No. S241655

COPY

SUPREME COURT OF CALIFORNIA

JAZMINA GERARD, KRISTIANE MCELROY, AND JEFFREY CARL,

Plaintiffs-Appellants,

vs.

ORANGE COAST MEMORIAL MEDICAL CENTER,

Defendant-Respondent.

On Review From the Court of Appeal, Fourth Appellate District, Division Three, Case No. G048039
and
After an Appeal From The Superior Court Of California, Orange County
The Honorable Nancy Wieben Stock, Presiding, Dept. CX-105
Case No. 30-2008-00096591

APPLICATION OF CALIFORNIA HOSPITAL ASSOCIATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT ORANGE COAST MEMORIAL MEDICAL CENTER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.250(f)(1) of the California Rules of Court, California Hospital Association respectfully applies for leave to file an amicus curiae brief in support of the position of Defendant and Respondent Orange Coast Memorial Medical Center. The proposed brief is attached.

I. STATEMENT OF INTEREST

Amicus California Hospital Association ("CHA") represents the interests of hospitals, health systems and other healthcare providers in California. CHA includes nearly 500 hospital and health system members. CHA's mission is to improve healthcare quality, access and coverage, and create a regulatory environment that supports high-quality, cost-effective healthcare services.

Consistent with that mission, CHA consults on issues that affect the healthcare industry and advocates on behalf of hospitals, health systems, and other healthcare providers. CHA is uniquely able to assess both the impact and implications of the legal issues presented in employment cases. This is especially true here, as CHA was directly involved in the drafting of the special healthcare meal period waiver provision at issue in this case.

CHA regularly participates as amicus curiae in significant California appellate cases that, like the present one, may have a substantial practical impact on the interests of CHA members and their employees.

No party's counsel has authored this brief, either in whole or in part; nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the amici curiae, their members, or counsel have contributed money intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.520(f)(4).

II. PROPOSED AMICUS CURIAE BRIEF

The proposed amicus curiae brief will assist the Court in deciding this matter in two ways. *First*, the brief will explain that the special healthcare meal period waiver provision in Wage Order 5-2001 has always been valid, both before and after SB 88 took effect. CHA has unique insight into the history of the waiver provision and its adoption by the Industrial Welfare Commission (IWC), as it was directly involved in the provision's drafting.

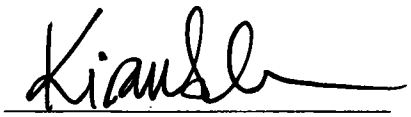
Second, the brief will demonstrate the historical reliance by California hospitals, employees, and unions on the special healthcare meal period waiver provision, which the IWC found to be "consistent with the health and welfare of workers." Because of this longstanding reliance by all relevant stakeholders, even if this Court were to conclude the waiver provision was invalid before SB 327's enactment, its ruling should be

prospective only. A retroactive ruling could result in devastating financial impacts on healthcare providers in this state, with little countervailing benefit to healthcare employees, who have for decades been given the choice to voluntarily waive one of their meal breaks in order to leave earlier on longer shifts.

Dated: December 22, 2017

Respectfully Submitted,

SEYFARTH SHAW LLP



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I. Introduction

Plaintiffs ask this Court to invalidate Wage Order 5's special Healthcare Meal Period Waiver Provision, which could expose California's healthcare institutions to massive retroactive liability for *complying* with that Wage Order provision for almost two decades. The California Hospital Association (CHA), which was directly involved in the drafting, adoption, and implementation of the Waiver Provision, writes to emphasize that there is no legal or public policy justification for this result.

First, for this Court to conclude that the IWC lacked authority to adopt the Waiver Provision, it would need to upend well-settled law—a consequence that Plaintiffs fail to recognize in their briefing.

Specifically, as the Court of Appeal held, when SB 88 took away the IWC's authority to "adopt" Wage Orders inconsistent with the meal period requirements of Labor Code Section 512, it did not purport to invalidate Wage Orders that had *already been adopted* but were not yet *effective.* For Plaintiffs' contrary position to succeed, this Court would need to hold that when SB 88 said "adopt," it meant "effective date."

But California's statutory scheme and long-settled case authority both recognize that a regulation's "adoption" is legally distinct from—and precedes—its "effective date." CHA urges this Court not to disregard this fundamental principle of administrative law, which could have unintended and far-reaching consequences in other cases.

Perhaps recognizing the limits of their position, Plaintiffs emphasize an alternative argument in their Reply Brief: that, even before SB 88's passage, the IWC was only authorized to adopt meal period regulations that were consistent with the requirements of Section 512. But that theory is clearly erroneous because, before SB 88's enactment, Labor Code Section 516 specifically empowered the IWC to adopt meal break regulations "notwithstanding any other provision of law."

Plaintiffs' position thus depends on this Court either disregarding the "notwithstanding" provision entirely, or giving it a meaning different from the Court's own prior decisions interpreting that term. Once again, CHA urges this Court to refrain from disrupting an area of law in which statutory terms already have acquired a settled meaning.

Second, CHA writes to emphasize that the special Healthcare Meal Period Waiver Provision—which has, for decades, allowed healthcare employees to leave work 30 minutes early at the end of a long shift—is "consistent with the health and safety" of workers. Plaintiffs do not challenge the IWC's findings to that effect, nor could they because (unlike the IWC) they have no particular expertise in this area.

Nevertheless, Plaintiffs suggest that the Waiver Provision somehow "weakens" worker protections. That contention is belied by the fact, as detailed below, healthcare employees, as well as unions representing them, have advocated for the Waiver Provision no fewer than *three times* in the

last several decades: in 1993 when the IWC first adopted the provision; in 2000 when the IWC was directed to adopt new wage orders following AB 60's passage; and in 2015 when the Legislature was considering SB 327 in the wake of *Gerard I*. CHA urges this Court to be mindful of these decades of unwavering support in determining the validity of the Waiver Provision.

Third, even if this Court were to conclude that the Waiver Provision is invalid, CHA urges the Court to make its ruling prospective only based on considerations of fairness and due process. For over two decades, all of the relevant stakeholders—CHA's members, other healthcare institutions, employees, and labor unions—have relied on the Waiver Provision.

