No. 17-15124

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEV ANAND OMAN, TODD EICHMANN, MICHAEL LEHR, AND ALBERT FLORES, INDIVIDUALLY, ON BEHALF OF OTHERS SIMILARLY SITUATED, AND ON BEHALF OF THE GENERAL PUBLIC,

Plaintiffs – Appellants,

v.

DELTA AIR LINES, INC.,
Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Case No. 15-cv-00131-WHO

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT

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Counsel for Amicus Curiae California Employment Lawyers Association

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, California Employment Lawyers Association ("CELA" or "*Amicus*"), respectfully requests leave of this Court to file the accompanying *amici curiae* brief in support of Plaintiffs-Appellants Dev Anand Oman, Todd Eichmann, Michael Lehr, and Albert Flores. Pursuant to Ninth Circuit Rule 29-3, *Amicus* has endeavored to obtain the consent of all parties to the filing of the brief. Plaintiffs-Appellants have consented to the filing. Defendant-Appellee Delta Air Lines, Inc. ("Delta") has declined to consent to the filing. A true and correct copy of the proposed brief is attached to this motion.

Identity and Interest of *Amicus*

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions involving allegations of unpaid wages similar to those at issue in *Oman et al. v. Delta Air Lines, Inc.* CELA has a substantial interest in protecting the statutory and common law rights of workers in California and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of workers in California by, among other things, advocating for effective employment law enforcement procedures such as class actions in appropriate cases, and submitting amicus briefs and letters on issues affecting employment rights,

including amicus briefs in the California Supreme Court in *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522 (2014), *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), and *Dynamex Operations West, Inc. v. Superior Court*, Case No. S222732 (case pending). CELA members represent employees who would be adversely impacted by a ruling against Plaintiffs-Appellants.

An *Amicus* Brief is Desirable and the Matters Asserted Are Relevant to the Disposition of the Case

As a membership group of advocates on behalf of hourly workers in California and workers throughout the United States, CELA is in a position to provide an analysis of the importance of broad enforcement of wage and hour protections, the application of hourly wage laws to workers in California, and the public policies embodied in remedial workplace standards laws.

CELA submits this brief not to repeat the arguments made by the parties, but to bring the Court's attention to the public policies embodied in the California Labor Code, and the application of the Labor Code to the unpaid wage claims in this case.

CELA's proposed amicus brief will assist the Court by offering additional perspective on the breadth and scope of California wage laws and their application to the claims in this case in three ways. First, CELA argues that in light of the

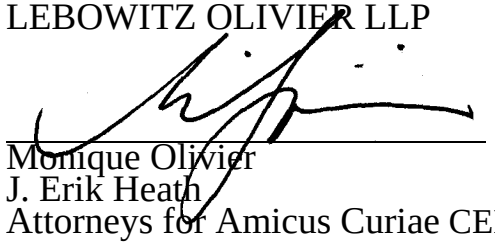
broad remedial purpose of California wage laws, an employer's compensation plan that involves "formulas" that do not pay for each hour worked runs afoul of California's minimum wage protections and the law against "averaging" to comply with minimum wage. Second, CELA argues it is well-established that California wage laws apply to all work done within its borders. To the extent that the district court's ruling conflicts with that law, it must be reversed. Third, CELA argues that the Dormant Commerce Clause does not act as a barrier to the plaintiffs' pursuit of the wage claims in this case, and this Court can and should address that issue. Finally, CELA seeks leave to submit the attached brief to emphasize that the arguments advanced by defendant Delta Air Lines, Inc., if accepted by this Court, would seriously undermine the ability of workers to vindicate their rights under California wage laws.

For the reasons stated above, CELA respectfully submits that its accompanying brief will assist the Court in deciding the matter, and therefore requests the Court's leave to file it.

Dated: May 5, 2017

Respectfully Submitted,

DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP

By: 

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)

Amicus curiae California Employment Lawyers Association ("CELA" or "*Amicus*") hereby provides the following disclosure statement:

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), CELA is a non-profit corporation that offers no stock. There is no parent corporation or publicly owned corporation that own 10 percent or more of stock.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amicus* states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief.

