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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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FRANCES HARRIS, et al.,
*Petitioner*s,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Real Parties In Interest.

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Court of Appeal Case Nos. B195121/B195370
Second Appellate District, Division One

JCCP No. 4234 (*Liberty Mutual Overtime Cases*)
Honorable Carolyn B. Kuhl, Judge

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CONSUMER ATTORNEYS OF CALIFORNIA'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/PETITIONERS FRANCES HARRIS et al.

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I. INTRODUCTION

In this amicus curiae brief, Consumer Attorneys of California ("CAOC") addresses discrete points from its unique perspective as a leading legal organization advocating the rights of California workers and consumers.

First, a few observations are in order on the real-world backdrop for the Court's eventual decision and the potential impact for employees. The arcane legal issues here, related to the administrative exemption to California's overtime laws, all but resemble the tax code. The complexity and intricacy should not obscure the human dimension and the importance of overtime pay in our society.

By all accounts, economic trends are distinctly unfavorable to employees. Perhaps more than ever, workers depend on fair wage compensation for financial survival. Many benefits that have traditionally accompanied employment, including health coverage and retirement plans, are being significantly reduced, eliminated entirely in many jobs or, at a minimum, being left to employees to fund in large part or in whole - if the money is there to do so. The cost of practical necessities, such as gasoline and a child's college education, is skyrocketing while wage growth in many fields is stagnant. To get by, Americans appear to be working harder than ever. It was recently reported that approximately 40% of Americans labor

50 hours or more per week at their jobs. [Cite] California, of course, is not a small portion of the national economy. Many employees in this state work in office environments, and so could be impacted by a judicial interpretation of the state administrative exemption.

For a host of reasons, then, this Court's application of California's overtime laws in this case may have a significant impact on the quality of life for a significant number of California workers. Employers create and provide jobs, and for this they should be applauded. Still, an economically rational employer will compensate its employees as little as the market permits and the law requires, including for overtime performed. An employee who has no legal right to overtime compensation is not only paid less to cover the necessities of life, but also has no real counterweight to avoid what this Court recently called the "evil of overwork." (Gentry v. Superior Court (2007) 42 Cal.4th 443, 456 (Gentry).) Leverage for the employee becomes even more challenging when employers take the aggressive position (without going to the Legislature or relevant administrative agency to seek a change in the law) that the overtime rules are "outdated" or "outmoded." Upholding the Second District Court of Appeal in this case will advance the cardinal public policies underlying California's overtime laws and will benefit the class of people these laws were enacted to protect.

II. ARGUMENT

A. States Are Active Players in Regulating Overtime Pay in the Workplace

In an effort to "enrich[]" the Court's "judicial decision making process" and "broaden[] its perspective," CAOC touches below on the national landscape of state overtime laws and regulations. (Connerly v. State Personnel Bd. (2006) 37 Cal.4th 1169, 1177 (discussing "valuable role" of amici curiae).) By providing workers more extensive wage protections than federal law, California is actually in good company. The overtime laws are historically, and remain, a realm of dual regulation by the state and federal governments. It was individual states that first sought to rectify the imbalance of bargaining power that came to characterize the industrial age workplace and, in many respects, still characterizes it today as our economy evolves.

More than a century ago, some state legislatures adopted wage and hour laws to protect their citizens - only to see many such regulations struck down as unconstitutional. This was the era epitomized by Lochner v. New York (1905) 198 U.S. 45, when private contracts for employment were temporarily thought to trump public welfare statutes. (See Hess Collection Winery v. California Agr. Labor Relations Bd. (2006) 140 Cal.App.4th 1584, 1599 (discussing "bygone era of substantive due process").) But the

judicial outlook evolved. By the Great Depression, states had the recognized authority, as this Court stated back then, to set the "rate of pay for overtime work" and "maximum hours of labor." (Max Factor & Co. v. Kunsman (1936) 5 Cal.2d 446, 460.) More recently, the United States Supreme Court noted what, except for a brief period, is now beyond dispute: "[T]he establishment of labor standards falls within the traditional police power of the State." (Fort Halifax Packing Co., Inc. v. Coyne (1987) 482 U.S. 1, 21.)

