No. S241812

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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BRETT VORIS,
Plaintiff-Appellant,

v.

GREG LAMPERT,
Defendant-Respondent.

After an Unpublished Decision by the Court of Appeal, Second Appellate District, Division Three, Appeal No. B265747 on Appeal from Judgment of Los Angeles Superior Court Case No. BC 408562, Honorable Michael L. Stern, Trial Judge

APPLICATION OF EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL TO FILE *AMICI CURIAE* BRIEF; *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT GREG LAMPERT

ORRICK, HERRINGTON & SUTCLIFFE LLP
JULIE A. TOTTEN (State Bar No. 166470)
KATIE E. BRISCOE (State Bar No. 287629)
400 Capitol Mall, Suite 3000
Sacramento, CA 95814-4497
Telephone: (916) 447-9200
Facsimile: (910) 329-4900
jatotten@orrick.com
kbriscoe@orrick.com

Attorneys for *Amici Curiae* EMPLOYERS GROUP and CALIFORNIA EMPLOYMENT LAW COUNCIL ("CELC")

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Sacramento, CA 95814-4497
Telephone: (916) 447-9200
Facsimile: (910) 329-4900
jatotten@orrick.com
kbriscoe@orrick.com

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APPLICATION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT GREG LAMPERT

Pursuant to Rule 8.520(f) of the California Rules of Court, proposed *amici curiae* Employers Group and California Employment Law Council ("CELC") respectfully request permission to file the enclosed *amici curiae* brief in support of the Defendant-Respondent Greg Lampert. The proposed *amici curiae* brief offers a unique perspective on why the Court should not recognize a conversion tort claim for unpaid wages and does not seek to merely repeat the arguments in Respondent's Brief. Rather, *amici* present additional arguments and clarifications that will assist the Court in evaluating the important legal issues in this case.

STATEMENT OF INTEREST

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly three million employees. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships. It also provides on-line, telephonic, and in-company human resources consulting services to its members.

Because of its collective experience in employment matters, including its appearance as *amicus curiae* in state and federal fora over many decades, the Employers Group is distinctively able to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved as *amicus* in

many significant employment cases, including: *Duran v. U.S. Bank National Association* (2014) 59 Cal.4th 1; *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 14; *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272; *Arias v. Superior Court* (2009) 46 Cal.4th 969; *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal.4th 993; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937; *Gentry v. Superior Court* (2007) 42 Cal.4th 443; *Prachasaisoradej v. Ralphs Grocery Company* (2007) 42 Cal.4th 217; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094; Pi*oneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360; *Smith v. Superior Court* (2006) 39 Cal.4th 77; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028; *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264; *Reynolds v. Bement* (2005) 36 Cal.4th 1075; *Miller v. Department of Corrections* (2005) 36 Cal.4th 446; and *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319.

CELC is a voluntary, nonprofit organization that works to foster reasonable, equitable, and progressive rules of employment law. CELC's membership includes more than 80 private sector employers, including representatives from many different sectors of the nation's economy (health care, aerospace, automotive, banking, technology, construction, energy, manufacturing, telecommunications, and others). CELC's members include some of the nation's most prominent companies, and collectively they employ hundreds of thousands of Californians. CELC has been granted leave to participate as *amicus curiae* in many of California's leading employment cases, such as: *Duran*, *supra*, 59 Cal.4th 1; *Brinker*, *supra*, 53

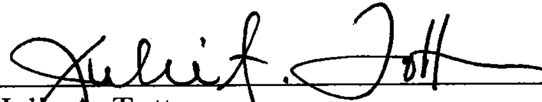
Cal.4th 1004; *Harris v. Superior Court* (2011) 53 Cal.4th 170; *Chavez, supra*, 47 Cal.4th 970; *Hernandez, supra*, 47 Cal.4th 272; Jon*es v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158; *Murphy, supra*, 40 Cal.4th 1094; *Green v. State of California* (2007) 42 Cal.4th 2254; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317; and *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

No current party in this case, or counsel for any current party in this case, authored the proposed *amici curiae* brief or any part of the brief. No person or entity other than the Employers Group or CELC contributed any money to fund the preparation or submission of this brief.

