No. S248726

IN THE SUPREME COURT 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

APPLICATION OF CATHAY PACIFIC AIRWAYS LIMITED FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT

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APPLICATION OF CATHAY PACIFIC AIRWAYS LIMITED FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT

To the Chief Justice and Associate Justices:

Cathay Pacific Airways Limited ("Cathay"), through its attorneys, respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Defendant/Respondent Delta Air Lines, Inc.[1] Cathay is a Hong Kong-flagged airline headquartered in Hong Kong. It provides passenger and cargo services to over 200 destinations in Asia, North America, Australia, Europe, and Africa.

Cathay employs pilots and flight attendants in the U.S. who operate trans-Pacific flights between Hong Kong and fifteen U.S. airports, including Los Angeles International Airport ("LAX") and San Francisco International Airport ("SFO") in California. Cathay has bases at both LAX and SFO; Cathay flight crew who are based in California generally operate direct flights from either LAX or SFO to Hong Kong and back. Being based in California, however, does not necessarily mean that a flight crew member is a California resident or is paid in California. Flight crew often reside in states other than where they are based. Cathay's California-based flight crew spend the vast majority of their work time outside California, either in international airspace between California and Hong Kong, or in Hong Kong.

Cathay's interest in the present case is acute. Cathay is currently a defendant in a putative class action pending in the U.S. District Court for the Northern District of California, entitled *Goldthorpe v. Cathay Pacific*

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[1] No party or party's counsel authored this brief in whole or in part, and no party or party's counsel, or any person other than the *amicus curiae*, its members, or its counsel in this case, contributed money that was intended to fund preparing or submitting the brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

Airways Limited, No. 3:17-cv-03233. The *Goldthorpe* plaintiffs are current and former Cathay pilots residing in California, Texas, Washington, and Nevada who seek to represent a class of pilots who flew any Cathay flights that "originated within the State of California," but performed their work primarily outside of California—in international airspace and in Hong Kong. Those plaintiffs claim that they are entitled to the protections of California's meal period and rest period laws (even while they are in-flight in international airspace), California's minimum wage and overtime laws, and Labor Code sections 201 through 203, 204 and 226. *Goldthorpe* has been stayed while this Court considers the questions presented in this action and in *Ward v. United Airlines*, No. S248702. Cathay's flight attendants have also sued Cathay, alleging that Cathay violated California's meal and rest period statutes by failing to provide them with California-compliant meal periods and rest periods while they operated international flights.

The legal rule pressed by the plaintiffs here—that plaintiffs who spend even one hour of work time in California are entitled to the full panoply of California's wage-and-hour laws—could substantially disrupt airline operations by forcing airlines to comply with a patchwork of varying state laws, and invite massive litigation.

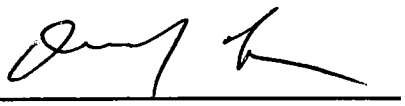
Cathay respectfully submits this brief to provide this Court with a broader perspective on the certified questions. Cathay also seeks to provide the perspective of carriers not party to this case or *Ward* as to why this Court should adhere to the presumption against the extraterritorial application of California law, and to the use of the job situs test to determine whether an employee should be subject to California wage-and-hour law.

CONCLUSION

The application should be granted and the accompanying brief filed.

February 15, 2019

Respectfully submitted,



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INTEREST OF THE *AMICUS CURIAE*

Cathay Pacific Airways Limited ("Cathay") is a Hong Kong-flagged airline headquartered in Hong Kong. It provides passenger and cargo services to over 200 destinations in Asia, North America, Australia, Europe, and Africa. Cathay employs pilots and flight attendants in the U.S. who operate trans-Pacific flights between Hong Kong and fifteen U.S. airports, including Los Angeles International Airport ("LAX") and San Francisco International Airport ("SFO") in California. Cathay flight crew who are based in California generally operate direct flights from either LAX or SFO to Hong Kong and back.

The interest of the *amicus* is more fully described in the application for leave, *ante*. As explained there, Cathay is currently a defendant in a putative class action brought by former and current Cathay pilots who seek the application of the California Labor Code to a putative class of pilots who flew any Cathay flights that "originated within the State of California." That action has been stayed pending this Court's resolution of the present case and *Ward v. United Airlines*, No. S248702. Some Cathay flight attendants earlier sued Cathay under a similar legal theory.