Dated: May 5, 2017

DUCKWORTH PETERS
LEBOWITZ OLIVIER LLP

By: _____

Monique Olivier
J. Erik Heath
Attorneys for Amicus Curiae CELA

STATEMENT OF INTEREST

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions involving allegations of unpaid wages similar to those at issue here. CELA has a substantial interest in protecting the statutory and common law rights of workers in California and ensuring the vindication of the public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of workers in California by, among other things, advocating for effective employment law enforcement procedures such as class actions in appropriate cases, and submitting amicus briefs and letters on issues affecting employment rights, including Supreme Court amicus briefs in *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), and *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012).

CELA's proposed amicus brief will assist the Court by offering additional perspective on the remedial purpose of California wage laws and the application of those laws – in light of that purpose -- to the minimum wage and other claims at issue here. As CELA's brief shows, California law prohibits averaging to meet the requirements of minimum wage pay. Permitting an employer to use compensation

schemes that fail to pay employees for each hour of work violates California law. CELA's brief also argues that California wage claims must be construed, as this Court has acknowledged, to reach all time worked in California, even where workers may also work in other states. Finally, CELA offers its perspective on the Dormant Commerce Clause and how it does not stand as a barrier to a worker's wage claims under California law. CELA submits this brief on behalf of its members and its members clients, because this Court's ruling may affect workers and employers throughout California.

SUMMARY OF ARGUMENT

This case provides the Court the opportunity to address the contours of California minimum wage requirements. The employer in this case, Delta Air Lines, Inc. ("Delta") asserts that a pay "formula" properly pays plaintiffs for all hours worked. If, as the plaintiffs assert, however, the record reveals that workers are not paid for each hour worked, such a compensation structure would undoubtedly violate California's law against "averaging," which is firmly rooted in the directive that workers be paid "not less than the applicable minimum wage for all hours worked." IWC Wage Order 9-2001 § 4(B). If accepted by this Court, Delta's arguments could act as a runway for employers to use creative pay descriptions to obscure actual amounts being paid while depriving workers of California's broad minimum wage protections.

Amicus also address the appropriate application of California wage laws to workers who undisputedly spend some, but not all, of their work hours within California. There can be no doubt that workers are entitled to the protection of California law whenever they are working within its borders. To that end, there is no conflict with the Dormant Commerce Clause that would prevent application of California law to the wage claims asserted in this case. Contrary to Delta's contention, the rich body of protections for workers does not narrow simply because the worker also spends time working in other states. When the worker is working in California, California wage laws apply.

ARGUMENT

I. The Remedial Purpose of California's Labor Laws and Wage Orders Is to Broadly Protect the Rights of Workers.

California courts have long given special consideration to laws protecting workers, broadly interpreting statutory provisions due to the remedial nature of these laws. As the California Supreme Court noted in 1948, "[i]t has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due." *In re Trombley*, 31 Cal. 2d 801, 809 (1948). Likewise, two decades later, the Court concluded that "[w]ages of workers in California have long been accorded a

special status… This public policy has been expressed in the numerous statutes regulating the payment, assignment, exemption, and priority of wages… California courts have long recognized the public policy in favor of full and prompt payment of wages due an employee." *Kerr's Catering Serv. v. Dep't of Indus. Rel'n*, 57 Cal. 2d 319, 325-26 (1962).

California courts have further recognized that "in 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." *Indus. Welfare Comm'n v. Superior Ct.*, 27 Cal. 3d 690, 702 (1980); *see also Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1103 (2007) ("We have also recognized that statutes governing conditions of employment are to be construed broadly in favor of protecting employees." (citations omitted)); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004). These principles "apply equally to the construction of wage orders." *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833, 840 (2015).