Accordingly, the Employers Group and CELC respectfully request that this Court accept and file the enclosed *amici curiae* brief.

March 7, 2018 Respectfully submitted,

ORRICK, HERRINGTON &
SUTCLIFFE LLP



Julie A. Totten
Katie E. Briscoe
Attorneys for *Amici Curiae*
EMPLOYERS GROUP AND CALIFORNIA
EMPLOYMENT LAW COUNCIL

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ORRICK, HERRINGTON & SUTCLIFFE LLP
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KATIE E. BRISCOE (State Bar No. 287629)
400 Capitol Mall, Suite 3000
Sacramento, CA 95814-4497
Telephone: (916) 447-9200
Facsimile: (910) 329-4900
jatotten@orrick.com
kbriscoe@orrick.com

Attorneys for *Amici Curiae* EMPLOYERS GROUP and CALIFORNIA EMPLOYMENT LAW COUNCIL ("CELC")

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INTRODUCTION

This case should be viewed against the appropriate backdrop.

Beginning in the progressive era and continuing through to the present day, the Legislature has enacted a raft of laws regulating the wages of California's workers.[1] The Legislature has articulated a detailed set of substantive rules governing all manner of how and when employees are to be paid. It has specified in fine detail the range of damages and penalties that employers may face for violating those substantive rules. And it has created an elaborate enforcement regime for identifying and prosecuting those violations, including numerous private causes of action, several state administrative agencies, and, for certain employment-law violations, a bounty regime.

In the course of doing this, the Legislature has had to make difficult tradeoffs between incommensurable values. On a host of employment issues, it has had to determine how to weigh fairness against economic efficiency, job security and worker solidarity against competition with out-of-state producers, economic growth against sustainability, and so forth. The elaborate set of rules contained in the Labor Code today are the culmination of the Legislature's efforts to arrive at its preferred balance of those values.

Brett Voris's argument begins with the remarkable concession that "no controlling decision" of *any* California appellate court has recognized a right to recover for conversion of unpaid wages. (OB21.) Thus, by Voris's

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[1] (*See, e.g.*, Workmen's Compensation, Insurance and Safety Act of 1913, Law of May 26, 1913, ch. 176; Section 13 of the "uncodified 1913 act", Stats. 1913, ch. 324, § 13, p. 637 [creating the IWC and delegating power to set minimum wage]; California Family Rights Act, Gov. Code, §§ 12945.1-12945.2; Fair Employment Practices Act (FEPA), former §§ 1410-1413; California Fair Pay Act, § 1197.5.)

own account, there is no common law basis for his common law claim. But Voris is undaunted. This Court, he says, can supply the missing authority for his position. He urges this Court to embroider the Labor Code with a claim that the Legislature has not created, apparently believing that the Legislature has delegated authority to the courts to fill a hole left in the Labor Code's interstices.

That would be an extraordinary request, even if this were a case about some heretofore unforeseen circumstance. (*Cf. Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 142 [concluding "it [was] inappropriate to impose liability for conversion" where defendant used plaintiff's genetic material for medical research without his authorization].) And it is all the more bizarre in a case like this: where Voris seeks the creation of a duplicative common law claim to vindicate a right that California employment law has protected for over a century in a regulatory space where the Legislature has been exceedingly proactive. Simply put, the Labor Code is not a common law statute that delegates lawmaking authority to the courts. To the contrary, it comprises a highly detailed and finely calibrated set of rules, designed to achieve the Legislature's preferred compromise of values in a highly complex space. Creating a new claim in that space through judicial fiat would upset that balance.

Voris has also failed to show that creating a new claim for conversion of unpaid wages is necessary. The Labor Code already provides numerous means by which employees can seek unpaid wages. And that is true even in the circumstance to which Voris is most attentive: where an employer is insolvent and therefore cannot pay wages that are owed. As we explain below (at III.), the Labor Code imposes individual liability on certain corporate officers acting on behalf of an employer who cause various wage

violations to occur. And even without these provisions of the Labor Code, employees have long been able to recover wages from individuals under corporate veil-piercing principles by showing that the individuals are the employer's alter ego.

