**IN THE COURT OF APPEAL**
**OF THE STATE OF CALIFORNIA**
**FOURTH APPELLATE DISTRICT**
**DIVISION THREE**

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| JAMES SHEPPARD,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>NORTH ORANGE COUNTY REGIONAL OCCUPATIONAL PROGRAM,<br><br>Defendant and Respondent. | Case Number G041956<br><br>Orange County Superior Court<br>Civil Case No. 04CC11086<br><br>Orange County Superior Court<br>Judge David C. Velasquez |

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# BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT AND RESPONDENT

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# BRIEF OF *AMICI CURIAE*

## I. INTRODUCTION

*Amici Curiae* the California School Boards Association and its Education Legal Alliance ("CSBA and its Alliance"), the League of California Cities, and the California State Association of Counties ("CSAC") file the instant Brief to provide responses, from a policy and practicality perspective, to questions this Court recently posed to the California Attorney General's Office, and then to the parties in this action. This Court, on June 21, 2010, invited the Attorney General's Office to seek permission to file an *amicus curiae* brief to answer a number of questions relating to the application of state wage and hour law to the public sector. The Attorney General's office informed this Court on August 17, 2010, that it declined to file any brief, and on August 24, 2010, this Court issued an order directing the same questions to the parties.

The content of this Court's questions signals that this Court is considering a very broad holding that would determine the extent to which state wage and hour law applies to the public sector in general, and to educational institutions in particular. The immediate issue for this Court to decide is whether Defendant and Respondent is subject to the minimum wage, pursuant to Industrial Welfare Commission ("IWC") Wage Order No. 4-2001 and the general minimum wage order. But the Court's questions have also inquired whether, pursuant to California Labor Code

section 1173, the IWC has any ability at all to regulate employment at California public entities.

This Brief describes the public policy and practicality reasons why IWC authority should not extend to the California public sector at all. This lack of authority should not only void existing regulations, but should also exempt the public sector from regulations IWC could promulgate in the future, should it ever receiving funding and return to an active status.[1] This Brief also describes why imposing the California state minimum wage in the public sector is unwarranted, particularly given that the federal minimum wage already applies.

First, public policy does not favor an interpretation of California Labor Code section 1173 authorizing the IWC to regulate public sector employment. Public entities in California, including cities, counties, special districts, educational institutions, and others, are already subject to extensive federal and state protections that largely duplicate the safeguards that could be promulgated by the IWC. These include the Fair Labor Standards Act ("FLSA"), which governs minimum wage and overtime in the public sector, and also a host of other laws governing public sector employment. (See, *infra* Section II.A.1.)

Second, this concern of duplicative and burdensome layers of

[1] "[T]he IWC was de-funded by the California Legislature effective July 1, 2004 . . . ." (*Perez v. Safety-Kleen Systems, Inc.*, 2007 WL 1848037, *2 (N.D. Cal. 2007)).

regulation is even more pronounced for California public educational institutions, because the California Education Code already imposes its own wage and hour requirements, including specific laws governing overtime. (See, *infra* Section II.A.2.)

Third, IWC regulation of the public sector in California, pursuant to Labor Code section 1173, would be ineffective and inconsistent in any event, because a large fraction of California counties and cities are organized under charter, including both the cities and counties of Los Angeles, San Francisco, and San Diego. This means that the charter provisions in Article XI of the California Constitution would preclude IWC wage and hour regulations from applying to these counties and cities. In addition, the California Constitution grants all Counties (charter or not) the exclusive right to provide for compensation of their employees, which precludes IWC regulation from applying to them. (See, *infra* Section II.A.3.) Permitting the IWC to regulate public agencies would create significant confusion, as certain public agencies would be exempt from IWC regulation (counties and charter cities) and other similar public agencies, such as general law cities, would be covered by the regulations.

Fourth, California's public sector should be outside the scope of IWC regulation to avoid the significant adverse effects, financial and otherwise, of the "tidal wave" of high-stakes litigation that has occurred in the private sector in the state law wage and hour context. (See, *infra*

Section II.A.4.)

Fifth, placing public sector employers outside the scope of IWC regulation will advance the policy of applying heightened safeguards upon implementation of laws purporting to govern public agencies themselves. (See, *infra* Section II.A.5.)

