No. 20-55981

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY AYALA,
Plaintiff-Appellant,

v.

U.S. XPRESS ENTERPRISES, INC., and U.S. XPRESS, INC.,
Defendants and Appellees.

On Appeal from the United States District Court
for the Central District of California

Case No. 5:16-CV-00137-GW

The Honorable George H. Wu

BRIEF FOR *AMICUS CURIAE* LEGAL AID AT WORK; CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION; AND CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT ANTHONY AYALA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amici make the following disclosures:

Legal Aid at Work, California Rural Legal Assistance Foundation, and the California Employment Lawyers Association hereby certify as follows: amici have no parent corporations, have no stock, and hence, no public company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE* AND CONSENT TO FILE

Amici Curiae Legal Aid at Work,[1] California Rural Legal Assistance Foundation,[2] and the California Employment Lawyers Association[3] prosecute California wage

[1] Legal Aid at Work (formerly the Legal Aid Society – Employment Law Center) (LAAW) is a public interest legal organization founded in 1916 that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAAW has represented low-wage clients in both individual and class action cases involving a broad range of employment-related issues, including wage claims.

[2] California Rural Legal Assistance Foundation (CRLAF) is a nonprofit legal service provider that since 1986 represents low-income individuals across rural California and engages in regulatory and legislative advocacy to promote the interests of low-wage workers, particularly farm workers. CRLAF's Litigation Unit engages primarily in class and representative action litigation, enforcing workplace protections for farmworkers and other low-wage workers in rural California and recovering wages and other compensation due to them, including piece-rate farmworkers. Based on its longstanding work on behalf of immigrants and the rural poor compensated on a piece-rate basis, CRLAF holds a strong interest in the interpretation and enforcement of Labor Code section 226.2.

[3] California Employment Lawyers Association (CELA) is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including individual, class, and representative actions enforcing California's wage and hour laws. CELA has a substantial interest in protecting the statutory and common law rights of California workers 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 California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court in employment rights cases, such as *Murphy v. Kenneth Cole Prods., Inc*., 40 Cal. 4th 1094 (2007), *Gentry v. Super. Ct.*, 42 Cal. 4th 443 (2007), *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal. 4th 1004 (2012), *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522 (2014), and in cases before the Ninth Circuit.

and hour claims on behalf of low-wage workers in industries where piece-rate wage schemes are common, including the agriculture, construction, garment, manufacturing, transportation, and janitorial sectors. The workers we represent are often compensated pursuant to piece rate formulas. These pay formulas are ripe for exploitation by unscrupulous employers. The formulas create intense pressure to work in unsafe conditions and in unsafe manners to improve pay, and they can be manipulated to appear more generous than they are in reality. Absent vigorous enforcement of California Labor Code section 226.2, including enforcement by organizations like ours, these pay structures often result in workers being underpaid and bearing the risk of delay and unforeseen costs, which should be borne by their employers.

No party's counsel authored the brief in whole or in part or contributed money intended to fund preparing or submitting the brief. No person, other than amici curiae, their members, or their counsel, contributed money intended to fund preparing or submitting the brief. All parties to this appeal have consented to the filing of this brief.

INTRODUCTION

Amici submit this brief in support of Plaintiff-Appellant's request that the Court certify the following question to the California Supreme Court: Does section 226.2 of the California Labor Code permit an employer to define by unilateral policy the scope of "the activity being compensated on a piece-rate basis," Labor Code § 226.2, or is such activity "defined by reference to the mathematical formula used to calculate employee's pay?" Appellant's Opening Br. at 40.

In Section I, this brief will demonstrate that certification is warranted because this novel issue, in addition to being dispositive of one claim presented by the appeal, has broad application and important public policy ramifications. *See Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 939 F.3d 1045, 1048 (9th Cir. 2019). Specifically, the use of piece-rate pay formulas are widely and increasingly used in many industries. Although these formulas provide employers with many benefits, employers can manipulate the formulas to deny employees separate pay for work that "is not directly related to the activity being compensated on a piece-rate basis." Labor Code § 226.2. The District Court's interpretation of section 226.2 permits this manipulation by allowing employers to define the scope of activities "compensated on a piece-rate basis" to include work that does not in fact provide compensation under the piece-rate formula, thereby denying workers separate pay for those activities. Whether this interpretation comports with the language and

intent of section 226.2 is an important California state law question; the California Supreme Court should be provided an opportunity to address the issue.