When President Franklin Roosevelt took action at the national level on wage and hour regulation, there was no presumption that the federal government would occupy the field. The Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. § 201 et seq.) did not establish the exclusive means of relief for employees who are "misclassified" - the dry euphemism for an employer's illegal denial of overtime compensation. To the contrary, "not only does the FLSA leave 'room' for supplementary state regulation of overtime, the FLSA expressly indicates that it does not preempt this regulation." (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 567.) As this Court observed, the federal statute "'explicitly permits states to set more stringent overtime provisions than the FLSA.'" (Ibid.)

Specifically, the United States Congress confirmed the power and

ability of states to regulate in the savings clause codified at 29 U.S.C. § 218(a). While stressing federal doctrine, defendants/real parties in interest Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation (together, "defendants") conveniently ignore and fail to acknowledge the savings clause. For purposes of this case, the savings clause - part of the original FLSA enactment seventy years ago - is the most important aspect of the federal scheme. Through 29 U.S.C. § 218(a), the federal government expressly affirmed the concurrent and coequal power of states to act, as they deem necessary, to protect workers.

Consistent with the equal dignity accorded state regulation, California has long provided employees independent wage protections under state law. The Industrial Welfare Commission ("IWC") was established in 1913, or a quarter century before the FLSA. (See Industrial Welfare Com. v. Superior Court (1980) 27 Cal.3d 690, 700-02 (historical background related to IWC).) Wage Order 4-2001 governing the administrative exemption (Cal. Code Regs., tit. 8, § 11040) springs ultimately from "1913 legislation directing [the IWC] to provide for a 'minimum wage' for women and children." (Bell v. Farmers Insurance Exchange (2001) 87 Cal.App.4th 805, 810 (Bell II).) The state's regulatory power is also affirmed in the California Constitution: "The Legislature may provide for minimum wages and for the general welfare of employees and

for those purposes may confer on a commission legislative, executive, and judicial powers." (Cal. Const., art. XIV, § 1.)

Consequently, there is nothing unusual about employers being required to comply with state wage and hour laws in addition to federal laws.

B. As Federal Law Expressly Permits, Other States Have Enacted Their Own Administrative Exemption and Given It Independent Significance

Indeed, many other states have promulgated their own overtime rules, including their own administrative exemption. Secondary sources collect some of the state authority on this exemption and related ones. (See, e.g., Annot., Who is Executive, Administrator, Supervisor, or the Like, Under Exemption for Such Employees From State Minimum Wage and Overtime Pay Statutes (2007) 85 A.L.R.4th 519 (originally published in 1991; available on Westlaw).)

A few examples illustrate the independent and protective force, consistent with California law to date, that other states have given their state-level administrative exemption:

Connecticut

In Butler v. Hartford Technical Institute, Inc. (Conn. 1997) 704 A.2d 222 (Butler), the Supreme Court of Connecticut took up that state's administrative exemption. (See Conn. ADC § 31-60-15 (elaborating

meaning of employment in "bona fide administrative capacity").)

As a general interpretive matter, the Connecticut high court emphasized "the overall remedial nature of the overtime laws" and the need to give the Connecticut framework "a liberal construction in favor of those whom the legislature intended to benefit." (Butler, supra, 704 A.2d at p. 227.) This parallels California law, of course, as elaborated many times. To quote a recent case: "Because the laws authorizing the regulation of wages, hours, and working conditions are remedial in nature, courts construe these provisions liberally, with an eye to promoting the worker protections they were intended to provide." (Prachasaisoradej v. Ralphs Grocery Co., Inc. (2007) 42 Cal.4th 217, 227.)

Like California's Wage Order 4-2001, the Connecticut administrative exemption requires the employer to prove that the worker's "primary duty" consists of "[t]he performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers." (Conn. ADC § 31-60-15(a).) In Butler, the Connecticut Supreme Court upheld the trial court's finding that the "directly related" prong was not satisfied. The employee there, a bookkeeper, "made no decisions that would impact on the business and had no authority to make policy or to supervise employees." (Butler, supra, 704 A.2d at p. 229.) Beyond this, the employer "monitored her progress on her

assignments." (Ibid.)

CAOC understands the record here, involving claims adjusters for Liberty Mutual and Golden Eagle, to be similar on the role played in the business enterprise. Policymaking is done entirely by others. The adjusters' work is carried out and closely monitored pursuant to standardized procedures created, and meticulously followed, by the employer. (See Answer Brief on the Merits, pp. 5-8.)

