

Case No. S248726

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

DEV ANAND OMAN, ET AL., *Plaintiffs and Petitioners*,

v.

DELTA AIR LINES, INC., *Defendant and Respondent*

SUPREME COURT
FILED

FEB 22 2019

Jorge Navarrete Clerk

Deputy

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 Case No. 17-15124

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF
AND [PROPOSED] BRIEF OF *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS AND PETITIONERS, DEV ANAND OMAN, *ET AL.***

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court 8.208

Pursuant to California Rule of Court 8.488, Amici Curiae, DAN GOLDTHORPE, JAMES DONOVAN, CHRIS BENNETT, JAMES ISHERWOOD and DAVID VINCENT, by and through the undersigned counsel, certify that there are no interested entities or persons that must be listed in this Certificate under Rule 8.488.

Dated: February 15, 2019

MASTAGNI HOLSTEDT, APC

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DAVID E. MASTAGNI
ISAAC S. STEVENS
Attorneys for the Amici Curiae

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**APPLICATION TO FILE AMICI CURIAE BRIEF
IN SUPPORT OF PLAINTIFFS AND PETITIONERS DEV ANAND
OMAN, ET AL.**

TO THE HONORABLE CHIEF JUSTICE TANI GORRE
CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE STATE OF CALIFORNIA:

Pursuant to Cal. Rules of Court, Rule 8.520(f), the Amici Curiae respectfully ask for leave to file the attached brief of Amici Curiae in support of Plaintiffs and Petitioners Dev Anand Oman, *et al.* This application is timely made.

THE AMICI CURIAE

This application is submitted on behalf of Amici Curiae Dan Goldthorpe, James Donovan, Chris Bennett, James Isherwood, and David Vincent (collectively referred to as the “Amici.”) The Amici are, or were, employed by Cathay Pacific Airways as pilots. They are also plaintiffs in a wage and hour lawsuit currently pending in the Northern District of California, *Goldthorpe v. Cathay Pacific Airways Limited and USA Basing Limited* (N.D. Cal. Case No. 3:17-cv-03233) (hereafter referred to as “*Goldthorpe.*”)

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INTEREST OF AMICI CURIAE

The Amici have a significant interest in the resolution of this issue, both as persons engaged in work that takes them in and out of California, and as plaintiffs in *Goldthorpe*.

The Amici are current and former employees of Cathay Pacific Airways Limited (“Cathay”) and USA Basing Limited (“USA Basing”). Cathay schedules pilots, including Amici, to perform transpacific flights to and from Hong Kong out of their respective home bases in Los Angeles and San Francisco. It requires pilots to perform pre-flight activities, before departing their home base. It also requires them to perform post-flight duties after they land in Hong Kong. The pilots are not compensated for these pre- and post-flight activities. Additionally, pilots are required to spend days in “reserve” status, where they are subject to being called in to replace sick or otherwise unavailable pilots. While serving in reserve status, pilots are considered to be on duty. They cannot drink alcohol, and must immediately respond to phone calls from their employer. They are not compensated for their time in reserve status.

Amici are also the plaintiffs in the *Goldthorpe* case, where they allege defendants Cathay Pacific Airways Limited and USA Basing Limited violated the Labor Code. One of the issues in the case is whether the Labor Code’s overtime provisions apply where employees spend time working in and out of California in the same workweek. The court in *Goldthorpe* stayed

the case pending this Court's rulings in the instant case and *Ward v. United Airlines, Inc.* (Cal. Sup. Ct. Case No. S248702.))

NEED FOR FURTHER BRIEFING

The Amici are familiar with the issues before the Court and the scope of their presentation. They believe further briefing is necessary to address matters not fully considered by the parties' briefs, to ensure that the issues affecting the Amici are fully heard and considered by this Court.

Unlike many other employees in the airline industry, the Amici's work in the United States occurred solely in California. If the Court determines the Labor Code does not protect employees who travel outside the state during their workweek, the Amici would not be protected by any state's wage and hour laws. Thus, the Amici have a particularly significant interest in ensuring the Labor Code applies to their overtime work.

CONCLUSION

For the foregoing reasons, the Amici respectfully ask the Court to accept the accompanying brief for filing in this case.¹

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¹ Pursuant to California Rule of Court 8.520(f)(4), no party to this case authored the accompanying amicus brief in whole or in part, and no party other than the amici made a monetary contribution intended to fund the preparation or submission of the brief.

