SUPREME COURT
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Case No. S248726

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DEV ANAND OMAN; TODD EICHMANN; MICHAEL LEHR; ALBERT FLORES, individually, on behalf of others similarly situated, and on behalf of the general public,

Plaintiffs/Petitioners,

v.

DELTA AIR LINES, INC.,

Defendant/Respondent.

On Grant of Request to Decide Certified Questions from the United States Court of Appeals for the Ninth Circuit
Pursuant to California Rules of Court, Rule 8.548
Ninth Circuit No. 17-15124

PLAINTIFFS-PETITIONERS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

The two amicus briefs filed in support of Plaintiffs – from California Employment Lawyers Association, California Rural Legal Assistance Foundation, Legal Aid at Work, National Employment Law Project, and Women's Employment Rights Clinic (collectively, "CELA") and Dan Goldthorpe et al. ("Goldthorpe") – provide additional reasons why this Court should answer "yes" to each of the Ninth Circuit's three certified questions.

First, plaintiffs and their amici demonstrated that the statutory language, legislative history, and expressly stated purposes of IWC Wage Order 9-2001 section 4 and Labor Code section 1194 require all employers, wherever based, to pay at least the minimum wage for all time they "suffer or permit" their employees to work *in California*, even if those employees' in-state work is only episodic and is for less than a full day at a time. *See* Plaintiffs-Petitioners' Opening Brief ("OB") at 20-34; Plaintiffs-Petitioners' Reply Brief ("RB") at 6-9, 11-21; CELA Br. at 1-4, 17-20; Goldthorpe Br. at 9-11.

Second, Plaintiffs and their amici demonstrated that the statutory text, history, and purposes also establish the California Legislature's intent to have the protections of Labor Code sections 204 (time of payment) and 226 (accurate wage statements) apply to all such in-state work as well, whether or not the out-of-state employer chooses to extend those same protections to its non-California-based employees' non-California work. *See* OB 22-23, 35-42; RB 6-9, 17-21; CELA Br. at 1-4, 8-16.

Third, Plaintiffs and their amici demonstrated that California's prohibition against employers using wage "averaging" to avoid paying for "each hour worked," *see, e.g., Armenta v. Osmose, Inc.* (2005) 135

Cal.App.4th 314; *Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, prohibits employers from implementing a pay formula "in certain situations resulting in higher pay [that] *does not award credit for all hours on duty*." (Emphasis added). *See* OB 43-53; RB 9-11, 22-23; CELA Br. at 20-36; Goldthorpe Br. at 10-11.

Amicus Cathay Pacific Airways Limited ("Cathay") is the only amicus supporting defendant Delta Air Lines, Inc. that addresses in any detail the first two certified questions, which ask whether an out-of-state employer is required to comply with California wage-and-hour laws for work performed by its employees *in California*. Cathay asserts that "California's wage-and-hour laws should apply only to employees for whom California is the primary job situs – *i.e.*, where the employee principally or exclusively works." Cathay Br. at 8, 11-15. But Cathay never responds to Plaintiffs' showing that the "job situs" test has no basis in the statutory text, is contrary to the legislative purpose, and is unduly vague and unworkable in practice. *See, e.g.*, OB 40-41; RB 7-9, 11-17; *see also* CELA Br. at 12-13, 17-20.

Cathay also parrots Delta's arguments about "extraterritoriality," but again ignores Plaintiffs' responses. To be clear, Plaintiffs have never contended that California wage-and-hour law applies to *all* time worked in *all* jurisdictions by out-of-state-based employees employed by out-of-state companies, just because those employees may have spent *some* time working in California. *See* Cathay Br. at 13. Rather, Plaintiffs have consistently stated that California law applies only to "all hours worked" by those employees *in* California. There is nothing "extraterritorial" about that application of California law. *See, e.g.*, OB 9, 29 n.10, 33-34, 42; RB 17-21; *see also* CELA Br. at 5-7.

Amicus California New Car Dealers Association ("Car Dealers") does not directly address *any* of the three certified questions. It agrees with *Plaintiffs* that under California law, "[e]mployees must be paid at least the minimum wage for every hour worked." Car Dealers Br. at 8. It also agrees with Plaintiffs that an "employer cannot fail to pay its employees for every hour on the clock, nor can it rationalize that failure by relying on the fact that an employee's overall pay averaged out to an amount greater than the minimum wage for the pay period," *id.* at 18, and that "[a]n employer may not use productivity payment amounts from already-earned employee hours to cover the employer's minimum wage obligations as to other unpaid hours." *Id.* at 22-23 (emphasis omitted).

