No. S259172

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JESSICA FERRA,
Plaintiff-Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,
Defendant-Respondent.

After a Decision by the Court Of Appeal
Second Appellate District Case No. B283218
Appeal From the Los Angeles County Superior Court, Hon. Kenneth R. Freeman (Los Angeles Super. Ct. No. BC586176)

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JESSICA FERRA; PROPOSED BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

California Cases

Federal Cases

State Statutes

Federal Statutes and Regulations

IWC Wage Orders

Other Authorities

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Proposed amicus California Employment Lawyers Association ("CELA") requests leave to file the accompanying amicus curiae brief in support of petitioner Jessica Ferra.

Interest of the Amicus Curiae

CELA is an organization of California attorneys whose members represent employees in California and federal employment law cases, including wage-and-hour class actions similar to this. CELA and its members have a substantial interest in ensuring the vindication of the public policies codified in the California Labor Code and Industrial Welfare Commission's Wage Orders, and have taken a leading role in the effort to protect and advance the statutory and common law rights of California workers, including by submitting amicus briefs and letters and appearing before this Court in such recent cases as *Kim v. Reins Intl. Cal., Inc.* (2020) 9 Cal.5th 73; *Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1038; *Troester v. Starbucks, Corp.* (2018) 5 Cal.5th 829; *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903; *Augustus v. ABM Securities Services, Inc.* (2016) 2 Cal.5th 257; *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348; and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004.

How the Proposed Amicus Brief Will Assist the Court

The issue in this case concerns the meaning of the phrase, " . . . the employer shall pay the employee one [] hour of pay at the

employee's regular rate of compensation," in Labor Code section 226.7(c) and Industrial Welfare Commission ("IWC") Wage Order No. 5-2001, sections 11(B) (meal periods) and 12(B) (rest periods).

CELA agrees with petitioner and dissenting Justice Lee Smalley Edmon, who persuasively analyzed why the Legislature and IWC intended this one-hour "regular rate" calculation to encompass all non-discretionary components of an affected employee's income. CELA fully agrees with that analysis and the conclusion that the Legislature and IWC intended the "regular rate" for meal-and-rest break penalty purposes to be calculated the same way the "regular rate" has long been calculated under Labor Code section 510(a) and Wage Order 5-2001 section 3(A)(1)(a), which require employees who work overtime hours to be "compensated [for that work] at not less than [1-1/2 times] the employee's regular rate of pay."

CELA does not repeat petitioner's arguments in the accompanying brief. Rather, it presents additional support for those arguments and for Justice Edmon's cogent analysis of the meaning of the phrase "pay . . . at the employee's regular rate of compensation" in Labor Code section 226.7(c) and Wage Order No. 5-2001 section 11(B).

In the accompanying brief, CELA demonstrates why the text, structure, and regulatory and legislative history of California's meal-and-rest-break premium laws, and logic and common sense, compel the conclusion that the Legislature and IWC intended the words "compensation" and "pay," and the phrases "pay . . . at the employee's regular rate of compensation"

and "be compensated at … the regular rate of pay for an employee" in Labor Code sections 226.7(c) and 510(a) and their Wage Order counterparts all to mean the same thing. CELA will further show that there is *no* evidence that the Legislature or IWC meant "pay . . . regular rate of compensation" to mean "pay the base hourly rate only" (except with respect to those employees, not at issue here, whose *only* source of income is a base hourly rate), while there is considerable legislative and regulatory evidence to the contrary.

Finally, CELA will show that the Court of Appeal's mistaken construction of Section 226.7 undermines the purpose of the IWC's and Legislature's remedial scheme, creating a perverse incentive for employers to reduce their economic exposure for meal-and-rest-break violations by cutting employees' base hourly rates to minimum wage levels while paying the difference in fixed periodic bonuses – a change that will adversely affect *all* employees whose compensation includes a base-rate component.

Conclusion

For the foregoing reasons, the Court should grant amicus curiae CELA's application for leave to file the attached amicus brief.[1]

[1] No party or counsel for a party to this appeal authored any part of this amicus brief or made any monetary contribution thereto. No persons other than the amicus and its counsel made monetary contributions to the preparation or submission of this brief.

Dated: September 30, 2020

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INTRODUCTION

In 2000, the California Legislature enacted Labor Code section 226.7 to provide a self-executing premium pay remedy of "one additional hour of pay at the employee's regular rate of compensation" for meal-and-rest-break violations. In considering how to calculate that remedy for an employee whose income includes a base hourly rate plus a non-discretionary periodic bonus, the divided Court of Appeal panel ruled that the Legislature intended Section 226.7's premium-pay calculation to be limited to the base hourly rate only, even though nearly identical statutory and regulatory language in state and federal overtime law has long been construed to require all non-discretionary income to be included in calculating the "regular rate."

In dissent, Justice Lee Smalley Edmon explained where the panel majority got it wrong and why the text of Section 226.7(c), on its face and in its legislative and historical context, compelled the conclusion that the Legislature and the Industrial Welfare Commission ("IWC") (whose Wage Order language the Legislature borrowed nearly word for word) intended the "regular rate" under Labor Code section 226.7(c) and IWC Wage Order 5-2001 sections 11(B) and 12(B) to be construed the same way as "regular rate" under Labor Code section 510(a) and Wage Order 5-2001 section 3(A)(1)(a) – i.e., as requiring all non-discretionary components of employee income to be included in the calculation.

Respondent Loews Hollywood Hotel, LLC ("Loews"), like the panel majority, contends that the Legislature and IWC could

not have intended premium pay under California meal-and-rest-break law to include the same components as premium pay under California overtime law because the meal-and-rest-break statute and Wage Order provisions refer to "regular rate of compensation" while the overtime statute and Wage Order provisions refer to "regular rate of pay," suggesting that *some* difference must have been intended. As Justice Edmon explained, though, the operative phrase in Section 226.7(c) and its Wage Order counterparts is "regular rate," a term of art that the IWC and Legislature drew from a well-established, decades-old body of federal and state overtime law, which requires consideration of all components of an employee's non-discretionary remuneration. Justice Edmon also pointed to the interchangeable use of the synonymous words "pay" and "compensation" throughout the Labor Code and case law and in Sections 226.7(c) and 510(a) themselves (as well as in their Wage Order counterparts, and in the IWC's 2000 Statement of Basis); and she explained why, textually and historically, appending the words "of pay" rather than "of compensation" to the term of art "regular rate" in Section 226.7(c) could not reasonably be construed as conveying an intent to require a different construction, let alone a construction never expressed in the IWC's Statement of Basis or Section 226.7's legislative history.