Connecticut does not appear to have a seminal appellate decision involving claims adjusters, as in California with Bell II, supra, 87 Cal.App.4th 805 seven years ago, followed by Bell v. Farmers Insurance Exchange (2004) 115 Cal.App.4th 715 and then the Second District's decision on review here. Nonetheless, there are signs that Connecticut would not necessarily follow federal doctrine, especially after the 2004 revamp by the Department of Labor. In a recent decision, a Connecticut federal court declined to adjudicate "supplemental" state wage and hour causes of action asserted by a class of claims adjusters who also sued under the FLSA. The federal court explained, among other things, that the Connecticut state causes of action "involved novel or complex issues of state law." (Neary v. Metropolitan Property & Cas. Ins. Co. (D.Conn. 2007) 472 F.Supp.2d 247, 251.) This undermines the insurers' assumption that federal and state law is all one monolith on paying claims adjusters (or

not) for overtime.

Oregon

Oregon also has its own administrative exemption. It too contains the common prerequisite that an "[a]dministrative employee" is one "[w]hose primary duty consists of . . . [t]he performance of office or non-manual work directly related to management policies or general business operations of the employee's employer or the employer's customers." (Or. ADC 839-020-0005(2)(a)(A).)

The exemption in Oregon has not generated much decisional law. Nonetheless, an older precedent lends some insight. In Williams v. Corbett, 286 P.2d 115 (Or. 1955) (Williams), overruled in part on other grounds by Godell v. Johnson (Or. 1966) 418 P.2d 505, the Oregon Supreme Court held that an employee was not administratively exempt. As California law once did, the Oregon wage order at that time generally applied only to "women and minors." (Williams, supra, 286 P.2d at p. 117.) In pertinent part, the wage order provided that a woman was not employed in an administrative capacity unless she "is engaged in work which is predominantly intellectual, managerial, or creative; which requires exercise of discretion and independent judgment; and for which the remuneration is not less than $200 per month." (Ibid., emphasis deleted.) This language tracks California Wage Order 4, at issue in the present litigation. (Cf. Bell II,

supra, 87 Cal.App.4th at pp. 809-10 (text of California order).)

The Oregon Supreme Court held that the employee there, a "maid-of-all-work" at a hotel, was not exempt despite performing some managerial functions and duties. As the court explained, "it cannot be held as matter of law that plaintiff's work was predominantly managerial." (Williams, supra, 286 P.2d at p. 118.) "A manager is defined as one who has control of a business or business establishment. [Citation.] While some of the plaintiff's duties were managerial in character, her work was not predominantly so, but rather was of a menial nature." (Ibid.)

This reasoning foreshadows essentially the same rationale soundly followed by the Second District in the current case. As a practical matter, many employees will perform at least some duties that appear administrative in nature. This is why, when determining whether an employee works in an administrative capacity, the inquiry should focus on whether the tasks are primarily or predominantly administrative. Given the nature of many jobs - some duties will be administrative, others not - the only useful fulcrum is the nature of the primary duties. Here, according to the Court of Appeal, the insurer defendants introduced a "mountain of evidence" demonstrating that the claims adjusters are "primarily engaged in the day-to-day tasks of adjusting individual claims, such as investigating, making coverage determinations, setting reserves, and negotiating

settlements." (Harris v. Superior Court (2007) 154 Cal.App.4th 164, 179.) Even if "defendants did introduce evidence that some plaintiffs might do some work at the level of policy or general operations . . . no evidence shows that even a single plaintiff primarily engages in such work." (Id. at p. 178)

This nuanced assessment of the employees' role was the correct approach more than fifty years ago in the Oregon case, and it continues to make sense today. Otherwise, employers could assign a smidgen of administrative duties to a class of workers - just a fraction of what the employees do all day - and then deny overtime pay by claiming the administrative exemption.

C. Other Courts Have Found Claims Adjusters to Fall Within the General Presumption that Employees Are Paid for Overtime

The defendant insurance companies try to label the First District's Bell decisions, and the Second District opinion now on review, as aberrations in their overtime classification of insurance claims adjusters. The case law in this vein is not homogeneous, however; it is actually fact-specific. The rationales for the decisions are also all over the map. At any rate, the California appellate courts are not legal oddities. There is certainly authority going the same direction as the Bell precedents, and now the Second District in the current litigation.