That reliance was more than reasonable. Until *Gerard I*, the IWC's authority had never been questioned by the Legislature, which went on to amend the meal period statute three more times after SB 88 but never repealed the Meal Period Waiver Provision. Further, in *Brinker*, this Court explicitly affirmed the IWC's broad authority, and extensively discussed the Waiver Provision with approval. And throughout this time period, healthcare institutions were, by law, required to post the Wage Order containing the Waiver Provision in the workplace for all employees to see.

In these circumstances, retroactively invalidating the Waiver Provision would be fundamentally unfair. Indeed, retroactive premium pay liability could punish all of California's private health care institutions—to

the tune of *hundreds of millions* of dollars—not for violating a Wage Order, but for *complying* with a Wage Order provision that has been in effect substantially unchanged since 1993. This raises a host of important state law and constitutional issues—including serious Due Process concerns.

In sum, ordinary principles of statutory construction compel the conclusion that the IWC was authorized to adopt the Meal Period Waiver Provision. And even if this Court were to conclude otherwise, fairness and due process require that any ruling invalidating the Waiver Provision not be given retroactive effect.

II. The Health Care Meal Period Waiver Provision Has Always Been Valid

CHA first addresses Plaintiffs' latest argument, not previously emphasized, that Wage Order 5's Healthcare Meal Period Waiver Provision was void from its inception. Reply Brief at 12-15. Because the IWC had explicit statutory authority to enact such a provision "notwithstanding any other provision of law," Plaintiffs' argument must fail.

Second, CHA wholeheartedly agrees with Orange Coast that SB 88 did not subsequently invalidate the Waiver Provision. Orange Coast Br. at 26-33. CHA writes separately to highlight the profound administrative law implications of Plaintiffs' contrary position.

A. The Waiver Provision Was Within the IWC's Authority from Inception

For the first time in their Reply Brief, Plaintiffs argue that the IWC's adoption of the Healthcare Meal Period Waiver Provision "was void at its inception," even before SB 88, because "[t]he IWC's authority was always limited to adopting wage orders consistent with" the meal period requirements of Section 512. Reply Br. at 7, 8. Plaintiffs' argument depends on this Court's ignoring the settled meaning of statutory terms.

AB 60 enacted certain meal break requirements in Labor Code Section 512(a). At the same time, in the same chapter, AB 60 authorized the IWC to "adopt" orders respecting meal periods, "consistent with the health and welfare of workers," "*notwithstanding any other provision of law*." Cal. Labor Code §516 (emphasis added). *See* Orange Coast Request for Judicial Notice ("Orange Coast RJN"), Ex. A, pp. 18-19.

"The statutory phrase 'notwithstanding any other provision of law' has been called a 'term of art' ... that declares the legislative intent to override all *contrary* law." *Arias v. Superior Court*, 46 Cal.4th 969, 983 (2009), quoting *Klajic v. Castaic Lake Water Agency*, 121 Cal.App.4th 5, 13 (2004). "Use of that phrase 'expresses a legislative intent to have the specific statute control despite the existence of other law which might otherwise govern.'" *Ni v. Slocum*, 196 Cal.App.4th 1636, 1647 (2011), quoting *People v. Franklin*, 57 Cal.App.4th 68, 74 (1997); *In re Marriage*

of Cutler, 79 Cal.App.4th 460, 475 (2000) (the term "signals a broad application overriding all other code sections").

The Legislature's use of this settled statutory term in Section 516 thus established its intent to authorize the IWC to adopt meal period orders "despite the existence of" Section 512, *Ni*, *supra*, and to have those IWC orders "override all contrary law," *Arias*, *supra*, including Section 512. *See* Orange Coast RJN, Ex. D, p. 69 (DLSE Memo: "IWC will continue to have an important role in defining meal period requirements, as section 10 of AB 60 adds Section 516 to the Labor Code, which provides that notwithstanding any other provision of law, the IWC may adopt or amend regulations regarding meal periods, break periods, and days of rest.")

Plaintiffs' contrary view that the IWC had no authority to depart from Section 512, if accepted, would require this Court to conclude that the Legislature's use of "notwithstanding..." in Section 516 was superfluous. *Wells v. One2One Learning Found.*, 39 Cal.4th 1164, 1207 (2006) ("interpretations which render any part of a statute superfluous are to be avoided.") At a minimum, it would require the Court to conclude that the phrase means something different here than it did in *Arias* and the other authority cited above. Again, this Court should reject Plaintiffs' invitation to upend a well-settled body of law.

Plaintiffs' position also ignores this Court's guidance in *Brinker*: "[t]he declared intent in enacting section 512 was not to revise existing

meal period rules but to codify them *in part*." *Brinker*, 53 Cal.4th at 1038 (emphasis added). This Court explained that "the Legislature did not intend to upset existing rules, absent a clear expression of contrary intent," because "when the Legislature entered the field of meal break regulation in 1999, it entered an area where the IWC ... had, over more than half a century, developed a settled sense of employers' meal break obligations." *Id.* at 1037; *see also id.* at 1035 (IWC's experience with regulating meal breaks began in 1943).

It is thus not surprising that AB 60 would grant the IWC continued authority to enact meal break regulations "notwithstanding" Section 512's partial codification of meal break requirements. Indeed, as Orange Coast explains, the IWC has had a "settled sense" of meal break obligations in the healthcare industry for decades, because the meal period waiver provision has been in Wage Order 5 since 1993. Orange Coast Br. at 16-17.

Plaintiffs' position also is at odds with *Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429 (2006), a case on which they rely extensively. *Bearden* recognized that, before SB 88, the IWC had broad authority to adopt meal period provisions:

> [Defendant] cites the former version of section 516, before it was amended [by SB 88] in 2000, instead of the current version. The impact of the 2000 amendment is significant. The former version provided: "*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." (Italics added.)
>
> In 2000, the Legislature amended the introductory clause of section 516 so that it now reads: *"Except as provided in Section 512 ...."*

Id. at 437–38 (emphasis in original).[1]

If the IWC never had the authority to adopt wage orders inconsistent with Section 512, as Plaintiffs contend, the impact of SB 88 would not have been "significant." *Bearden*, 138 Cal.App.4th at 437; *accord Gerard v. Orange Coast Mem'l Med. Ctr.*, 9 Cal.App.5th 1204, 1213 (2017) (*Gerard II*) ("SB 88 definitely changed the law"; before SB 88, the IWC had "authority under section 516(a) to adopt wage orders like section 11(D), notwithstanding any other provision of law, including section 512(a).")