Illustrating the protective intent of California wage laws, several provisions of the Labor Code expressly provide that the wage claims are unwaivable. Labor Code section 206.5 makes illegal releases of wage claims when wages are due to a worker. Labor Code section 219(a) provides that "no provision of this article

[Labor Code, sections 200-244] can in any way be contravened or set aside by a private agreement." Labor Code section 2804, which pertains to an employer's failure to indemnify employees for business expenses, expressly provides that "[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State." Thus, "it is clear from the many Labor Code sections … that there is in this state a fundamental and substantial public policy protecting an employee's wages…" *Phillips v. Gemini Moving Specialists*, 63 Cal. App. 4th 563, 574 (1998).

The strength of the worker protections in California law can also be found in the authority granted to the Industrial Welfare Commission ("IWC"). The IWC, established in 1913, holds the authority to investigate working conditions and enforce its wage orders with powerful criminal, administrative and civil enforcement mechanisms. *Martinez v. Combs*, 49 Cal. 4th 35, 54-56 (2010). Since 1913, California voters and the State Legislature have added to the IWC's power by providing it with greater legislative, executive, and judicial authority and by expanding its jurisdiction to cover all employees in California. *Id.* at 55. In 1973, the California Constitution was amended to reaffirm the broad scope of the IWC's authority to "provide for minimum wages and for the general welfare of

employees." Cal. Const., art. XIV, § 1. The Legislature's response was to expand the role the IWC plays in setting minimum labor standards, to include review and updating of "adequate and reasonable wages, hours, and working conditions appropriate for all employees in the modern society." *Industrial Welfare Com.*, 27 Cal. 3d at 702, *quoting* Lab. Code § 1173, enacted Stats. 1973, ch. 1007, § 1.5, at 2002.

Through the wage orders, the IWC retains both the power to set minimum labor standards and "the power to adopt rules to make the minimum wage effective." *Martinez*, 49 Cal. 4th at 64. This, in turn, includes the power to "to insure the receipt of the minimum wage and to prevent evasion and subterfuge…" *Id*. (quoting *Cal. Drive-in Restaurant Assn. v. Clark*, 22 Cal. 2d. 287, 302 (1943)). The IWC's authority thus extends beyond the simple setting of minimum wages and overtime rules. It includes the power to define terms necessary to enforce its Orders. *Martinez*, 49 Cal. 4th at 60-61; *Industrial Welfare Com.*, 27 Cal. 3d at 702. The IWC's authority is so broad that its discretion will be upheld unless there is a direct conflict with a statute or with a prior interpretation of a statute by a court. *Industrial Welfare Com.*, 27 Cal. 3d at 702-703, 724-725; *Cal. Drive-In Restaurant Assn.*, 22 Cal. 2d at 292 (resolution of conflicting statute and wage

order).[1] The remedial nature and strength of the IWC's authority means its promulgations "are to be liberally construed." *Industrial Welfare Com.*, 27 Cal. 3d at 702.

In light of this clear mandate to broadly protect workers in California, courts must use caution before circumscribing workers' rights under the Labor Code.

II. Employers Cannot Evade California's Minimum Wage Obligations through Creative Descriptions of Pay that Result in Unlawful Averaging.

"California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked." *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 323 (2005); *Pressler v. Donald L. Bren Co.*, 32 Cal. 3d 831, 837 (1982). "Hours worked" means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Wage Order 9-2001, § 2(H)*; see, e.g.*, *Mendiola*, 60 Cal. at 840 (on-call sleeping time is compensable under California law).

[1] "Because of the quasi-legislative nature of the IWC's authority, the judiciary has recognized that its review of the commission's wage orders is properly circumscribed… 'A reviewing court does not superimpose its own policy judgment upon a quasi-legislative agency in the absence of an arbitrary decision…'" *Industrial Welfare Com.*, 27 Cal. 3d at 702, *quoting Rivera v. Div. of Industrial Welfare*, 265 Cal. App. 2d 576, 594 (1968).

