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.

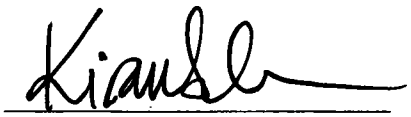
Second, the brief will demonstrate the historical reliance by California hospitals, employees, and unions on the special healthcare meal period waiver provision, which the IWC found to be "consistent with the health and welfare of workers." Because of this longstanding reliance by all relevant stakeholders, 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).