In sum, the unambiguous legislative authorization to enact regulations "notwithstanding any other provision of law," as interpreted by *Arias, Bearden* and other authority, must lead this Court to conclude that the IWC was within its authority to adopt the Healthcare Meal Period Waiver Provision. *Brinker*, 53 Cal.4th at 1027 ("IWC's wage orders are entitled to extraordinary deference ... in upholding their validity," and "[t]o

[1] *Bearden* involved a different Wage Order and different meal period provision, which the IWC had adopted *after* SB 88 took effect. Because of that timing, *Bearden* concluded that the IWC had by then lost the authority to adopt a meal period provision inconsistent with Section 512.

the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes.")

B. The Waiver Provision Is Consistent with the "Health and Welfare" of Healthcare Employees

Plaintiffs also make the related argument that, if AB 60 were construed to have permitted departures from Section 512's meal period requirements, it would have given the IWC "carte blanche" to adopt regulations without regard to "worker rights." Reply Br. at 12; *id.* at 15 (Meal Period Waiver Provision "weakened" AB 60 standards).

Plaintiffs ignore that, although AB 60 authorized the IWC to "adopt" orders respecting meal periods "notwithstanding" other law, it specifically required those orders to be "consistent with the health and welfare" of workers. Orange Coast RJN, Ex. B, p. 19 (AB 60 codification of Section 516). As part of that process, and "consistent with [the IWC's] duty to protect the health, safety and welfare of workers," AB 60 further directed the Commission to "conduct a review of wages, hours, and working conditions in the ... healthcare industry," and "convene a public hearing to adopt or modify regulations." *Id.*, pp. 19-20 (codification of Section 517(b)).

Thus, far from receiving "carte blanche" to disregard workers' rights, the IWC was statutorily mandated to adopt only meal period provisions that it determined, after public review and comment, to be

consistent with worker health and welfare. As detailed below, the IWC followed those procedures and timely adopted the Waiver Provision, Orange Coast RJN Ex. F, p. 86, which was "final and conclusive for all purposes." Cal. Labor Code §517.

And in its Statement as to the Basis, the IWC specifically found that the Meal Period Waiver Provision was "[c]onsistent with the health, safety, and welfare of employees in the healthcare industry." Orange Coast RJN Ex. F, p. 100. Pursuant to Labor Code Section 1187, those findings are "conclusive." Cal. Lab. Code § 1187.

Importantly, Plaintiffs *do not contest* the IWC's findings. It is, therefore, undisputed that the Waiver Provision is consistent with worker health and welfare. Nevertheless, CHA addresses this issue in greater detail in order to put to rest any concern that recognizing the validity of the Waiver Provision would be detrimental to worker well-being. CHA has unique insight into this issue, given its participation in the crafting of the Waiver Provision, as well as its members' experiences in implementing the voluntary meal period waivers at their facilities.[2]

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[2] CHA also addresses this issue because the list of Pending Issues on the Court's website includes: "To what extent, if any, does the language of Labor Code section 516 regarding the 'health and welfare of those workers' affect the analysis?" As just explained, the fact that the IWC was statutorily required to, and did, find the Waiver Provision "consistent with the health and welfare" of workers supports the Provision's validity.

The historical record, described below, shows that the healthcare industry, as well as the labor unions representing healthcare employees, advocated for the Healthcare Meal Period Waiver in order to respond to the unique needs of hospitals and their employees, especially those working Alternative Workweek Schedules ("AWS").[3]

a. 1993: IWC grants workers meal period flexibility. From its inception through 1986, Wage Order 5 did not permit employees to work an AWS. Wage Order 5-86. Rather, it assumed a regular work day consisted of 8-hour shifts, with a right to a meal period after five hours of work. *Id.*

This structure created practical problems for the healthcare industry, which needed "more flexibility with respect to work scheduling" in order to provide patient care efficiently and to allow workers to elect to work longer shifts over fewer days. *See* Amendments to IWC Order 5-89, Official Notice.[4] Thus, effective April 2, 1986, the IWC added Section 3(K) to Wage Order 5, to permit AWS arrangements whereby healthcare employees could work 12-hour shifts without overtime (provided certain

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[3] An "alternative workweek schedule" is defined in Wage Order 5 as "any regularly scheduled workweek requiring an employee to work more than eight (8) hours in a 24-hour period." Wage Order 5, §2(A). Since the employee vote required by Section 3(C) of the Wage Order, thousands of patient care employees have voted for workweeks consisting of three days of twelve hours each, in lieu of five days of eight hours each, thus getting two extra days off each week.

[4] *See* https://www.dir.ca.gov/iwc/Wageorder5_89_Amendments.pdf

employee-protective criteria, including secret ballot elections, were satisfied). Wage Order 5-86.

In 1993, CHA and others in healthcare petitioned the IWC to "clarify and expand regulations regarding flexible schedules and overtime" and "to permit employees to waive meal periods." Orange Coast RJN, Ex. A, p. 9, Statement as to the Basis of Amendments to Sections 2, 3, and 11 of IWC Order 5-89. After three public hearings, the IWC amended Wage Order 5-89 to provide greater flexibility for employees who desired to work an AWS. Along with that, the IWC also gave those employees more flexibility with respect to meal breaks, for the first time allowing employees who work shifts in excess of eight hours to waive their right to one of their two meal periods. *Id.*, pp. 3-5.

The AWS and Meal Period Waiver amendments together provided the needed flexibility, benefitting both healthcare providers and employees. The AWS provision "permit[ted] employers and employees maximum daily and weekly scheduling flexibility." *Id.*, p. 9. In particular, it allowed employees to free up one or more days each week to spend on personal pursuits, instead of working five 8-hour days each week. Thousands of employees thus voluntarily chose to work three- and four-day weeks, normally consisting of 10 and 12 hour days.

