B151808

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION 7**

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**ROSEMARIE CUMMINGS et. al.,**

*Plaintiff and Appellant*

*v.*

**AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA**

*Defendants and Respondents*

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Appeal from Superior Court of Los Angeles County
Case No. BC 212783
Hon. Wendell Mortimer, Judge.

# REQUEST BY CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR PERMISSION TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF PLAINTIFF/APPELLANT

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California Employment Lawyers Association

REQUEST FOR PERMISSION TO FILE AMICUS BRIEF:

TO THE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION SEVEN:

The California Employment Lawyers Association (CELA) requests permission to file a brief as amicus curiae in support of plaintiff and appellant Rosemarie Cummings et. al. CELA is a statewide organization of attorneys primarily representing plaintiffs in employment termination and discrimination cases.

CELA, through its undersigned attorney, is familiar with the questions involved in this case and the scope of their presentation and believes that there is necessity for additional argument on the following points:

- The application of any ruling in this case to the rights of minimum wage workers throughout the state. Requiring employees to individually litigate common wage and hour claims will yield a substantial amount of violations that go without prosecution. Public policy favors prosecution of these claims on a class-wide basis, as well as payment of unpaid wages to those who may lack awareness of the unlawful nature of their employers' payroll practices.

If this request is granted, the following brief in support of

plaintiff and appellant is respectfully submitted.

Respectfully submitted,

Date: March 19, 2002 LAW OFFICES OF JEFFREY K. WINIKOW

By: Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

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# AMICUS BRIEF OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT

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AMICUS BRIEF

ARGUMENT: Requiring Employees to Individually Prosecute Common Wage and Hour Claims is Inconsistent With Public Policy

From Selma to Salinas, workers rely upon class action litigation to effectuate "public policies" that otherwise exist only on paper. To require California's working poor to individually litigate identical wage and hour claims, in multiple forums, with multiple counsel, is to strip the wage and hour laws of their teeth. Indeed, because many of these workers are either ill informed about their rights, lack the resources to enforce their rights, or both, one can - and should - expect a significant number of wage and hour violations to go without prosecution should the court divest workers of their ability to seek class wide relief.

California has long regarded the accurate - and prompt - payment of wages to be a firmly established matter of public policy. As recognized in Gould v. Maryland Sound Indust., 31 Cal.App.4th 1137, 1147 (1995):

> Public policy has long favored the full and prompt payment of wages due an employee. Wages are not ordinary debts. Because of the economic position of the average worker and, in particular, his family, it is essential to public welfare that he receive his pay promptly....

Remedial statutes reflecting overtime and minimum wage laws should be construed broadly so as to further remedial objectives.

Industrial Welfare Com. v. Superior Court, 27 Cal.3d 690, 702 (1980) ("[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection."). ***The mandate to liberally construe California wage and hour law is meaningless unless one also liberally construes the procedures made available for vindicating these rights***. Gibson v. Unemployment Ins. App. Bd., 9 Cal.3d 494 (1973).

In its denial of class certification, the trial court failed to consider not only the public policy underlying the enforcement of wage and hour law, but the practical hurdles facing workers trying to exact institutional reform through individual actions. As noted in Reyes v. Board of Supervisors, 196 Cal.App.3d 1263, 1280 (1987): "we must not forget the class action is a product of the court of equity. It rests on considerations of necessity and convenience, adopted to prevent a failure of justice." (Internal quotations omitted). While the class action in Reyes addressed the denial of welfare benefits to a class of potential recipients, the opinion is equally prophetic with regard to the ability of California's low wage workers to place their employer's payroll practices under the microscope of wage and hour law:

> Such victims as a practical matter without class certification will individually neither seek nor obtain redress because they are too poor, their claims too small and the legal issues too arcane to obtain private counsel. Id.

Instead of focusing on practical realities and public policy concerns, the trial court myopically viewed the issue as a purely legal question. And its conclusion was wrong. Caselaw does not mandate individual actions in order to challenge the exempt status of a readily identifiable class of workers. Indeed, if issues arising from standardized payroll practices cannot be adjudicated on a class-wide basis, then what does this say about the ability to prosecute civil rights cases through class action?

While Ramirez v. Yosemite Water Co., 20 Cal.4th 785 (1999) held that claims for unpaid overtime involve factual determinations that must be made on a case-by-case basis, the California Supreme Court did not abrogate the use of class actions in enforcing overtime laws. It did not seek to overturn decades of precedent. And it did not mandate that wage and hour law enforcement was to turn on the ability of minimum wage workers to forage for counsel willing to prosecute individual overtime claims of marginal economic value. Instead, the Court merely noted the obvious: that each case has to be examined on its own facts.

Petitioners here do not seek class certification in a pro forma matter. They do so because of the unique facts presented in the record. When these unique facts raise common questions of law, and when these common questions predominate over individual questions, a trial court can - and should - certify the matter as a class action. Nothing in Ramirez suggests otherwise.

The facts of this case do not merely suggest "commonality," they scream it. Class certification should turn on what an employer ***does*** at least as much as on what an employer ***says***. Here, the Auto Club says that

individual assessments are necessary to determine exempt status, but prior to litigation the Auto Club never attempted to assess overtime rights on an individualized basis. Instead, the evidence shows that the Auto Club standardized its employment practices, standardized its compensation schemes, and standardized the job duties for its Sales Agents and Life Specialists. The Auto Club never paid overtime to any of the putative class members because the company determined that - as a class - its standardized job duties were not subject to individual differentiation. If anything, having treated these workers as a class throughout their employment, Auto Club should be estopped from now switching positions and contending that these workers' overtime rights turn on individualized assessments.

The trial court's ruling appears to be more of a referendum on the propriety of class actions than anything else. Of course there will be some unique factual differences within a class; however, these inevitable differences do not preclude the use of a class action to decide those questions which all members have in common. The certification linchpin is in showing the "predominance" of common questions, not in showing the absence of individual ones.

As much as this case involves the interests of the putative class of Sales Agents and Life Specialists of Defendant, it also involves the legal rights of California's low wage workers to collectively challenge unlawful payroll schemes. These workers do not seek special treatment, but only the same treatment as anyone else to have common claims, arising from common operative facts, adjudicated on a class-wide basis. These workers demand nothing more, and the law insists on nothing less.

## CONCLUSION

For the foregoing reasons and authorities, Amicus California Employment Lawyers Association respectfully requests that the Court reverse the trial court's denial of class certification.

Date: March 19, 2002 LAW OFFICES OF JEFFREY K. WINIKOW

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By: Jeffrey K. Winikow
Attorney for Amicus Curiae
California Employment Lawyers Assoc.

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court Rule 14(c), the undersigned hereby certifies that the Amicus brief previously filed by the California Employment Lawyers Association contained 1449 words, according to the word count software included in the WordPerfect 8 software with which the brief was written.

Dated: March 19, 2002 LAW OFFICES OF JEFFREY K. WINIKOW

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Attorneys for Amicus Curiae
California Employment Lawyers Association