Car Dealers' disagreement with Plaintiffs (and with the Ninth Circuit statement of the questions presented for certification) is factual. Disputing the factual predicate underlying the certified question (that the employer's pay formula "does *not* award credit for all hours on duty"), Car Dealers insist that Delta's flight attendants *are* credited for all on-duty time (including on-the-ground time in California), *are* paid more than the minimum wage for that time, and "earn *additional*, above-minimum-wage amounts for every hour that they actually fly." *Id.* at 27 (emphasis in original). That counter-factual assertion ignores the language of the Ninth Circuit's third question and contradicts the record, which demonstrates that 85% of the Plaintiffs' pay periods are compensated under Delta's "Flight Pay" plan only (which pays nothing for on-the-ground hours), and that Delta's "1-for-2 Credit" plan, in the infrequent instances it is applied, only pays flight attendants for every other on-duty hour (one hour of Flight Pay for every two hours worked), not for every hour worked. *See* OB 12-14, 50-53; RB 10-11, 24-25.

Delta's third and final set of amici – Employers Group and California Employment Law Council ("EG-CELC") – ignores the first certified question (regarding the obligation to pay California wages for California work time) and skims past the second (while concluding without any explanation or analysis that California has "little interest" in regulating the conduct of out-of-state employers or subjecting them to a "patchwork" of state employment laws). EG-CELC Br. at 30-33; *but see* OB 40-42.

EG-CELC's principal argument, the focus of our response below, is that state and federal courts (and apparently the Legislature in enacting Labor Code section 226.2) have for many years been uniformly mistaken in how they interpret and apply *Armenta* and *Gonzalez*, and that this Court should "rearticulate the reasoning" of those decisions by abandoning their focus on the statutory text and purposes (as discussed in OB 20, 22, 27, 38-39), and instead limiting the judicial inquiry to how the defendant employer *characterizes* the scope and coverage of its pay plan. *See* EG-CELC Br. at 12.

Under EG-CELC's radical reinterpretation of California minimum wage law, if the employer states in its employment contracts or workplace policies that its pay formula is *intended* to compensate employees for all on-duty time (whether or not that time is productive, income-generating, or used as a factor in calculating employee pay), the resulting "contract" is legally binding, "requir[ing] the court to allocate wages to hours worked precisely as the parties themselves have agreed," regardless of how the pay formula operates in practice or how wages are actually calculated. *Id.*

EG-CELC then goes even further, arguing that in the absence of any such (inevitably self-serving) contractual allocation by the employer, the courts should "apply[] all compensation earned to all compensable

activities performed," *id.*, meaning that even where an employer has not affirmatively stated that its pay formula covers all on-duty time, the courts must adopt a non-rebuttable presumption of such full coverage.

This stunning approach to minimum-wage analysis would not only replace California's non-waivable wage-and-hour protections with the most extreme version of *Lockner*-era "freedom of contract" imaginable – under which an employer would be free to impose whatever construction of its pay formula it chooses to impose – but would ensure that the only employees entitled to minimum-wage protections in the future would be those whose employers are too witless (or too honest) to state in an employment contract or other communication that their pay formula covers all tasks performed during all on-duty time.

EG-CELC and Car Dealers both profess to accept the Courts of Appeal's rulings in *Armenta* and *Gonzalez* as accurate statements of California law. *See* Car Dealers Br. at 16-20; EG-CELC Br. at 15-24. Both agree that California's minimum wage law prohibits employers from failing to "award credit for all hours on duty," even if those employers pay an "average" hourly rate for all on-duty hours that exceeds the minimum wage. *See* EG-CELC Br. at 19, 21-22, 28; Car Dealers Br. at 22. Yet using as their springboard a factual predicate that contradicts the question presented and is contrary to what Delta's compensation scheme actually provides, those amici urge this Court to effectively overrule *Armenta, Gonzalez,* and the uniform case law following those decisions, in the guise of rearticulating the underlying reasoning of those cases.