The new Meal Period Waiver Provision worked hand-in-hand with the AWS Provision, giving "employees freedom of choice"—that is, it

allowed employees already working long shifts (such as 12 hours) to voluntarily leave early instead of being forced to stay at work an extra 30 minutes to accommodate a second, unpaid, off-duty meal period. *Id.*

Indeed, "[t]he vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a [meal period] waiver." *Id.* This is not surprising because, even without the second meal period, employees working 12-hour shifts still would be provided with one 30-minute meal break and three 10-minute rest breaks, giving them sufficient time to eat and rest.

And it is important to remember that, if an employee decided she wanted to have a second meal period, she could revoke the waiver. The waivers are *voluntary* and *revocable* on one day's written notice. Orange Coast RJN, Ex. F, p. 83, Section 11(D). In that circumstance, to accommodate two off-duty, unpaid meal periods, the employee either would be scheduled for a 13 hour shift (rather than a 12 ½ hour shift), or would continue to be scheduled for a 12 ½ hour shift but would be paid for 11 ½ hours.

b. June 2000: IWC again approves an AWS and meal period waiver proposal negotiated by the healthcare industry and labor. After AB 60's passage, CHA participated in virtually every public hearing before the IWC and worked in collaboration with healthcare labor unions to come up with a proposal regarding AWS and meal period waivers.

The culmination of these efforts was the IWC's public hearing, held on June 30, 2000, at which the proposal negotiated among CHA members, other health care providers, healthcare labor unions, and employees was approved by the IWC. *See* CHA's Request for Judicial Notice, filed concurrently ("CHA RJN"), Ex. A, Transcript of Public Hearing, June 30, 2000, Attachment A (proposal).

The proposal was lauded by IWC Commissioners. *Id.*, p. 13 (the "compromise that the industry and its participants and labor have reached ... demonstrates very good faith on the part of both sides on some very difficult issues," and "was an example of how the various interests involved in these issues can get together and negotiate something that works for everyone."); *id.* at 22 (Commissioner Coleman: "the key thing to keep in mind is the flexibility that [AWS and Meal Period Waiver Provision] affords not only ... the industry, but it is flexibility for the -- for the workforce to be able to do this. So, I think this is a human issue...").

This sentiment was also echoed by representatives of the California Labor Federation, the Service Employees International Union (SEIU), and the United Nurses Associations of California (UNAC), all of whom urged the IWC to accept the proposal they had negotiated with management-side interests. *Id.* at pp. 16-18 ("we think this is an agreement that you should approve").

The result, as this Court explained, was that "health care

representatives persuaded the IWC to at least preserve expanded [meal period] waiver rights for their industry, along the lines of those originally afforded in 1993." *Brinker*, 53 Cal.4th at 1047. This Court also observed the beneficial effect of the Waiver Provision, noting it "permit[ted] ... employees to waive a second meal period on longer shifts in order to leave earlier." *Id.* at 1047.

c. 2015: Unions representing healthcare workers affirm their support for the Waiver Provision. Unions wrote letters in support of SB 327, affirming the benefits to their members of the Waiver Provision. UNAC/UHCPF explained:

> UNAC members have for years enjoyed the flexibility of alternate work schedules, which allows for greater staffing flexibility and better patient care. Patient outcomes are dramatically improved in environments where the nurses and other health care professionals can place priority on the needs of their patients without interruption by an arbitrary meal period when the shift runs long. (RNs are generally able to eat during work time in break rooms.) In addition, allowing health care workers the option of working longer shifts enables them to take extra days off during the work week, which in turn ensures that they are fully rested when they return to work to provide better patient care.

Orange Coast RJN Ex. K, p. 121, 213; *see also id.*, Ex. N (Case No. S225205, Amicus Brief of UNAC and SEIU), pp. 10-12; *id.*, Ex. M (UNAC/SEIU Letter).

The SEIU echoed these views, noting that "employees generally like to waive one of their two meal periods because they are scheduled for 12 1/2 hours (to accommodate one off duty meal period) rather than 13 hours (to accommodate 2 off duty meal periods)." Orange Coast RJN Ex. K, p. 210. These alternate work schedules "are overwhelmingly preferred by healthcare workers" the SEIU explained, because these schedules allow, among other things, "more time with family and friends." *Id.*; *see also id.*, Ex. K, p. 243 (AFSCME, AFL-CIO letter of support).[5]

Based on this extensive record, there can be no question that the Waiver Provision is "consistent with the health and welfare" of healthcare employees. The IWC's unchallenged findings to that effect, made in accordance with the procedures mandated by AB 60, further support that the IWC acted within its authority in adopting the Waiver Provision.

C. This Court Should Decline Plaintiffs' Invitation to Upend California's Administrative Law Scheme

CHA agrees with Orange Coast that SB 88 had no impact on the IWC's authority to adopt the Waiver Provision. CHA writes separately because, based on its active participation in the IWC hearings as described above, it has unique insight into the state's administrative rulemaking processes. Orange Coast RJN, Ex. C, p. 60. If this Court were to conclude

[5] Indeed, the only group opposed to the measure was plaintiffs'-side attorneys. Orange Coast RJN, Ex. K, p. 260 (letter from the Consumer Attorneys of California).

that SB 88 invalidated the duly-adopted Waiver Provision, it would create an irreconcilable tension in the field of administrative law—a result this Court should (and can) avoid.

Under the California Administrative Procedures Act, there is a statutory distinction between the "adoption" of a regulation and its "effective date." *Compare* Cal. Gov't. Code §§11346-11348 ("Procedure for *Adoption* of Regulations") *with* Cal. Gov't. Code §11343.4 (adopted regulations filed with Secretary of State "*become effective*" in accordance with prescribed schedule).

"The Labor Code includes regulatory procedures analogous to those in the APA, but applicable only to the IWC." *Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal.4th 557, 569 (1996). Those procedures also recognize the distinction between a Wage Order's adoption and its effective date. *Compare* Cal. Labor Code §1173 (authorizing IWC to "*adopt* an order") *with* Labor Code §1184 (adopted order "shall be *effective* ... not less than 60 days from the date of publication") (emphasis added).