The panel majority focused almost entirely on the words "pay" and "compensation" and the canon of statutory construction that when the Legislature use different words, it often intends different meanings. But those two words "pay" and

"compensation" are synonyms, with no meaningful difference between them, and the Legislature and IWC used them as synonyms throughout Sections 226.7(c) and 510(a), as well as in other sections of the Labor Code and other Wage Order provisions.

The obligation of an employer under Section 226.7(c) to "*pay* . . . at the employee's regular rate of *compensation*" is materially indistinguishable from the right of an employee to be "*compensated* at … the regular rate of *pay* for an employee" under Section 510(a). The operative language in both sentences is the term of art "regular rate" and both sentences use the same words, although in different order.

Nothing in Section 226.7 or Sections 11(B) or 12(B) of Wage Order 5-2001 equates "regular rate of compensation" with "base hourly rate only" (except for those employees whose *only* income is a base hourly rate, who are not affected by the dispute in the case). Nor is there any evidence in the statutory language, statements of legislative purposes, or IWC's Statement of Basis indicating that the Legislature and IWC intended the phrase "regular rate of compensation" to be limited to an employee's base hourly rate of pay only, regardless of how that employee happens to be compensated.

As a self-executing statute (which requires employers to pay the required wage premium upon failing to provide a legally mandated meal or rest period), Section 226.7's meaning was intended to be easily applied and understandable for all employers and workers, regardless of how those workers are

compensated. If the Legislature had intended to distinguish between the "regular rate" for meal-and-rest-break purposes and the "regular rate" for overtime purposes, it would have said so expressly, and would not have adopted such a significant distinction by referring to the employer's obligation to "pay . . . the employee's 'regular rate of compensation'" without further explanation.

For California employees who earn only a base hourly wage rate, calculation of the meal-and-rest-break wage premium under Section 226.7(c) is straightforward and undisputed: just add an hour of pay at the employee's base hourly rate. For California employees who have no base hourly wage rate or whose base rate rarely if ever factors into their actual pay (e.g., if their pay is principally based on piece rates, commissions or other incentive pay, or who are salaried), calculation of the meal-and-rest-break wage premium is also straightforward and undisputed: just divide the employee's total non-discretionary pay (not counting overtime premiums) by the total number of hours worked (again, the same way "regular rate" is calculated for overtime purposes). (*See Ferra v. Loews Hollywood Hotel* (2019) 40 Cal.App.5th 1239, 1258-59 & nn.2-3 (dissent); *see also id.* at 1251 [distinguishing the "mortgage consultants" in *Ibarra v. Wells Fargo Bank, N.A.* (C.D. Cal., May 8, 2018) 2018 WL 2146380 at *3, whose "normal compensation was not comprised solely or even primarily of pay calculated at an hourly rate" and whose "hourly pay was stated to be only an advance on commissions"]; Loews' Answering Br. ("Ans. Br.") at 57 [same].)

This case concerns a third, smaller group of employees whose compensation comprises an hourly base rate *plus* an additional amount (like petitioner Ferra's periodic non-discretionary bonus). The question before the Court is whether the Legislature silently intended the term "regular rate of compensation" to have a special meaning that applies to that small category of employees only, without having ever stated any intention to impose special adverse treatment on those particular employees.

The panel majority's construction of Section 226.7(c) is flawed for the reasons that Justice Edmon and petitioner identified, and for the additional reasons that we discuss below. That construction, if accepted, would also create a dangerous incentive, which the Legislature and IWC surely did not intend. It would encourage employers facing the obligation to pay future meal-and-rest-break premium penalties to reallocate substantial portions of their employees' income from a base hourly rate to a fixed periodic bonus, thus limiting their Section 226.7(c) exposure, avoiding the statute's deterrent effect, and undermining the public policy favoring regular work breaks to protect worker health and safety.

The panel majority strained to interpret "regular rate of compensation" differently from "regular rate of pay," despite the lack of evidence that the Legislature or IWC intended such a different meaning. Sometimes, the simplest explanation is the correct one. That is true here. The Legislature and IWC used the terms "regular rate of pay" and "regular rate of compensation"

interchangeably, and that is how those terms should be construed.

ARGUMENT

I. THE LEGISLATURE AND IWC INTENDED "PAY AT THE . . . REGULAR RATE OF COMPENSATION" UNDER LABOR CODE SECTION 226.7 TO HAVE THE SAME MEANING AS "COMPENSATE[] AT THE . . . REGULAR RATE OF PAY" UNDER LABOR CODE §510(a) AND FEDERAL OVERTIME LAW.

All available evidence compels the conclusion that the Legislature and IWC intended "regular rate of compensation" in Labor Code section 226.7(c) and Wage Order 5-2001 sections 11(B) and 12(B) to mean the same thing as "regular rate of pay" in Labor Code section 510(a) and Wage Order 5-2001 section 3(A)(1)(a) – which all parties and the panel majority agree requires the regular rate for overtime premiums to be calculated based on *all* forms of compensation paid to the employee (with limited exceptions such as purely discretionary bonuses).

As Justice Edmon recognized in her thoughtful analysis, three principles of statutory interpretation are most compelling here: the presumption that the Legislature is aware of the judicial construction of existing laws; the recognition that the Legislature, like any other user of language, sometimes uses synonyms with the intent that they be construed as synonyms; and the principle that remedial statutes like section 226.7 must be liberally construed. (*Ferra*, 40 Cal.App.5th at 1256 (dissent).) CELA will not repeat Justice Edmon's analysis, which like petitioner's stands persuasively on its own, but will instead provide additional support for that analysis.

The Court of Appeal majority rested its construction of Section 226.7(c) almost entirely on the hoary canon that "'[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.'" (*Ferra*, 40 Cal.App.5th at 1247 (majority opinion) [quoting *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117]; *see also Ferra*, 40 Cal.App.5th at 1268 (dissent) [noting the majority's uncritical reliance on this canon].) But no single canon of construction is ever determinative, as the canons (which are often inconsistent with one another) are just guides to interpretation that courts may draw upon where the statutory text is otherwise unclear; and there are several reasons why that particular canon cannot dictate the outcome here.[2]

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[2] As a leading legal scholar once observed, "there are two opposing canons on almost every point." (Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); *see also* Antonin Scalia & Bryan A. Garner, READING LAW at 68 (2012), available at https://www.mobt3ath.com/uplode/book/book-67921.pdf ["No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions."].)