This Court also asked the Attorney General's office and the parties to address whether IWC Wage Order 4-2001 and the minimum wage order currently purport to impose the California minimum wage requirement on public sector employers (assuming Section 1173 authorizes the IWC to act as to the public sector). This Court should rule that the wage orders do not purport to impose the minimum wage on the public sector. Public agencies already must pay the $7.25 minimum wage imposed by federal law, and imposing the higher state minimum wage as well would make paid internship, vocational, and other programs more onerous for public agencies; would make their weathering the economic downturn more difficult; and would open up the possibility of state court litigation for potential mis-application of the state minimum wage requirement. (See, *infra* Section II.B.)[2]

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[2] The League and CSAC join in all parts of this Brief except for Section II.A.2, which details the potential effects of this Court's ruling on school districts and other educational institutions.

## II. DISCUSSION

### A. PUBLIC POLICY DOES NOT FAVOR AN INTERPRETATION OF LABOR CODE SECTION 1173 AUTHORIZING THE INDUSTRIAL WELFARE COMMISSION ("IWC") TO REGULATE PUBLIC SECTOR EMPLOYMENT

#### 1. Cities, Counties, and Other Public Entities, as Well as Public Educational Institutions, Should be Outside the Scope of IWC Regulation Because Public Employees Are Already Subject to Extensive Federal and State Law Protections

As a matter of public policy, allowing the IWC the authority, under Labor Code 1173, to regulate public sector employers is wholly unnecessary, and would duplicate numerous other protections – either direct or indirect – that public employees already possess with regard to "wages paid " and "hours and conditions of labor and employment." (Labor Code, § 1173.)

The first and primary safeguard California public employees already enjoy is under federal law. The nation's public agencies, including public agencies in California, are subject to the wage and hour requirements of the federal Fair Labor Standards Act ("FLSA"). The FLSA was enacted in 1938 in the midst of the Great Depression, has been updated through a

series of amendments since that time, and has been interpreted through regulations and opinion letters of the federal Department of Labor. In 1985, the United States Supreme Court held that FLSA applied to workers in the public sector. (*Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016.)

The FLSA's consistent intent has been to protect all covered workers from substandard wages and oppressive working hours and conditions that are considered detrimental to the "health, efficiency, and general well being of workers." (*Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641.) The Act was "designed to give specific minimum protection to individual workers and to ensure that each employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of 'overwork' as well as 'underpay.'" (*Ibid.*)

There are six key components to the Act, but two components are primary – the federal minimum wage, which is currently $7.25 per hour, and the straightforward overtime requirement, which is that any non-exempt employee must be paid time and a half for all hours worked in excess of forty (40) in a workweek. (29 U.S.C. §§ 206, 207.) [3] (The other four components are recordkeeping and posting, child labor, equal pay

[3] There are exceptions to this limitation for qualifying police and fire, among others, who can be paid overtime after a higher threshold. (See, 29 U.S.C. § 207 subd. (k).)

based on gender, and anti-retaliation.) The statute has numerous complexities, among others how regular rate is determined for purposes of calculating overtime and whether particular factual scenarios satisfy exemptions under the Act. However, prominent recent debates in FLSA law have turned not on lack of clarity of or impracticality in applying existing standards, but over whether as a conceptual matter certain activities should be considered "work." (See, e.g., *Bamonte v. City of Mesa* (9th Cir. 2010) 598 F.3d 1217 [considering whether peace officer donning and doffing time is compensable under the FLSA].) As described below, this level of clarity and precision does not exist consistently for state wage and hour law.

The FLSA affords California public employees extensive remedies against their employers for violations of the Act. Like other parts of the Act, the remedies provisions are strong but simple to apply. Employees are entitled to recover the amount of unpaid wages they are owed, plus attorneys' fees, plus as liquidated damages an additional amount equal to the amount of damages owed. (29 U.S.C. § 216 subd. (b).) Employees will recover this liquidated damages amount (effectively obtaining double damages) unless the employer can carry its burden of proof to show good faith. (29 U.S.C. § 260.)