To ensure that Plaintiffs are not perceived as acquiescing in amici's flawed reading of 13 years of post-*Armenta* case law, and to clarify the

factual record upon which the Ninth Circuit's third certified question was based, we address amici's ill-conceived minimum-wage analysis below.

ARGUMENT

I. The Rule of *Armenta* Rests on Statutory Text, Not on the Agreement of the Parties

A. The Labor Code and wage orders require payment for "all hours worked"

The central question in *Armenta,* 135 Cal.App.4th at 321, was whether California minimum wage law, like the Fair Labor Standards Act ("FLSA"), permits an employer to pay its employees an *average* hourly wage that equals or exceeds the statutory minimum, or whether California law requires payment of an *actual* hourly wage for *each* hour worked that equals or exceeds the minimum wage. In answering that question, the Court of Appeal appropriately looked first to the statutory text. In contrast to the FLSA, which focuses on the workweek as a whole and "requires payment of minimum wage to employees who 'in any work week' are engaged in commerce," the IWC's Wage Orders have a far narrower temporal focus, requiring payment of "'not less than the applicable minimum wage *for all hours worked* in the payroll period . . ..'" *Id.* at 323 (quoting Wage Order No. 4, 8 Cal. Code Regs. § 11040) (emphasis added in *Armenta*). Given this materially different focus of state versus federal minimum wage protections, the Court of Appeal in *Armenta* properly concluded that the Wage Order's specific reference to payment for "all hours worked" necessarily "expresses the intent to ensure that employees be compensated at the minimum wage for *each* hour worked." *Id.* (emphasis added).

Almost seven years later, the Court of Appeal conducted a similar start-with-the-statutory-text analysis in *Gonzalez.* After noting that

"[t]he *Armenta* court focused first on the language of the wage order" in distinguishing between state and federal minimum wage law, the Court of Appeal in *Gonzalez* reiterated that "the California wage order's emphasis on '*hours worked*' reflected 'the intent to ensure that employees be compensated at the minimum wage for *each hour* worked,'" and again held that a pay plan that does not *in fact* pay at least the minimum wage for all compensable work time (in that case, time spent waiting to perform a repair) is unlawful under California law. 215 Cal.App.4th at 47 (italics added by *Gonzalez*).

Many courts since *Armenta* and *Gonzalez* have followed the same analytical model, focusing first on what the statutory language requires, then turning to any additional textual or legislative history materials to confirm what the IWC and/or Legislature thereby intended, and only then determining as a factual matter what work time the employer's pay scheme *actually* compensates – regardless of how the employer characterizes its pay plan. *See, e.g., Bluford v. Safeway Inc.* (2013) 216 Cal.App.4th 864, 871-72; *Vaquero v. Stoneledge Furniture* (2017) 9 Cal.App.5th 98, 107-10. The California Legislature has endorsed this analytical approach, at least implicitly, by codifying *Gonzalez* in Labor Code section 226.2 in 2015. *See* Cal. Lab. Code § 226.2(a)(7) ("An employer who, in addition to paying any piece-rate compensation, pays an hourly rate of at least the applicable minimum wage for all hours worked, shall be deemed in compliance" with the requirement that employers must pay for all hours worked).

Like the Courts of Appeal in *Armenta*, *Gonzalez*, and subsequent cases, the federal district court that will decide this case on remand from the Ninth Circuit (once this Court answers the three certified questions) should begin its analysis with the statutory language that requires employers to pay

at least the minimum wage for each hour worked; not "by evaluating the compensation agreement of the parties" to determine how the employer characterizes that agreement, EG-CELC Br. at 24-25, but by considering how the employer's pay formula actually operates and what job tasks the pay formula does and does not compensate, and in what amounts.

EG-CELC asks this Court to require a different approach to minimum-wage analysis, skipping the critical inquiry into whether the employer's pay scheme actually compensates employees for all hours worked, and instead deferring to the employer's characterization of its pay plan's coverage. EG-CELC claims to derive support for that approach from the references in *Armenta* and *Gonzalez* to Labor Code sections 221, 222, and 223, which prohibit wage kickbacks, withholding of collectively bargained wages, and secret underpayment of statutory or contractual wages. Although the Courts of Appeal in *Armenta* and *Gonzalez* cited those statutes in support of their holdings, none of those statutes was directly at issue in either case, and the appellate courts considered those statutes only "[a]fter parsing through the regulatory language" at issue, in an effort to "consider[] the wage order in the context of the statutory framework as a whole." *Gonzalez*, 215 Cal.App.4th at 47-48 (citing *Armenta*, 135 Cal.App.4th at 323); *see* OB Br. at 45-46.