California law requires employers to pay their workers at least minimum wage. Cal. Lab. Code § 1197; Wage Order 9-2001 § 4. A failure to pay an employee for all hours worked necessarily results in a minimum wage violation, because under California law, "'all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation.'" *Brown v. Wal-Mart Stores, Inc.*, No. C 08-5221 SI, 2013 U.S. Dist. LEXIS 55930, at *21 (N.D. Cal. Apr. 18, 2013), *quoting Armenta*, 135 Cal. App. 4th at 323. That is, allowing an employer to average its employees' compensation over their total hours worked contravenes the Labor Code by effectively reducing the employees' contractual rate of compensation. *Armenta*, 135 Cal. App. 4th at 323; *see also Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1154 (9th Cir. 2016) ("California law also prohibits 'averaging' to meet minimum wage requirements."); *Quezada v. Con-Way Freight, Inc.*, No. C 09-03670 JSW, 2014 U.S. Dist. LEXIS 5922, at *5 (N.D. Cal. Jan. 16, 2014) (provisions of the California Labor Code "require courts to consider whether an employee earns at least minimum wage for every hour (or part of every hour) in isolation as opposed to on average").

California's law against averaging is firmly rooted in the language of the Labor Code, the wage orders, and the purpose of minimum wage laws. The court in *Armenta* cogently explained the important difference between the Fair Labor

Standards Act, which permits averaging, and the California Labor Code and wage orders, which do not:

> the minimum wage provisions of the FLSA differ significantly from California's minimum wage law. FLSA requires payment of minimum wage to employees who "in any work week" are engaged in commerce. In contrast, section 1194, subdivision (a) provides that any employee receiving "less than the legal minimum wage" is entitled to recover the unpaid balance of the "full amount" owed. The minimum wage applicable to respondents is set forth in California Wage Order No. 4, section 4(A), which currently provides: "Every employer shall pay to each employee wages not less than … [$ 6.75] per hour *for all hours worked*." (Italics added.) Wage Order No. 4, section 4(B) provides: "Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage *for all hours worked* in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (Italics added.) This language expresses the intent to ensure that employees be compensated at the minimum wage for each hour worked. The averaging method utilized by the federal courts for assessing a violation of the federal minimum wage law does not apply here.

Armenta, 135 Cal. App. 4th at 323 (concluding that multiple examples "demonstrate that California provides greater protections to its minimum wage employees).[2]

Time and time again, California courts have found that, no matter how a worker is paid – "by time, piece, commission or otherwise," *see* Wage Order 9-2001§ 4(B), – employers *must* pay for all time worked. *See, e.g.*, *Gonzalez v.*

[2] The applicable wage order here, Wage Order 9-2001 which applies to employees in the transportation industry, contains the same provision. *See* Wage Order 9-2001 § 4(B).

Downtown LA Motors, LP, 215 Cal. App. 4th 36, 49 (2013) (employees paid on a piece rate basis were "entitled to separate hourly compensation for time spent waiting for repair work or performing other non-repair tasks directed by the employer during their work shifts"); *Bluford v. Safeway Inc.*, 216 Cal. App. 4th 864, 867 (2013) (drivers paid based on miles driven and performance of specific tasks must also separately be paid for rest periods); *Reinhardt v. Gemini Motor Transport,* 869 F. Supp. 2d 1158, 1168 (E.D. Cal. 2012) (piece-rate pay system that did not separately pay truck drivers for non-driving duties violates California law requiring pay for each hour worked); *Cardenas v. McLane Food Services, Inc.* 796 F. Supp. 2d 1246, 1252 (C.D. Cal. 2011) (piece-rate pay system that did not separately pay truck drivers for non-driving duties and rest periods violates California law requiring pay for each hour worked). A pay "formula" that does not pay for each hour worked, is a pay structure that violates California law. *Armenta*, 135 Cal. App. 4th at 323.

The effects of obscuring employee pay through such formulas are compounded when an employer then also fails to provide workers with accurate and timely information about hours worked and pay received. California law requires employers to maintain accurate time and rate of pay records, and to provide that information in timely wage statements to employees. Cal. Lab. Code §1174(d); IWC Wage Order 9-2001 §7; Cal. Lab. Code § 226; *Carrillo v.*

Schneider Logistics, Inc., 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011). These requirements exist because, unless an employer separately specifies hours worked and rates of pay, there is "employee confusion over whether they received all wages owed them, difficulty and expense [] in reconstructing pay records," and the real possibility of not being paid the actual wages owed. *Ortega v. J.B. Hunt Transp., Inc.*, 258 F.R.D. 361, 374 (C.D. Cal. 2009); *see also Kisliuk v. ADT Sec. Servs., Inc.*, 263 F.R.D. 544, 548 (C.D. Cal. 2008).

