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' REPLY BRIEF

MATTHEW C. HELLAND
SBN 250451
helland@nka.com
DANIEL S. BROME
SBN 278915
dbrome@nka.com
NICHOLS KASTER, LLP
235 Montgomery St., Suite 810
San Francisco, CA 94104
Telephone: 415.277.7235
Facsimile: 415.277.7238

MICHAEL RUBIN
SBN 80618
mrubin@altber.com
BARBARA J. CHISHOLM
SBN 224656
bchisholm@altber.com
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: 415.421.7151
Facsimile: 415.362.8064

Counsel for Plaintiffs/Petitioners

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SBN 224656
bchisholm@altber.com
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: 415.421.7151
Facsimile: 415.362.8064

Counsel for Plaintiffs/Petitioners

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INTRODUCTION

The plain text and clearly established purposes of the California Labor Code and IWC Wage Order provisions at issue dictate the answer to the Ninth Circuit's certified questions, because those provisions demonstrate the Legislature's and IWC's intent to require employers to pay at least the minimum wage for *all* time they "suffer or permit" their employees to work in California.

Delta must pay its flight attendants at least the California minimum wage for all pre- and post-flight work it assigns those employees to perform in California because Wage Order 9-2001 Section 4, by its express terms, requires "[e]very employer" to pay at least the minimum wage "to each employee" "for all hours worked." *See* Petitioners' Opening Brief ("Pl. Br.") at 8, 24-25; *see also* Labor Code § 1194. Delta must pay those flight attendants their California wages in a timely fashion and must accurately record their in-California hours and wages on California-compliant wage statements because Labor Code Section 204(a) requires timely payment of "[a]ll wages . . . earned by any person in any employment," and because Labor Code Section 226(a) imposes a mandatory duty on each "employer [to] furnish to his or her employee [other than those expressly exempted by Section 226(j)] an accurate itemized statement in writing showing [hours worked and rates of pay]." *See* Pl. Br. at 8, 35-37. These workplace protections apply to every employee whose employer suffers or permits them to work in California. *See* Labor Code § 1171.5(a) ("All protections" of state law "are available to all individuals . . . who are or who have been employed[] in this state"); *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1197 n.3 (quoting Section 1171.5(a)).

Delta never responds to Plaintiffs' textual analysis. Nor does it respond to Plaintiffs' showing that the Legislature and the IWC *intended* these results, which are not only mandated by the plain statutory text but are essential to accomplishing the state's underlying statutory purposes. *See* Pl. Br. at 20, 22-28, 37-39, 52-53.

Delta urges this Court to adopt an ambiguous and ill-defined "job situs" test instead, untethered to the statutory language and unsupported by case law, to determine when work performed in California at the direction of an out-of-state employer must be compensated, promptly paid, and accurately documented. Under Delta's proposed test, California's minimum wage and other worker-protection laws would apply only to employees who work "exclusively or principally" in California during a particular pay period, no matter how regularly they work in California or how essential their California work may be to their employer's business operations. Answer Brief on the Merits ("Delta Br.") at 34, 47.

Delta argues that its proposed construction of California minimum wage law and the two related statutory protections is compelled by *Sullivan* and *Tidewater Marine West, Inc. v. Bradshaw* (1996) 14 Cal.4th 557. But Delta misreads those cases for the reasons Plaintiffs already demonstrated in their opening brief. Pl. Br. at 29-32. Delta makes no effort to respond to Plaintiffs' rebuttal.

Delta also attempts to justify its job situs test on public policy grounds, repeatedly defending its test as a "clear, simple, fair, and predictable method for determining the applicability of California law." Delta Br. at 13; *see also id.* at 31, 34, 53. Plaintiffs disagree with that characterization because Delta's proposed "exclusive-or-principal-job-situs" test is actually riddled with uncertainties, ambiguities, and unfairness.

But even if Delta's proposed test were as desirable as Delta suggests, the Ninth Circuit's certified questions must be answered on the basis of what the IWC and the Legislature actually wrote and intended, not whether Delta believes some alternative approach would be preferable. After all, a bright-line construction that flatly exempted all flight attendants from the protections of California wage law would certainly be "clear, simple, . . . and predictable," but it is not at all what the IWC or Legislature intended.

Delta keeps adding conditions and limitations to its proposed test in response to the various problems with it that Plaintiffs have identified. For example, to address Plaintiffs' hypothetical about the employee who worked for three weeks in California before transferring to Nevada, Pl. Br. at 40, Delta now asserts that any inquiry into principal job situs under its proposed test must be conducted pay-period-by-pay-period. Delta Br. at 13. Narrowing that time frame solves the problem of employees who work exclusively in California during one pay period and elsewhere during another. But it provides no guidance for the far more common circumstance of an employee who splits work time (whether equally or not) between two or more jurisdictions during a particular pay period. Moreover, because Delta's job situs test is not based on the statutory language or any underlying statements of legislative policy, there are no meaningful benchmarks to which courts can refer in determining how much work an employee must perform in a particular state—either in absolute or comparative terms—for that state to be the employee's "principal" job situs during an applicable pay period.