The canons of statutory interpretation are "merely aids to ascertaining probable legislative intent." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 521 n.10; *see also Chickasaw Nation v. United States* (2001) 534 U.S. 84, 94 [canons of statutory interpretation are "not mandatory rules. They are guides that need not be conclusive."] [quotation marks omitted].) While the canons can serve as "tools to assist in interpretation," they are "not the formula that always determines it" (*City of Palo Alto v. Public Emp. Relations Bd.* (2016) 5 Cal.App.5th 1271, 1294 [citations omitted]), and they may not be applied to "defeat the

As Justice Edmon pointed out, the canon that "presumes" (at least in some circumstances) that the Legislature intends different words in "*a* statute" to have different meanings (*Briggs*, 19 Cal.4th at 1117 [emphasis added]) sheds no light on *what* that intended difference might be. (*Ferra*, 40 Cal.App.5th at 1269 (dissent).) Thus, even if that canon applied to the text of Section 226.7(c) standing alone, or to the text of Section 226.7(c) as compared to the text of Section 510(a), it could still not explain what difference the Legislature might have intended.

Loews suggests that the Legislature faced a binary choice between two potential meanings of "regular rate of compensation" in Section 226.7(a): either including all forms of non-discretionary remuneration, just as Section 510(a) has long been construed, or excluding all forms of remuneration other than the "base hourly rate," which is Loews' preferred construction. (Ans. Br. at 27.) But even if the Legislature had intended "regular rate of compensation" in Section 226.7(c) to mean something different than "regular rate of pay" in Section 510(a), there would still be no way to determine from the statutory language what that difference was supposed to be. The phrase "regular rate," removed from its historical context and settled construction, could have meanings ranging from the least protective (base hourly rate only) to the most (all forms of remuneration, whether non-discretionary or not), and all variants in between (i.e., as

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underlying legislative intent otherwise determined." (*Dyna-Med, Inc. v. Fair Emp. & Housing Comm'n* (1987) 43 Cal.3d 1379, 1391.)

including only some forms of non-discretionary income, such as shift differentials, commissions, piece rate payments, or other types of bonus payments). The fact that the Legislature and IWC did not expressly refer to any of these formulations provides strong indication that they did not intend any difference in how the "regular rate" should be calculated for meal-and-rest-break versus overtime premium purposes.

A. The Legislature Should be Presumed to Have Used the Term "Regular Rate" in Section 226.7 as it Has Long Been Used in the Wage-and-Hour Context.

As Justice Edmon and petitioner have demonstrated, the two-word term "regular rate" as used in Section 226.7 (and Section 510(a) and the parallel Wage Order provisions) is a term of art with a long-established meaning in wage-and-hour law. (*Ferra*, 40 Cal.App.5th at 1258-61 (dissent); Petitioner's Opening Brief ("Pet. Br.") at 33-52; Petitioner's Reply Brief ("Pet. Reply Br.") at 11-18.) This Court should presume that the Legislature and IWC intended that term to be interpreted in Section 226.7 of the Labor Code and in Sections 11(B) and 12(B) of the Wage Orders just as it has always been interpreted in other wage-and-hour contexts. (*See Ferra*, 40 Cal.App.5th at 1257 (dissent) and cases cited; *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785 ["Where legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the same construction, unless a contrary intent clearly appears."].)

Calculation of the "regular rate" has historically required consideration of all non-discretionary remuneration, including hourly wages, differentials, bonuses, commissions, piece rate, salary, and other similar forms of pay. (*See* 29 U.S.C. section 207(e); 29 C.F.R. section 778.108; *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, 555.) The phrase "regular rate" originated in the federal Fair Labor Standards Act, which has provided since 1938 that an employee's overtime premium must be calculated based on the "regular rate at which [the employee] is employed." (29 U.S.C. section 207(a)(1).) The IWC subsequently borrowed that term of art in stating how overtime premium wages should be calculated under California law, while appending the words "of pay" to the term "regular rate" – without intending that change of language to convey any different meaning. (*Ferra*, 40 Cal.App.5th at 1260 (dissent).) The Legislature, in turn, borrowed the IWC's "regular rate of pay" formulation when it enacted Labor Code section 510(a) in Assembly Bill 60 ("AB 60") in 1999, again with slight but substantively immaterial differences.[3]

[3] Section 3(A)(1)(a) of the Wage Orders states that overtime work "is permissible provided the employee is compensated for such overtime at not less than: (a) One and one-half (1-1/2) the employee's regular rate of pay," while the second sentence of Section 510(a) states that overtime work "shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee." Neither Loews nor the panel majority suggests that *these* differences reflect any material change in how overtime premium pay must be calculated.

The following year, in 2000, the IWC used the phrase "regular rate" again, this time to state how meal-and-rest-break premium should be calculated under California law. This time, instead of stating that the employee shall be "compensated . . . at not less than [1-1/2 times] the employee's regular rate of pay," as provided in section 3(A)(1)(a) of the earlier Wage Orders, the IWC used the active voice and a different word order, stating "the employer shall pay the employee [one] hour of pay at the employee's regular rate of compensation . . . ." (Wage Order 5-2000 sections 11(B), 12(B).) Again, the Legislature followed suit, using almost the identical language in Section 226.7(c).[4]

The consistent thread from the FLSA to state overtime law to state meal-and-rest-period law is the phrase "regular rate." No one disputes that the Legislature and IWC, in using the phrase "regular rate of pay" in Labor Code section 510(a) and the Wage Orders, meant the same thing that Congress meant by the phrase "regular rate at which [the employee] is employed" in the FLSA – even though the IWC and Legislature appended different words to the phrase "regular rate" (and adopted slightly different formulations of the employer's payment obligation that, once again, made no substantive difference). (*See, e.g.*, *Alvarado*, 4

[4] Sections 11(B) and 12(B) of the Wage Orders states that if an employer fails to provide a legally mandated meal period or rest break, "the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation . . . .," while Section 226.7(c) states that in such circumstance, "the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation . . . ." Again, the slight differences in phrasing are immaterial.