For example, a federal court recently rejected the argument that a class of claims representatives worked in an administrative capacity under federal law. (See Neary v. Metropolitan Property & Casualty Insurance Co. (D.Conn. 2007) 517 F.Supp.2d 606, 613-615.) Other federal courts have similarly ruled that adjusters did not fall within the federal administrative exemption. (See, e.g., Robinson-Smith v. Government Employees Insurance Co. (D.D.C. 2004) 323 F.Supp.2d 12, 23-26.)

Of perhaps greater interest - since this suit is under California law - state courts have done the same under state wage and hour regulations. To take one illustration, an employee is not administratively exempt under the Minnesota Fair Labor Standards Act unless he or she, among the multiple requirements, "performs office or nonmanual work directly related to management policies or general business operations." (Minn. R. 5200.0200; see also Minn. Stat. Ann. § 177.23, subd. 7(6).) This familiar language resembles, of course, the analogous prong in California's Wage Order 4-2001. (Cal. Code Regs., tit. 8, § 11040, subd. 1(A)(2)(a)(I).) On a record similar to this case involving claims adjusters for Liberty Mutual and Golden Eagle, a class of claims adjusters in Minnesota recently prevailed on overtime claims under the Minnesota law.

In Milner v. Farmers Ins. Exchange, No. 01-15004, 2005 WL 2757291 (Minn.Dist.Ct. Apr. 5, 2005), the trial court entered judgment on a

jury verdict in favor of the class of claims representatives. There, as here, the record showed that the adjusters "do not set claims handling policy or procedures; rather, they follow manuals and established guidelines." (Id. at p. *3.) Similarly, there, as here, the claims representatives "do not make decisions regarding how FIE's business should be structured or operated," such as "hire or fire decisions; budget recommendations, or other tasks associated with administering a business operation." (Ibid.) For these and other reasons, the adjusters in Milner "did not perform work directly related to management policies or general business operations." (Ibid.) Although Farmers Insurance appealed, the reviewing courts did not disturb these sound conclusions. (See Milner v. Farmers Ins. Exchange (Minn.Ct.App. 2006) 725 N.W.2d 138, aff'd in part, rev'd in part and remanded by Milner v. Farmers Ins. Exchange (Minn. 2008) 748 N.W.2d 608.) In fact, by the time the case reached Minnesota's highest court, "[t]he parties agree[d] that these findings signify that the claims representatives were improperly classified as exempt." (Milner v. Farmers Ins. Exchange, supra, 748 N.W.2d at p. 612 n.4.)

The Milner litigation illustrates that state and federal exemptions can diverge. "Many class members in the [Minnesota] litigation also were participating" in a federal overtime class action against Farmers. (Milner v. Farmers Ins. Exchange, supra, 748 N.W.2d at p. 612 n.5.) The state and

federal class actions against Farmers "proceeded more or less concurrently and independently to judgment." (Milner v. Farmers Ins. Exchange, supra, 725 N.W.2d at p. 141.) The federal suit culminated in the Ninth Circuit opinion cited by Liberty Mutual and Golden Eagle in the present case. The Ninth Circuit held that the federal class of Farmers adjusters qualified for the federal administrative exemption under the new federal regulations promulgated in 2004. (In re Farmers Insurance Exchange, Claims Representatives' Overtime Pay Litigation (9th Cir. 2007) 481 F.3d 1119.) However, the Ninth Circuit limited its holding to the scope of the federal exemption. Declining to resolve "nuances of state law," the Ninth Circuit acknowledged: "'[T]he purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA.'" (Id. at p. 1134.)

Thus, fleshing out Minnesota's administrative exemption in the Milner litigation, the Minnesota judicial system generated a different conclusion on the same adjusters' exempt status. The Minnesota trial court perceived no inconsistency between the state and federal overtime suits: "The MDL action focused on the Federal statute and this action focuses on the Minnesota Statute." (Milner v. Farmers Ins. Exchange, supra, 2005 WL 2757291, at p. *9.) Likewise, in its review, the Minnesota Supreme Court

observed that "the FLSA is not dispositive here because it is structured differently than the MFLSA." (Milner v. Farmers Ins. Exchange, supra, 748 N.W.2d at p. 612 (holding that misclassification alone does not violate Minnesota statute).)