Delta admits that under its "exclusive[] or principal[] job situs" formulation, none of its roughly 20,000 flight attendants (or 12,000 pilots) would be entitled to the protection of California's or *any* state's laws,

because none of those employees work "principally" in any state, no matter where they reside or which airport is their home base. Delta Br. at 34-35, 47. Delta's proposal is a transparent attempt to exempt itself and other airlines from any obligation to comply with any state's labor and employment laws with respect to those employees.

For all of these reasons and as further detailed below, the Court should reject Delta's proposed job situs test and answer the first two certified questions "yes," confirming that Delta must pay its flight attendants for all time worked on the ground in California, pay those workers in a timely manner under Labor Code Section 204, and provide accurate wage statements identifying those wage payments and the applicable hourly rates under Labor Code Section 226.

The Court should also answer "yes" to the third certified question, because California's "*Armenta/Gonzalez* bar on averaging" *does* "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 worked."

Delta devotes little space to that third question as framed, perhaps because California's appellate courts have been uniform in holding over the past 13 years that the Labor Code requires employers to pay at least the minimum wage for *every* hour worked by their employees (meaning every hour the employee is required to be available and is not free from the employer's control, *see, e.g.*, *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584). If an employer's pay scheme does not separately compensate the worker for such time—for example, if a commissioned salesperson is not paid at least the minimum wage for time spent on all non-sales-related duties, or a piece-rate worker is not separately paid for rest-

break time, *see, e.g., Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864, 872 ("rest periods must be separately compensated in a piece-rate system")—the employer cannot defend its pay practice on the ground that the employee's *average* pay (calculated by dividing the total amount of wages paid by the number of hours worked) was greater than the state minimum wage and thus in compliance with California law. *See* Delta Br. at 57.

Instead of answering the third question directly, Delta relies on the district court's recitation of the facts to argue that it actually did pay its flight attendants for all time they worked on the ground in California. Delta claims that its Flight Pay Formula always results in average hourly pay that exceeds the California minimum and that its 1-for-2 Credit back-up pay formula guarantees that flight attendants will be paid at least half of their hourly Flight Pay (and thus more than the minimum wage) for every hour worked. Delta Br. at 55-60. Those arguments fail: legally, because of the uniform line of California case authority since *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314 holding that California minimum wage compliance cannot be achieved through "averaging"; and factually, because Delta's Flight Pay Formula and 1-for-2 Credit, by their terms and as applied, do *not* compensate flight attendants for all hours worked. *See* Pl. Br. at 43-53.

The undisputed facts demonstrate that Delta did *not* pay its flight attendants for their California pre- and post-flight time. Pl. Br. at 50-52 (citing *Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1078). Moreover, Delta concedes that it did not comply with its California wage-payment and wage statement obligations with respect to that on-the-ground

time. Pl. Br. at 18-19. For these reasons and the reasons that follow, the Court should answer all three certified questions in the affirmative.[1]

ARGUMENT

I. The California Legislature and Industrial Welfare Commission Intended California's Minimum Wage Law and Related Workplace Protections to Apply to Plaintiff Flight Attendants

Wage Order 9-2001 applies by its terms to "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) (emphasis added). There is no dispute that this Wage Order covers Plaintiffs. Moreover, although the Wage Order creates a series of limited exemptions, *see, e.g., id.* § 11090(1)(A)-(F), (3)(H), (L)-(N), (4)(D), none of those exemptions, nor any of the exemptions or alternative statutory protections for specific categories of employees under Labor Code Section 204(a) and (c) or Labor Code Section 226(a), (d), (i), and (j), apply to Plaintiff flight attendants. *See* Pl. Br. at 37. Consequently, Plaintiffs are presumptively entitled to the full benefit of the wage-and-hour protections of California law. *See Sullivan,* 51 Cal.4th at 1197 ("The Legislature knows how to create exceptions for nonresidents when that is its intent.").

Delta nonetheless urges this Court to carve out an exception from those Wage Order and statutory protections for employees who, during a given pay period, do not work "exclusively" or "principally" in California. Although Delta does not define "principally," its brief suggests that

[1] Although the parties also have a dispute concerning Delta's definition of "Relevant Time Period," *see* Delta Br. at 16 n.2, that dispute is not before this Court.