Cal.5th at 555; *Ferra*, 40 Cal.App.5th at 1260-61 (dissent); DLSE Enforcement Manual §49.1.2 ["In determining what payments are to be included in or excluded from the calculation of the regular rate of pay, California law adheres to the standards adopted by the U.S. Department of Labor to the extent that those standards are consistent with California law."].)

The panel majority's supposition that the IWC and Legislature intended the term "regular rate" in the meal-and-rest-period context to mean something different than "regular rate" as used in the overtime context (because the operative sentence begins with "pay" and ends with "of compensation" rather than beginning with "compensated" and ending with "of pay") is not supported by any evidence in the regulatory or legislative record. Considering that the term "regular rate" had been in regular, consistent use under the FLSA for more than a half-century before the IWC borrowed it in 1999-2000, it would have been exceedingly strange for the IWC to have borrowed that term with the intent that it have a different meaning in the meal-and-rest-break context than in the overtime-wage context, at least not without stating that intent expressly (or expressly defining the term "regular rate of compensation" to mean "base hourly rate only" – or to use the phrase "base hourly rate only" rather than "regular rate of compensation" in Section 226.7(c)).

When the Legislature enacted Section 226.7 in 2000, it merely adopted the language used by the IWC. (*See Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1107 [quoting Senate Rules Committee's statement that the language was

"intended to track the existing provisions of the IWC wage orders regarding meal and rest periods"].) If the Legislature had intended "regular rate" in Section 226.7 to have a different meaning than "regular rate" in Section 510, it would have said so. (*See Ferra*, 40 Cal.App.5th at 1265 (dissent).)

B. The Legislature and IWC Used the Synonyms "Compensation" and "Pay" -- and the Synonymous Phrases "Regular Rate of Compensation" and "Regular Rate of Pay" -- Interchangeably.

As Justice Edmon also correctly observed, the Legislature and IWC have repeatedly used the terms "pay" and "compensation" interchangeably as synonyms for "wages." (*Ferra*, 40 Cal.App.5th at 1266-68 (dissent); *see also* Pet. Br. at 57-61, 67; *Murphy*, 40 Cal.4th at 1104 n.6 ["the Legislature has frequently used the words 'pay' or 'compensation' in the Labor Code as synonyms for 'wages.' … The same is true of the IWC wage orders."].)[5] Both terms are also used in Sections 226.7 *and* 510, just in different order. (*Ferra*, 40 Cal.App.5th at 1267 (dissent).)

Despite this consistent, synonymous usage, the panel majority (*id.* at 1247 n.4) and Loews (Ans. Br. at 44-45) state that their narrow construction of Section 226.7 is supported by an alternative definition of "compensation" that makes no sense in the context of *either* statute. According to the panel majority and Loews, the Legislature and IWC intended "regular rate of

[5] The "usual and ordinary sense" of the word "compensation" is "payment or reward in any form." (*Johnson v. Mattox* (1968) 257 Cal.App.2d 714, 718; *see also Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 32.)

compensation" to draw its meaning from the 4th edition of the American Heritage Dictionary, which includes among its definitions of "compensation" "money, given or received as payment *or reparation*, for a service or a loss." (*Ferra*, 40 Cal.App.5th at 1247 n.4; Ans. Br. at 44-45 [emphasis added].) Loews contends that because this definition includes "reparation … for … a loss" and not just "payment … for a service," the Legislature and IWC must have intended "regular rate of compensation" in Section 226.7(c) to be limited to reparations, which to Loews means restitution for one hour of base rate wages, rather than one hour of actual income (although Loews never explains why that calculation would comport with the Legislature's intent). (Ans. Br. at 45.)[6]

There is no evidence that the Legislature or IWC, when requiring employers that fail to provide a legally mandated meal period or rest break to "pay the employee one additional hour of pay at the employee's regular rate of compensation," intended the secondary meaning of "reparation … for a loss" rather than the primary meaning of "payment for a service." Even if such evidence existed, moreover, it would not explain why the correct

[6] Had the Court of Appeal majority consulted Black's Law Dictionary instead of the American Heritage Dictionary, it would have found that "compensation" means "Remuneration and other benefits received in return for services rendered; esp., salary or wages" (Compensation, Black's Law Dict. (11th ed. 2019)); and "pay" means "Compensation for services performed; salary, wages, stipend, or other remuneration given for work done" (Pay, Black's Law Dict. (11th ed. 2019)). Justice Edmon found similarly synonymous definitions of "compensation" and "pay" in Merriam-Webster's. (*Ferra*, 40 Cal.App.5th at 1266 (dissent).)

interpretation of the employee's "regular rate" for "reparation … for a loss" must be the employee's base hourly rate, when all other "regular rate" calculations under state and federal wage-and-hour law are based on a prorated share of all non-discretionary income.

Dictionary definitions are sometimes a useful tool in statutory interpretation, but they are no substitute for analyzing the words used by the Legislature. As Justice Edmon observed, the Legislature used the terms "compensation" and "pay" throughout Sections 226.7(c) and 510, in sentences whose structure makes plain that the identical meaning was intended by both words. (*Ferra*, 40 Cal.App.5th at 1267 (dissent).)

Section 226.7(c) provides, "If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, … the employer shall *pay* the employee one additional hour of *pay* at the employee's regular rate of *compensation* for each workday that the meal or rest or recovery period is not provided." (Emphasis added.)

Section 510 provides, "Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek … shall be *compensated* at the rate of no less than one and one-half times the regular rate of *pay* for an employee." (Emphasis added.)

The Legislature's use of the same combination of "pay" and "compensation" in both statutes, although in slightly different order, strongly suggests that the Legislature intended those words to be interpreted according to their common meanings, and

thus as synonyms. If the Legislature had meant "pay" and "compensation" to have different meanings (and particularly if it had meant that "compensation" should mean "reparation for a loss"), the parallel sentences in both statutes would make little sense.[7] As Justice Edmon recognized, the Legislature's use of "substantially similar" language in closely related statutes is a persuasive indicator that the Legislature intended that language to have the same meaning in both statutes. (*Ferra*, 40 Cal.App.5th at 1267-68 (dissent) (citing *Moran*, 40 Cal.4th at 785).)