Allowing an employer to pay by a "formula" not disclosed on a wage statement thus risks mischief: employers could simply ignore recordkeeping requirements to obtain an after-the-fact lower rate of pay. *See Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 996 (9th Cir. 2017) ("The regular rate of pay under the FLSA cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract." (citations and internal quotations omitted)); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (noting that penalizing employees where an employer failed to keep proper records "in conformity with his statutory duty… would allow the employer to keep the benefits of an employee's labors without paying due compensation" and unfairly places a "premium" on the employer's statutory failure); *Tyson Foods, Inc. v. Bouaphakeo*, — U.S. —, 136 S. Ct. 1036, 1047 (2016) ("when employers violate

their statutory duty to keep proper records," the "remedial nature" and public policy embodied in wage laws "militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'").

Further, Delta's pay "formula" defense to the minimum wage claims alleged here risks violating yet another provision of the Labor Code, which renders it "unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract." Lab. Code § 223; *Armenta*, 135 Cal. App. 4th at 323 ("adopting the averaging method advocated by respondents contravenes [§ 223] and effectively reduces [the] contractual hourly rate"); *Quezada*, 2014 U.S. Dist. LEXIS at *6-7 (§ 223 is violated when an employer pays less than the contracted rate through what amounts to averaging); *see also Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554 (2007) (recognizing that to avoid the erosion of wages, employers must disclose what portion of pay is designated for expenses separate from wages).

An employer cannot avoid its minimum wage obligations by failing to disclose wages paid and hours worked, and then post hoc characterizing the pay, which does not pay for all hours worked, as a legally compliant "formula."

III. California Law Applies to All Time Worked in California.

The text of the Labor Code is clear that California law applies to time worked in California. "All protections, rights, and remedies available under state

law, except any reinstatement remedy prohibited by federal law, are available to *all individuals* . . . who have applied for employment, or who are or who have been employed, in this state." Lab. Code § 1171.5(a)). To the extent that the district court's orders can be read to prevent California law from applying to the plaintiffs' claims, which undisputedly involve time worked in California, they are erroneous.

If there was there any doubt on this issue, it was put to rest in 2011 by the California Supreme Court. *See Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191, 1197 & n.3 (2011). The *Sullivan* Court held that California's overtime provisions "apply by their terms to all employment in the state," even to employees spending brief periods of time within its borders. *Id.* at 1197-98. Thus, the *Sullivan* plaintiffs themselves were entitled to California overtime protections for their California work, even though they spent as few as 20 days in the state within a three-year period. *Id.* at 1194. This Court confirmed that holding in *Sullivan II*, finding that "California has chosen to treat out-of-state residents equally with its own." *Sullivan v. Oracle Corp.*, 662 F.3d 1265, 1271 (9th Cir. 2011) (*Sullivan II*).

Similarly, the Labor Code provisions at issue here broadly apply to all employment within California without restriction. *See, e.g.*, Lab. Code §§ 204 ("All wages . . . earned by any person in any employment are due and payable twice during each calendar month . . ."), 226, 510, 1174, 1194, 1194.2; Wage Order 9-2004 (wage order applies to "all persons employed in the transportation

industry."). That the wage laws "speak broadly" to reach all employment within California is supported by the state's strong public policy protecting workers. *Sullivan I*, 51 Cal. 4th at 1198; *Pressler*, 32 Cal. 3d at 837; *Indus. Welfare Comm'n.*, 27 Cal. 3d at 702 (Labor Code provisions "are to be liberally construed" to promote such protection).

