No. S156555

IN THE SUPREME COURT OF CALIFORNIA

FRANCES HARRIS et al.,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

LIBERTY MUTUAL INSURANCE COMPANY et al.,
Real Parties in Interest.

LIBERTY MUTUAL INSURANCE COMPANY et al.,
Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

FRANCES HARRIS et al,
Real Parties in Interest.

After a Decision by the Court of Appeal
Second Appellate District
Division One, Case Nos. B195121, B195370
Los Angeles County Superior Court Case Nos. BC 246139, BC246140

APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

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APPLICATION OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

To the Chief Justice and Associate Justices:

Chamber of Commerce of the United States of America (the "Chamber"), through its attorneys, respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation. The Chamber is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

The reclassification of exempt administrative employees as nonexempt production workers is an issue of broad and continuing importance to a wide variety of businesses in California. The legal rule embraced in the decision below and pressed by the plaintiffs here would substantially disrupt California businesses and invite massive litigation. By departing from the federal regulations incorporated in Wage Order 4–2001 and the federal judicial decisions construing those regulations, the statutory construction urged by the plaintiffs would balkanize labor regulation in

direct conflict with the manifest intent of the Industrial Welfare Commission (IWC). And the plaintiffs' position narrows the administrative exemption to the vanishing point. In plaintiffs' view, the exemption from wage and hour regulations for "administrative" employees would apply only to employees at a "level" of the organizational chart that places them above and apart from the generation of revenue or the reduction of expenses, even if their tasks are administrative and discretionary. That premise could lead to the reclassification as hourly wage earners of hundreds of thousands, if not millions, of salaried administrative employees who currently are and historically were considered exempt from most California wage and hour requirements.

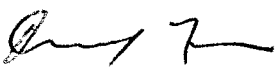
If affirmed, the decision below could prompt an entire new series of cases addressing purported wage claims of whole categories of employees long believed (and held) exempt from the overtime pay and meal- and rest-period obligations. This Court instead should enforce the IWC's intent and bring the administrative exemption into accord with federal law.

CONCLUSION

For the foregoing reasons, the application should be granted and the accompanying *amicus curiae* brief filed.

August 4, 2008

Respectfully submitted,



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INTEREST OF THE *AMICUS CURIAE*

Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

The interest of the *amicus* is more fully described in the application for leave, *ante*. As explained there, reclassification of exempt administrative employees as nonexempt production workers under the wage-and-hour laws is an issue of broad and continuing importance to a wide variety of businesses in California. The Chamber and its members therefore have a strong interest in explaining to this Court the broad repercussions of the drastic narrowing of the administrative exemption in the decision under review, including the balkanized regulation and extensive litigation likely to result if that decision is not reversed .

ARGUMENT

The Industrial Welfare Commission (IWC) could not have been clearer in expressing its intent to harmonize the exemption for

administrative workers in the California wage-and-hour laws with the parallel exemption under federal law as it stood in 2001 (and has stood materially unchanged since then). In the decision under review, however, the court of appeal strained to avoid both the plain meaning of Wage Order 4–2001, § 1(A)(2) (the "Wage Order") and the consistent regulatory and judicial precedent construing the federal regulations incorporated by reference in it. The strain is obvious: Justice Vogel's dissent consumes only seven pages while the panel majority takes 22. The dissent simply applies the federal regulations incorporated by the Wage Order, and accords with the federal decisions on point. The majority could not reach its result without following a much more circuitous path. This Court should opt for the simplicity of straightforward logic that respects the IWC's policy choice to follow federal policy in this regard.

Rather than apply the firm guidance invoked by the Wage Order itself—the contemporary federal regulations that the IWC instructed it (and this Court) to follow—the decision below relied instead on an indistinct dichotomy between administrative work and production labor that is a relic from the earliest days of industrial labor regulation. It is as if a court addressed the words "due process" using a dictionary in preference to two centuries of jurisprudence.