Respectfully submitted,

Dated: February 15, 2019

MASTAGNI HOLSTEDT, APC

A handwritten signature in black ink, appearing to read 'D. Mastagni', is written over a horizontal line.

DAVID E. MASTAGNI

ISAAC S. STEVENS

Attorneys for the Amici Curiae

**AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS AND
PETITIONERS DEV ANAND OMAN, ET AL.**

**I.
ARGUMENT**

California's minimum wage laws are meant to ensure that people are paid a minimum wage for every hour they work in the state. When an employee spends part of the workweek working in California, and another part working elsewhere, she is entitled to the minimum wage for each hour she spent working in California – regardless of what she was paid for her out-of-state hours. Allowing employers to use wages they paid for out-of-state hours worked to offset liability for unpaid hours of work in California would contravene the state's interest in ensuring employees are paid minimum wage for each hour they work. Accordingly, the Court should rule that employees who work in and out of the state during the same workweek are entitled to receive at least the minimum wage for their in-state hours of work.

**A. CALIFORNIA HAS A STRONG INTEREST IN ENSURING
EMPLOYEES ARE PAID FOR ALL THE HOURS THEY
WORK IN THE STATE**

California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked. (*See Armenta v. Osmose, Inc.* (2005) Cal.App.4th 314, 319.) To further this policy, California's minimum wage law must be construed as mandating that employees be paid at least

the minimum wage for each hour they work in the state – regardless of the fact that they work other hours outside the state.

This Court affirmed the principle that California law requires an employer to pay employees for all the time they work in *Troester v. Starbucks* (2018) 5 Cal.5th 839. There, the employee was not paid for about thirteen hours of work over the course of almost a year and a half. Starbucks tried to evade liability for the unpaid wages by claiming the work time was *de minimis*. This Court rejected this claim, opining that California law did not allow the company to assert a *de minimis* defense to an employee’s claim for unpaid wages (*Id.* at 585.) In so doing, the Court recognized that California has a strong interest in ensuring that employees are paid for every hour they spend working in the state.

As stated in *Troester*, California law requires payment of a minimum wage for “every hour” worked – not merely weekly compensation sufficient to average out to an hourly rate over the minimum wage. (*See* Labor Code §1194(a) (providing that an employee receiving less than the legal minimum wage is entitled to recover the unpaid balance of the full amount); Industrial Welfare Commission Wage Order No. 4, §4(B) (providing “every employer shall pay to each employee. . . not less than the applicable minimum wage for *all hours worked* in the pay period.”))

Indeed, courts throughout the state have rejected attempts to apply the federal “averaging” method to determining minimum wage liability for work

performed in California. (See *Vaquero v. Stoneledge Furniture LLC* (2017) 9 Cal.App.5th 114, review denied (June 21, 2017); *Rhea v. General Atomics* (2014) 227 Cal.App.4th 1560, 1574; *Bluford v. Safeway Stores, Inc.* (2013) 216 Cal.App.4th 864, 872.) The courts have rejected the averaging method because it does not comply with California's minimum wage law, which mandates that all hours must be paid at the statutory or agreed rate, and no part of that rate can be used as an offset against an employer's minimum wage obligation. (See *Armenta, supra*, 135 Cal.App.4th 314, 323 (citing Labor Code §§ 221-223.))

B. MINIMUM WAGE LAWS CANNOT BE SUBJECTED TO A JOB SITUS TEST

If an employee works in California, she must be paid at least the minimum wage for each hour she works in the state – even if she works outside California during the same workweek. Ruling otherwise would contravene California's interest in ensuring employees are paid for all hours worked in California.

This Court already affirmed that California's overtime laws apply to employees who spend the majority of their work days out of state. (See *Sullivan v. Oracle* (9th Cir. 2009) 557 F.3d 979, 981.) The Court should reach the same conclusion with respect to California's minimum wage laws.

The fact that an employee spends time working out of the state does not render the employee exempt from California's labor laws. Indeed, the fact that an employee does not spend most of his time working in California becomes less important to the question of whether the state's labor laws apply where out-of-state travel is an inherent part of the employee's job duties. (*Bernstein v. Virgin America, Inc.* (2017) 227 F.Supp.3d 1049, 1060.) The same may be true where the employee would not be protected by any state's overtime laws unless California's applied. (See *Bostain v. Food Express, Inc.* (2007) 159 Wash.2d 700, 710-11.)