To CAOC's knowledge, in the rich tapestry of wage and hour rules nationwide, only the federal government has targeted insurance claims adjusters for exempt status. This is in 29 C.F.R. § 541.203(a), the deliberate and comprehensive regulation announced by the United States Department of Labor in 2004. While asserting that "changing presidential administrations" have nothing to do with the matter (Reply Brief on the Merits, p. 17), defendants do not dispute that the federal government made "significant changes" when it overhauled the federal regulatory scheme after Wage Order 4-2001. (Answer Brief on the Merits, p. 37.) After citing the new federal regulations in their opening brief, defendants now appear to concede that only "those regulations in effect in 2001 when Wage Order 4-2001 was adopted" bear on how this litigation is resolved. (Reply Brief on the Merits, p. 1 n.1.)

D. Existing California Precedent, and the Basic Principles Long Applied to Resolve Overtime Disputes Under California Overtime Laws, Should Not Be Cast Aside to Decide this Case

In the realm of appellate briefing, it is telling when only one party is

able to cite California appellate precedent and administrative opinion letters to support its interpretations. It is also telling when one party tries to steer the reviewing court away from these sources of California law. The insurance companies' briefing merits comment because it seeks to win the case by pushing aside important California precedents and principles at the heart of the inquiry.

Between the opening and reply briefs on the merits, the defense position appears to have evolved. The opening brief stressed supposedly unanimous federal precedent applying the FLSA. In their reply brief, the insurance companies have toned down their reliance on federal case law. They now say they should prevail under the "plain language" of Wage Orders 4 and 4-2001. According to the defendants' reply brief, California's administrative exemption is simple stuff and its application yields only one easy conclusion - they win.

Respectfully, if the two wage orders were as plain as the insurance companies now contend, it is highly unlikely this case would be before this Court. The parties have already spent several years litigating just one of the multiple exemption prerequisites, regarding the meaning of "administrative capacity."

After getting in this Court's door, the defendants have retreated to

the "letter" of the wage orders but under all pertinent sources of interpretive guidance, they lose. This is why the defendants proclaim that the well-established canons of construction governing overtime pay under California law are "inapplicable." (Reply Brief on the Merits, pp. 1, 17.) Notably, the Court did not think so in Ramirez v. Yosemite Water Co. (1999) 20 Cal.4th 785 (Ramirez). There, the Court distilled, and firmly emphasized, the "basic principles" driving "the scope of an exemption from the state's overtime laws." (Id. at p. 794.)

California's overtime rules exist for the "'protection and benefit of employees'" - not employers - and, as such, the overtime laws "'are to be liberally construed with an eye to promoting such protection.'" (Ibid.) Nothing indicates that these sound principles be thrown out the window just because one party claims to rely on the "plain language" of an IWC wage order. (See also Gentry, supra, 42 Cal.4th at pp. 455-56; Smith v. Superior Court (2006) 39 Cal.4th 77, 83; Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575, 592.) The Labor Code itself "confirms 'a clear public policy . . . that is specifically directed at the enforcement of California's minimum wage and overtime laws for the benefit of workers." (Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 340.)

Perhaps most glaringly, the defendants fail to address the touchstone directive that "exemptions from statutory mandatory overtime provisions

are narrowly construed." (Ramirez, supra, 20 Cal.4th at p. 794.) The federal doctrine that defendants prefer follows the same principle. "We have held that these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." (Arnold v. Ben Kanowsky, Inc. (1960) 361 U.S. 388, 392; see also A.H. Phillips, Inc. v. Walling (1945) 324 U.S. 490, 493.)

E. The Court of Appeal Correctly Applied the "Plain Language" of the California Wage Orders

Indeed, it appears the defense cannot prevail in this case unless the administrative exemption is given a sweeping interpretation scooping up, not just the employees now before the Court, but a broad swath of workers it was never meant to cover. Every California appellate decision on this exemption, and this Court's own case law on employment issues, counsel against such a flawed precedent.