Accordingly, whether California wage-and-hour laws apply to flight crew, including pilots and flight attendants, who spend the majority of their work time outside California is an issue of broad and continuing importance to international airlines that operate in California. Cathay therefore has a strong interest in explaining to this Court the broad repercussions that would result from the extraterritorial application of California labor law to interstate and international carriers.

INTRODUCTION

This Court has agreed to determine whether, for employees who work in California "only episodically and for less than a day at a time," employers must comply with California laws governing (a) the timing of wage payments (Labor Code § 204), (b) the content of wage statements (*id.* § 226), and (c) the California minimum wage (*id.* §§ 1182.12, 1194, California Industrial Welfare Commission Wage Order Number 9 ("Wage Order 9")).

In answering the questions, the Court should follow the straightforward logic of the job situs test adopted in *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, and *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 578. That test is consistent with the long-established presumption against the extraterritorial application of California law. And, as the U.S. Supreme Court has recognized, that test accords with the federal system established by the U.S. Constitution, which retains the sovereignty of the individual states while providing the national government with legislative authority over interstate issues including, most obviously, interstate and foreign commerce.

Thus, California's wage-and-hour laws should apply only to employees for whom California is the primary job situs—*i.e.*, where the employee principally or exclusively works.

The plaintiffs ask this Court to abandon the job situs test and to presume extraterritorial regulation whenever an employee has worked in California for any proportion of a pay period, no matter how small. In other words, employers would have to comply with California wage-payment laws even to pay wages earned for work outside California. And plaintiffs seek to require employers to track their employees' whereabouts on a minute-to-minute basis to determine whether California minimum wage laws should

apply, even if the employee goes on to work in several other jurisdictions during that same day. There is no basis to expand the reach of these California employment statutes in a way that upends the presumption against extraterritorial application of California law.

ARGUMENT

A. The Presumption Against Extraterritoriality Precludes Application of California's Wage-and-Hour Laws to Employees Who Work Principally Outside California.

This Court long ago recognized a clear presumption that the Legislature does "not intend to give its statutes *any* extraterritorial effect." (*North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, 4 [emphasis added].) That presumption is inherent in all California statutes, including the Labor Code, and is rebutted only if a contrary intent is "clearly expressed or reasonably to be inferred 'from the language of the act or from its purpose, subject matter or history'[citation]." (*Ibid.*) These statements are consistent with the "basic principle of federalism" that permits each State to "make its own reasoned judgment about what conduct is permitted or proscribed within its borders." (*State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 422; see also *Healy v. Beer Institute, Inc.* (1989) 491 U.S. 324.) "It would be impossible to permit the statutes" of any State "to operate beyond the jurisdiction of that State ... without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." (*State Farm*, *supra*, 538 U.S. at p. 421 [quoting *New York Life Ins. Co. v. Head* (1914) 234 U.S. 149, 161].) "[A] State may not impose economic sanctions on violators of its laws with the intent of

changing ... lawful conduct in other States." (*BMW of North America, Inc. v. Gore* (1994) 517 U.S. 559, 572.)

The presumption against the extraterritorial application of the State's laws is implicated here because the employees at issue principally work outside California. As a result, the work triggering the Labor Code obligations at issue—relating to the timing of those wage payments and the content of the wage statements for those wages—occurs principally outside California.

Nothing in the text of the California statutes at issue here reflects an intention by the Legislature to apply them outside California. Plaintiffs try to infer legislative intent from the fact that the Labor Code sections at issue do not expressly *exclude* airline employees who principally work outside the state. But that simply reverses the presumption *against* extraterritoriality that inheres in every state statute (and is necessary in a federal system). (See *North Alaska Salmon, supra*, 174 Cal. at p. 4 ("the presumption is that [a state] did not intend to give its statutes any extraterritorial effect").) Thus, employees who principally work outside the state are presumptively excluded from the Labor Code requirements. To overcome that presumption, the Legislature would have had to expressly *include* them, as it has done in the workers' compensation context. (See, e.g. Labor Code §§ 3600.5, 5305.) Lacking any indication of legislative intent to extend wage payment, wage statement and minimum wage provisions to include out-of-state work, Plaintiffs point instead to the legislative intent to apply the Labor Code requirements to all employees *in* California. But that says nothing about

employees whose work is principally elsewhere.[2] As the U.S. Supreme Court observed in a related context, extraterritorial application of a labor law cannot be imputed from the statute's explicit application to "every" contract; there must be an express intention to apply a statute to work performed extraterritorially. (*Foley Bros., Inc. v. Filardo* (1949) 336 U.S. 281, 285.)