The plaintiffs ask this Court to follow a similar course, and whittle the administrative side of that dichotomy into near-nothingness, confined to those whose activities not only do not "produce" the primary good or service sold, but also do not contribute in any way to the employer's bottom line. The Court instead should implement the IWC's intent and confirm that the more sophisticated analysis in the federal regulations and related guidance is controlling California law as well.

A. The Federal Regulations Incorporated In The Wage Order Preclude Resort To A Redefinition Of The Administration/ Production Dichotomy On A Blank Slate.

The Wage Order exempts from wage-and-hour regulation employees who are employed in an "administrative capacity." In promulgating this Wage Order, the IWC tried to make that exemption precisely coextensive with its analogue in regulations promulgated under the federal Fair Labor Standards Act, yet without committing the California standard automatically to embrace any later drastic changes in federal law.[1] Accordingly, the IWC incorporated by reference several subparts of the Code of Federal Regulations in effect on January 1, 2001, when the Wage Order was issued (the "federal regulations").[2] Wage Order 4–2001, § 1(A)(2)(f). That incorporation by reference aims specifically at the "activities constituting exempt work and non-exempt work," and mandates that the scope of those activities "shall be construed in the same manner" as in those regulations.

Those incorporated regulations specifically note that "claims adjusters"—or at the very least "many persons employed as ... claims adjusters"—meet the "test of 'directly related to management policies or general business operations.'" 29 C.F.R. § 541.205(c)(5). The regulations do the same for several other occupations, including "credit managers, safety directors, ... wage-rate analysts, tax experts, account executives in

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[1] In fact, as the United States Department of Labor has explained (*Amicus* Br. 21-26), federal law has not varied in substance since the benchmark date in the Wage Order. The current, revised federal regulations simply elucidate those in effect in 2001.

[2] Accordingly, all citations to the Code of Federal Regulations refer to the version in effect at that time.

advertising agencies, customers' brokers in stock exchange firms, [and] promotion [personnel]." *Id.*

The referenced federal regulations are *part* of the Wage Order, not distantly analogous expressions of opinion that a court might take or leave in accord with its own views of the proper result in a particular case. Rather, because the Wage Order does not elaborate on its own general standards, it prescribes that "[t]he activities constituting exempt work and non-exempt work"—the specific, concrete activities, not just the general statutory language—"shall be construed in the same manner" as in the incorporated federal regulations. Wage Order, § 1(A)(2)(f). The regulations limit the meaning of the general terms "directly related to management policies or general business operations" by providing detailed guidance about the specific "*activities* constituting exempt and non-exempt work."

As Liberty Mutual and the United States Department of Labor have explained in detail, the federal case law speaks with one voice in addressing the exempt status of claims adjusters. That case law confirms that, in accord with the statement about claims adjusters in 29 C.F.R. § 541.205(c)(5), the administrative exemption encompasses claims adjusters as a general rule. If affirmed, the contrary view of the administrative exemption adopted in the decision under review would conflict not only with the most specific reference in the federal regulations, but with all (or at least the vast majority) of federal decisions to address the same issue. That result defies the IWC's intent to make its administrative exemption coextensive with that recognized under federal law.

Nonetheless, the plaintiffs here ask this Court to proceed as if the abstract "administrative/production worker dichotomy" had never been refined in the federal regulations incorporated into Wage Order 4–2001, but

rather was open to reinterpretation on a blank slate by every court confronting an administrative exemption claim. The analysis the plaintiffs advance could drastically alter the classification of administrative employees throughout California.

The plaintiffs endorse the holding below that the administrative exemption in the Wage Order covers "only work performed at the *level* of *policy* or *general* operations." 154 Cal.App.4th at 177 (first emphasis added; remaining emphasis in original); *see also id.* at 178-181 (repeating versions of this "level" formulation). But that is not what the Wage Order says. Like the incorporated federal regulations, the Wage Order requires only that an employee's work be nonmanual and "directly related to management policies or general business operations." Wage Order, § 1(A)(2)(a). The word "level" does not appear in the relevant part of the Wage Order or (in any remotely similar sense) in the incorporated federal regulations. It is a purely a judicial invention.