This FLSA protection directly covers the areas of concern identified in Labor Code section 1173 as the province of the IWC. But public sector

employees in California have numerous *additional* protections, aside from the FLSA, that provide workers with bargaining strength in dealing with employers, and serve to minimize the risk that employers will overwork or underpay employees. Unlike much of the California private sector, the public sector is heavily unionized. "Unionization rates are much higher in the public sector than in the private sector. In 2007, well over half of California's public-sector workers belonged to a union"; by contrast, "the nation's private-sector unionization rate is 7.5 percent." (http://www.eurekalert.org/pub_releases/2007-09/uoc--lac083107.php) (viewed September 13, 2010) (summarizing UCLA's Institute for Research on Labor and Employment, "The State of the Unions in 2007: A Profile of Union Membership in Los Angeles, California and the Nation".) Accordingly, many public employees can address any instances of overwork and underpay that may arise through the collective bargaining process or even, if applicable, the grievance and arbitration provisions in applicable collective bargaining agreements or memoranda of understanding ("MOUs"). (See, e.g., *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623.)

In addition, although the protections do not typically pertain to issues of overwork or underpay, public sector employers face a large number of state and legal restrictions that private employers *do not*, so that adding the developing matrix of state wage and hour law to this list of

applicable labor law requirements would impose a crushing burden on legal departments to cope with extensive regulation. California public sector employers must contend with the state and federal constitutional protections that their workers enjoy as employees of public entities, including the First and Fourth Amendments to the U.S. Constitution. Many public employees also have due process rights that safeguard their "property interest" in continued employment at the same level of pay. (See, *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 207-208.) These areas of constitutional law have significant complexity, and they apply in addition to a myriad of other laws that regulate both the public and private sector, including Title VII's prohibitions on discrimination, the state Fair Employment and Housing Act ("FEHA") prohibitions, the Family Medical Leave Act ("FMLA") and its state counterpart, whistleblower protections, and many other laws.

Adding to the foregoing numerous and extensive restrictions and safeguards the possibility that the IWC may add, without legislative authorization, *additional* state law restrictions in the form of overtime, meal and rest period, or other regulations akin to those applied in the private sector would add enormous legal and administrative expense – it would add what is well-known as one of the most complex and hotly litigated areas of California law: state wage and hour law.

### 2. Public Educational Institutions Should Clearly be Outside the Scope of IWC Regulation Because They Are Already Regulated by the Education Code

California public educational institutions should be outside the scope of IWC regulation because, in addition to all of the many employment and labor restrictions set forth above, public educational institutions are subject to an array of Educational Code restrictions that pertain *specifically to compensation, and even overtime*. Allowing the IWC Wage Orders to extend to public educational institutions would subject these institutions to three layers of regulations in the same area – the federal FLSA, the California Education Code, and the IWC restrictions. Employees of the institutions would have a surfeit of compensation restrictions and protections that clearly provide diminished returns, whereas the administrative, legal, and potential litigation burdens on school districts and other educational institutions would be substantial.

The California Education Code already provides the following wage and hour and/or compensation restrictions on California public educational institutions. First, the Education Code already has an overtime requirement applicable to school districts. Section 45128 provides that "[t]he governing board of each district shall provide the extent to which, and establish the method by which, ordered overtime is compensated." It describes that it must be compensated by "a rate at least equal to time and one-half the

regular rate of pay of the employee designated and authorized to perform the overtime." (Educ. Code, § 45128.) The Education Code's definition of overtime is more extensive than overtime is defined in the FLSA, and includes overtime for hours worked in excess of daily limits (the FLSA has only weekly limits): "Overtime is defined to include any time required to be worked in excess of eight hours in any one day and in excess of 40 hours in any calendar week. If a governing board establishes a workday of less than eight hours but seven hours or more and a workweek of less than 40 hours but 35 hours or more for all of its classified positions or for certain classes of classified positions, all time worked in excess of the established workday and workweek shall be deemed to be overtime." (*Ibid.*)

There are also more detailed limitations on permissible workweeks that employees may work without being paid overtime. (Educ. Code, §§ 45127, 45131, 45132.) Sections 45128 and 45138 provide certain exceptions to and exclusions from the overtime requirement, and, like the FLSA does in certain circumstances, Sections 45128 and 45129 authorize a district to pay overtime with compensatory time off instead of cash. (*Id.*, §§ 45128, 45129.) Next, Education Code section 45025 provides that part-time teachers have to be paid in parity with full-time teachers: "In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to

the time actually served by full-time employees of the same grade or assignment." (Educ. Code, § 45025.)