B. Statutory requirements cannot be contravened through contract

EG-CELC's proposal to limit the inquiry in wage-payment disputes to the terms of the parties' "contract of employment" improperly subordinates the Labor Code's unwaivable statutory workplace protections to whatever contract terms an employer is able to impose on its employees. But California law has long forbidden employers from using their superior

bargaining power in that manner. *See, e.g., Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 82 ("employees may not agree to waive their entitlement to the minimum wage"); RB at 24-26 & n.8; Cal. Lab. Code § 1194 (employees entitled to minimum wage "[n]otwithstanding any agreement to work for a lesser wage"); Cal. Lab. Code § 219(a) ("no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied"); Cal. Lab. Code § 515(d)(2) (weekly salary must be based on no more than 40-hour week "notwithstanding any private agreement to the contrary"); *see generally* Cal. Lab. Code § 923 (recognizing that "the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment").

EG-CELC also argues that unless there is an explicit "agreement between the parties to compensate certain activities at a specific rate," the courts must "apply[] all compensation earned to all compensable activities performed" – in other words, must divide the total wages earned by the number of on-duty hours, to come up with the average. EG-CELC Br. at 12. Under this misguided approach, the only way an employer could become liable for a minimum wage violation would be by drafting an employment agreement that expressly informed employees that they would be paid only for some tasks but not for others. Conversely, an employer could avoid liability entirely by stating that the employee's pay encompasses all on-duty work or by stating nothing at all and letting its silence do the work of EG-CELC's proposed unrebuttable presumption (as long as the "average" hourly wage exceeds the statutory minimum).

The facts of *Gonzalez* provide a concrete illustration of how damaging EG-CELC's approach would be to the public policies underlying California minimum wage law. According to EG-CELC, the illegal compensation structure in *Gonzalez* (now prohibited by Labor Code section 226.2) would have been completely lawful if the employer, instead of accurately stating how its piece-rate compensation formula actually worked, had instead described its employee's "pay for the day" as encompassing all on-duty time, calculated as the greater of the 1) flag hours paid at the flag rate, or 2) all on-duty hours paid at the applicable minimum wage. Describing the *Gonzalez* pay plan that way would not have cured any of its structural defects – either before or after the enactment of Section 226.2. The flag rate would still compensate the workers for some tasks but not others. A worker who performed compensable flag-rate tasks *and* other non-compensable tasks would still be paid the same amount as his counterpart who worked fewer hours performing flag-rate tasks only. But under EG-CELC's proposed approach to minimum-wage protection, the pay plan would be immune from legal challenge simply because of how the employer characterized it.

Whenever an employer calculates pay "for the day" by compensating some work activities but not others, it violates California's minimum wage laws. Describing that pay plan in "greater of" terms rather than "pay for the day" terms does not cure its illegality. The "clear reaffirmation of the principles underlying *Armenta*" that EG-CELC urge this Court to adopt, EG-CELC Br. at 29, is in fact nothing less than the complete abandonment of those underlying principles. *See* OB 45-47; CELA Br. at 22-25, 31-32.

II. The Ninth Circuit's Description of Delta's Pay Scheme is Fully Supported by the Facts

EG-CELC tries to distinguish Delta's pay plan factually from the pay plans invalidated in *Armenta*, *Gonzalez*, *Bluford*, and *Vaquero* by asserting that the employment agreements between Delta and its flight attendants contemplated that whatever pay the flight attendants received would be considered payment for all on-duty work hours. *See* EG-CELC Br. at 26. If the Court reaches this issue, it should reject EG-CELC's factual characterization as contrary to the record and to the third certified question.