Finally, Voris's proposal for expanding the law of conversion to unpaid wages has no discernable limiting principle. By Voris's light, a plaintiff has a claim for conversion any time the plaintiff can plausibly allege that the defendant owes the plaintiff money. That cannot possibly be the law.

Amici respectfully suggests that this court should decline Voris's request to create new law in this already highly regulated space and affirm.

ARGUMENT

I. Creating A Claim For Conversion Of Unpaid Wages Would Contravene The Legislature's Comprehensive And Detailed Remedial Scheme In Employment Litigation.

As noted, Voris concedes that no California precedential decision has recognized a conversion claim for unpaid wages. Instead, Voris proposes that this Court create such a claim. One effect of that proposal is that plaintiffs may request punitive damages in every case where they can plausibly allege that their wages have not been properly paid. As explained below, such a change would work a seismic shift to the texture of employment litigation in California and is the sort of judgment that is best left to the Legislature.

A. The economic, cultural, and ethical implications of employment law are highly complex and best suited for the Legislature.

Employment law touches on some of the most fundamental aspects of life, and it is one of the primary means by which the Legislature regulates California economy. It affects not only "the health and welfare of ...

workers" but also "the *public* health and *general* welfare." (*Voris v. Lampert* (Mar. 28, 2017, No. B265747) 2017 WL 1153334, *11 [Lavin, J., dis. opn.], italics added.) For individuals, the employment laws regulate who will have access to the dignity of a day's work and how much food one can put on the table. For companies, the employment laws can create predictability and stability and help industries avoid costly races to the bottom. And for California as a whole, the employment laws affect the cost and supply of goods and services produced here and thus affect the state's competitive position in an increasingly competitive global marketplace.

Determining the best set of substantive and procedural employment rules, the remedies that will be available for violations of those rules, and the right enforcement regime is a mind-bogglingly difficult and normatively fraught task.

First, consider the substantive rules. Developing the rules of employment law requires weighing tradeoffs and balancing the benefits and consequences of each rule that develops. This is hard stuff that is best done when lawmakers can consult the opinions of experts and the public—and it is because it inherently requires resolving conflicts between incommensurable values and then making difficult choices about how best to achieve those values.

Second, consider the Legislature's choice among the wide range of possible enforcement regimes. Should the Legislature rely on individual plaintiffs to defend their rights by bringing lawsuits in court? Or should the Legislature create a government agency, like the Division of Labor Standards Enforcement ("DLSE") or Labor and Workforce Development Agency ("LWDA"), to monitor employers and initiate administrative enforcement proceedings? Or should the Legislature deputize private attorneys general to

bring claims in a representative capacity and to collect bounties when lawsuits are successful, as does the federal False Claims Act or the Labor Code Private Attorneys General Act? (*See* 31 U.S.C. §§ 3729 – 3733; Lab. Code, §§ 2699 et seq.)[2] Each of these options has its own unique set of risks. If the Legislature relies on individual plaintiffs, who may fail to have a sufficient incentive to bring a lawsuit, the law may be under-enforced; if it relies on public enforcement, it may worry about the public fisc and the possibility of regulatory capture; if it relies on bounty hunters, it may burden the courts with a rising tide of frivolous lawsuits. (*See* Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation* (2014) 114 Colum. L.Rev. 1913, 1924-1942, 1996-2005.) Here again, determining how the employment laws will be enforced is a highly complicated and finely reticulated endeavor.

Third, consider the remedies available to plaintiffs who can demonstrate that their rights under the employment laws have been violated. Here, the inquiry focuses on calibrating remedies to ensure the right level of deterrence for would-be violators and the right level of compensation for aggrieved employees. And once again, the inquiry raises a lot of hard questions. Consider, as relevant here, the decision whether to allow plaintiffs to request punitive damages in certain types of lawsuits. On one hand, the availability of punitive damages may send the message that society especially disapproves of certain conduct and may further deter that conduct. On the other hand, the variable nature of punitive damage awards can produce windfalls for some plaintiffs and inequities across equally-situated

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[2] All subsequent statutory references are to the Labor Code unless otherwise indicated.