The brief also addresses two additional points. In Section II, the brief examines the legislative intent underlying section 226.2, and concludes such intent supports holding—should the Court decline to certify the question—that section 226.2 does not permit an employer to define the scope of the piece-rate activity. This examination comports with California's rule that, when reviewing the meaning of a California statute, a court's "primary task is to determine the lawmakers' intent." *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1082 (2005); *see also Baker v. Workers' Comp. Appeals Bd.*, 52 Cal. 4th 434, 442 (2011). Here, the legislative intent is clear: Section 226.2's purpose is to ensure that employers compensate workers separately for work unrelated to the work compensated by the piece-rate formula, regardless of whether the employer defined such work as covered by the piece-rate compensation. The Court can achieve this purpose by interpreting section 226.2 to limit piece-rate activity to work incorporated in the formula used to calculate pay.

Section III demonstrates that the District Court misread *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), in holding that team drivers are not entitled to pay for the time they are confined to the truck's sleeper-berth. Properly read, *Taco Bell* is consistent with the conclusion that the drivers are under the

control of the employer when in the sleeper-berth, and therefore entitled to pay for that time.

ANALYSIS

I. The Importance of the Interpretation of California Labor Code Section 226.2 Warrants Certification to the California Supreme Court.

This Court should certify to the California Supreme Court an important, unresolved question of California law: Does section 226.2 of the California Labor Code permit an employer to define by unilateral policy the scope of the activity being compensated on a piece-rate basis, or is such activity defined by reference to the mathematical formula used to calculate employees' pay? This question is novel, as California courts have not yet addressed it in any precedential opinions, and "presents 'important public policy ramifications,'" as it affects a broad cross section of California's workforce. *Vazquez*, 939 F.3d at 1048 (quoting *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc)). Thus, the "spirit of comity and federalism" counsels in favor of certifying this issue to the California Supreme Court. *Id.*

The California courts' interpretation of section 226.2 has broad application because numerous industries in California compensate workers according to piece rate schemes, and such schemes are growing in popularity. M.E. Davis, *A Longitudinal Study of Piece Rate and Health*, 180 Pub. Health 1, 1 (2020); John

Matthes, *An Imperfect System: Piece Rate Employment and the Impact on California's Central Valley Agriculture Industry*, 27 San Joaquin Agric. L. Rev. 67, 69 (2017) ("Piece rate employment is widespread and touches and concerns many industries."). Industries that use piece rate schemes include: construction, garment, manufacturing, transportation, delivery, automotive, agriculture, cable installation, translation, and data entry. *California Employers: Ignore Piece-Rate Compensation Rules at Your Peril*, JD Supra (Feb. 5, 2019), https://perma.cc/7G2S-VB8P.

Piece rate schemes are increasingly popular largely because of the benefits these schemes provide employers. First, these pay schemes encourage workers to work as hard as possible. Edward P. Lazear, *Compensation and Incentives in the Workplace*, 32 J. Econ. Persp. 195, 198 (2018) ("The literature is virtually unequivocal in documenting that . . . [piece rate pay] provides incentives for workers to produce."); *see also* Matthes, *supra*, at 67–68. These pay formulas also create fixed, predictable labor costs for employers. For example, by paying garment workers a fixed price per stitch, a manufacturer knows the precise cost of a piece of clothing, regardless of whether there was a production delay caused by a broken machine or a lack of proper supplies. *See* Natalie Kitroeff & Victoria Kim, *Behind a $13 Shirt, a $6-an-Hour Worker*, L.A. Times (Aug. 31, 2017), https://perma.cc/VS9K-MQYB; *see also* ER 223–24.

Although clearly advantageous to businesses, piece-rate systems impose significant burdens on workers. Piece rate schemes seem at first glance beneficial to workers due to the possibility of increased pay for increased productivity, and may be fair if administered lawfully. But workers paid according to piece rate schemes are particularly susceptible to exploitative work conditions, including unsafe work conditions and opaque pay practices. Workers paid by the piece often only learn about the exact piece formula *after* they have finished a job. Gregorio B. Encina, *Crew Workers Split Between Hourly and Piece-Rate Pay,* Cal. Agric., at 5–8 (Nov. –Dec. 1996), https://perma.cc/2DKU-4Y69. Some employers limit their costs by mid-day assigning tasks that are not compensated by the pay formula: for example, weeding fields when paid by the amount harvested, or restocking materials when paid by piece installed. *See id.*; *infra* at 11–12.