Applying the ordinary plain meaning of "compensation" in context, then, this Court should find that the Legislature intended "regular rate of compensation" in Section 226.7 to have the same meaning as "regular rate of pay" – in the sense of remuneration, or income – just as those terms had been used synonymously in the Labor Code before Section 226.7 was enacted.

The fact that the Legislature and IWC used the phrase "regular rate of compensation" *as well as* the phrase "regular rate of pay" in several pre-2000 overtime law enactments further supports Justice Edmon's conclusion that California lawmakers

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[7] For example, Loews' "reparation for a loss" definition of "compensation" makes no sense in the context of the rest of Section 226.7. Under Loews' reading, an employer would pay an employee for a missed or late break one hour of pay at the employee's regular rate *of reparation for a loss*. How is an employee's "regular rate of reparation for a loss" to be calculated? Why would that amount be equal to the employee's base hourly rate?

intended those phrases to be synonymous and interchangeable. (*See Ferra*, 40 Cal.App.5th at 1267 (dissent) [analyzing Labor Code section 204.3 (enacted in 1993) and 751.8 (enacted in 1995)]; *see also* Pet. Br. at 60-61.)[8] This Court should not strain to impose different meanings on words that the Legislature has repeatedly used as synonyms. (*See also Ferra*, 40 Cal.App.5th at 1266 (dissent) [identifying numerous cases where the courts have interpreted different terms as synonyms based on the Legislature's use of those terms in context].)[9]

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[8] Section 204.3(a), which provides compensatory time in lieu of overtime premium pay, states: "An employee may receive, in lieu of overtime compensation, compensating time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by law. If an hour of employment would otherwise be compensable at a rate of more than one and one-half times the employee's *regular rate of compensation*, then the employee may receive compensating time off commensurate with the higher rate." [Emphasis added]. Section 751.8(b), which provides overtime pay for mine and smelter workers, states: "All work performed … in excess of 40 hours in a workweek, shall be compensated at one and one-half times the employee's *regular rate of compensation*." [Emphasis added]. Further evidence that the Legislature and IWC used the two formulations interchangeably is shown by Wage Order 16, which applies to mine workers, and in which the IWC defined overtime premium pay by reference to the employee's "regular rate of pay." (Wage Order 16, section 3(A).)

[9] Recognizing that "pay" and "compensation" are used as synonyms does not render any word meaningless or surplusage. It simply means that the two words share the same meaning. (*See, e.g.*, *Wachovia Bank v. Schmidt* (2006) 546 U.S. 303, 314 [recognizing that Congress sometimes uses words as "synonym[s] or alternative[s]"]; *In re Miller* (10th Cir. BAP 2014) 519 B.R. 819, 823 n.22 ["Congress certainly does use synonyms in its

The most persuasive evidence of the Legislature's intent to treat "regular rate of pay" and "regular rate of compensation" as synonyms in Section 226.7(c) is the fact that the IWC, whose meal-and-rest-break wage premium language the Legislature borrowed without revision, used those two terms interchangeably in its 2000 Statement as to Basis, using the phrase "regular rate of compensation" to state the governing standard and the phrase "regular rate of pay" to describe how that standard should be applied. (*See* Pet. Br. at 71-72; Reply Br. at 29; *Ferra*, 40 Cal.App.5th at 1262 (dissent).) If the IWC had intended a different "regular rate" calculation for meal-and-rest-period premiums than for overtime pay premiums (either for all employees or for the narrow category of employees like petitioner Ferra whose regular rate for overtime purposes includes a base hourly rate plus a periodic non-discretionary bonus), the Statement of Basis is where the IWC would have made that intent clear. But the IWC gave no indication of having such hidden intent.

C. To the Extent Any Ambiguity Remains, the Principle of Liberal Construction Requires the Adoption of the Most Protective Construction Consistent with the Statutory Language.

Section 226.7 is a remedial statute that, in case of ambiguity, must be construed liberally to protect the rights of affected workers. (*Ferra*, 40 Cal.App.5th at 1256-57 (dissent).) "A statute which is remedial in nature and in the public interest is

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drafting, and courts should not strain to interpret words differently when their ordinary meaning is synonymous."].)

to be liberally construed to the end of fostering its objectives. … "[W]herever the meaning is doubtful, it must be so construed as to extend the remedy." (*People ex rel. Dep't of Transp. v. Muller* (1984) 36 Cal.3d 263, 269 [internal quotation marks omitted].) To the extent the reference to "regular rate of compensation" in Section 226.7 is ambiguous, the principle of construing remedial statutes in the most protective, textually supportable manner requires a construction of Section 226.7 that preserves, rather than arbitrarily constrains, the traditional methodology for calculating an employee's "regular rate."

The panel majority acknowledged that the Legislature and IWC enacted the one-hour meal-and-rest-break wage penalty provision to further the twin goals of deterrence and compensation, while concluding that paying only the base rate to workers in petitioner's circumstances would be adequate to satisfy those goals. (*Ferra*, 40 Cal.App.5th at 1252 ["Requiring employers to compensate employees with a full extra hour at their base hourly rate for working through a 30-minute meal period, or for working through a 10-minute rest break, provides a premium that favors the protection of employees."].) But it is for the Legislature and the IWC, not the courts, to decide how much employee protection is enough; and to the extent Section 226.7 is unclear about whether the Legislature intended application of the traditional "regular rate" calculation, the more generous of the two competing interpretations must prevail. (*Muller*, 36 Cal.3d at 269 [adopting the more generous interpretation where language of remedial statute was ambiguous].)

D. There Is No Evidence That the Panel Majority's and Loews' Interpretation of "Regular Rate of Compensation" Is What the Legislature Intended.

The panel majority never explains *why* the Legislature and IWC would have intended "regular rate of compensation" to mean "base hourly rate only" in the meal-and-rest-break premium context. Nor did any of the federal district court decisions cited by the panel offer any explanation. (*See Ferra*, 40 Cal.App.5th at 1250-51.) Loews presents a complicated argument about how premium pay for overtime violations serves different purposes than premium pay for meal-and-rest-period violations. But that argument does not withstand scrutiny, and there is absolutely no evidence that the IWC or Legislature even considered that argument, let alone was persuaded by it.

1. Section 226.7 Does Not Contain Any Language Referring to the Employee's Base Hourly Rate of Pay.

There are several textual reasons why neither the Legislature nor the IWC could have intended the phrase "regular rate of compensation" to refer to an employee's base hourly rate of pay. At the risk of stating the obvious, neither the Legislature nor the IWC expressly referred to the employee's "base hourly rate" of pay or any comparable formulation. The lawmakers' choice of language is important, because both bodies used express "hourly rate" language in other contemporaneously adopted Labor Code and Wage Order provisions.