"principally" means at least 50% of the employee's work time, even if the employee works in several different states during a given pay period (although it is not clear how much more than 50% Delta believes should be required).[2]

The word "principally" is nowhere found in the Wage Order or Labor Code provisions at issue. Wage Order 9-2001 § 4 requires "[e]very employer" to pay "to each employee" at least the minimum wage "for all hours worked." 8 Cal. Code Regs. § 11090(4). The only limitations on that obligation are set forth in the Wage Order exemptions cited *supra* at 11, none of which apply to Plaintiff flight attendants. Similarly, Labor Code Section 204(a)'s timely wage-payment requirement expressly applies to "[a]ll wages . . . earned by any person in any employment," and Section 226(a)'s requirement that employers must provide complete and accurate wage statements with each paycheck broadly applies to all employers whose employees are not exempted by Section 226(j). Neither of these mandatory provisions is conditioned on, or modified by, a requirement that the non-exempt employee must work "exclusively or principally" in California during a particular pay period, rather than in some other state or states.

II. Delta's Proposed Job Situs Test Is Neither Required nor Supported by *Tidewater* or *Sullivan*

Delta's principal argument is that *Sullivan* and *Tidewater compel* adoption of its proposed exclusive-or-principal-job-situs test. That cannot be. Under Delta's proposed test, an employee who works a single day in

[2] Under Delta's approach, none of the Plaintiffs would be protected by California wage law, even though Plaintiffs Lehr, Eichmann, and Flores are based at California airports and even though Plaintiffs Eichmann and Flores are also California residents. *See* Pl. Br. at 35 n.13.

California would not be entitled to the protections of California's wage laws; yet this Court in *Sullivan* held otherwise. *Sullivan*, 51 Cal.4th at 1201 ("California's overtime law [applies] to full days . . . of work performed here by nonresidents"); *see also* Pl. Br. at 31-32 (explaining how Delta misread *Sullivan* and *Tidewater*). Instead of responding to Plaintiffs' analysis of *Sullivan* and *Tidewater*, Delta simply reiterates its previous arguments, citing the same selective excerpts that Plaintiffs' opening brief fully addressed and placed in context.

There are two important take-aways from *Sullivan* and *Tidewater*. First, contrary to Delta's assertion, neither case purported to address, much less resolve, the circumstances at issue here, in which an out-of-state company regularly required a group of its employees (flight attendants) to work on the ground in California for substantial but irregular time intervals.

In *Tidewater*, this Court "express[ed] no opinion as to whether" California law applied "to crew members who work primarily outside California's state law boundaries." 14 Cal.4th at 579. Consequently, Delta's reliance on *Tidewater* for the proposition that "an employee must principally work in California for this state's wage-and-hour laws to apply," Delta Br. at 32, is contradicted by the Court's own language. All parties agree that California wage-and-hour laws apply to employees (like those in *Tidewater*) who are based in California and mostly work in California. *Tidewater* simply holds that those facts are *sufficient* to trigger application of California law, not that they are *necessary*. 14 Cal.4th at 578–79; *see* Pl. Br. at 32.

Besides, if Delta were right that the Legislature intended California wage-and-hour law only to protect employees who worked exclusively or principally in California during a particular pay period, *Sullivan* would

have come out the other way. In *Sullivan*, this Court held that an out-of-state resident employee who performs more than eight hours of work in California on a given day must be paid a California overtime premium for that day's overtime work, even if that employee lives and mostly works out of state. *Sullivan*, 51 Cal.4th at 1205. Under Delta's approach, that same employee would have no entitlement to the California minimum wage for any of those in-California hours; and, if paid less than the California minimum wage, arguably would have no right to statutory overtime calculated on the basis of what the employee should have been paid. That cannot be what the IWC and California Legislature intended. *See id.* at 1197 n.3 (quoting Labor Code §1171.5(a)'s declaration of legislative finding that "[a]ll protections" of state law "are available to all individuals . . . who are or who have been employed[] in this state").

Second, although neither *Tidewater* nor *Sullivan* is controlling on their facts, both cases make clear how this dispute over the applicability of California wage law should be analyzed: by looking to the regulatory and statutory text and the evidence of underlying purpose. In *Sullivan*, this Court started with the plain language of the overtime statute and engaged in a textual analysis that was informed by the Court's review of the statute's history and purposes and by the principle that the Legislature knows how to create exemptions when it wishes to do so. 51 Cal.4th at 1197-98. In *Tidewater*, this Court similarly considered the plain terms of the IWC wage orders and provisions of the Labor Code that shed light on the Legislature's intent. 14 Cal.4th at 577. Delta's invitation to abandon this established approach to statutory construction in favor of its proposed exclusive-or-principal-job-situs test, a test unsupported by the statutory text or stated statutory purposes, must be rejected.

For these reasons, Delta's reliance on *Tidewater* and *Sullivan* is unavailing. Those cases support Plaintiffs' position, not Delta's.

III. Delta's Proposed Job Situs Test Is Neither Clear, Simple, Fair, nor Predictable

Unable to derive support for its proposed test in the language or legislative history of the applicable Wage Order and Labor Code provisions, and stymied in its efforts to rely upon *Tidewater* and *Sullivan*, Delta makes a series of policy arguments that it believes will support its exclusive-or-principal-job-situs test. But statutory meaning must be based on legislative intent as reflected in the statutory text, not a free-standing inquiry into whether the legislature made sound policy choices. In any event, Delta's proposed test does not even pass muster as clear, simple, fair, or predictable.