The Ninth Circuit recognized that Delta's "Flight Pay calculation . . . does not award credits for 'each hour worked'" because it "provides credit only for hours flown or scheduled to be flown, not for hours preparing the airplane for passengers." *Oman v. Delta Air Lines, Inc.* (9th Cir. 2018) 889 F.3d 1075, 1078, 1080. The Ninth Circuit incorporated this factual finding into its third question by asking this Court whether *Armenta* and *Gonzalez* apply to a pay formula that "in certain situations resulting in higher pay, does not award credit for all hours on duty." *Id.* at 1077. While this Court has the authority to restate the certified question, it makes no sense for this Court to reject the underlying factual predicate unless Delta and its flight attendants actually did reach "an express agreement to compensate the employee for *all* activities that constitute hours worked under California law." EG-CELC Br. at 26 (emphasis in original). They did not.

Delta's written pay policies (its "Work Rules") provide that, in the most common flight-attendant scenario (which the record shows applies to 85% of Plaintiffs' pay periods), Delta pays flight attendants at their Flight Pay rate for their out-of-gate-and-into-gate "Block Time" only, with *no*

additional pay for any of their mandatory, on-the-ground, pre- and post-Block Time work. OB 12-18, 21, 50-53; RB 23-24, 26 n.10.

Delta's decision to pay its flight attendants only for their in-the-air time and not for their on-the-ground-in-California time is no different from Downtown LA Motors' decision in *Gonzalez* to pay its automobile service technicians only for their flag-rate tasks and not for their other tasks. Just as Downtown LA Motors could not escape liability by citing its so-called minimum wage "guarantee," neither could Delta escape liability *if* it had provided a similar guarantee (which it did not, *see* OB 52-53; RB 26-28).

An employer can satisfy California minimum wage law by paying at least the minimum wage for *all* on-duty time and then paying performance-based wages *on top of* that payment. *Gonzalez* and subsequent cases make clear that the employer cannot offer those two payment methods as alternatives, because that would mean a worker who is required to perform more on-duty job tasks than a co-worker but is paid the same amount for spending the same amount of time on the same compensable tasks, will not receive any pay for those additional on-duty job tasks – and that would be a violation of California minimum wage law.

III. Employers May Provide Performance-Based Compensation While Still Paying for All Hours Worked

EG-CELC and Car Dealers also contend, apparently as a public policy argument, that if Plaintiffs prevail, California employers will no longer be able to pay piece rates or commissions or other performance-based wages to employees without violating California law. That is not so. As long as employers pay each employee at least the minimum wage for all time worked, they are free to add performance-based pay on top of that hourly wage to create whatever (otherwise lawful) incentives for the quality

or quantity of work they choose. As the Court of Appeal explained in rejecting this same argument in *Vaquero*:

> Our conclusion does not cast doubt on the legality of commission-based compensation. Instead, we hold only that such compensation plans must separately account and pay for rest periods to comply with California law. Nor will our decision lead to hordes of lazy sales associates. The commission agreement … provided that a sales associate who failed to meet minimum sales expectations … was subject to disciplinary measures up to and including termination. Thus, employers … have methods to ensure that an employee's productivity does not suffer as a result of complying with California law by paying a minimum wage for rest periods.

Vaquero, 9 Cal.App.5th at 117.

California law permits productivity-based compensation schemes as long as they satisfy a simple baseline requirement: in addition to offering productivity pay, the employer must also pay at least the minimum wage for all time worked. *See, e.g.*, *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2012) 913 F.Supp.2d 1001, 1007 (violations exist where employees "are not being compensated directly for stocking, pre-opening, or post-closing time, during which they usually cannot earn a commission"); *Bluford*, 216 Cal.App.4th at 872 (violations exist where "[d]river pay was also based on fixed rates for certain tasks and hourly rates for other tasks and delays, … [but] none of these fixed rates were applied to rest periods").

If the California Legislature had intended to exempt some or all production-based compensation systems from the longstanding requirement that employers must pay at least the minimum wage for all time worked, it could easily have done so. But the Legislature did exactly the opposite. Labor Code section 226.2 codifies the holding in *Gonzalez* and provides an express roadmap for piece-rate employers determining how to comply with

its requirement, stating that they can comply by paying the piece-rate "*in addition to*" paying at least the hourly wage for all hours worked. Cal. Lab. Code § 226.2(a)(7) (emphasis added); *see* OB 48.[1]

As the Ninth Circuit recognized, it is undisputed that Delta's Flight Pay formula pays flight attendants at their Flight Pay rate for their Block Time flight hours and nothing more. It is likewise undisputed that when Delta pays flight attendants under that Flight Pay formula, it does so *instead of* paying them under its 1-for-2 Credit, not "in addition to" any minimum hourly pay. While Delta is free to "incentivize" its flight attendants by paying more for certain activities, it should not be allowed to treat their other work activities as unpaid.