In many cases, piece rate is coupled with systemic wage theft violations. *See, e.g.*, Dominic Fracassa, *Wage Theft Costs Low-Paid California Workers $2 Billion Per Year,* S.F. Chron. (May 26, 2017), https://perma.cc/2QP4-LXSM (noting industries that recorded the highest incidence of wage theft included agriculture, car wash, garment manufacturers, hotel housekeeping, and construction). For example, of 77 garment factories in Los Angeles paying piece rate wages, the U.S. Department of Labor found violations at 85 percent of these factories. Kitroeff & Kim, *supra*. The DOL ordered the factories pay "$1.3 million

in back wages, lost overtime and damages." *Id.* The per-piece stitch rates these factories paid made obtaining a minimum wage next to impossible for workers. *See id.*

Because of the incentive to work as fast as possible inherent in the pay structure, workers paid via piece rate are significantly more likely to report injuries and other health limitations than workers paid by the hour. Davis, *supra*, at 7. These negative health outcomes are particularly pronounced for minorities, women, and low-income workers. *Id.*; *see also* Keith A. Bender et. al., *Piece Rates and Workplace Injury: Does Survey Evidence Support Adam Smith?*, 25 J. Population Econ. 569, 587 (2012).

Section 226.2's dual requirements that employees be paid for rest and recovery time and for time "not directly related to the activity being compensated on a piece-rate basis" as separate compensation "from any piece-rate compensation" are designed to curb many of the exploitative risks posed by piece-rate schemes. Ensuring that rest and recovery periods are compensated protects workers from suffering financial penalty for attending to their health and safety needs. Mandating separate compensation for time "not directly related to the activity being compensated on a piece-rate basis" ensures that workers are not assigned unpaid tasks, which circumvents California's policy that all hours worked are paid.

But if the scope of time "not directly related to the activity being compensated on a piece-rate basis" depends not on the pay formula, but instead on the employer's definition of "the activity being compensated," the protections provided by section 226.2 would be seriously diminished, harming a broad swath of California workers. *See infra* at 12–14. Because section 226.2 was enacted just five years ago, approximately, state courts have only had limited opportunity to interpret the statute, and there has been no authoritative interpretation of time "not directly related to the activity being compensated on a piece-rate basis" under section 226.2.[4] Given the novelty of this issue, and the broad effect it could have on California workers, the interpretation of "other non-productive time" warrants certification to the California Supreme Court.

II. Allowing Employers to Avoid Compensating Employees for "Nonproductive Time" Under Section 226.2 Will Harm California's Most Vulnerable Workers and Contravene Legislative Intent.

If the Court declines to certify the question to the California Supreme Court, it should conclude that the "activity being compensated on a piece-rate basis" depends on whether that activity results in additional wages under the pay formula.

[4] *Jimenez-Sanchez v. Dark Horse Express*, 243 Cal. Rptr. 3d 691 (2019) interpreted that the meaning of "the activity being compensated on a piece-rate basis" depended on "the employment agreements between defendant and the drivers." *Id.* at 702. But *Jimenez-Sanchez* was depublished, and so it is not a precedential opinion. *See* Cal. Rules of Court, Rules 8.1115 and 8.1125.

When reviewing the meaning of California statutes, a court's "primary task is to determine the lawmakers' intent." *MacIsaac v. Waste Mgmt. Collection & Recycling, Inc.*, 134 Cal. App. 4th 1076, 1082 (2005); *see also Baker v. Workers' Comp. Appeals Bd.*, 52 Cal. 4th 434, 442 (2011). Here, the legislative purpose of Labor Code section 226.2 is clear: require employers to compensate employees separately where workers cannot receive piece rate earnings for their work, regardless of whether the employer contemplated that such work would be compensated via piece-rate remuneration. In passing A.B. 1513, the legislature made clear that section 226.2 was intended to ensure that workers paid on a piece-rate scheme were paid a "separate hourly wage for all other time worked, including work performed before, after and between piece rate tasks." A.B. 1513, Assemb. Floor Analysis Rep. 4–5 (Cal. 2015) (citing *Gonzalez v. Downtown LA Motors LP*, 215 Cal. App. 4th 36, 46, 52–53 (2013)). And to effectuate that purpose, the legislature broadly defined "other nonproductive time" that must be compensated hourly as "time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis."[5] Labor Code § 226.2.