In the district court and the Ninth Circuit, Delta urged adoption of a "job situs" test without defining that term and without assigning any time period to the analysis, leaving uncertain whether an employee's "principal job situs" should be based on each hour, shift, day, week, pay period, month, quarter, year, or other. Now, in response to Plaintiffs' hypothetical about an employee who worked exclusively in California for three weeks before transferring to Nevada, Delta asserts that the relevant time unit should be each separate pay period. Delta Br. at 13, 34; *but see id.* at 53-54 (continuing to rely on district court cases calculating job situs based on overall percentage of time worked in state).[3]

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[3] *See, e.g., Ward v. United Airlines, Inc.* (N.D. Cal., July 19, 2016) No. C 15-02309 WHA, 2016 WL 3906077, at *5 ("for class members who worked primarily outside of California, Section 226—like the rest of California's labor laws—does not apply"); *Vidrio v. United Airlines, Inc.* (C.D. Cal., Mar. 15, 2017) No. CV15-7985 PSG (MRWX), 2017 WL

Delta's new approach answers one question (what time period governs its proposed inquiry), but complicates that inquiry by requiring a new assessment every pay period, no matter how regularly the employee works in California. Delta's approach also fails to resolve the conflict between its proposed test and *Sullivan*, which applied California law to the shortest unit of time that would entitle an employee to California overtime (an eight-hour-plus day), just as Plaintiffs seek to apply California minimum wage law to compensable periods of time worked in California. *See Troester v. Starbucks* (2018) 5 Cal.5th 829, 847; *see also* Pl. Br. at 33 (pointing out that Plaintiffs' approach does not impose any administrative burden on employers who already pay their employees the California minimum wage, or more, for each hour worked).

More important, Delta's proposed test provides absolutely no guidance in cases where there is a dispute about whether an employee's "principal job situs" is in California or elsewhere (or nowhere at all, as Delta argues with respect to Plaintiff flight attendants, Delta Br. at 34-35, 47). Because the phrase "principal job situs" is not a statutory term of art, but simply a formulation devised by Delta to avoid having to comply with California wage-and-hour law, there are no case precedents, agency

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1034200, at *6 (California law does not apply where class members "performed less than 18 percent of their work in California during the class period"); ER 10, 13 (citing the total amount of time worked in California during the course of employment). In *Ward* and *Vidrio*, which are also before this Court on certified questions, defendant United Airlines (unlike Delta here) continues to advocate an all-or-nothing job situs test based upon the aggregate percentage of time spent in the state. *See* Case No. S248702, Defendant and Respondent United Airlines, Inc.'s Answer Brief on the Merits, at 33 (plaintiffs "worked, on average, just twelve percent (for pilots) and 17.2 percent (for flight attendants) of their time in California").

regulations, or other guideposts for applying Delta's test to employees who work in several jurisdictions during a given pay period.

Of course, even if Delta's job situs test were clear, simple, and predictable—like a bright-line rule that expressly exempted all flight attendants and pilots from the protections of California wage law—it would still be impermissible, because it is irreconcilable with the language and purpose of the applicable Wage Order and Labor Code provisions. *See supra* at 11 (citing Wage Order 9-2001's coverage and exemptions). That is what matters. Thus, while *Plaintiffs'* construction of the applicable law has the benefit of actually being "clear, simple, and predictable" (as well as "fair")—because it requires out-of-state employers to comply with California wage law to the extent they direct their employees to perform work in California—the reason Plaintiffs' construction should be adopted by this Court is because it adheres to the statutory text and furthers the underlying statutory purposes. *See* Pl. Br. at 22-27, 36-39.

IV. Plaintiffs' Proposed Rule Does Not Require Extraterritorial Application of California Wage-and-Hour Law, Does Not Violate the Dormant Commerce Clause, and Does Not Raise any Conflict-of-Law Issues

Delta next contends that the IWC and Legislature could not have intended Plaintiffs' construction of the applicable provisions because that would result in an impermissible extraterritorial application of California law, violate the Dormant Commerce Clause, and raise complicated conflict-of-laws issues. Delta Br. at 36 n.20, 43-53.

Plaintiffs already responded to Delta's extraterritoriality argument, demonstrating that no issue of extraterritorial application arises from California laws that require employers: 1) to pay their employees at least

the California minimum wage rate for all hours the employees are required to work in California; 2) to pay those California wages in a timely manner under Labor Code Section 204; and 3) to accurately record those wages in accordance with Section 226(a). Pl. Br. at 9, 29.

Delta concedes that no extraterritoriality issues are raised by a law that requires employers to pay the California minimum wage for work performed in California. Delta thus limits its extraterritoriality argument to Labor Code Sections 204 and 226(a), contending that if required to comply with those laws with respect to time worked in California, Delta might feel compelled, for reasons of administrative convenience, to pay all flight attendants in accordance with Sections 204 and 226(a) for all hours worked, not just on-the-ground California hours. Delta Br. at 51-52.