plaintiffs. (*See Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471; *see also Phillip Morris USA v. Williams* (2007) 549 U.S. 346.) Further, the sheer availability of punitive damages dramatically increases the settlement value of a case and thus encourages plaintiffs (and their lawyers) to bring weaker cases to the courts. (*See Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1107 ["[W]orth considering is the effect that the prospect of punitive damages might have on the settlement value of marginal claims."]; *see also* Priest, *Punitive Damages Reform: The Case of Alabama* (1996) 56 La. L.Rev. 825, 830 ["It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."]; Koenig, *The Shadow Effect of Punitive Damages on Settlements* (1998) 1998 Wis. L. Rev. 169, 179; Cohen & Kyle, Punitive Damage Awards in State Courts, 2005 (March 2011), U.S. Department of Justice Bureau of Justice Statistics Special Report NCJ 233094 [DOJ study finding that punitive damages were "requested in approximately 30% of [conversion] trials"].) The relative unpredictability of punitive damage awards also makes settlement negotiations lengthier and more complicated, even in the most basic wage claims for which damages otherwise are a matter of mathematical computation. (*See, e.g.*, 3 Robinson & Arkin, Litigating Tort Cases (2017) § 28:5 ["The mere pleading of punitive damages will automatically make the litigation of the case far more complex and time-consuming."]; Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform* (2002) 50 Buff. L. Rev. 103, 162.)[3]

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[3] Voris contends that standards of proof for recovering punitive damages and establishing tort causation are a sufficient bulwark against rogue punitive

As this brief overview suggests, employment is one of the most complicated and normatively fraught areas of the law in which the Legislature operates. It is therefore the paradigmatic subject matter for careful and sensitive legislative judgment and an appropriate place for judicial restraint.

B. The Labor Code provides a comprehensive and highly detailed regime for remedying unpaid-wage claims.

Employment law is not only the sort of field in which legislative judgment is most needed, it is also an area of law in which the Legislature has in fact been quite proactive.

The Labor Code provides a host of protections governing the wages that employees earn and how they are to be paid. Among other things, the Code sets minimum wages (§§ 1197, 1197.1), overtime pay (§ 510), employee meal periods and rest breaks (§§ 226.7, 512), timing of pay (§ 204), and elaborate pay stub requirements (§ 226). An employee may bring claims for any wages not timely paid (§ 204), and can recover wages withheld after termination or resignation (§§ 201, 202), including statutory waiting-time penalties of up to 30 days' additional wages for failing to pay all wages due upon separation (§ 203).

The Labor Code also establishes an elaborate set of remedies for vindicating rights provided under the Code. An employee paid less than the

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damage awards. (*See* RB25.) We have our doubts. But whether or not that is true, limits on *recovery* do not solve the implications that punitive damages can cause for *pleading* behavior. That plaintiffs ultimately might not *recover* punitive damages would not stop them from upping the stakes by requesting punitive damages for wage conversion. (*See The Shadow Effect of Punitive Damages on Settlements*, *supra*, 1998 Wis. L. Rev. at p. 171 ["an understanding of punitive damages awards is of less practical significance than knowledge of the impact of these verdicts on claim settlement."].)

minimum wage or required overtime may bring a civil action and recover liquidated damages. (*See* §§ 1194, 1994(a).) An employee may pursue these claims by filing an administrative wage claim with the Labor Commissioner (§ 98), as well as a civil action. The employee may seek damages, statutory penalties (*see, e.g.*, §§ 203, 226, subd. (e)), civil penalties (§§ 2699 et seq.), interest (§§ 98.1, 218.6), liquidated damages (§ 1197.4), restitution, and equitable relief. Victorious employees are entitled to attorneys' fees in wage claim cases. (§ 218.5(a) [non-payment], 1194(a) [overtime].)