In *Tidewater*, this Court construed the Legislature's intent regarding possible extraterritorial application of the IWC's wage orders in expressly "limited circumstances, such as when California residents working for a California employer travel temporarily outside the state during the course of the normal workday *but return to California at the end of th[at] day*," such that the employee begins and ends the workday within the borders of the State of California. (*Tidewater*, *supra*, 14 Cal.4th at 577-78 (emphasis added).) The work in California for less than a day described in the certified question differs fundamentally from the temporary, same-day travel described by *Tidewater*.

B. The Employee's Job Situs Should Determine Whether California Wage-and-Hour Laws Apply.

The United States Supreme Court long ago established the principle that the controlling factor in determining the applicability of a state's labor laws is determined by "the employee's predominant job situs rather than a generalized weighing of factors or the place of hiring." (*Oil, Chemical and*

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[2] Plaintiffs' reference to Labor Code section 245.5(a)(3)'s exclusion of "flight deck" and cabin crew" employees from California's sick leave law as evidence of the Legislature's intent to apply all the rest of California's wage-and-hour laws to flight crew who work principally outside this state is inapposite. That exemption does not address extraterritorial application of the law and there is no indication that its purpose was to address concerns of extraterritoriality. Rather, the exclusion applies to *all* "flight deck" and "cabin crew" employees, even those who work principally or exclusively within California.

Atomic Workers Int'l Union, AFL-CIO v. Mobil Oil Corp. (1976) 426 U.S. 407, 414 ("*OCAW*") [addressing Texas' right-to-work law].) As Justice Marshall explained, "the use of a job situs test will minimize the possibility of patently anomalous extra-territorial applications of any given State's right-to-work laws." (*Id.* at p. 419.) The Court found it "immaterial" that Texas may have more contacts than any other State with the employment relationship in that case. (*Id.* at p. 420.) On the contrary, the Court held that it is "fully consistent with national labor policy to conclude, if the predominant job situs is outside the boundary of any State, that no State has a sufficient interest in the employment relationship" to apply its own employment regulations. (*Id.* at pp. 420-21.)

That does not leave a regulatory vacuum. There is a reason that the Constitution accords to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States." (U.S. Const., art. I, § 8, cl. 3.) And interstate or international transportation is "commerce" of the most basic kind. In fact, the federal government covers most of the same ground here, between the Fair Labor Standards Act and the Railway Labor Act, which both apply to the interstate and international transportation workers at issue here.

This Court has recognized the same job situs principle, holding that California law will apply to employees if they "exclusively, or principally" work in California—not merely because they may "enter California temporarily during the course of the workday." (*Tidewater, supra,* 14 Cal.4th at p. 578.) District courts in the Ninth Circuit have generally applied the *Tidewater/OCAW* job situs test in determining whether California wage-and-hour laws apply to airline employees who spend the vast majority of their work time outside California ever since. (See, e.g., *Booher v. JetBlue*

Airways Corp. (N.D. Cal. Dec. 12, 2017) 2017 WL 6343470 at *7; *Oman v. Delta Air Lines* (N.D. Cal. 2017) 230 F. Supp. 3d 986, 993; *Vidrio v. United Airlines, Inc.* (C.D. Cal. Mar. 15, 2017) 2017 WL 1034200 at *4; *Ward v. United Airlines, Inc.* (N.D. Cal. July 19, 2016) 2016 WL 3906077 at *3-4.) Indeed, federal district courts in California and elsewhere have applied the job situs test to determine the applicability of other labor and employment laws. (See, e.g., *Risso v. APL Marine Servs., Ltd.* (C.D. Cal. 2015) 135 F.Supp.3d 1089, 1094 (holding that the California Fair Employment and Housing Act did not apply in part because the vast majority of the plaintiff's employment was performed outside California); *Peikin v. Kimmel & Silverman, P.C.* (D.N.J. 2008) 576 F.Supp.2d 654.)

Here, too, the application of the California Labor Code to employees should hinge on their job situs. An employee who works exclusively or principally within California during the relevant pay period should receive wage statements and be paid wages for that period that comply with the Labor Code. But California laws should not govern the payment of wages that were not earned principally within California, as is often the case with flight crew.

C. The Court Should Decline Plaintiffs' Invitation to Apply California Law to Work Performed Principally Outside the State.