[5] The term "other nonproductive time" is a misnomer. The legislature defines "other nonproductive time" in relation to whether that time is "directly related to the activity being compensated on a piece-rate basis," not whether or not the employee is engaging in productive activity of any sort. It appears the term

The District Court's decision permits USX to avoid paying for time spent on tasks not compensated under the piece-rate formula, as required by section 226.2, by categorizing its piece rate compensation scheme to include tasks that, in reality, are wholly uncompensated. There is only one activity actually compensated by USX's piece rate scheme: driving the truck on the specified route. While it is clear that this decision will result in a loss of compensation for the truck drivers at issue, the implications extend far beyond these workers. Other industries where piece rate schemes are common, such as agriculture, construction, and garment manufacturing, are also the industries where workers are most vulnerable to wage theft. *See supra*, at 7–8.

As the legislature recognized in passing section 226.2, without appropriate limitations, piece rate payment can be used as another tool for employers to mask underpayment of wages. In a 1996 survey, agricultural workers in California explained some of the ways employers have attempted to exploit workers under piece-rate compensation schemes:

> A worker described how on a previous job he had been offered $1 per box of apricots picked. When he picked 100 boxes for the day the rate

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"nonproductive time" was derived from *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005), one of Section 226.2's judicial antecedent. In *Arementa*, the employer defined "productive" time as time "directly related to maintaining utility poles in the field," and all other time—including "traveling to and from a job site, loading or maintaining vehicles, and attending safety meetings"—as "nonproductive." *Gonzalez*, 215 Cal. App. 4th at 24; *Armenta*, 135 Cal. App. 4th at 463.

> was suddenly changed to 50 cents per box. A common view was, "I would like piece rate, but only if more effort means more pay. What they have done here is pay us less per unit of work once they found out we did too much. They forget that we put much more effort into this work by the piece." Another worker explained, "If we are making too much on piece rate we are told to also weed and that reduces our earnings."

Encina, *supra*, at 5–8.

While this survey was conducted before the enactment of section 226.2, it demonstrates how interpreting section 226.2 to provide employers latitude to define the "activity being compensated on a piece-rate basis" would harm workers. If an agricultural employer is paying employees per pound of produce harvested, but the employer can define that work to include not just the act of harvesting but also weeding, pruning, or sorting, the employee may be forced to spend significant time on uncompensated tasks. And because the employee must follow the direction of the employer or risk termination, there is little workers can do to prevent employers from adding additional unpaid tasks to their workload. Employers ultimately control which tasks workers are required to complete each day. They can change those requirements at their pleasure to manipulate worker pay.

Labor Code section 226.2 was enacted to ensure that tasks not directly related to harvesting are compensated separately under a piece rate scheme. If employers are given the flexibility to define the "activity being compensated on a piece-rate basis" in a way that incorporates activities uncompensated by the piece-

rate formula, as USX has done in the trucking industry, it will enable them to circumvent their duty to pay workers for all hours worked, thereby exacerbating poor working conditions in industries that are already plagued by wage theft and other exploitative practices.

The District Court emphasized that its interpretation of section 226.2 would "give employees and employers room to reach an agreement defining the scope of a piece-rate system[.]" ER014. This reasoning ignores the unequal bargaining power between employees and employers —a reality that "has long been fully recognized by legislation curtailing . . . employer[s'] freedom to bargain with [their] employees as [they] choose[]." *C.S. Smith Metro. Mkt. Co. v. Lyons*, 16 Cal. 2d 389, 399 (1940); s*ee also Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753 (1985) (citing 29 U.S.C. § 151); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945). This inequality means that increased latitude to determine the scope of piece rate will invariably be used to widen the scope of what counts as compensable time under any given formula. Under this interpretation, there is nothing to prevent a garment manufacturer from including daily cleaning of the factory floor into the price paid per hem stitched. Similarly, there is nothing to prevent a construction contractor from determining that the piece rate per window installed includes trips to Home Depot to purchase materials. The length of time that must be spent performing these extraneous tasks is largely outside the control

of the individual employee. Moreover, the incorporation of various tasks into piece rate pay makes it difficult for an employee to assess how the rate of pay per piece would translate into a daily or weekly salary, and therefore whether it is worthwhile to accept the job in the first place.