Cases since *Sullivan I and II* have been uniform in confirming that California law protects *all* work done within its borders. *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2017 U.S. Dist. LEXIS 1679, at *17 (N.D. Cal. Jan. 5, 2017) (California law "clearly applies" "to work performed within California's borders"); *Aguilar v. Zep Inc.*, No. 13-cv-00563-WHO, 2014 U.S. Dist. LEXIS 120315, at *35 (N.D. Cal. Aug. 27, 2014); *Candy Shops, Inc. v. Sup. Ct*, 210 Cal. App. 4th 889, 906 (2012) ("under *Sullivan* a California employer generally must pay *all* employees, including nonresident employees working in California, state overtime wages unless the employee is exempt." (emphasis in original)); *Yoder v. W. Express, Inc.*, 181 F. Supp. 3d 704, 724 (C.D. Cal. 2015) (noting that *Sullivan* plaintiffs spent as much as 98.6 percent of working time in other states).

Plaintiffs work in California (as well as other states) on a regular basis. In light of the express terms of the Labor Code and the wage orders, and the broad remedial scope of the wage laws, Plaintiffs are entitled to protection under California law for their work in California.

IV. The Dormant Commerce Clause Does Not Bar the Wage Claims Asserted Here.

In the district court, Delta argued that Plaintiffs could not proceed with their Labor Code claims without offending the Dormant Commerce Clause. Although the district court did not reach this issue, because it will stand as a barrier to the efficient prosecution of the case upon remand, *Amicus* submits that this Court should address this issue, and make clear that California workers receive the full protection of the California Labor Code.

The Commerce Clause of the U.S. Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "This affirmative grant of power does not explicitly control the several states, but it 'has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.'" *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, 1087 (9th Cir. 2013) (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 98 (1994)). This legal doctrine, which has commonly been called the Dormant Commerce Clause, "is driven by concern about economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting

New Energy Co. v. Limbach, 486 U.S. 269, 273 (1988)) (internal quotations omitted).

But clearly, "not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States." *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443-44 (1960) (the Framers "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country"). On the contrary, the very framework of American federalism envisions the different states functioning as laboratories for "novel social and economic experiments," which "may often be adopted by other states without Balkanizing the national market or [even] by the federal government without infringing on state power." *Rocky Mt. Farmers Union*, 730 F.3d at 1087-88. As succinctly described by this Court, the Dormant Commerce Clause therefore "respects federalism by protecting local autonomy." *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148–49 (9th Cir. 2012).

Given a state's wide latitude to regulate activity within its borders, it is understandable that state and local laws are not commonly found to violate the Dormant Commerce Clause. The few contemporary cases where state regulations have exceeded this constitutional line, however, tend to fall within two discrete

categories. "Most regulations that run afoul of the dormant Commerce Clause do so because of discrimination." *Harris*, 682 F.3d at 1154-55. Absent discrimination, then the state law will be upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Sullivan II*, 662 F.3d at 1271. But state laws found unconstitutional solely because of their burden on interstate commerce are "few in number." *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959); *see Harris*, 682 F.3d at 1148 (only a "small number" of cases meet this substantial burden test).

The California Labor Code does not fit within these categories, neither as applied generally, nor as applied solely to airlines. First, the Labor Code does not discriminate against out-of-state residents. Under this test, discrimination "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste*, 511 U.S. at 99. It is already clear that there is no discrimination here because, as this Court has found, "California applies its Labor Code equally to work performed in California, whether that work is performed by California residents or by out-of-state residents. There is no plausible Dormant Commerce Clause argument when California has chosen to treat out-of-state residents equally with its own." *Sullivan II*, 662 F.3d at 1271.

Second, applying the Labor Code here would not have any remarkable impact on interstate commerce because it would not disrupt the actual flow of goods and services. As described above, the rare state laws failing constitutional scrutiny on these grounds have done so not "merely because [they] affect[ed] interstate commerce," but because that effect amounted to a "substantial burden" on interstate commerce. *Harris*, 682 F.3d at 1154.