Next, Section 45023.5 of the Education Code, titled "Compensation for work beyond the instructional day," requires educational institutions to pay employees, such as teachers, a like amount for work required to be done after the instructional day is completed: "If compensation is provided to certificated employees of any elementary, high, or unified school district for a work assignment which is not part of the contracted instructional day duties, like compensation, whether paid on an hourly or monthly basis, or on a flat rate basis or otherwise, shall be paid to all certificated employees of the district who perform like work with comparable responsibilities." (Educ. Code, § 45023.5.) This requires an extra level of monitoring compensation above and beyond what the FLSA requires, even for exempt employees paid on a salary basis.

Section 45048 of the Education Code sets forth requirements on the timing of payment for educational employees. Section 49116 of the Education Code regulates the maximum work hours for minors, providing specific limits for different ages. (Educ. Code, § 49116.) Education Code sections 45038 and 45039 govern permissible payment schedules for employees aside from monthly pay schedules, and Section 45040 governs withholding for employees on alternate schedules. Section 45033 prohibits any decrease in salary of a certificated employee for failure to meet

additional educational or study requirements. (Educ. Code, §§ 45038-45050, 45033.)

Not only the amount of compensation, but the *timing* of payment constitutes another area in which the IWC arguably might be permitted to regulate the public sector – were its authority to extend to the public sector. Yet the topic of timing of payment, as well, is already covered by detailed provisions of the Education Code. Section 45048 sets forth requirements on the timing of payment for educational employees. Section 45049 sets forth requirements for timing of payment for additional work projects and other items done by certificated employees.

Permitting the IWC to further regulate educational institutions, despite the very detailed and specific compensation requirements set forth in the Education Code, will only add confusion to an already comprehensive system of protections for public educational employees.

### 3. IWC Regulation of the Public Sector Could Only Constitute An Unworkable, Inconsistent Patchwork Since California's Counties and its Many Charter Cities Are Constitutionally Excluded From State Law Wage Regulation

IWC regulation of the public sector pursuant to Labor Code section 1173 would also be unworkable and improper because of the large number of public entities that would be constitutionally excluded from such

regulation under the California Constitution, namely all charter Cities, and all Counties (charter or not).

First, charter cities could not be subject to the regulations. The California Constitution precludes the Legislature and the IWC from imposing wage and hour regulation on charter entities, including overtime, meal break and other compensation requirements. (See, *Curcini v. County of Alameda*, 164 Cal.App.4th 629, 643-44 (2008); *Dimon v. County of Los Angeles*, 166 Cal.App.4th 1276, 1283 (2008).) Although *Curcini* and *Dimon* involved charter Counties, the reasoning in those cases is nevertheless applicable to charter Cities. (*Curcini, supra,* 164 Cal.App.4th at p.1643 (observing "California courts have applied interchangeably the reasoning from cases involving one type of entity to cases involving the other in the context of the constitutional delegation of issues of employee compensation").)

When a city in California adopts a charter, its provisions "are the law of the state and have the force and effect of legislative enactments." (Cal. Const., art. XI, § 3, subd. (a).) Among the "plenary authority" specifically delegated to a charter city is control over the terms of employment and ***compensation*** of its employees. (Cal. Const., art. XI, § 5, subd. (b)(4).) Under Article XI, section 5, subdivision (b)(4) of the Constitution, a charter entity's right to provide for the compensation of its employees trumps conflicting state laws. (*Curcini, supra,* Cal.App.4th at p.643; *Dimon*,

*supra,* 166 Cal.App.4th at p.1281; *Sonoma County Organization of Public Employees v. City of Sonoma*, (1979) 23 Cal.3d 296, 314-15 [holding the state could not forbid charter cities from granting pay increases to their employees, because the determination of wages was a matter of local rather than statewide concern] .) [4]