To be sure, Delta and other employers with interstate operations might *choose*, for ease of administration, to pay all employees (even those who are never assigned to work in California) promptly and at least bi-weekly, and to provide those employees with detailed wage statements that include all information required by California and other states' wage statement laws. But a state law (like Section 204 or Section 226(a)) that *allows* but does not require a company to comply with its provisions outside the state has no "extraterritorial" application. *Cf. Sullivan*, 51 Cal.4th 1207 (statute has extraterritorial effect when it is "'operative . . . outside the state'" (quoting *N. Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, 4)). The fact that Delta or some other airline that flies in and out of California might voluntarily choose to comply with Section 204 by paying all flight attendants promptly after the close of each pay period (as Delta has already done by implementing its new pay policy, Pl. Br. at 19) or by recording all flight attendant hours and wages on California-compliant

wage statements, does not make the underlying California laws extraterritorial.

In fact, Delta has greatly overstated the administrative difficulties it might face if it began issuing wage statements in compliance with each state's laws. Modern scheduling tools easily permit Delta to track flight attendants' on-the-ground pre- and post-flight work time in California, and Delta has admitted that it can easily calculate that work time. *See* SER 125 (calculating pre-flight work time as the difference between report time and block-out). Although nothing in Labor Code Section 226(a) requires a single wage statement that records all hours worked in all states in a single pay period, neither does Section 226 prohibit interstate employers like Delta from including more information in its wage statements than California law requires.[4]

Because Plaintiffs' construction of California law does not require Delta to pay the California minimum wage for work performed by flight attendants outside of California, or to pay for or document those employees' out-of-state time in the manner required by Sections 204 or 226, Delta's argument that California law is impermissibly extraterritorial is a makeweight.

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[4] Delta suggests that several other states' wage statement requirements may be inconsistent with California's. Delta Br. at 47. But it has still not identified any state's wage statement law that prohibits employers from reporting the information that California requires. In the Ninth Circuit, the closest Delta came to identifying a conflict was to compare Wyoming's requirement of a "detachable portion of the check," Wyo. Stat. Ann. § 27-4-101, with Delaware's requirement of a "separate slip," 19 Del. Code § 1108. But neither of those states' statutes are before this Court and neither conflict with Labor Code Section 226(a).

Delta's Dormant Commerce Clause argument (which it acknowledges is *not* before this Court, Delta Br. at 36 n.20) fails for the same reason. *See* Pl. Br. at 34-35. Delta's sole contention in support of this argument is that Plaintiffs seek to "project" California's laws into other states. Delta Br. at 48 n.27. As explained above, that is simply not true.[5]

Finally, Delta contends that complex choice-of-law issues would arise if California could require out-of-state employers to comply with its wage-and-hour laws for in-state work performed by their employees. Delta Br. at 46. Even if Delta were correct, there is no indication that the IWC or Legislature gave any weight to conflict-of-law principles in deciding what minimum workplace protections would be required under California law; the ease or difficulty of conducting a choice-of-law analysis in a given case therefore has nothing to do with how the IWC and Legislature *intended* those laws to be construed.

Again, though, Delta is incorrect. There is no reason why California law should *not* apply to a dispute about an employer's compliance with California wage laws *with respect to hours worked in California*, and Delta has not made any showing that any state has a stronger interest in having its laws, rather than California's laws, apply to such California time. *See* Pl. Br. 41-42; *cf. Sullivan*, 51 Cal.4th at 1204 ("Colorado and Arizona have expressed no interest in disabling their residents from receiving the full

[5] Delta relies on *Hirst v. Sky West, Inc.* (N.D. Ill. 2017) 283 F.Supp.3d 684, but the Seventh Circuit recently reversed the district court's Dormant Commerce Clause holding in that case. *Hirst v. SkyWest, Inc.* (7th Cir. 2018) 910 F.3d 961, 967 ("[T]he existence of a great regulatory burden on an employer does not necessarily mean minimum wage laws have a discriminatory effect on interstate commerce. State and local wage laws can burden companies within their own localities just as much, if not more, than out-of-state ones. All airlines—indeed all employers—are subject to these laws, regardless of state citizenship.").

protection of California overtime law when working here, or in requiring their residents to work side-by-side with California residents in California for lower pay."); *see also* Pl. Br. at 28-29.