The Legislature enacted Section 510 in 1999, as part of AB 60, the Eight-Hour Day Restoration and Workplace Flexibility

Act of 1999. Section 510(a) bases the measure of an employee's overtime compensation on the employee's "regular rate of pay." By contrast, other provisions in AB 60 make express reference to an employee's "hourly rate." For example, Labor Code Section 514, enacted as Section 8 of AB 60, provides, "This chapter does not apply to an employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a *regular hourly rate of pay* for those employees of not less than 30 percent more than the state minimum wage." (Emphasis added.) Similarly, Labor Code section 515(d), enacted as Section 9 of AB 60, provides, "For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's *regular hourly rate* shall be 1/40th of the employee's weekly salary." (Emphasis added.) The 1999-2000 Legislature thus undoubtedly knew how to describe an "hourly rate" when it wanted to, yet it chose not to use the term "hourly rate" when enacting Section 226.7(c) in 2000 as part of Assembly Bill 2509.

The IWC, too, knew how to refer to an employee's base hourly rate rather than the employee's "regular rate" when that was its intent. For example, in Section 3(B)(3) of Wage Order 5, the IWC specified that the adoption, repeal, or nullification of an alternative workweek schedule shall not result in the reduction of an employee's "*regular rate of hourly pay*." (Emphasis added.) And when the IWC chose to allow collective bargaining parties to

agree to certain different terms and conditions than those set forth in the Wage Orders, it gave those rights to parties to an agreement where employees receive a "*regular hourly rate of pay*" of not less than 30 percent more than the minimum wage. Wage Order 5-2001, section 3(L). (Emphasis added).

By contrast, the Wage Order's meal-and-rest-break provisions do not include any reference to "base rate" or "regular rate of hourly pay." The IWC's choice not to include such language, but instead to require employers to "pay the employee one (1) hour of pay at the employee's regular rate of compensation," reflects a deliberate intent *not* to limit the "regular rate" to the base hourly rate only (except, of course, for those employees whose only compensation is the base hourly rate).

2. Purported Differences in the Purposes of Meal-And-Rest-Period Premium Pay and Overtime Premium Pay Do Not Support a Different Reading of "Regular Rate."

Loews' construction also cannot be justified based on any supposed difference in purpose between premium pay for overtime work and premium pay for meal-and-rest break violations. The panel majority did not purport to support its interpretation on this ground. To the contrary, it acknowledged that both forms of premium pay serve important compensation *and* health-and-welfare purposes, just as this Court recognized in *Murphy*, 40 Cal.4th at1109-10. (*See Ferra*, 40 Cal.App.5th at 1248-49.) But even if the two premium-pay statutes served somewhat different purposes, those differences could not justify

Loews' proposed interpretation of "regular rate of compensation" in Section 226.7(c) as meaning "base hourly rate only."

First, both premium pay provisions are intended to deter employers from overworking their employees (thus furthering a health-and-welfare purpose) while easing the burdens of extended worktime on those employees' health and welfare (i.e., a compensatory purpose). The panel majority recognized this. (*Ferra*, 40 Cal.App.5th at 1248-49.) And of course, state and federal authorities have long recognized that overtime premium pay serves the "dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long workweek." (*Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 423-24; *see also Bay Ridge Operating Co. v. Aaron* (1948) 334 U.S. 446, 471 [overtime premiums balance "the burdens [on workers] of overly long hours"]; *Murphy*, 40 Cal.4th at 1109 ["As has been recognized, in providing for overtime pay, the Legislature simultaneously created a premium pay to compensate employees for working in excess of eight hours while also creating a device 'for enforcing limitation on the maximum number of hours of work ... , to wit, it is a maximum hour enforcement device ... .'"] [quoting *Cal. Mfrs. Ass'n. v. Indus. Welfare Comm'n* (1980) 109 Cal.App.3d 95, 111]; *id*. at 1109 [overtime premium pay's "central purpose is to compensate employees for their time, [and] it also serves a secondary function of shaping employer conduct."].)

In *Murphy*, this Court explained that Section 226.7(c)'s premium pay requirement and Section 510(a)'s overtime pay

requirement serve the same purposes of deterrence and compensation. "The IWC intended that, like overtime pay provisions, payment for missed meal and rest periods be enacted as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." (*Murphy*, 40 Cal.4th at 1110.) In adopting the IWC's premium pay remedy, the Legislature sought to further these same purposes. (*Id.; see, e.g.*, *Cal. Mfrs. Ass'n*, 109 Cal.App.3d at 114-15; *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 113 ["[T]he Legislature views the right to a rest period as so sacrosanct that it is unwaivable."]; Lab. Code §516(a) [instructing the IWC, as part of AB 60, to adopt meal-and-rest period provisions in the Wage Orders to promote workers' health and welfare].

Despite the panel majority's recognition that the purposes of overtime and meal-and-rest period premiums are indistinguishable, and notwithstanding this Court's analysis in *Murphy*, Loews insists that the two provisions serve materially different purposes that justify attributing different meaning to the statutes' "regular rate" formulations. (Ans. Br. at 27-30.) Loews' arguments are unpersuasive.

As a threshold matter, to the extent Loews' argument turns on the notion that Section 226.7 premium pay, unlike overtime pay, is not compensatory (Ans. Br. at 28-29), its argument is foreclosed by *Murphy*. (*See Murphy*, 40 Cal.4th at 1110.)

Loews' reliance on *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, is also misplaced. *Kirby* followed

Murphy's analysis in recognizing that the Section 226.7 premium pay remedy is a wage (53 Cal.4th at 1256), but *Kirby* did not undertake any analysis of how to calculate that premium pay. (*See generally* 53 Cal.4th 1244.) That *Kirby* makes passing reference to the health-and-welfare purposes of Section 226.7 in concluding that the cause of action provided in Section 226.7 is to recover for missed meal or rest periods, and not to recover unpaid wages (*id.* at 1255; *see* Ans. Br. at 28), sheds no light on the statutory interpretation question presented in this case. In any event, this Court cannot disregard *Murphy*'s admonitions that (1) Section 226.7's purposes, like the purposes of overtime premiums, also include compensation and deterring certain employer behavior (*Murphy*, 40 Cal.4th at 1110); and (2) the Legislature uses "pay" and "compensation" interchangeably, both to mean "wages" (*id.* at 1104 n.6.).