In practical effect, restricting the administrative exemption to work performed at the "*level* of policy or general operations" narrows the administrative exemption to a tiny core of employees who have nothing to do with any of the day-to-day, profit-related activities of the business. Indeed, a court could freely (and the court below did) conclude that no employee whose work has anything to do with revenue generation or cost reduction can be an administrative employee.

Yet the point of the administrative exemption is not to confine exemption to central management or the purely ancillary segments of a firm, but to encompass "so-called white-collar employees" who provide administrative skills and services at *all* levels of a business. 28 C.F.R. § 541.205(b). By narrowing the administrative exemption to persons who

formulate rather than execute company policy, the plaintiffs to a substantial extent ask this Court to merge that exemption (Wage Order § 1(A)(2)) with the *executive* exemption, which applies to those "[w]hose duties and responsibilities involve the management of the enterprise ... or of a customarily recognized department or subdivision thereof" (*id.* § 1(A)(1)).

But the federal regulations preclude any such limitation. So long as the work is "of substantial importance to the management or operation of the business, the phrase 'directly related to management policies or general business operations' is *not* limited to persons who participate in the formulation of management policies or in the operation of the business as a whole." 29 C.F.R. § 541.205(c). Even the decision below acknowledged that the claims adjusters at issue here did work of such substantial importance. *See* 154 Cal.App.4th at 184.[3]

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[3] Moreover, in straining to justify creating a conflict with the federal regulations notwithstanding their incorporation into the Wage Order, the decision below injected ambiguity into an otherwise-clear regulatory provision by reaching beyond the provision's terms to a separate body of law. To make sure which *interpretation* of federal law would control, the IWC incorporated a small, clearly identified set of federal regulations into its Order, going so far as to specify that the Order incorporated only the regulations in effect when it issued. Those regulations make the status of claims adjusters (and several other occupations) clear. That status cannot become less clear because another federal regulation, *not* incorporated into the statute, arguably muddies the waters (though the federal courts seem unconfused). Yet the decision below relied on that *un*incorporated regulation (29 C.F.R. § 778.405), to create the very ambiguity that the IWC's selective incorporation had excluded, and thus to excuse judicial disregard of the regulations that were incorporated. *See* 154 Cal.App.4th at 183-184. As the United States Department of Labor points out (*Amicus* Br. 22-23 n.12), the decision below misunderstood the nonapplicable regulation. The plaintiffs appear to have disclaimed reliance on that provision. This Court likewise should ignore it.

B. The Adminstrative Exemption Encompasses Sophisticated Workers Whose Duties Enhance Their Employers' Bottom Line.

In that light, it is no answer to contend, as the court below did, that claims adjusters nonetheless may fall outside of the exemption because they were engaged in a "claims-adjusting component of their employer's business" rather than something removed from substantive significance. 154 Cal.App.4th at 178. Nothing in the federal regulations suggests that "components" in a business may not require the efforts of employees subject to the administrative exemption. To the contrary, the regulations make clear that many "components" of many businesses require the efforts of administrative employees.

Indeed, revenue generation of many sophisticated enterprises may turn primarily on the efforts of administrative employees supported by nonexempt employees. Not only claims adjusters, but "credit managers," "account executives in advertising agencies," and "customers' brokers in stock exchange firms" are listed as examples of pursuits that likely fall within the exemption. Yet the latter two occupations are largely engaged in sales of their employers' services, a type of "production" that would disqualify them from the exemption if it is narrowed to duties performed at "the "*level* of policy or general operations," as plaintiffs would have it and as the decision below held (154 Cal.App.4th at 177).

