McClung*, 34 Cal.4th at p. 470.) "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Const., art. III, § 3.) "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Const., art. VI, § 1.) Thus, "[t]he judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326.) Under the separation of powers doctrine, the Court, not the Legislature, must determine what the law was so that it can determine whether a new enactment changed the law.

The determination of whether SB 327 clarified or changed the law is critical to resolution of the issues. "A statute that merely *clarifies*, rather than changes, existing law does not

operate retrospectively even if applied to transactions predating its enactment" "because the true meaning of the statute remains the same." (*Western Security* 15 Cal.4th at p. 243.) [emphasis in original]) But if SB 327 *changed* the law, the issue of retroactivity arises and a court must decide whether that change in law applies retroactively to the claims in this case. (*McClung,* 34 Cal.4th at p. 472).

1. The Enactment of SB 327 was a Change in the Law that Should Not Have Been Given Retroactive Application

The Court of Appeal adopted the Legislative declaration that SB 327 was not a change in the law but a clarification of the law. The facts simply do not support that conclusion. SB 327 added the following language to section 516:

> (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.) "This provision 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."

Despite the Legislative declaration that this enactment constituted a clarification, it is for the court to determine whether

the statue clarifies or changes the law: "the "Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean."" (*McClung*, 34 Cal.4th at p. 473.)

In determining whether a statute clarified or changed the law, courts give "due consideration" to the Legislature's intent in enacting that statute. (*Western Security*, 15 Cal.4th at p. 244.) The Legislature's declaration of an existing statute's meaning, while not dispositive, is a factor entitled to consideration. (*McClung,* 34 Cal.4th at p. 473.). Courts look to "the surrounding circumstances" as well as the Legislature's intent when determining whether a statute changed or merely clarified the law. (*Western Security*, 15 Cal.4th at p. 243). And "[A] declaration that a statutory amendment merely clarified the law "cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*McClung*, 34 Cal.4th at p. 473). As set forth above, an examination of the Legislative history here could lead to only one conclusion: that the IWC had no authority to adopt section 11(D).

Further: "a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment." (*Western*

Security, 15 Cal.4th at p. 243.) Such a statute "may be applied to transactions predating its enactment without being considered retroactive" because it "is merely a statement of what the law has always been." (*Riley* 100 Cal.App.4th at p. 603.)

The court, in *Gerard I*, established what the law was and what it had been for 15 years. The Legislature, in direct response to that court holding, declared the law to be otherwise. Applying the same rules discussed above, Section 516 as amended on October 5, 2015, constitutes a *change* in the law that cannot be given retroactive effect. SB 327 would change the law by rendering ineffective the SB 88 amendment to Section 516.

2. The Retroactive Application of SB 327 Violates the Due Process Rights of all Health Care Employees

As stated in McClung, "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*McClung*, 34 Cal.4th at p. 475 [quoting *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844)].) A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Myers*, 28 Cal.4th at p. 841.)

Here, the Legislature chose not to include the word "retroactive" in the statute. Nor does the word "retroactive" appear in SB 327 itself. Rather than expressly declare the bill "retroactive," the Legislature chose to articulate what the law was on October 1, 2000, and that the bill "is declarative of, and clarifies, existing law." Because the Legislature has no power to

declare what the law was, and it chose not to expressly state the bill applies "retroactively," SB 327 is not retroactive.

Nonetheless, any retroactive application of SB 327 would be unconstitutional, not just because it violates separation of power principles, but also because it violates the due process rights of Respondents and the putative class members. In *Landgraf v. USI Film Products* (1994) 511 U.S. 244, the Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." (*Landgraf*, 511 U.S. at p. 265.) The Court noted that "the antiretroactivity principle finds expression in several provisions of our Constitution," including the ex post facto clause, the provision prohibiting the impairment of obligations of contracts, the Fifth Amendment's takings clause, the prohibition of bills of attainder, and the due process clause. (*Landgraf*, 511 U.S. at p. 266.)

A retrospective law is invalid if it conflicts with certain constitutional protections, *e.g.*, if it: (a) is an *ex post facto* law; (b) impairs the obligation of a contract; or (c) deprives a person of a vested right or substantially impairs that right, thereby denying due process. (*Roberts v. Wehmeyer* (1923) 191 Cal. 601, 612.) "Even in the face of specific legislative intent, retrospective application is impermissible if it 'impairs a vested ... right without due process of law.'" (*In re Marriage of Fellows* (2006) 39 Cal.4th 179,189 [quoting *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 447]).

Here, retroactive application of SB 327 would constitute an

unconstitutional taking of past due wages. As this Court held in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 ("*Murphy*") the additional hour of pay provided by Section 226.7 constitutes a premium wage, not a penalty. *Murphy* also explained, "[u]nder the amended version of section 226.7, an employee is entitled to the additional hour of pay *immediately* upon being forced to miss a rest or meal period. In that way, a payment owed pursuant to section 226.7 is akin to an employee's *immediate* entitlement to payment of wages or for overtime." (*Murphy* 40 Cal.4th at 1108 (emphasis added).)

Thus, if SB 327 were retroactive, it would immediately take away from thousands of health care workers thousands of dollars of premium wages that are presently owed without due process. The error of the Court of Appeal was in not considering the impact of SB 327 on the rights of tens of thousands of health care workers throughout the state.

V. CONCLUSION

This action began as a classic collision of laws and regulations. What brings it to this Court is the error of the Court of Appeal in permitting the Legislature to reach through the wall separating the two branches of government and direct the court how to decide the case before it. The integrity of the courts and their ability to independently decide cases depends on resisting

this type of legislative intrusion. The decision of the Court of Appeal should be reversed.

Dated: August 10, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel of record hereby certifies that, pursuant to the California Rules of Court, Rule 8.504(d)(1) and 8.490, the enclosed was produced using 13-point Century Schoolbook type style and contains 8,710 words. In arriving at that number, counsel has used Microsoft Word's "Word Count" function.

Dated: August 10, 2017

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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the State of California, County of Los Angeles. I am over the age of 18 and not a party to the within suit; my business address is 1875 Century Park East, Suite 1000, Los Angeles, California 90067.

On **August 11, 2017**, I served the document described as:

APPELLANT'S OPENING BRIEF ON THE MERITS

on the interested parties in this action by sending on the interested parties in this action by sending [ ] the original [or] [✓] a true copy thereof to interested parties as follows [or] as stated on the attached service list:

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Executed on **August 11, 2017**, at Los Angeles, California.

Patti A. Diroff
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