Delta focuses on a particular pay period in which Plaintiff Oman worked in seven different states: California, Minnesota, New York, Georgia, South Dakota, Tennessee, and Montana. Delta Br. at 42-43. It contends that a court would have difficulty applying a conflict-of-laws analysis to that pay period to determine which (if any) state paystub laws apply. *Id.* Contrary to Delta's claims, however, the required governmental-interest analysis is straightforward. The question would be whether any of the other six states' interest (if any) in *precluding* employers from providing the wage statement information required by Section 226(a) was strong enough to overcome California's interest, with respect to work performed in California, in requiring employers to disclose that information. The answer is plainly no. *See Sullivan*, 51 Cal.4th at 1205 ("neither Colorado nor Arizona has a legitimate interest in shielding Oracle from the requirements of California wage law as to work performed here").[6]

[6] Nor would California have any interest in precluding Delta from adding to any California-compliant wage statements the only piece of information required by one of those other states that California does not require: the employer's telephone number, as required by New York law. *See* NYLL § 195(3). Given the simple fix to bring a California wage statement into compliance with New York law, Delta's concern that New York law might apply to California work, *see* Delta Br. at 36 n.20, is greatly overblown.

V. California Law Prohibits Averaging as a Means of Complying with State Minimum Wage Requirements

The Ninth Circuit's third certified question asks whether California's requirement that employers must pay for all work performed is satisfied by a pay scheme like Delta's that tracks all hours worked but does not separately pay for all of those hours, even though the total amount of compensation paid is greater than if Delta paid only the minimum wage for each hour of work. As the Ninth Circuit explained in its order requesting certification, Delta's "Flight Pay calculation provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers," and as a result, Delta's compensation system "at times fails to award credit for all hours on duty," specifically the flight attendants' on-the-ground pre- and post-flight job duties. *Oman*, 889 F.3d at 1078.

Delta never directly answers this third question as posed, perhaps because the answer is so clear. Under California law as set forth in *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, and many other California state court decisions (as well as federal court decisions applying California law), employers must pay for *all* hours worked and cannot satisfy that requirement by paying only for some—or even most—hours worked. Even if the total amount paid divided by the total number of hours worked would exceed the state minimum wage, an employer may not justify its failure to pay for one category of work by averaging across all hours worked the compensation it paid for other categories of work. *See* Pl. Br. at 43-45, 47 & n.18 (collecting cases); *see also* Labor Code § 226.2; *Nisei Farmers League v. Cal. Labor and Workforce Devel. Agency* (Jan. 4, 2019) __ Cal.App.5th __, No. F075102, 2019 WL 99087, at **9-10.

Delta does not disagree. That is why, instead of responding to the third certified question as phrased, Delta presents a complicated argument about why its pay scheme is compliant with *Armenta* and *Gonzalez*, and at least implicitly, why the Ninth Circuit was factually mistaken in stating that Delta's method of calculating flight attendant pay "at times fails to award credit for all hours on duty." 889 F.3d at 1078. Plaintiffs respond to Delta's factual arguments below, to the extent this Court chooses to reach them.[7]

VI. Delta Violates California's Minimum Wage Law by Failing to Credit All Hours Worked

For the overwhelming majority of duty periods, Delta uses only its Flight Pay Formula as the basis for paying its flight attendants. Pl. Br. at 13, 21. That Formula calculates compensation by measuring *only* the "on

[7] Delta also briefly argues that its formulas for paying flight attendants are permitted by Wage Order 9-2001 §§ 1, 4(B), which require transportation industry employers to pay "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*." Delta Br. at 57-58 & n.30 (emphasis added). The "or otherwise" language simply means that California's minimum wage requirement applies to all covered workers no matter how their employer structures their pay. As the Court of Appeal explained in *Gonzalez*, "[the] Wage Order [] does not allow any variance in its application based on the manner of compensation." 215 Cal.App.4th at 49. Delta's compensation scheme violates California minimum wage law not because the Flight Pay Formula fails to pay for on-the-ground time in California on an hourly basis rather than some "other" basis, but because it does not compensate flight attendants for that time at all. *Compare In re Certified Tire* (Sept. 18, 2018) 28 Cal.App.5th 1 [238 Cal.Rptr.3d 825], *pet. for review pndg*, No. S252517 (concluding based on factual record that employer "directly and expressly" paid hourly rate for all hours worked, not just "productive" time) *with Ontiveros v. Safelite Fulfillment, Inc.* (C.D. Cal. Oct. 12, 2017) No. CV15-7118-DMG (RAOx), 2017 WL 6261476, at *5 ("*Safelite*") (employer's "Performance Pay Plan" which relied on "Productivity Variable Pay" failed to pay for all hours worked) *and* 29 C.F.R. § 778.502(d) (describing unlawful "bonus" plans designed to evade overtime requirements).

duty" time between block-in and block-out and multiplying that time by the individual flight attendant's Flight Pay Rate. *Id.* at 12. No credit is given for the flight attendants' mandatory pre- and post-flight time in calculating compensation under the Flight Pay Formula. *Id.* at 12-13. As a result, for duty periods compensated under the Flight Pay Formula, Delta's calculations fail to account for any of the time the flight attendant spends performing on-the-ground pre- and post-flight job duties (because the Formula is based on block time only). Whether the flight attendant spends one hour on pre- and post-flight duties or substantially longer, his or her compensation under Delta's Flight Pay Formula is the same, because it is exclusively based on the amount of block time worked. Pl. Br. at 12-13; Delta Br. at 19 n.6, 23, 59, 60.[8]

Delta also argues that even if its Flight Pay Formula does not comply with California law when viewed in isolation, it had an alternative back-up formula, the 1-for-2 Credit, that ensured payment of at least the California minimum wage to all flight attendants. Delta Br. at 58-60.