The inquiry does not end when a court determines an employee's work occurred primarily outside of California. While there is a presumption that statutes do not apply extraterritorially, this presumption is not irrefutable. The language of the law, its subject-matter, purpose, or history can show the Legislature intended for it to apply to work performed outside California's boundaries. (See *N. Alaska Salmon Co. v. Pillsbury*, 174 Cal.1, 4 (1916).)

This Court has repeatedly declined invitations to create a bright line rule limiting California's wage and hour rules to work performed in the state. (See, e.g., *Sullivan v. Oracle Corporation* (2011) 51 Cal.4th 1191, 1208.) For example, in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, this Court declined to state whether the Industrial Welfare Commission's Wage Orders applied only to employment in California. (*Id.*

at 578.) Other courts have followed suit. Likewise, in *Wright v. Adventures Rolling Cross Country, Inc.* (N.D. Cal. 2013) 2013 WL 1758815, the court found that the Labor Code's overtime requirements applied to every workweek where an employee performed *any* work in California, even if the rest of the work was performed outside of the state. (*Id.* at 10.)

When an employer directs its employees to perform work in California, it subjects itself to many of California's labor laws – even for employees who may spend large amounts of time working for the employer out of state. For example, an employer who hires an employee in California is required to act in accordance with California's workers' compensation laws even if the employee is injured out of state. (Labor Code § 3600.5.) Likewise, an employer whose employees perform overtime work in the state must pay employees according to California's overtime laws – even if the employees are not residents of the state. (*Sullivan, supra*, 51 Cal.4th at 1197 (*citing* Labor Code § 1171.5.)) There is no reason to treat minimum wage laws any differently than the state's other labor laws. An employer subjects itself to California's overtime and worker's compensation laws when it has employees work in California. The same is true with respect to California's minimum wage requirements.

The Amici respectfully join the Petitioners in urging the Court to rule that California's minimum wage laws apply to *all* employees who perform

work in California – regardless of whether they spend some of their time working outside the state during the same pay period. To rule otherwise would frustrate California’s public policy of ensuring that employees are paid for every hour they work.

**II.
CONCLUSION**

For the foregoing reasons, the Amici respectfully ask this Court to declare that California’s minimum wage laws apply to employees who perform work in California in any given workweek – regardless of whether they spend time working out of state during that time.

Respectfully submitted,

Dated: February 15, 2019

~~MASTAGNI HOLSTEDT, APC~~

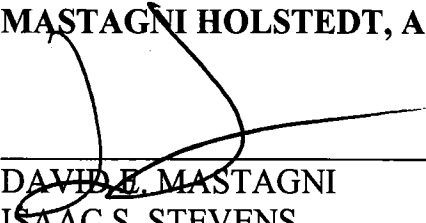
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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that this brief consists of 1,892 words, as counted by the computer program used to generate the document.

Dated: February 15, 2019

MASTAGNI HOLSTEDT, A.P.C.



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Attorneys for the Amici Curiae

PROOF OF SERVICE

SHORT TITLE OF CASE: *Oman, et al. v. Delta Air Lines, Inc.*
SUPREME COURT CASE NO.: S248726

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the above-entitled action. My business address is 1912 I Street, Sacramento, California 95811-3151. On the date below, I served the following document(s):

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND [PROPOSED] BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS AND PETITIONERS, DEV ANAND OMAN, ET AL.

Addressed as follows:

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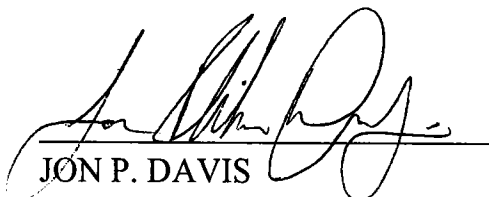
X BY ELECTRONIC SERVICE: I certify that all participants in the case are registered TRUEFILING users and that service will be provided this date by TRUEFILING to parties' attorneys of record;

And,

Molly Dwyer, Clerk of the Court UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT The James R. Browning Courthouse 95 7th Street San Francisco, CA 94103 <i>Appellate Court</i>	
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X BY U.S. MAIL. By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing today, following ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Mail, with postage thereon fully prepaid at Sacramento, California in the ordinary course of business.

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct and executed on February 15, 2019, at Sacramento, California.


JON P. DAVIS