Another instructive example—closely analogous to the activities of claims adjusters—appears in 29 C.F.R. § 541.208(c). That regulation notes that a "credit manager who makes and administers the credit policy of his employer" is likely to be exempt. In particular, "[e]stablishing credit limits for customers and authorizing the shipment of orders on credit, including the decisions to exceed or otherwise vary these limits in the case of

particular customers, would be exempt work of the kind specifically described in [29 C.F.R.] § 541.2." But that is what claims adjusters do—assess a claim with reference to particular insureds, particular policies, and particular facts, with substantial leeway in deciding whether to pay or deny a claim, and how much, if anything, to pay. Indeed, the duties of credit managers have far more to do with the "production" side of the dichotomy, as the financial analysis and decisions they make are directly related to sales, that is, revenue generation. Claims adjusters, by contrast, work on identifying appropriate disbursements and, thus, containing unwarranted expenses—cash outflow rather than inflow.

Yet another specific example in the federal regulations excludes any limitation of the exemption to administrative activities directed to the business as a whole. The regulations note that an "administrative assistant in the production department of the business" is "engaged in activities relating to the administrative operations of the business"—and thus is exempt if she meets the other standards for the exemption. But her function clearly would not meet the "level"-centric test adopted below and urged by the plaintiffs here. Yet that result is impossible if the federal regulations control as the Wage Order instructs.

One of the principal policy justifications offered below for limiting the "administrative" type-of-work criterion to employees at a high or central "level" of an organization is a fallacy: that even the most clearly clerical office workers would qualify for the administrative exemption if it were not limited to employees at the "level" of policy or "general" business operations (defined to exclude the actual operation of the business). *See* 154 Cal.App.4th at 181-182. That attack pummels a straw man. The type of work performed ("directly related to management policies or general

business operations") is only one of *four* screens that limit the application of the administrative exemption. Wage Order 4–2001, § 1(A)(2); *id.* § 1(A)(2)(a), (f). To be exempt from wage and hour laws, an employee also must satisfy factors addressing "discretion and independent judgment" (*id.* § 1(A)(2)(b)), the type and degree of supervision (*id.* § 1(A)(2)(c)-(e)), and salary (*id.* § 1(A)(2)(g)). The scant justifications offered for a stringent narrowing of the general type of work subject to the administrative exemption—one of four screens—completely disregarded the other screens. Most *clerical* office workers do not engage in the activities identified in the exception (Wage Order 4-2001, § 1(A)(2)(a)), and fewer still operate with independent discretion and only general supervision.

C. This Court Should Implement The IWC's Policy Choice To Reduce Balkanized Wage-and-Hour Regulation.

The IWC did its best to protect California employers from the burdens of a balkanized wage-and-hour regulatory regime for their administrative employees. Rationalizing employment regulation in that way helps make California a more attractive location for employers with sophisticated job opportunities. Policy changes of that kind are necessary if California is to retain long-established employers such as the American Automobile Association, which recently announced its departure. Indeed, regulatory expenses are a major factor in Toyota's decision not to build its hybrid Prius model in the state that buys so many of them.

Restricting the administrative exemption to a small group of high-level employees would thwart the IWC's effort to bring California law on the exempt status of administrative employees into accord with federal law. That would be improper. It is for the IWC to make policy on this ground, not the courts. The IWC's choice to rationalize regulation and thus

encourage employment in the administrative sphere is clear. This Court should implement that choice.

CONCLUSION

The judgment of the court of appeal should be reversed.

August 4, 2008

Respectfully submitted.

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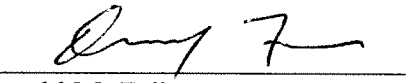
CERTIFICATE OF COMPLIANCE
WITH CALIFORNIA RULE OF COURT 14(C)

Pursuant to California Rule of Court 14(c), I hereby certify that the attached Brief of Amicus Curiae is proportionately spaced, has a typeface of 13 points, and contains 2,656 words.

I declare and certify under the laws of the State of California that the foregoing statement is true and correct and that this certificate was executed on August 4, 2008.



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CERTIFICATE OF SERVICE

I, Kristine Neale, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Two Palo Alto Square, Suite 300, Palo Alto, CA 94306. On August 4, 2008, I served the within documents:

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an UPS agent for delivery.

☐ by causing the document(s) listed above to be personally served on the person(s) at the address(es) set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for personal service and mailing. Under the firm's practice with regard to mailing, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 4, 2008, at Palo Alto, California.

Kristine Neale