As Plaintiffs have demonstrated, Pl. Br. at 50-53, there are two fundamental flaws in that argument. First, the mere fact that a lawful (according to Delta) alternative pay scheme may be available does not justify an employer's failure to pay the minimum wage under the pay

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[8] Several examples of how this works are presented in Pl. Br. at 13-18. Thus, although Delta contends that its Flight Pay Formula pays for all hours worked by its flight attendants, *see, e.g.,* Delta Br. at 62, that is true only in the sense that Delta deems the Flight Pay for block time also to cover its flight attendants' non-block time, even though it does not pay any *additional* amounts for the non-block time. Under California law, there is an obvious (and legally material) difference between actually paying for each additional hour worked (or portion of each hour, *see Troester*, 5 Cal.5th at 847), and simply informing employees that their compensation encompasses all work performed, even if the calculation of that formula only takes certain categories of work into account.

scheme that it *actually* uses—and the record establishes that approximately 85% of Plaintiffs' duty periods were paid based on the Flight Pay Formula alone. Pl. Br. at 13; *cf.* Delta Br. 61 (acknowledging that it calculated Plaintiff Oman's pay for February 15, 2014 by multiplying his hourly Flight Pay Rate times 5.467 credit hours, even though Oman worked 7 hours 32 minutes that day). Second, Delta's alternative 1-for-2 Credit does *not* pay flight attendants for all hours worked, it only pays for half of those hours. *Id.* at 14, 51-53; *see also* Delta Br. at 22-23 (acknowledging that that 1-for-2 Credit pays "one hour at [flight attendants'] Flight Pay Rate for every two hours on duty," but equating that formula to payment of "one-half of their Flight Pay Rate for every hour on duty" without any support in the record).[9]

Delta next makes the surprising argument that if it had not disclosed its compensation formulas to its flight attendants, but had simply paid them what the formulas required while representing that the pay covered all hours worked, Plaintiffs would have no basis for complaining. Delta Br. at 61-62. That is a ridiculous argument. The whole point of Section 226(a)'s wage statement requirement is to ensure that employers provide complete and accurate disclosures of how employee pay is calculated. *See also* Labor Code §§ 221, 222, 223, 226, 2810.5 (requiring disclosure at the time of hire of "[t]he rate or rates of pay and basis thereof"). Plaintiffs have a right to that information, and if Delta's formula for calculating flight

[9] Delta cites the deposition testimony of Plaintiff Lehr for the proposition that one Plaintiff admitted receiving at least the minimum wage for all hours worked. Delta Br. at 21. Lehr said no such thing (and his testimony would not be binding even if he had). Instead, Lehr simply confirmed that *if* his total pay were divided by his total hours, i.e., averaged, his average hourly pay would be higher than the legally required minimum. SER 154-61.

attendant pay did not separately compensate Plaintiffs for all hours worked, Plaintiffs would still have a claim for unpaid wages under California law, no matter what false representations Delta may have made. (In all likelihood, Plaintiffs would also have a separate claim against Delta under Labor Code Section 223, which states that an employer may not "secretly pay a lower wage while purporting to pay the wage designated by statute . . . .").[10]

Delta's Flight Pay Formula establishes an economic hedge against on-the-ground delays, allowing Delta to avoid paying extra wages for unexpected or unusual pre- or post-flight delays except in the small number of instances in which the delay is so long that it causes the amount of ground time in a duty period to exceed the amount of block time. *See* Pl. Br. at 53. Delta saves money by structuring its compensation scheme that way, but at the cost of violating California law, which requires employers to pay for *all* time worked. *See, e.g.*, *Troester*, 5 Cal.5th at 847.

This case is conceptually identical to *Gonzalez*, in which the employer paid its piece-rate mechanics a "flag rate" for their productive repair work, but did not compensate them at all for the inevitable down time between those fully-compensated repair tasks. *Gonzalez*, 215 Cal.App.4th at 41. The employer in *Gonzalez* guaranteed its mechanics that their total piece-rate pay would never fell below the amount those

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[10] Delta also asserts that it could have paid flight attendants a flat rate for all of their on-duty time. Delta Br. at 61. But that is not what Delta does or how its compensation formulas work. Approximately 85 percent of the time Delta paid under the Flight Pay Formula, which multiplied each day's block time by the flight attendant's Flight Pay Rate, without regard to pre- and post-flight work, and in a small number of instances Delta utilized the 1-for-2 Credit, which only compensated that flight attendant for half the hours worked. *See* Pl. Br. at 52-53.

employees would have earned had they been paid the minimum wage on an hourly basis, *id.* at 41-42, just as Delta argues here (incorrectly as a factual matter) that its 1-for-2 Credit guarantees flight attendants that all of their hours would be compensated at an average hourly rate that exceeds California's minimum wage.