Long-settled case authority also confirms that "adoption" is legally—and temporally—distinct from a law's "effective date." *See e.g. Ross v. Bd. Of Ret. Of Alameda Cty. Emp. Ret. Ass'n*, 92 Cal.App.2d 188, 193 (1949) (general rule that "the date of 'adoption' or passage of [a law] is not the date the enactment becomes of actual force and power, that is, effective, unless the enactment should specifically so declare."); *Gleason v.*

City of Santa Monica, 207 Cal.App.2d 458, 460-61 (1962) ("'the date of 'adoption' is the date of passage" "rather than ... its effective date.")

These authorities thus make clear that when a statute says "adoption," it does not mean "effective date." That distinction, as the Court of Appeal correctly recognized, is dispositive here.

AB 60 authorized the IWC to "adopt" orders respecting meal periods, "consistent with the health and welfare of workers," "notwithstanding any other provision of law." Cal. Labor Code §516. It further directed the IWC to "adopt" those orders by July 1, 2000, which orders would then be "final and conclusive for all purposes." *Id.*, §517(a).

The IWC followed those procedures with respect to the Health Care Meal Period Waiver Provision: after convening public hearings, Orange Coast RJN, Ex. C, pp. 47-50, and finding that the Provision was consistent with the "health and welfare" of healthcare workers (a process detailed above), it timely adopted the Provision on June 30, 2000. Orange Coast RJN, Ex. F, pp. 83, 100-101; *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1045 (2012) ("The IWC complied with [AB 60's] directive to adopt new wage orders.")

Three months after the IWC adopted the Provision, SB 88 took away the IWC's authority to "adopt" future orders inconsistent with Section 512's meal period requirements. *See* Orange Coast RJN, Ex. G, p. 108 (SB 88: amending Section 516 to provide that "Except as provided in Section

512", the IWC may "*adopt* or amend working condition orders with respect to ... meal periods") (emphasis added). Nowhere, as Orange Coast correctly explains, did SB 88 state it was purporting to retroactively unravel wage order provisions that the IWC already had duly "adopted." Orange Coast Br. at 31-34.

To conclude that SB 88 invalidated the Waiver Provision, one would have to rely on the fact that Provision, although already-adopted, had not yet become effective. But that argument ignores that the Legislature deliberately chose the word "adopt," both in SB 88 and in the affected statutes. Orange Coast RJN, Ex. G, p. 105, ¶4 (SB 88 "*would prohibit the commission from adopting* a working condition order that conflicts with those 30-minute meal period requirements"); Labor Code §§ 516, 517(a). For Plaintiffs' position to succeed, the Court would need to conflate "adopt" with "effective date"—that is, it would have to conclude that the Legislature meant to preclude a wage order from being "effective" though there already had been hearings and it had already been "adopted."

But that is not a plausible construction of the statutes because, as the authorities above make clear, "adopt" in the rulemaking context is a term of art, conceptually and temporally separate from a law's "effective date." *In re Bittaker*, 55 Cal.App.4th 1004, 1009 (1997) ("if a word or a phrase has a well-known and definite legal meaning, it will ordinarily be construed to have that meaning when used in a statute").

For this Court to conflate the two concepts, as Plaintiffs urge, would upend settled administrative law. It would mean "adopt" had one meaning for purposes of Labor Code Sections 516 and 517, but a different meaning in statutes such as Labor Code Section 1173 and the California APA, Cal. Gov't. Code §§11346-11348. No reason exists to create such a conflict among statutes, which can only lead to uncertainty in this area of the law. *In re Bittaker*, 55 Cal.App.4th 1004, 1009 (1997) (Courts should "consider use of the same or similar language in other statutes, because similar words or phrases in statutes *in pari materia* ordinarily will be given the same interpretation"); *People v. Garcia*, 21 Cal.4th 1, 10 (1999).

Conflating the two terms also ignores that certain procedural requisites often come between a regulation's "adoption" and its "effective date." *E.g.* Labor Code §1182.1 (IWC action to adopt new provisions under Sections 517 and 1172 must be published in newspaper); *Id.*, §1184 (adopted provisions "shall be *effective* ... not less than 60 days from the date of publication").

Indeed, the Healthcare Meal Period Waiver Provision was itself "adopted" on June 30, 2000, but its "effective date" was not until October 1, 2000. CHA RJN, Ex. B, pp. 10-11, 18 (IWC's Notice of Actions Taken at Public Hearing on June 30, 2000); Orange Coast RJN, Ex. C, p. 59 (Minutes of June 30, 2000 Public Hearing). In the interim, as one IWC Commissioner noted, "there will be a lot involved in making sure that" the

adopted regulations are "put in the proper form and issued through the proper entities," including finalizing the Statement as to the Basis for the newly-adopted regulations and their publication. CHA RJN, Ex. C, pp. 218-220 (Transcript of May 26, 2000 hearing).

It would thus be illogical to conclude that the Legislature, in prohibiting the IWC from "adopting" certain regulations, meant to invalidate already-adopted regulations because they were not yet "effective."

In sum, CHA urges this Court to avoid an interpretation of SB 88 that ignores the settled meaning of statutory terms, creates conflict among rulemaking statutes, and invalidates an IWC action that was taken in accordance with AB 60's explicit rulemaking procedures.

For all these reasons, and for the reasons articulated in Orange Coast's brief, CHA urges this Court to uphold the validity of the Healthcare Meal Period Waiver Provision.

III. This Court Should Not Impose Massive Retroactive Liability On Hospitals for Reasonably Complying With A Wage Order

If this Court nevertheless decides that the IWC lacked authority to adopt the Meal Period Waiver Provision, CHA urges the Court to avoid the massive retroactive liability and harm such a decision could inflict on healthcare providers throughout California. The Court may do so in one of two ways: (a) exercising its authority to make its ruling prospective only, or

(b) ruling that SB 327, even if it were a change in law, should be applied retroactively. There is ample justification for both courses of action.

A. Any Ruling Invalidating the Waiver Provision Should Be Prospective Only

The "general rule" that "judicial decisions are given retroactive effect" has "not been an absolute one." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 979 (1989). An exception is appropriate "when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule." *Id.* at 983.

"Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." *Smith v. Rae-Venter Law Grp.*, 29 Cal.4th 345, 372 (2002); *see also Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 688 (1992) (reliance on former rule was reasonable; statutory objectives not compromised by prospective application); *Woods v. Young*, 53 Cal.3d 315 (1991)(same); *Claxton v. Waters*, 34 Cal. 4th 367 (2004).

In particular, an exception is warranted "when a party justifiably has relied on the former rule." *Bearden*, 138 Cal.App.4th at 442-43; *accord Newman*, 48 Cal.3d at 983 (exception "when retroactive application of a

decision ... would unfairly undermine the reasonable reliance of parties on the previously existing state of the law.")

Prospective application is also appropriate "where a ... statute has received a given construction by a court of last resort, and contracts have been made or property rights acquired in accordance with the prior decision." *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 46 Cal.3d 287, 305 (1988). In that circumstance, "neither will the contracts be invalidated nor will vested rights be impaired by applying the new rule retroactively." *Id.* (decision eliminating private right of action applied prospectively only).

Thus, the key considerations here are (1) the extent to which the healthcare industry, its employees, and healthcare labor unions reasonably relied on the Waiver Provision, and (2) the severe negative impact on stakeholders if the Waiver Provision were to be retroactively invalidated.

CHA is able to offer insight into both of these issues. Because of its involvement in the drafting and implementation of the Waiver Provision, CHA can offer an industry-wide historical perspective on the extent to which the Waiver Provision has been relied upon over the last twenty years. For the same reasons, CHA is also uniquely able to assess the severe negative impact retroactive invalidation would have on its members and other healthcare institutions.

1. Hospitals and unions reasonably relied on the Waiver Provision for over two decades

As detailed above, the Waiver Provision—a product of collaboration between hospitals, employees, and labor unions—has appeared in Wage Order 5 since 1993. After AB 60's passage, the IWC again adopted the Waiver Provision on June 30, 2000, and it was preserved in the January 2001 version of Wage Order 5. Since that time, it has appeared in each and every amended version of the Wage Order. *See* Amendments and Annual Updates to Wage Order 5-2001, dated January 1, 2002, January 1, 2033, July 1, 2003, January 1, 2004, January 1, 2005, and January 1, 2006.

And by law, healthcare institutions have been required to post every version of Wage Order 5 at their work sites, where it could be seen and relied upon by employers and employees alike. *See* Wage Order 5-2001, ¶22 ("Every employer shall keep a copy of this Order posted in an area frequented by employees where it may be easily read during the workday").

Thus, the posted Wage Order itself tells patient care employees that they have a right to waive one of their two meal periods in order to shorten their work day. And it specifically provides that an employer that violates the posted Wage Order is subject to a variety of penalties. *Id.*, ¶20.

Between 2003 and 2010, the Legislature amended Labor Code §512 another three times, to provide exceptions to the meal period requirements for other industries. *See* Labor Code §512(c)-(f); Stats. 2003 ch. 207 §1

(AB 330); Stats. 2005 ch. 414 §1 (AB 1734); Stats. 2010 ch. 662 §1 (AB 569). Despite actively considering Section 512 on those three occasions, the Legislature neither changed nor repealed the healthcare industry's Meal Period Waiver Provision.

It was thus reasonable for the healthcare industry to have relied on the continued validity of the Provision. *See e.g. Isaacs v. Bowen*, 865 F.2d 468, 473 (2d. Cir. 1989) ("when the agency charged with the implementation of a statute has purported to interpret it by promulgating regulations, and Congress—without overruling or clarifying the agency's interpretation—later amends the statutory scheme, the agency view is then deemed consistent with Congress' objectives.")

Then, in 2012, *Brinker* extensively discussed the history and binding effect of Wage Order 5, including the Meal Period Waiver Provision. This Court confirmed that the Wage Orders are "presumptively valid legislative regulations," and "are entitled to extraordinary deference, both in upholding their validity and in enforcing their specific terms." *Brinker*, 53 Cal.4th at 1026-27. At no point in its lengthy discussion did this Court question the IWC's authority to provide the meal period exception. On the contrary, the Court observed that:

> the IWC sought to make its orders track [AB 60] as closely as possible and expressed hesitance about departing from statutory requirements. (See, e.g., IWC public hearing transcript (May 5, 2000) pp. 52–56.) What

> departures it made appear to have been conscious choices, expressly identified in the IWC's Statement as to the Basis, and frequently justified by explicit reliance on its authority to augment the Labor Code. (See IWC Statement as to the Basis (Jan. 1, 2001) pp. 19–20.)

Id. at 1048. *Brinker*'s assessment is entirely consistent with the twenty-year history of the Waiver Provision, described above.

Subsequently, in 2015, hospitals and unions confirmed their longstanding reliance on the validity of the Waiver Provision in letters supporting SB 327. Over 75 hospitals and/or health systems explained: "For over 30 years, healthcare employers and employees have been able to utilize the special healthcare waiver provision ... and there has never been any question about its validity." CHA RJN, Ex. D, at Senate 001, 003; *see generally id.* at Senate 001-321; Orange Coast RJN Ex. K.

Unions also wrote confirming their longstanding reliance on the validity of the Waiver Provision. UNAC, the nurses' union that sponsored SB 327, explained that "UNAC members have for years enjoyed the flexibility of alternate work schedules" and that the Waiver Provision represented "years of established practice." CHA RJN, Ex. D; *see also* Orange Coast RJN Ex. N (UNAC/SEIU Amicus Brief explaining that the IWC had authority to enact the Waiver Provision, and explaining its benefits to workers).[6]

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[6] After SB 327's passage, UNAC even issued a statement describing the

Similarly AFSCME, AFL-CIO pointed out that, "[s]ince 1993, healthcare employers have been able to offer a meal period waiver," and that a decision invalidating the Waiver Provision "severely disrupts the lives of our members" and "upends well-established staffing schedules." CHA RJN, Ex. D at Senate 026. *See also id.* at Senate 096 (California Labor Federation's letter); Orange Coast RJN Ex. K, p. 188 (SEIU letter to the Assembly: "common interpretation" of Wage Order 5 was that it allowed the waiver).