It is hardly surprising that Dormant Commerce Clause violations under this test are rare, as case law illustrates just how difficult this "substantial burden" test is. For example, in 1945, the Supreme Court struck down as burdensome an Arizona limit on train lengths that, because it was more restrictive than the national standard, required trains to be converted and reconverted as they entered and exited the state. *See S. Pac. Co. v. Arizona*, 325 U.S. 761, 772-74 (1945). The following year, the Court declared as unconstitutional a Virginia requirement of racial segregation on interstate bus trips, which meant passengers would be reseated at state lines, and continuously reseated as the racial makeup of the passengers shifted while the bus traversed the state. *Morgan v. Virginia*, 328 U.S. 373, 386 (1946). Perhaps most famously, the Court addressed an Illinois law requiring interstate truckers to stop at the state border and exchange mud flaps to fit the state's requirements – mud flaps that were not only different than the industry standard, but also illegal in other states. *Bibb*, 359 U.S. at 529. This exchange was hardly

trivial, as it took anywhere from two to four hours for a truck driver to weld a mud flap into place. *Id.*, at 527. Similarly, a Wisconsin statute was unconstitutional when it would have required "double" trailer trucks to detour around the state. *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978).

A common thread underlies these cases where state laws have substantially burdened interstate commerce. In each, the outlier state law functioned as a dam, literally stopping the flow of interstate commerce at its border. In order to gain passage through this dam, physical adjustments had to be made at the state line – whether that was reseating passengers, converting trains, or welding mud flaps. *See e.g., Bibb*, 359 U.S. at 526 (The conflicting standards required "an interstate carrier to shift its cargo to differently designed vehicles once another state line was reached."). If those adjustments could not be performed, then commerce had to detour around the state entirely. As this Court has thus recognized, the analysis under the "substantial burden" test "turns on the interstate *flow of goods*." *Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*, 768 F.3d 1037, 1044-45 (9th Cir. 2014) (internal quotations omitted) (emphasis in original).

The converse of this rule is also true: absent "impair[ment of] the free flow of materials and products across state borders, there is not a significant burden on interstate commerce." *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015). As a result, state laws that are more administrative in nature, and

do not impede the actual *flow* of commerce, have regularly been upheld – even when interstate transportation companies are involved. *See e.g.*, *Huron Portland Cement*, 362 U.S. at 448 (upholding Detroit's pollution ordinance, with which federally licensed ships would be required to comply); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952) (upholding Arkansas law requiring certain interstate truck drivers to obtain a permit); *Atl. C. L. R. Co. v. Mazursky*, 216 U.S. 122, 133 (1910) (upholding South Carolina penalty on railroads regarding the processing of claims for lost freight).

Even when compliance with the state law requires some expense, it is also clear that those "administrative costs of compliance, alone, are generally insufficient to be deemed an unconstitutional burden." *Bernstein*, 2017 U.S. Dist. LEXIS 1679, at *36, *quoting Barclays Bank Internat. Ltd. v. Franchise Tax Bd.*, 10 Cal. App. 1742, 1755 (1992). And this Court has routinely rejected constitutional challenges that are based on administrative costs. For instance, a Montana law mandating train service to towns with populations greater than 1,000 residents was upheld despite the heavy costs such service imposed on railroad companies. *See Burlington N. R. Co. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1114 (9th Cir. 1985). The *Burlington* Court noted that the analysis would have been different "[h]ad Montana restricted the frequency and service of interstate trains," but that the railroad's operating losses alone did not "impede[] substantially the free flow

of commerce from state to state." *Id*., *quoting Southern Pacific*, 325 U.S. at 767; *see also Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1180 (9th Cir. 2011) (dormant commerce clause not implicated even though California clean fuel regulations imposed additional costs on maritime vessels).

An airline's pay policies clearly fall in the latter category of cases. Unlike *Bibb*, the California Labor Code does not hold up commerce, such as air traffic, at the state line until the employer complies with its provisions. *Compare Bibb*, 359 U.S. at 529, *with Burlington*, 763 F.2d at 1114. Passenger jets take off and land on schedule regardless of an airline's pay policies. Even if compliance with the Labor Code hypothetically imposed some administrative costs on airlines, that expense is simply not the sort of burden implicating the Dormant Commerce Clause.