Loews also contends that its construction of Section 226.7(c) must be correct because the one-hour wage premium does not directly correlate to the loss suffered by an employee who has not been provided a break, or a timely break, or a work-free break. (Ans. Br. at 28-30.) That argument makes no sense. First, *Murphy* attributed no significance to the lack of correlation between the premium pay remedy and the employee's loss. Instead, this Court explained that the Legislature and IWC decided to assign a fixed value to the loss occasioned by a meal-or-rest-break violation because of the difficulty of calculating such injuries, while recognizing that the "liquidated damages"-like remedies provided by section 226.7(c) are nonetheless

compensatory, not punitive. (*Murphy*, 40 Cal.4th at 1112). The fact that Section 226.7 premium pay is "linked to an employee's rate of compensation" supported *Murphy*'s analysis that the remedy serves a compensatory purpose, even though there is not a "perfect correlation" between that amount and the employee's loss from a missed, late, or interrupted break (which could be range from a few minutes to 30 minutes of lost rest time). (*Id.* at 1113-14.)

More importantly, Loews' "lack of proportionality" argument fails to explain how "regular rate of compensation" *should* be construed. After all, Loews' base-rate construction is neither more or less proportional than the traditional all-compensation "regular rate" construction. In neither case does the amount of the wage premium directly correlate to the amount of "loss" suffered by an employee who has not been provided a legally mandated meal period or rest break. Nothing in Loews' "lack of proportionality" argument thus has any bearing on which of the two competing interpretations of "regular rate" the IWC and Legislature intended.

II. THE PANEL MAJORITY'S AND LOEWS' CONSTRUCTION WOULD INVITE EMPLOYER MANIPULATION AND SPAWN UNNECESSARY LITIGATION.

Under the "base hourly rate" approach adopted by the panel majority, unscrupulous employers that currently pay employees at a base rate only, or at a base-rate-plus (as petitioner Ferra is paid) could easily immunize themselves from significant premium-pay penalties under Section 226.7(c) by the

simple expedient of converting all employees to a base-rate-plus compensation scheme, while allocating a substantial proportion of that pay to the "plus" side – i.e., by keeping the total amount of compensation unchanged, but designating the minimum-wage portion as the employees' "base rate" and the rest as a non-discretionary weekly, bi-weekly, or monthly "bonus." That result would undermine section 226.7's goals of compensation and deterrence, because it would result in dramatically lower premium pay for affected employees while largely removing the economic disincentive to non-compliance currently faced by employers deciding how strictly to comply with California's meal-and-rest-break requirements.

It has long been recognized under the FLSA and state law that the "regular rate" for purposes of overtime calculations "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." (29 C.F.R. section 778.108.) As the U.S. Supreme Court has explained, the "regular rate" "must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." (*Youngerman-Reynolds*, 325 U.S. at 424.) This is because the public policy goals underlying the "regular rate" requirement in overtime law are to deter employers from overworking their employees (by spreading work to additional employees) and to compensate employees who perform long hours of work. (*Id.* at 423-24; *see also Overnight*

Motor Transp. Co. v. Missel (1942) 316 U.S. 572, 577-78; *Murphy*, 40 Cal.4th at 1109 [overtime premiums have dual purpose of "compensat[ing] employees for their time [and] serv[ing] a secondary function of shaping employer conduct"].)

Similar considerations should govern the construction of the term "regular rate of compensation" under Section 226.7. The requirement to provide meal periods serves the "most basic demands of an employee's health and welfare." (*Cal. Mfrs. Ass'n*, 109 Cal.App.3d at 115.) Rest breaks required by the Labor Code and Wage Orders are likewise considered "so sacrosanct that [they are] unwaivable." (*Vaquero*, 9 Cal.App.5th at 113.) As such, the meal-and-rest-period requirements are "'part of the remedial worker protection framework'" that calls for the interpretation that would "'best effectuate that protective intent.'" (*Id.* [quoting *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027].)

Like overtime premiums, the premium pay remedy for meal-and-rest-period violations was intended "as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." (*Murphy*, 40 Cal.4th at 1110.) That incentive would be sharply undermined by a construction that allowed employers to designate a portion of their employees' compensation package as the only "regular" portion for purposes of calculating meal-and-rest-period premium pay.

The panel majority's and Loews' construction would also create difficulties in application and clog the courts with

litigation over how to calculate the "regular rate of compensation" of employees with different types of compensation packages. (*See* Reply Br. at 31 n.5 [citing cases evidencing several of the diverse compensation plans under which California workers are employed].) Such complications could not have been intended in a statute that is intended to be self-executing, i.e., which requires employers automatically to pay their employees an hour of premium pay on each day a required break is missed, late, or interrupted, without the employee having to file a claim with the Labor Commissioner or bring a lawsuit. (*See* Lab. Code §226.7(c).)

Consider, for example, sales employees who earn a base hourly rate plus substantial commissions. The panel majority recognizes that, even under its construction of Section 226.7(c)), those employees are entitled to a "regular rate of compensation" based on all of their compensation, as long as the base hourly rate is just an advance against commissions and not the amount those commissioned workers are usually paid. (*Ferra*, 40 Cal.App.5th at 1252 [distinguishing *Ibarra*, 2018 WL 2146380].) Loews agrees with this construction. (Ans. Br. at 57 [recognizing that in *Ibarra*, the court found that the base hourly rate "did not actually determine the compensation received" and therefore deeming *Ibarra* "inapposite" to this case].)

But nothing in the panel majority's and Loews' statutory interpretation addresses the closely related scenario in which the employees' compensation scheme includes a guaranteed base rate at the applicable minimum wage, *plus* a substantial additional

amount of incentive pay, whether it be sales commissions, piece-rate pay, or other compensation based on output. Under the panel majority's approach, such pay schemes would inevitably trigger litigation to determine the extent to which the stated minimum wage (or other base rate) is merely a subterfuge designed to artificially lower the employer's premium-pay obligations, or whether it is a true base rate within the "intent" of the IWC and Legislature – a difficult question to resolve given the absence of any indication the IWC or Legislature even considered the possibility that the "regular rate" for purposes of Section 226.7(c) would be calculated differently than the "regular rate" under Section 510(a). (*Cf. Oman v. Delta Airlines, Inc.* (2020) 9 Cal.5th 762, 778-89 [noting difficulty of determining how California minimum wage law applied to flight attendants' four applicable compensation formulas].) Litigation would also be inevitable under incentive-pay compensation schemes that guarantee fixed payments only for the employees' non-income-producing time (e.g., attending sales meetings) because in those circumstances, some hours would have an identifiable base rate while others would not. (*See Youngerman-Reynolds*, 325 U.S. at 426; *Vaquero*, 9 Cal.App.5th at 112.)