Plaintiffs assert that, if an employee spends *any time at all* working in California during a given pay period, California law governs the timing of wage payments and the content of wage statements. Under that theory, if a pilot worked 90 percent of a pay period in Massachusetts and one percent in California, that one percent compels the airline to apply California law to all wages paid during that pay period. Because employers generally advise their

employees in advance of the timing of wage payments, requiring compliance with Labor Code section 204 for any employee who works in California at any point would require the airline to ensure that its policy complies with Section 204 for all employees who *may* ever work in California for a short period of time. That is precisely the kind of expansive control over out-of-state conduct that the presumption against extraterritoriality normally prevents.

While plaintiffs go to great lengths to explicate the public policy benefits of these statutes, the utility of these statutes *for California employees* is not at issue here. Regardless of the importance and benefits of these laws for employees, the purpose of the California Labor Code and the IWC Wage Orders is to regulate the employment of individuals within borders of this state—not beyond them. Thus the IWC is required to ascertain information about wages, hours and working conditions "in this state." (Labor Code § 1173.) The DLSE likewise has authority to investigate and ascertain the wages, hours and working conditions of all employees employed "in the state." (*Id.* § 1193.5.) The job situs test both ensures that California law is applied to employees who perform work primarily in this state and that California law does not dictate how employers pay wages for work performed in other states or nations, or in international airspace.

Plaintiffs' primary argument is circular. They maintain that employees who work principally outside the State must receive California-compliant wage statements because it otherwise would be difficult for employees to "determine whether Delta had fully complied with California wage-and-hour requirements." (AOB 38.) In light of the presumption against extraterritorial application of California law, however, plaintiffs have not articulated why employees working mostly outside the state should be

assessing compliance with California law to begin with. The employees do not even work long enough within California to qualify for California overtime, and have no need to review their wage statements for compliance with California law. Plaintiffs cannot rebut the presumption against extraterritorial application of California law by bootstrapping a desire to monitor compliance with that inapplicable law.

D. Abandoning the Job Situs Test for the Minimum Wage and Other Requirements Would Create Insuperable Administrative Difficulties for Interstate and International Airlines.

Plaintiffs also claim that employees are entitled to a California minimum wage for any time worked in California, no matter how fleeting. If plaintiffs were correct, employers would have to track their employees' precise whereabouts at every moment to determine, for example, what minimum wage rate they should be receiving. That rule would create an enormous administrative burden to comply with each state's minimum wage laws depending on where their employees land (or, perhaps, pass through) on any given day. It would also likely result in significant confusion for the employees themselves, who could be subject to many different state laws and minimum wage rates in any given pay period.

Abandoning the job situs test will create uncertainty as to which law applies to the rest of the employee's shift after leaving California. As mentioned above, numerous plaintiffs have taken the position that, if a flight originates in California, the employer must comply with *all* California wage-and-hour laws for the entire flight, even while in international air space.

More difficult questions would arise from an extension of California's wage-and-hour statutes based on a tenuous nexus between their employment and California. Is a pilot who operates a flight out of California entitled to a

California-compliant meal period during that flight? During all flights during that pay period? Where does California regulation end?

In an industry that is inherently interstate and international, and where employees spent minimal amounts of time in different states and countries, a requirement to comply with each different state's laws is untenable. If California decides to impose its laws on these employees, other states inevitably will follow suit. That would produce a blizzard of practically indecipherable wage statements for each pay period reflecting different standards and (possibly) different pay rates and tax rates. And employers would be similarly subject to multiple, differing pay and break regulations. California does not require the application of California law to employees who work in California "only episodically and for less than a day at a time."

CONCLUSION

The Court should hold that:

(1) California Labor Code sections 204 and 226 do not apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California "only episodically and for less than a day at a time"; and

(2) California minimum wage law does not apply to all work performed in California for an out-of-state employer by an employee who works in California "only episodically and for less than a day at a time."

February 15, 2019

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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 8.204

Pursuant to California Rule of Court 8.204, I hereby certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains _____ words.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certificate was executed on February 15, 2019.

Donald M. Falk

PROOF OF SERVICE

Case: *Oman v. Delta Airlines, Inc.*
California Supreme Court No. S248726

I, Steffany Amacher, declare:

I am employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Mayer Brown LLP, 350 South Grand Avenue, 25th Floor, Los Angeles, California 90071-1503. On February 15, 2019 served a copy of the within document(s):

APPLICATION OF CATHAY PACIFIC AIRWAYS LIMITED FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT/RESPONDENT

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 15, 2019 at Palo Alto, California.

Steffany Amacher

CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT 8.204

Pursuant to California Rule of Court 8.204, I hereby certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 2,773 words.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certificate was executed on February 15, 2019.

Donald M. Falk