Next, **all Counties**, whether they are chartered or not, are excluded from section 1173 regulations. Article XI of the California Constitution, Section 1, subdivision (b), provides: "The governing body [of each county] shall provide for the number, compensation, tenure, and appointment of employees." (Cal. Const., art. XI, § 1, subd. (b).) The California Supreme Court held in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285, that legislation requiring counties and other local agencies to submit to binding arbitration of economic issues arising during labor negotiations violated article XI, section 1(b). The Court reasoned: "The constitutional language is quite clear and quite specific: the county, not the state, not someone else, shall provide for the compensation of its employees. Although the language does not expressly limit the power of the Legislature, it does so by 'necessary implication.' [Citation.] An express grant of authority to the county necessarily implies the Legislature does not

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[4] This grant of plenary authority is distinct from the more general "home rule" provisions of Article XI, section 5(a), which grant charter cities the authority to "make and enforce all ordinances and regulations in respect to municipal affairs." (Cal. Const., art. XI, § 5 subd. (a).)

have that authority. . . . Senate Bill 402 permits the union to change the county's governing board from the body that sets compensation for its employees to just another party in arbitration. It thereby deprives the county of the authority that section 1, subdivision (b), specifically gives to counties." (*County of Riverside, supra,* 30 Cal.4th at p.285.)

Thus, even if the IWC could, under Section 1173, impose wage and hour regulations on the public sector, under the California Constitution those regulations could apply only to some California agencies, resulting in significant inconsistencies in the rules applicable to public sector agencies. For example, a charter city would not be subject to any regulation by the IWC, but all of its general law city neighbors would be subject to that regulation. Currently, 119 of California's 481 cities are **charter cities**. San Francisco, Los Angeles, Sacramento, San Diego, Palm Springs, Pasadena, and San Luis Obispo are charter cities.[5] Also, 14 of California's 58 counties are **charter counties**. Charter counties include Los Angeles, Orange, San Bernardino, San Diego, and San Francisco.[6] Article XI, section 1(b) of the Constitution further excludes **all counties** (charter or not) from wage regulation.

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[5] League of California Cities, http://www.cacities.org/resource_files/28410.Charter_Cities.doc [last checked September 13, 2010]; see, e.g., *Schifando v. City of Los Angeles*, 31 Cal.4th 1074, 1082 (2006) [Los Angeles is a charter city].

[6] California Association of Counties, http://www.counties.org/default.asp?id=110 [last checked September 13, 2010].

Minimum wage clearly qualifies as a regulation on "compensation" for purposes of the charter city and county control. The same is true of other types of regulations the IWC might choose to impose, such as regulations on overtime and meal periods. The California Court of Appeal, First District recently held in a case of first impression that "Labor Code sections 510 and 1194 relating to overtime pay addresses matters of 'compensation' within the County's exclusive constitutional purview pursuant to article XI, sections 1, subdivision (b), and 4." (*Curcini*, *supra*, 164 Cal.App.4th at p.643.) This Court also held "the provisions of Labor Code section 512 prescribing meal periods, and section 226.7 providing a premium wage as compensation for missed meal and rest periods, are matters of compensation within the County's exclusive constitutional purview." (*Id.* at 645.) Finally, the Court of Appeal, Second Appellate District reached an identical result a few months later in *Dimon*. (*Dimon*, *supra,* 166 Cal.App.4th at pp. 1281-83.)

In *Curcini*, public employees argued that overtime and meal breaks fell outside of the County's constitutional authority because they relate to working conditions, and not compensation. (*Curcini*, 164 Cal.App.4th at pp.643-44.) The Court rejected this argument, recognizing that California courts have long treated overtime pay as compensation. (*Id.* at p.643.) As to meal periods, the Court stated:

> Considered in a vacuum, the argument seems plausible. However, appellants are actually seeking monetary compensation for having been required to work through meal and rest breaks. As in our discussion of overtime pay, the link to compensation seems clear. (*Id.* at 644.)

Moreover, Courts have recognized that "wages" also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1092, 1094.) For example, reimbursement for work uniforms has been held to be part of a public employee's compensation "like any other payment of wages, compensation or benefits." (*In Re Work Uniform Cases*, 133 Cal.App.4th 328, 338 (2005) [recognizing that "compensation" within the purview of counties, both charter and noncharter, relates to a broader spectrum of activities than merely setting salaries].) If these types of benefits and/or reimbursements fall within the exclusive authority of charter entities to regulate, then such matters as minimum wage, overtime, and meal and rest breaks certainly do.