Despite the fact that the Labor Code does not directly affect airline operations, airlines are fond of citing two non-controlling cases to disregard state and local employment laws. This Court should reject these cases as out-of-step with Ninth Circuit and Supreme Court precedent. The first case is a 1963 state court opinion concerning whether flight attendants were entitled to receive free uniforms under California law from their employer. *See United Air Lines, Inc. v. Indus. Welfare Com*., 211 Cal. App. 2d 729, 749 (1963).[3] The *United* Court had

[3] *United* was also later overruled on other grounds by the California Supreme Court. *See Indus. Welfare Com. V. Superior Court of Kern Cty*., 27 Cal. 3d 690, 728 n. 15 (1980).

difficultly identifying any burden that free uniforms placed on interstate commerce, other than the "personnel troubles" that would arise from California flight attendants receiving free uniforms while other flight attendants had to pay for theirs. The Court even conceded that this burden "may not be very great." *Id*., at 747. Given this not-so-great burden, it is highly doubtful that *United* could survive this Court's requirement that a state law impose a *substantial* burden on interstate commerce before it exceeded constitutional limits. *See Bernstein*, 2017 U.S. Dist. LEXIS 1679, at *36.

This Court should similarly reject application of *Ward v. United Airlines, Inc*., which was built on a foundation with a number of cracks. *See* No. 15-02309, 2016 U.S. Dist. LEXIS 94803, at *14-18 (N.D. Cal. July 19, 2016). Most notably, *Ward* followed the lead of the *United* Court, and accepted a relatively small burden – an "administrative burden" – as implicating constitutional concerns. *Id*. at *15. As in *United*, there is hardly anything remarkable about this "administrative burden," or anything suggesting that its impact on interstate commerce is *substantial* as required by this Court's precedent. *See Burlington*, 763 F.2d at 1114 (operating losses must be "severe enough to threaten the railroad's operations" before Dormant Commerce Clause could possibly be invoked); *Barclays*, 10 Cal. App. at 1755. Moreover, this administrative burden is grossly exaggerated as a practical matter. As Appellant illustrated below, it is actually quite simple for a

large corporation to draft a wage statement that complies with requirements from all 50 states, and many large entities do precisely that. (Plaintiff's Motion for Partial Summary Judgment [Dkt. 58], *Oman v. Delta Airlines, Inc.*, No. 3:15-cv-00131-WHO, at 20 (N.D. Cal. Jan. 4, 2017) ("a wage statement that complies with California law and includes the employer's phone number would comply with every state paystub law."), 158-168 (nationwide ADP survey of wage statement law). The *Ward* Court did not consider that reality when suggesting that compliance with California law somehow required pilots to receive conflicting wage statements of varying formats from different states. *See Ward*, 2016 U.S. Dist. LEXIS 94803 at *15-16.

Moreover, the mere existence of a "patchwork" of state laws, as it was characterized in *Ward*, is not sufficient to implicate the Dormant Commerce Clause here. After all, Congress has expressly decided that state employment laws can comfortably coexist with each other, and with the federal Fair Labor Standards Act (FLSA). *See* 29 U.S.C. § 218(a) (No provision of this chapter or of any order thereunder shall excuse noncompliance with any… State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter…"). Through Section 218, Congress "made clear its intent not to disturb the traditional exercise of the state's police

powers with respect to wages and hours more generous than the federal standards." *Pac. Merch.*, 918 F.2d at 1421. It therefore cannot be said that application of California law in this context disrupts any uniform system of regulation.

This Court should reject the application of the Dormant Commerce Clause in these circumstances. The burdens that are typically cited by airlines to avoid compliance with California law are no more remarkable than the general burdens that other large multi-state companies face, and certainly do not rise to constitutional proportions.

CONCLUSION

Amicus CELA respectfully requests that the orders and the judgment of the district court be reversed.

Dated: May 5, 2017

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Dated: May 5, 2017

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