The employer in *Gonzalez* unsuccessfully argued that there can be no California minimum wage violations if an employer always pays "an amount 'not less than' the amount its employees would have earned had they been paid the applicable hourly minimum wage for 'all hours worked' during a given pay period." *Gonzalez*, 215 Cal.App.4th at 45. This argument was properly rejected because it rested upon the same averaging principles that courts have uniformly rejected since *Armenta*. Quite simply, an employer may not justify its failure to pay for non-productive time by spreading compensation for productive time among all hours worked. *See* Pl. Br. at 45-47 & n.18; *see also* Labor Code § 226.2 (codifying *Gonzalez* and adding a limited "safe harbor" provision).

It makes no difference whether an employer justifies its underpayments by claiming to have paid an average hourly rate (as in *Armenta*) or by relying on an alternative pay formula that would have applied under different factual circumstances (as in this case and *Gonzalez*). Both after-the-fact justifications suffer from the same fatal flaw: by relying on high pay for some time to excuse the lack of any pay for other time, the employer impermissibly attributes some of that pay to time that was not actually compensated. Permitting compliance through a *Gonzalez* "floor guarantee" would effectively overturn *Armenta* and the many cases consistently applying its core principles over the past 13 years.

Delta acknowledges the similarities between this case and *Gonzalez*, Delta Br. at 67, but seeks to distinguish *Gonzalez* on the ground that Delta's floor guarantee is higher than the floor guarantee in *Gonzalez*. That is an immaterial distinction. The *Gonzalez* piece-rate formula violated the law because it did not provide compensation for all hours worked. There is no suggestion in *Gonzalez* that the result would have been different if the wage floor were set higher. *See Gonzalez*, 215 Cal.App.4th at 54 (piece-rate formula violated law even though employees earned "significantly more by working on cars than waiting for vehicles to repair"); *see also Safelite*, 2017 WL 6261476, at *5 (rejecting argument that employer's "compensation system is distinguishable from the one at issue in [*Gonzalez*] because the floor in [*Gonzalez*] was set at the minimum wage, whereas the floor applicable to Plaintiff was set at a higher rate, ranging from $13.20/hour to $15.00/hour"); *Balasayan v. Nordstrom, Inc.* (S.D. Cal. 2012) 913 F.Supp.2d 1001, 1008 (finding minimum wage violation where guaranteed hourly compensation was $10.85, as compared to then-applicable $8.00 state minimum wage); *Armenta*, 135 Cal.App.4th at 324 ("averaging all hours worked 'in any work week' to compute an employer's minimum wage obligation under California law is inappropriate. The minimum wage standard applies to each hour worked by respondents for which they were not paid.").

California's prohibition of "averaging" as a mechanism for bypassing an employer's obligation to pay for all work performed cannot be evaded through semantics or alternative formulas. *See supra* n.7. If an employer's compensation practice does not compensate employees for all time worked, it is unlawful, no matter how the employer attempts to justify it.

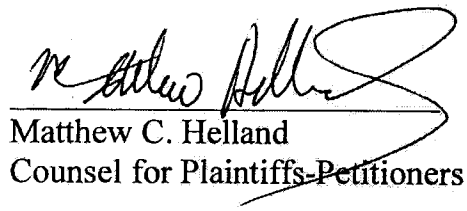
CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, this Court should answer "yes" to all three questions that it certified upon the Ninth Circuit's request.

Dated: January 15, 2019

Respectfully submitted,

NICHOLS KASTER, LLP
ALTSHULER BERZON LLP



Matthew C. Helland
Counsel for Plaintiffs-Petitioners

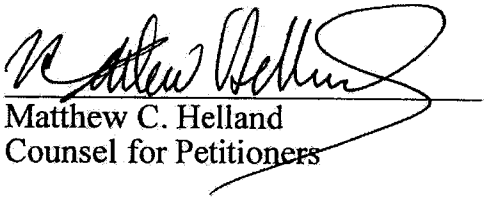
CERTIFICATE OF COMPLIANCE

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' Reply Brief, contains 7,003 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: January 15, 2019

Respectfully submitted

NICHOLS KASTER, LLP
ALTSHULER BERZON LLP



Matthew C. Helland
Counsel for Petitioners

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 January 16, 2019, I served the following document(s):

PETITIONERS' REPLY 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.

Thomas M. Peterson
Robert Jon Hendricks
Andrew P. Frederick
MORGAN, LEWIS & BOCKIUS LLP
One Market Street, Spear Tower
San Francisco, California 94105
Attorneys for Respondent Delta Air Lines, Inc.

Office of the Clerk
U.S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-152

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 16, 2019, at San Francisco, California.

Jean Perley