IV. Delta's Compensation Structure Does Not Reward Employee Productivity, but Instead Punishes Employees for Events Outside the Employee's Control

Adopting a rule that exempts incentive compensation plans from California's minimum wage law is particularly inappropriate in cases like this, where the employer's compensation plan does not reward employee

[1] EG-CELC suggests that Delta could rewrite its rules to provide a base hourly pay plus a bonus equal to the difference between Flight Pay and the hourly pay and pay the same total compensation for every duty period. While that compensation structure is not before this Court, a federal district court recently rejected a similarly complicated compensation formula because it failed to ensure "that an employee's take home pay increases by at least the minimum wage for every additional hour worked" – which is the essence of what California law requires. *Ontiveros v. Safelite Fulfillment, Inc.* (C.D. Cal., Oct. 12, 2017) 2017 WL 6261476, at *5. Plaintiffs agree with EG-CELC that it "should not be that hard" to draft a compliant compensation policy. But the way to do that is to provide any incentive pay on top of the minimum wage, not to force employees work periods of non-compensable time without being paid for that time.

productivity, but instead punishes employees for events outside their control.

Delta's compensation plan places a premium on time spent flying (Block Time) by paying for that time at the Flight Pay rate. Unlike a piece-rate worker who can earn more by working more efficiently or quickly, and unlike a commission-based sales employee who can increase earnings through improved sales techniques, a flight attendant cannot increase her Flight Pay earnings because she has no control over the length of her flights. *See* CELA Br. at 26 ("averaging means that factors beyond the worker's control determine whether or not the worker is paid for his or her time.").

Flight attendants also have little or no control over the amount of time spent on the ground. Some unpaid on-the-ground time is built into their schedules, such as the mandated preflight work hour and time spent deplaning. Other on-the-ground work occurs when flights are delayed. *See* OB 52-53; RB 26. Delta's "greater of" approach thus benefits Delta at the expense of its flight attendants, because it provides Delta a significant buffer against increased labor costs in the event of a delay. On the day Delta paid Plaintiff Oman 5.467 credit hours for 7 hours 32 minutes of work, for example, *see* Delta Br. 61, the 1-for-2 Credit would have not provided him *any* additional pay until he worked 10 hours 56 minutes total (5.467 x 2 = 10.934 credit hours, or 10 hours 56 minutes). This allowed Delta to require him to perform an extra 3 hours 24 minutes of on-duty work before he became entitled to a penny of additional pay. That structure can hardly be called an incentive-based compensation plan aimed at increasing employee productivity.

Delta's compensation plan arguably creates an incentive for flight attendants to board planes quickly so the flights leave on time. But that incentive exists only because Delta *does not pay* its flight attendants for their pre-flight time. While the law might tolerate a compensation structure that pays employees only the minimum wage for down time or other non-productive time, employers may not create incentives for employees to work quickly through non-income-producing tasks by requiring the work but refusing to pay for it.

CONCLUSION

For the reasons stated above and in Plaintiffs' prior briefs, this Court should answer "yes" to all three certified questions.

Dated: March 29, 2019 Respectfully submitted,

NICHOLS KASTER, LLP
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Michael Rubin

Counsel for Plaintiffs-Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), and in reliance upon the word count feature of the software used, I certify that the foregoing Plaintiffs-Petitioners' Consolidated Answer To Amicus Curiae Briefs, contains 4,424 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

Dated: March 29, 2018

Respectfully submitted
NICHOLS KASTER, LLP
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Michael Rubin

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PROOF OF SERVICE

Case: *Oman v. Delta Airlines, Inc.,*
California Supreme Court No. S248726
(U.S. Court of Appeals for the 9th Circuit, No. 17-15124)

I am employed in the City and 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 March 29, 2018, I served the following document(s):

PLAINTIFFS-PETITIONERS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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:

By First Class Mail: I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. 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 Mail 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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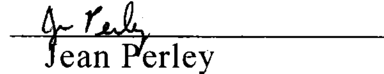
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this March 29, 2019, at San Francisco, California.



Jean Perley