The Plaintiffs' bar has sometimes argued -- particularly in the context of police officer and other public safety compensation -- that because their work raises public safety concerns, the Labor Code and IWC

Wage Orders regarding overtime and meal periods apply to charter City employees as a matter of *statewide concern*. Such an argument constitutes an improper attempt to rewrite clear language in the California Constitution. Courts have consistently held that wage requirements for public employees are not matters of statewide concern. (See, *San Francisco Labor Council v. Regents of University of California,* 26 Cal.3d 785, 789 (1980) ["T]he determination of wages paid to employees of charter cities as well as charter counties *is a matter of local rather than statewide concern.*"] [emphasis added]; *Dimon, supra,* 166 Cal.App.4th at pp.1289-1290 [meal breaks do not constitute a matter of statewide concern even for deputy probation officers].) Even if public safety employee compensation touched upon matters of statewide concern (and it does not) this would not change the patchwork nature of how IWC regulation would apply to the public sector. In fact, it would aggravate the complexity of how to resolve wage and hour questions for charter cities and counties in particular, and potentially cause increased litigation costs from resulting disputes.

Finally, the separate and distinct grant of authority in Article XI, section 1(b) for California Counties (charter or not) to "provide for the number, compensation, tenure, and appointment of employees" clearly conflicts with any authority of the IWC to regulate such matters as County employee overtime and minimum wage, as well as meal and rest breaks.

The California Supreme Court has held that the imposition of arbitration in labor negotiations, a matter more tangential to compensation, infringes Article XI, section 1(b). (*County of Riverside, supra,* 30 Cal.4th at p.285.) Indeed, the Court of Appeal in *Curcini* found that Article XI, section 1(b) governed overtime pay. (*Curcini, supra,* 164 Cal.App.4th at p.643.) The fact that all Counties are exempt from possible subjects of IWC regulation under Section 1173 would further render any authority of the IWC to regulate the public sector inconsistent and unworkable.

**4. Public Entities Should be Outside the Scope of IWC Regulation In Order to Avoid the Significant Adverse Financial and Other Effects of State Law Wage and Hour Litigation**

In contrast to the FLSA, which provides straightforward minimum wage and overtime protections, and simple but powerful remedies, the IWC wage orders and the California statutes under which they have been enforced have proven problematic for private sector employers. It is no secret that California wage and hour law has proved a "boom" area for litigation for more than a decade. (See, Christopher M. Pardo, The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery, 10 J. Bus. & Sec. L. 1 (Fall 2009) (detailing a "recent explosion" of wage and hour lawsuits); *Developments in California and Federal Wage and Hour Law*, 697 PLI/Lit 783,

796 (2003) (referring to the "tidal wave of California wage and hour class actions").) For employers, this translates into state wage and hour law being an onerous and even dangerous area, in which employers have faced an enormous volume of class actions and claims based not only on alleged misclassification of employees, but upon supposed violations of meal and rest break laws, and other matters, all of which rest on either alleged impracticalities of the laws, or vague or conflicting standards. Indeed, one of the most controversial recent decisions in state employment law is *Brinker Restaurant Corp. v. Superior Court* (2008) 80 Cal.Rptr.3d 781, in which the Court of Appeal held that "while employers cannot impede, discourage or dissuade employees from taking rest periods [mandated by California law], they need only provide, not ensure, rest periods are taken. . . ." (*Id.* at 786.) The California Supreme Court has granted review of *Brinker* (see, *Brinker Restaurant Corp. v. Superior Court* (Oct. 22, 2008) 196 P.3d 216, 85 Cal.Rptr.3d 688), and a host of *amici curiae* have contributed briefing, confirming very widespread interest in the decision. (*Ibid.*)

Finally, whereas the FLSA remedies are powerful but straightforward, by contrast the remedies under state wage and hour law prove either illusory and ineffective, or (more typically) stunningly draconian to employers, depending on how Courts have been able to interpret statutory provisions on remedies. (See, *Murphy v. Kenneth Cole*

*Productions, Inc.* (2007) 40 Cal.4th 1094, 1099 ["additional hour of pay," in Labor Code section 226.7, for failure to provide employee with meal or rest period pursuant to IWC wage order constituted "wages," rather than "penalty," and thus is governed by a three- rather than one-year statute of limitations].)