The Labor Code also empowers entities such as LWDA and the Department of Labor Standards Enforcement ("DLSE") to assess penalties and secure recovery on behalf of employees. (*See, e.g.*, §§ 210 [authorizing LWDA to assess statutory penalties for violations], 96.7 [authorizing DLSE to collect unpaid wages and benefits], 558 [authorizing DLSE to assess civil penalties and recover underpaid wages from employers who violate overtime, meal period, and rest break requirements].) To relieve the administrative burden and backlog of enforcing the Labor Code, the Legislature also authorized any aggrieved employees to stand in the shoes of labor law enforcement agencies as a proxy for the State of California to prosecute Labor Code violations and pursue civil penalties otherwise obtainable only by the State. (§§ 2699 et seq.) Small wonder, then, that numerous courts have concluded that "the Labor Code provides a comprehensive and detailed remedial scheme that provides an exclusive statutory remedy." (*Thomas v. Home Depot USA, Inc.* (N.D. Cal. 2007) 527 F.Supp.2d 1003, 1010 [collecting cases]; *see also Green v. Party City Corp.* (C.D. Cal. Apr. 9, 2002, No. CV-01-09681 CAS (EX)) 2002 WL 553219, at *5 ("[T]he Labor Code provides a detailed remedial scheme for violation of

its provisions."); *Caputo v. Prada USA Corp.* (C.D. Cal., Feb. 6, 2014, No. CV 12-3244 FMO (RZX)) 2014 WL 12567143, at *7.)

Importantly here, the Labor Code does not authorize claims for punitive damages. Indeed, the Legislature chose to pursue the aims of punitive damages—punishment and deterrence—in a different way: namely, through civil and criminal penalties. (*See Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 375 fn.6 [Labor Code's civil penalties provide "meaningful deterrent to unlawful conduct"]; *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 230-231 ("Labor Code includes provisions which are markedly punitive"); *see also Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1252 [penalties for violation of wage statutes are "punitive in nature"]; *Spragin v. McDonald's USA, LLC* (C.D. Cal. Jan. 20, 2011, No. CV1009617SVWJEMX) 2011 WL 13217960, at *2 [Labor Code penalties are punitive in nature]; *Patton v. Schneider Nat'l Carriers, Inc.* (C.D. Cal. June 8, 2009, No. CV0901010MMMAJWX) 2009 WL 10673060, at *3 [it would be "difficult to fathom how [Labor Code] penalties are not meant to 'punish' employers who willfully violate the provisions of the Labor Code"].)

By contrast, punitive damages *are* available for conversion claims. (Civ. Code, § 3294.) According to Voris, an employer can be held liable for conversion any time the employer should have paid an employee but didn't. Thus, on Voris's account, even the most routine wage case becomes a potential vehicle for a punitive damages verdict. (*In re Wal-Mart Stores, Inc. Wage and Hour Litigation* (N.D. Cal. 2007) 505 F.Supp.2d 609, 619 [allowing conversion will "transform *every* claim" into one for punitive damages]; *see id.* ["plaintiffs apparently included this [conversion] cause of action [solely] for the purpose of claiming punitive damages"]; *Brewer*,

supra, (2008) 168 Cal.App.4th at p. 1252 ["punitive damages are not recoverable" for liability premised on Labor Code violations].) But this cannot be the rule. Tort remedies—including punitive damages—do not extend to the employment relationship. (*See, e.g., Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180-1182 [tort damages not available for employer misrepresentations made to induce termination of employment]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-693 [refusing to extend tort remedies to wrongful termination claim, noting the employment relationship is not sufficiently similar to that of insurer and insured to warrant such judicial extension]; *see also Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 95 [discussing *Foley* and *Hunter* for the proposition that "courts should limit tort recovery in contract breach situations"].) "[T]he employment relationship is fundamentally contractual." (*Foley*, *supra*, 47 Cal.3d at p. 696.) As this Court has recognized, even limited rules extending tort liability to certain contract claims "could potentially convert every contract breach into a tort." (*Freeman & Mills*, *supra*, 11 Cal. 4th at p. 103.) In *Freeman & Mills, Inc. v. Belcher Oil Co.*, (1995) 11 Cal. 4th 85, the Court overruled its holding in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, that tort remedies were available for a breach of contract in which the breaching party denied the existence of the contract in bad faith. *Freeman* affirmed a "general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law' [citation] other than the bad faith denial of the existence of, or liability under, the breached contract." (*Freeman & Mills*, *supra*, 11 Cal. 4th at p. 102.) In doing so, the Court "reiterated the important differences between contract and tort theories of recovery" and cautioned that "courts should limit tort recovery in contract