Bill Dombrowski, the IWC's then-Chair who was "personally involved in the development of, and negotiations related to" adoption of the Waiver Provision in June 2000, also explained that "it was generally understood" by him, "[t]he IWC Commissioners and staff" that SB 88 "did not impact" the validity of the Waiver Provision. CHA RJN, Ex. D at Senate 269. The same understanding was expressed by Congressman Honda, who was the principal co-author of SB 88. *Id.* at Senate 311.

In short, until *Gerard I*, no question was ever raised about the IWC's authority to enact the provision—either at the time the IWC adopted its "final and conclusive" order on June 30, 2000, the seven times Wage Order

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"longstanding nurse-hospital agreement" to allow meal period waivers, and declaring the bill's enactment a "win-win-win, good for patients, nurses, and California hospitals." *See* http://www.unacuhcp.org/unacuhcp-saves-the-12-hour-shift-for-california-nurses-patients-and-hospitals/

5 was re-published, or the three times the Legislature amended Labor Code §512 to provide other industry-specific meal period exceptions.

On the contrary, *Brinker* affirmed the IWC's broad authority to enact its "presumptively valid" regulations and extensively discussed the Waiver Provision's purpose and history with approval. *Moradi-Shalal*, 46 Cal.3d at 305 (no retroactivity "where a ... statute has received a given construction by a court of last resort, and contracts have been made or property rights acquired in accordance with the prior decision.")[7]

In light of this history, there is no question that retroactively invalidating the Waiver Provision "would unfairly undermine the reasonable reliance of parties on the previously existing state of the law." *Newman*, 48 Cal.3d at 983.

2. Retroactivity will result in massive liability exposure and threaten Due Process violations

If this Court were to give its decision retroactive effect, it would authorize retroactive premium pay liability to be imposed against all of California's private health care institutions—not for violating a Wage Order—but for *complying* with a Wage Order provision that has been in

[7] The earlier *Bearden* and *Lazarin* decisions raised no concerns about the validity of the Healthcare Meal Period Waiver Provision, as they invalidated a *different* provision in a *different* Wage Order that was adopted *after* SB 88 took effect. *Bearden*, 138 Cal.App.4th at 442-43; *Lazarin v. Superior Court*, 188 Cal.App.4th 1560 (2010).

effect since October 2000. That result would be fundamentally unfair and would violate due process, as explained next.

Massive retroactive liability. In California, there are approximately 6,576 healthcare facilities covered by Wage Orders 4 and 5, comprised of 533 licensed hospitals, 1,294 long term care facilities, 1,418 primary care clinics, 642 specialty care clinics, and 2,689 home health agencies and hospices.[8] (Wage Order 4 has the same special healthcare meal period waiver provision as Wage Order 5). Together, these facilities employ over 1,000,000 employees within job classifications covered by the Healthcare Meal Period Waiver Provision (*e.g.*, Registered Nurses, LVNs, X-Ray Techs, Respiratory Therapists, and Physical Therapists).[9]

Further, approximately 87% of acute care hospitals have employees who have elected to work 12-hour shifts—these are the employees who typically execute meal period waivers under Wage Order 5 "in order to leave earlier." *Brinker*, 53 Cal.4th at 1047. Had these employees not signed a meal period waiver, they would have been required to take two off-duty, unpaid meal periods instead of one. This means that on a 12-hour shift,

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[8] The data can be found on the website of the Office of Statewide Health Planning and Development, at https://oshpd.ca.gov/HID/Facility-Listing.html#Hospital.

[9] The data can be found on the website of the Bureau of Labor Statistics at https://www.bls.gov/oes/current/oes_ca.htm#29-0000

they would have had to stay at work for an extra 30 minutes with no additional pay.

Putting this data together, it is clear that a retroactivity finding would potentially invalidate *hundreds of thousands* of meal period waivers on days that employees worked over 12 hours, even if only by one or two minutes. This could potentially affect millions of meal periods going back three years from the enactment of SB 327 (or even farther back in this case and others like it that are already pending). That means retroactive premium pay liability could easily amount to *hundreds of millions of dollars*. (The premium is "one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided." Wage Order 5-2001, ¶11(B)).

By way of example:

— the California Children's Hospital Association states that retroactive invalidation of the Waiver Provision "could result in millions of dollars in liability" for its members, who are hospitals that "care for the most vulnerable children in California—severely ill or injured—and [for whom] over 62% of visits to children's hospitals in 2012 were paid for by Medi-Cal." CHA RJN Ex. D, at Senate 045. "The financial liabilities" of premium pay liability, the association explains, "could increase stress on these important safety net institutions." *Id.*

— CHOC Children's similarly estimates "millions of dollars" in liability—dollars "that nonprofit safety net providers like CHOC Children's would otherwise reinvest in providing services to our state's most medically needy residents." *Id.*, at Senate 070.

— Numerous other hospitals, as well as the industry associations representing them (including CHA and the California Association of Health Facilities) also agree that potential retroactive liability could be in the millions of dollars for individual hospitals, and "hundred millions of dollars" collectively. *Id.*, at Senate 025 (CAHF), Senate 021-022 (CHA); *see generally id.* at Senate 001-321.

With this much at stake, it is clear that healthcare providers will be overwhelmed with class action and PAGA litigation. The time and expense of defending against such litigation will deplete their much-needed economic resources, and require each hospital to divert the time of many executives and support personnel from providing healthcare to defending law suits. None of the legitimate stakeholders in this area—healthcare institutions, employees, unions, and industry groups—want this result.

For all these reasons, the healthcare industry would be substantially prejudiced if the Court were to invalidate the Meal Period Waiver Provision retroactively. *Castaneda v. Holcomb*, 114 Cal.App.3d 939, 945-46 (1981) ("When an administrative interpretation is of long standing and has remained uniform, it is likely that numerous transactions have been entered

into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation.")

Due Process violations. In addition to the tremendous financial and administrative burden, a retroactivity finding would threaten serious Due Process violations for healthcare institutions.