Commentators, reviewing the *Kenneth Cole* case and the upcoming *Brinker* decision from the California Supreme Court, have been candid about the expensive, uncertain, and frankly hazardous nature of California wage and hour jurisprudence as it has applied to the private sector. For example, one has said:

> *Brinker*, if it is allowed to stand, means that employers in California are neither required to keep records of all meal breaks taken nor pay a one-hour premium in the cases where they are not recorded (likely even if they were taken). Considering the myriad meal break class actions currently pending in California courts (especially in the wake of *Murphy v. Kenneth Cole*), in total threatening to cost employers millions upon millions of dollars, and taking into account the record-keeping and logistical nightmare in many industries of ensuring that meal breaks are taken and properly recorded, this outcome is certainly a welcome one for management." (38th Annual Institute on Employment Law, *Hot Topics in Employment Law*, 802 PLI/Lit

681, 748-749 (2009).

The same commentator reported on recent awards, outside of California, based on missed meal and/or break periods as follows:

> In 2006, a Pennsylvania jury awarded $78 million to a class of 170,000 Wal-Mart workers after finding that the employees were not compensated for missed meal breaks and off-the-clock work. *Braun v. Wal-Mart Stores, Inc.*, No. 020303127 (Pa. Ct. C.P. Oct. 13, 2006). A year later, the Pennsylvania state judge awarded an additional $62.2 million in damages, which included $45 million in attorney fees. *Braun v. Wal-Mart Stores, Inc.*, No. 020303127 (Pa. Ct. C.P. Oct. 3, 2007). Wal-Mart has appealed both awards. *See also Borja/Trujillo v. Wal-Mart Stores, Inc.*, (employees allegedly worked off-the-clock and without meal periods; Wal-Mart settled for an estimated $50 million). (*Id.* at p.749.)

Currently, IWC Wage Orders do not impose meal and rest periods on public sector employees, nor do they impose any overtime requirements. But a ruling from this Court that Labor Code section 1173 *authorizes* the IWC to place such requirements on the public sector could make such requirements a reality.

Meal and rest breaks, and daily overtime or weekend overtime, may constitute items California public employees wish to have. If they do, they can collectively bargain for such privileges, as some public employees have done. Indeed, meal and break periods constitute ideal subjects of bargaining since they can serve as concessions public agencies can make to their employees, in difficult economic times, without necessarily incurring a corresponding financial loss to the agency.

But transplanting the bleak, war-torn landscape of private sector wage and hour law would without any doubt aggravate the financial troubles of public agencies. It should certainly not happen without an affirmative act of the Legislature to approve each additional restriction applied (e.g., daily overtime, meal break, or rest break). This Court should rule that, consistent with the canon of construction described in *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 330, California Labor Code section 1173 does not authorize regulation of the public sector.

**5. Placing Public Entities Outside the Scope of IWC Regulation Advances the Policy of Applying Heightened Political Safeguards to Regulation of the Public Sector**

Public agencies have legitimately come to expect that they will not be subjected to employment or other regulation except pursuant to legislation that expressly states that it applies to the public sector. The holding of cases such as *Campbell, supra,* 35 Cal.4th at p.330, and *Johnson*

*v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal.App.4th 729, 736, reflect this legitimate expectation.[7] Requiring express legislative authorization for regulation of the public sector advances the policy goal first of protecting California's public agencies from inadvertently being swept into the scope of laws designed to regulate entities organized for economic goals and which operate with the protections and privileges of the marketplace. Such laws may well fail to achieve their goals, and create unanticipated and severe problems, when applied to organizations funded by the public for the public good. Second, requiring express authorization from the Legislature protects California's public agencies from being regulated by one another, outside the ambit of legislative scrutiny and without direct political accountability. Here in particular, allowing the IWC to regulate California's public employers would essentially allow the handful of officials presiding over that agency to regulate government itself – to dictate how other California agencies pay, assign, and accommodate their employees. Requiring such laws to be promulgated through