Consider, too, the large number of employees whose base hourly rate is routinely supplemented by a shift differential that entitles them to a higher rate for work at night or on weekends or under certain conditions. Under the panel majority's and Loews' statutory construction, it is not clear whether those employees would be entitled to an hour of wages only at their lower base

rate as premium pay for a missed, late, or interrupted break, or whether that shift differential pay should also be included in the calculation – or indeed, whether the premium rate would be different on different days, or on different times of day. And of course, there would inevitably be litigation over incentive-pay workers (even those working under base-rate-plus-incentive-pay compensation schemes) in cases where the workers' total income rarely fluctuates, e.g., an agricultural worker who regularly picks ten bushels per day. (*See Youngerman-Reynolds*, 325 U.S. at 425-26.)

Limiting the "regular rate" under Section 226.7(c) to the "base rate" would plunge the courts into countless debates, forcing them to determine which components of an employee's pay package actually constitute the employee's "base rate" earnings. By contrast, requiring all forms of nondiscretionary compensation to be included in the calculation of the "regular rate of compensation" will ensure that the premium pay remedy has an actual deterrent effect on employers, best effectuating the remedial purposes of the Labor Code's and the Wage Orders' meal period and rest break requirements, while providing a clear standard that can readily be applied to all kinds of workers regardless of how they are compensated.

III. THERE IS NO REASON TO DEPART FROM THE GENERAL RULE THAT JUDICIAL DECISIONS APPLY RETROACTIVELY.

Loews contends that if this Court agrees with petitioner's interpretation of "regular rate of compensation," it should nonetheless apply that decision only prospectively. (Ans. Br. at

61.) But it offers no persuasive reason to depart from the general rule that judicial decisions are presumptively applicable to all pending cases. (*See, e.g.*, *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 967; *Alvarado*, 4 Cal.5th at 572-73.)

This Court gives full retroactive application to decisions that do not "overrule[] controlling authority or a uniform body of law that might be justifiably relied on." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1023; *see also Grafton Partners*, 36 Cal.4th at 967 ["Although prospective application may be appropriate in some circumstances when our decision alters a settled rule upon which parties justifiably relied, ordinarily this is only when a decision constitutes a clear break with decisions of this court or with practices we have sanctioned by implication, or when we disapprove a longstanding and widespread practice expressly approved by a near-unanimous body of lower-court authorities."] [internal quotation marks omitted].) This general rule of retroactivity "extends fully to decisions [that] … establish the meaning of a statutory enactment." (*Burris*, 34 Cal.4th at 1023; *see also Alvarado*, 4 Cal.5th at 574 (Cantil-Sakauye, C.J., concurring) ["the presence of a degree of uncertainty regarding a civil statute's meaning does not on its own justify" limiting the retroactive effect of a judicial decision].)

Loews asserts, without citation or any supporting evidence, that "tens of thousands of California employers" have construed and applied Section 226.7 as Loews did (Ans. Br. at 10; *see also id.* at 27). Unless Loews is referring to employers of hourly-rate-only workers (whose obligations under Section 226.7(c) are not in

dispute), that assertion is beyond implausible – although no data exists to quantify the number of employers that: (1) pay some or all employees a base rate plus a non-discretionary bonus; (2) fail to provide legally mandated meal periods or rest breaks to those employees; *and* (3) voluntarily pay those employees at a *different* "regular rate" for those meal-and-rest-break violations than they pay those same employees for any overtime work.

Even if companies like Loews were not in the distinct minority, though, retroactivity analysis does not focus on how many potential defendants might be affected, but whether those potential defendants had sufficiently reasonable, legally established, reliance expectations based upon a uniform body of previously settled law.

For the reasons discussed above and by petitioner, any employer that carefully analyzed its legal obligations under Section 226.7(c) would have recognized that the Legislature, IWC, and DLSE each used the terms "pay" and "compensation" interchangeably, and that the term "compensation" in Section 226.7 was modified by the established FLSA term of art, "regular rate." (*See, e.g.*, Reply Br. at 24 [discussing DLSE 2003 opinion letter]; *id.* at 28-29 [discussing IWC's 2000 Statement of Basis].) Any prudent employer therefore should have known to incorporate all "regular rate" components into its employees' Section 226.7 premiums.

Moreover, as petitioner observes, California employers have been on notice at least since 2012 (when *Studley v. Alliance Health Servs., Inc.* (C.D. Cal. July 26, 2012) 2012 WL 12286522

was decided) that Section 226.7(c) could be construed to include all forms of non-discretionary remuneration, not just an employee's base hourly rate (for employees who had such a base rate). (Reply Br. at 42-43.) Since 2012, the federal court decisions on this issue have been decidedly mixed – again placing employers on notice of their potential liability. (*See Ferra*, 40 Cal.App.5th at 1250-52 [discussing the two conflicting lines of federal authority].)

None of the prospective-only cases cited by Loews involved such conflicting lines of authority. They all involved dramatic changes in the law that rejected previously settled principles set forth in one or more published Court of Appeal decisions. (Ans. Br. at 60.)

CONCLUSION

For the reasons stated above, in petitioner's briefs, and in Justice Edmon's dissent, the Court of Appeal's decision should be reversed and this Court's construction of "regular rate of compensation" under Labor Code section 226.7 should be made fully retroactive.

Dated: September 30, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.500(c)(1) of the California Rules of Court, I hereby certify that this brief contains 8,561 words, including footnotes, but excluding the Tables of Contents and Authorities. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

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PROOF OF SERVICE

I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On September 30, 2020, I served the following document(s):

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JESSICA FERRA; PROPOSED BRIEF

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

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(B) By U.S. Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed September 30, 2020, at San Francisco, California.

/s/ Jean Perley
Jean Perley