"The announcement of a legal principle ... furnishes notice of what is either allowed or prohibited. Such notice is the most elemental requirement of due process." *Kreisher v. Mobil Oil Corp.*, 198 Cal.App.3d 389, 402 (1988); *Olszewski v. Scripps Health*, 30 Cal.4th 798, 829 (2003). In other words, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

A finding of retroactive liability would depart from these basic constitutional requirements of notice and fairness. It would impose retroactive liability on healthcare providers for complying with an express provision of Wage Order 5, and allowing their employees to voluntarily waive one of their two meal periods, even when their shifts have exceeded 12 hours. Nor, until this lawsuit, was there are any notice of the Waiver Provision's purported invalidity. On the contrary, a version of it has been in place since 1993, has been renewed in each and every version of Wage

Order 5 since 2000, and was extensively examined without disapproval by this Court in *Brinker*.

Plaintiffs have argued that notice was provided by *Bearden* and *Lazarin*, but those concerned a different industry and a different Wage Order—one that was adopted *after* the IWC's authority to deviate from Labor Code Section 512 had been eliminated. Further, while hospitals were required to post the Wage Order containing the Waiver Provision, they were not required to post either the *Bearden* or *Lazarin* decisions. Thus, any hospital or hospital employee who wanted to know the rules regarding meal period waivers would see only the Waiver Provision contained in Wage Order 5.

In short, exposing healthcare institutions to such massive, unforeseen liability on a retroactive basis raises serious Due Process concerns under both the state and federal constitutions. This Court may avoid these concerns by making any decision to invalidate the Healthcare Meal Period Waiver Provision prospective only.

B. Even if SB 327 Were a Change in Law, Retroactive Application Would Be Permissible and Appropriate

Alternatively, this Court could appropriately conclude that SB 327, even if it were a change in law (it is not, as Orange Coast has explained), operates retroactively.

In a previous brief, Plaintiffs recognized that, "even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively *reflect the Legislature's purpose to achieve a retrospective change.*" Case No. G048039, App. Supp. Br., at 11, n.4, quoting *Western Sec. Bank v. Sup. Court*, 15 Cal.4th 232 (1997) (emphasis added). In other words, "where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto.'" *Western Security*, 15 Cal.4th at 244-245, quoting *Cal. Emp. etc. Cal. Employment Stabilization Com'n v. Payne*, 31 Cal.2d 210, 214 (1947).

Here, the Legislature stated that SB 327 is "declarative of and clarifies existing law," and amended the statute to state explicitly that the Waiver Provision was "valid and enforceable on and after October 1, 2000, and continue[s] to be valid and enforceable." Cal. Labor Code §516. The Legislature thus intended, using clear and explicit language, for the Waiver Provision be valid, both before and after SB 327's enactment. This Court should give effect to that legislative intent, if not by concluding that SB 327 simply clarifies existing law (as Orange Coast and CHA urge), then, at a minimum, by concluding it applies retroactively.

Plaintiffs' argument that retroactively applying SB 327 would deprive workers of vested benefits without due process fares no better. As explained, whether retroactive application of a law violates due process depends, in part, on the extent of reasonable reliance upon the former law, the actions taken on the basis of that reliance, and the extent to which the retroactively application of the new law would disrupt those actions. *In re Marriage of Fellows*, 39 Cal.4th 179, 189 (2006).

Plaintiffs can show no such "reliance" on the "former law" (the purported former law being that SB 88 invalidated the Meal Period Waiver Provision). That is because all stakeholders (including employee unions) had reasonably assumed that the Waiver Provision that they had advocated for has been valid all along.

Employees who *voluntarily* signed a second meal period waiver had no expectation of taking a second meal period or of receiving premium pay for choosing to forego that meal period. Hospital employees even wrote in support of SB 327 because they did not want to lose the ability (which they thought they had all along) to waive their second meal break.

Thus, Plaintiffs' contention that it would violate due process to take away employees' "vested rights" to premium pay—which they had no expectation of receiving—is unfounded. In fact, the only vested employee right was the right to go home thirty minutes earlier each day, a right that was preserved by the Meal Period Waiver.

Further, due process violations would likely result if the Court were to conclude that SB 327 applies prospectively only, as explained above.

Plaintiffs also contend meal break rights are not waivable, as "the benefits of regular breaks have been recognized as 'consistent with the health and welfare of those workers.'" Reply Br. at 18. But this ignores that the IWC specifically found—and Plaintiffs have not challenged—that the Meal Period Waiver Provision is *also* "consistent with the health and welfare" of workers as it permits them to leave earlier on longer shifts if they want to do so.

There is, therefore, no unfair deprivation of premium pay for healthcare workers who *voluntarily* waived their second meal breaks in order to leave earlier, and had no expectation of receiving such pay.

Accordingly, as there is no constitutional impediment to doing so, the Court should "give effect to [the Legislature's] intention" to apply SB 327 retrospectively. *Western Security*, 15 Cal.4th at 244-245.

IV. CONCLUSION

For the foregoing reasons, the California Hospital Association joins in Defendant-Respondent Orange Coast Memorial Medical Center's request that the Court affirm the Opinion of the Court of Appeal in *Gerard II*. Alternatively, if the Court concludes that the IWC lacked authority to adopt the special healthcare meal period waiver provision in Wage Order 5, it should not give its ruling retroactive effect.

Dated: December 22, 2017

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

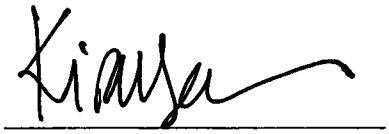
(Cal. Rules of Court, Rule 8.204(c))

The text of this Brief consists of 8,350 words as counted by the Microsoft Word processing program used to generate the Brief.

Dated: December 22, 2017

Respectfully Submitted,

SEYFARTH SHAW LLP



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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2029 Century Park East, Suite 3500, Los Angeles, California 90067-3021. On December 22, 2017, I served the following document:

APPLICATION OF CALIFORNIA HOSPITAL ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT ORANGE COAST MEMORIAL MEDICAL CENTER

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

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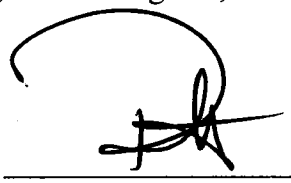

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