The District Court's interpretation frustrates the legislative purpose animating section 226.2 and would likely result in widespread changes to piece rate compensation systems across many industries. Employers would find a myriad of ways to define piece rate broadly to include a variety of tasks, as USX has done in this instance. Such changes would force employees to complete tasks for which they are wholly uncompensated, forcing them to bear the risk of externalities that the legislature has determined must be borne by the employer. Instead, to effectuate the goals of section 226.2 and the legislature's intent, the Court should conclude that "the activity being compensated on a piece-rate basis" only encompasses those tasks that in fact result in remuneration under the piece-rate formula in use.

III. The District Court Erred by Incorrectly Holding that Employers Can Contract Themselves out of Fundamental Labor Code Protections.

The District Court's decision also erred by holding that employers can contract themselves out of Labor Code protections.

The District Court's determination of Ayala's claim that time spent by team drivers in the sleeper-berth is not time under the employer's control relies on a similar flawed principle: Under the District Court's reasoning, so long as an employer provides its employees with one lawful pay scheme, it can avoid liability for other, unlawful pay schemes. To reach this conclusion, the District Court relied on a misreading of *Rodriguez v. Taco Bell Corp.*, 896 F.3d 952 (9th Cir. 2018), which held there was no violation of California's meal period provisions where employees could only receive a discounted meal if they ate that meal in the restaurant. *Id.* at 957. The *Taco Bell* court reasoned that since accepting the discounted meal was entirely optional, and employees were able to leave the premises during their meal break so long as they were not eating a discounted meal, employees "were free to use [their meal] time in any way they wish," and thus not under Taco Bell's control during their meal period. *Id.* Since Taco Bell had relinquished control, there was no violation of the California's meal period requirement.

Here, the District Court asserted that *Taco Bell* stands for the proposition that an unlawful work arrangement can be cured by the fact that the unlawful arrangement is "optional," and employees have another lawful option at work.[6]

[6] In fact, the District Court concluded that the other option available to drivers here, driving solo, did not comply with California law, because drivers were not

ER025. *Taco Bell* did not so hold. In that case, the optional nature of the discounted meal was pertinent because it indicated that employees on their meal breaks were not "under their employer's control." 896 F.3d at 957. Here, drivers were presented with the option of either driving in teams of two—and thus being confined to a sleeper-berth in the truck while the other driver was operating the vehicle—or driving solo. ER024. Unlike the discounted meal policy at issue in *Taco Bell*, whether or not a driver had the option to drive by himself has no bearing on whether he was under the employer's control. Regardless of whether or not the driver had the option of solo driving, the driver was confined to a sleeper berth attached to a truck cab moving at full speed when his colleague was driving. In either situation, the driver in the sleeper berth was subject to the employer's directives and control. *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582–84 (2000).

Although the issue of whether long-haul drivers are under their employer's control when required to remain in a sleeper berth appears narrow, the flawed reasoning, if extended, could result in low-wage workers in numerous sectors being effectively denied protections under California law. Under the District Court's reasoning, an employer could avoid liability for an otherwise unlawful pay

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compensated for "off-duty and sleeper-berth time logged for high-value cargo loads." ER001, ER023.

scheme by offering workers the option between a lawful, yet undesirable arrangement—say, a security guard on a night shift being required to stay outside and being paid at the minimum wage, and an unlawful, yet perhaps less undesirable option—say, that same security guard getting paid below the minimum wage but being allowed to stay in a dormitory. California law provides no such option to negotiate away protections mandated by the Labor Code and Industrial Wage Orders. In fact, California law explicitly prevents employers from "contraven[ing] or set[ting] aside [Labor Code protections] by a private agreement." Labor Code § 219(a).

CONCLUSION

For these reasons, Amici urge the Court to certify the question of whether an employer can define by policy or contract the scope of the "the activity being compensated on a piece-rate basis," or whether "the activity being compensated on a piece-rate basis" depends on the pay formula used to compensate workers. If the Court declines to certify the question, the Court should hold that an employer cannot define the "the activity being compensated on a piece-rate basis," and such activity only includes work that allows the employee to earn compensation under the pay formula. Amici also urge the Court to reverse the District Court's determination that a team driver is not under the employer's control while the other team driver is operating the truck.

Dated: December 2, 2020

Respectfully submitted,

George A. Warner
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/s/ George A. Warner
George A. Warner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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