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[7] For the California State University System ("CSU"), the legislature has codified this principle in Education Code section 66606.2. That section states that any law passed on or after January 1, 1997, does not apply to the CSU unless the law specifically states that it does. (Educ.Code, § 66606.2 ["[I]t is the intent of the Legislature that . . . (b) The California State University not be governed by any statute enacted after January 1, 1997, that does not amend a previously applicable act and that applies generally to the state or to state agencies, departments, or boards, unless the statute expressly provides that the California State University is to be governed by that statute."].)

legislation, by contrast, would allow for them to be made in a manner that allows maximum visibility to the public and provides such safeguards as direct political accountability of lawmakers and the Governor. These considerations further militate against interpreting section 1173 to allow the IWC to regulate public sector employers.

## B. PUBLIC POLICY DOES NOT FAVOR APPLYING THE STATE LAW MINIMUM WAGE IN WAGE ORDER 4-2001 OR THE GENERAL MINIMUM WAGE ORDER TO THE PUBLIC SECTOR, BECAUSE IT WILL ADVERSELY AFFECT AGENCIES' EFFORTS TO WEATHER, AND CONTINUE TO SERVE THEIR COMMUNITIES DURING, THE CURRENT HARSH FINANCIAL CLIMATE

This Court has also asked whether Wage Order No. 4-2001 or the general minimum wage order effectively operates to apply the state minimum wage to public sector employees, including employees of cities, counties, special districts, school districts, community college districts, and other organizations.

Public policy and practicality do not favor applying the state's minimum wage to public sector employees in California. First, allowing the federal minimum wage to be paid by cities, counties, school districts, and other organizations allows them greater flexibility to recruit and utilize available California labor, in a time when almost all public organizations in

California are facing dire financial conditions. Even the $0.75 difference between the state $8.00 per hour and federal $7.25 per hour minimum wages that currently exist will add up to substantial savings for public employers. Although public sector entities do not rely heavily on a work force of "minimum wage" employees, virtually all public entities are seeking to save resources, and a work force made up partially of students, part-time workers, and others in certain particular low-skill areas, can serve as a great benefit to public agencies.

Second, public agencies can use minimum wage jobs in order to provide for what constitute, essentially, paid internships, and thereby provide vocational training to individuals seeking to develop professional skills and gain experience that will allow them to seek more secure, skilled employment. Again, the difference of only $0.75 per hour between the state and federal minimum wages would add up significantly for public agencies that are financially distressed but that nevertheless wish to help and train the California work force through mutually beneficial employment relationships.

Third, imposing the state's minimum wage on the public sector may create additional problems of non-compliance, and significant litigation expenses for those employers who reasonably viewed the minimum wage requirements of California law as not applying to their agencies. Wages and penalties under California law are notoriously substantial, as described

above, and imposing the possibility of them on public agencies at this time would be improper. Indeed, public sector workers already have the protection of the federal minimum wage of $7.25 per hour. This Court should hold that the wage orders at issue do not impose any minimum wage on public sector employers.

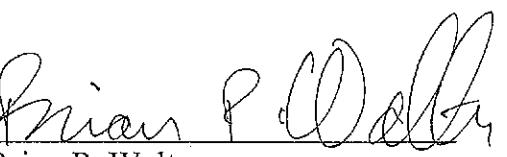
## III. CONCLUSION

For all of the foregoing reasons, *Amici Curiae* the California School Boards Association and its Education Legal Alliance, the League of California Cities, and the California State Association of Counties respectfully request that this Court rule that Labor Code section 1173 does not confer authority on the IWC to regulate the public sector, and alternatively that this Court rule that no private right of action is available to public employees to enforce any entitlement to minimum wage.

Dated: September 14, 2010

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

By: 

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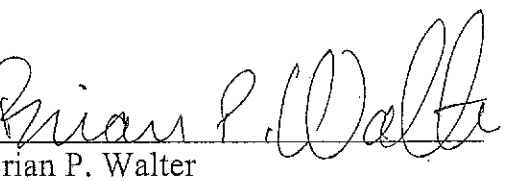
## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the enclosed Brief of *Amici Curiae* is produced using 13-point Roman type including footnotes and contains approximately 6,767 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 14, 2010 LIEBERT CASSIDY WHITMORE

By: 
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