CAOC will not repeat what plaintiffs/petitioners Frances Harris et al. have already argued on how this case should be decided. In the interest of legal clarity going forward, however, a final point warrants observation. Because the administrative exemption contains multiple prerequisites, it is vital to keep the various prongs from bleeding together. In their opening submission, the insurance companies failed to state a cogent position on

whether "substantial importance" is part of the "administrative capacity" inquiry, or distinct from it. Thus, without expressly saying so, the insurers conflated these two requirements. (E.g., Opening Brief on the Merits, pp. 18, 22, 26 (repeatedly citing 29 C.F.R. § 541.205(c) to challenge Court of Appeal decision).) The defendants' reply brief is more precise and makes a significant analytical concession. The insurers now acknowledge that 29 C.F.R. § 541.205(a) "sets forth two separate requirements" before an employee may be deemed exempt - to use shorthand, the capacity prong and the substantial importance prong. (Reply Brief on the Merits, pp. 1-2.) The insurers further acknowledge that the capacity prong is elaborated in 29 C.F.R. § 541.205(b), and the wholly distinct substantial importance prong is elaborated in 29 C.F.R. § 541.205(c). (Id., p. 2.) This is how the Second District read the regulation, and how the plaintiffs/petitioners have urged this Court to read it. (See Answer Brief on the Merits, pp. 27-28, 30-32.)

Given this recent confluence of positions, the insurance companies have foreclosed themselves from relying on 29 C.F.R. § 541.205(c) to prevail under the first prong related to administrative capacity. If the Court is to keep the various prongs straight, then 29 C.F.R. § 541.205(c) comes into play only on substantial importance. The type of work - the central issue before this Court - is a completely different question.

Although the parties now concur that the type of work and its degree

of importance are separate inquiries, the parties diverge on whether substantial importance is presented for this Court to decide in this particular case. For their part, the plaintiffs/petitioners appear to argue that substantial importance remains to be litigated in future proceedings, if it ever has to be reached. The suit comes to this Court on plaintiffs/petitioners' motion for summary adjudication, limited to the capacity prong of the exemption. (See Answer Brief on the Merits, pp. 8-9, 31-32 n.2.) Reflecting the narrow framing of plaintiffs/petitioners' motion in the Los Angeles Superior Court, the Second District did not address substantial importance. As the opinion explained: "Because plaintiffs are not primarily engaged in work that falls on the administrative side of the dichotomy, it is unnecessary for us to analyze the other elements of the administrative exemption, including the substantial importance requirement and the requirement that the employee exercise discretion and independent judgment." (Harris, supra, 154 Cal.App.4th at p. 185, fn. 10; see also id. at p. 184.)

Despite this history, the defendants seem to assume that substantial importance is squarely presented as an issue for this Court. In a confusing posture, they repeatedly reference 29 C.F.R. § 541.205(c), as purportedly shedding light on whether the claims adjusters work in an "administrative capacity." (E.g., Reply Brief on the Merits, pp. 7, 15-16.) This comes after acknowledging that 29 C.F.R. § 541.205(c) addresses only substantial

importance. (Id., pp. 1-2.) This Court's opinion would add clarity to the law by explaining, as the Court of Appeal did below, that the nature of the work (administrative or not, as fleshed out in 29 C.F.R. § 541.205(b)) and its level of importance (substantial or not, as fleshed out in 29 C.F.R. § 541.205(c)) are two separate inquiries under California's administrative exemption.

III. CONCLUSION

For the foregoing reasons, CAOC joins the plaintiffs/petitioners in respectfully asking this Court to affirm the judgment of the Second District Court of Appeal.

Dated: August 3, 2008

Respectfully submitted,

ARBOGAST & BERNS LLP

By: _____
David M. Arbogast

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned counsel certifies that the text of this petition uses a proportionately spaced Times New Roman 13-point typeface, and that the text of this petition consists of 4,441 words as counted by the Corel WordPerfect X3 program used to generate this amicus curiae brief.

Dated: August 3, 2008

_____

David M. Arbogast

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 19510 Ventura Boulevard, Suite 200, Tarzana, California 91356-2969.

2. That on August 4, 2008, declarant served the **CONSUMER ATTORNEY'S OF CALIFORNIA APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS/PETITIONERS FRANCES HARRIS et al.** by depositing a true copy thereof in a United States mail box at Tarzana, California in a sealed envelope with postage fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of August, at Tarzana, California.

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