MAYER·BROWN

Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, California 94306-2112

Main Tel (650) 331-2000
Main Fax (650) 331-2060
www.mayerbrown.com

Donald M. Falk
Direct Tel (650) 331-2030
Direct Fax (650) 331-4530
dfalk@mayerbrown.com

September 27, 2012

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Harris v. Superior Court (Liberty Mutual Insurance)*, No. S205097

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America and the California Chamber of Commerce (the "Chambers"), through their attorneys, submit this letter as *amici curiae* in support of the petition for review filed on September 4, 2012, by Liberty Mutual Insurance Company and Golden Eagle Insurance Corporation. The decision below ("*Harris II*") circumvents this Court's earlier decision in this case: No. S156555, reported at (2011) 53 Cal.4th 170, which reversed (2007) 64 Cal.Rptr.3d 547 ("*Harris I*"). Rather than implementing this Court's instructions and ensuring that the Wage Order at issue (Wage Order 4–2001) is properly construed in accord with the federal regulations whose substantive standards that Order adopts, the decision below applies the exact same legal standard that this Court held was erroneous. See Pet. 12 (chart comparing Court of Appeal's decisions before and after this Court's decision). Review is therefore warranted here for exactly the same reasons as resulted in the grant of review in No. S156555. Now, however, the reasons for review are reinforced by the need to preserve the integrity of the hierarchical arrangement of the California courts. See generally *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly 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 represents the interests of thousands of California businesses. 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. For that reason, the Chamber filed both a letter supporting review in the predecessor case (No. S156555), and a brief on the merits supporting real parties (petitioners here).

The California Chamber of Commerce ("CalChamber") is a voluntary, non-profit, California-wide business association with more than 14,000 members, both individual and corporate, who represent virtually every economic interest in the state. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. The issue presented here is one such case.

The Chambers and their members have a strong interest in further review of the decision below (207 Cal.App.4th 1225, attached to the petition) because, like the predecessor decision that this Court reversed, the new decision would substantially disrupt California businesses and invite massive litigation. The decision below is just as worthy of this Court's review as the original decision. Indeed, if anything, the decision now presented for review is more worthy because it presents the additional and significant question whether the Court of Appeal has complied with this Court's directions. The importance of the issue is manifest, and its recurrence is obvious from the volume of wage-and-hour class actions proliferating through the California courts, many of them (as in this case) challenging the application of the regulatory exemptions. This Court should grant review to ensure that California employers do not face differing wage-and-hour classification schemes despite the Industrial Welfare Commission's explicit effort to eliminate regulatory conflicts in this context.

The Court of Appeal's Second Decision Continues To Rely On Inapposite Federal Authority, Retaining The Square Conflict With Federal Law That The Wage Order Tried To Eliminate

Just like the predecessor decision that this Court reversed, the new decision in *Harris II* disregards the express intent of the Wage Order it purports to interpret and does so in a way that, if uncorrected, will have deep repercussions throughout the California economy. The decision parts from the federal regulations incorporated in Wage Order 4–2001 and the federal judicial decisions construing those regulations. And it rests on an insupportable premise: that the exemption from wage and hour regulations for

"administrative" employees applies 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. And it is irreconcilable with this Court's decision, which pointed away from the Court of Appeal's formulaic reliance on categories and classifications that are *not* part of the federal regulations that the Wage Order makes controlling, and that squarely conflict with the holdings of federal courts—including the Ninth Circuit—applying the same federal regulations to the same job duties at issue here.

The Court of Appeal decision also engages in sleight of hand, replacing one superseded federal authority with a different decision sharing the same flaws. The Court of Appeal supported the analysis in its former decision by citing *Bratt v. County of Los Angeles* (9th Cir.1990) 912 F.2d 1066, a Ninth Circuit decision that applied *different* federal regulations that have been superseded by the regulations incorporated into the Wage Order. In particular, this Court observed, the Court of Appeal relied on *Bratt* to restrict the scope of the administrative exemption to duties that are "carried on at the level of policy or general operations." 53 Cal.4th at 189 (quoting *Harris I*). This Court pointedly observed that "*Bratt*'s persuasiveness is in doubt." *Ibid.*

That was a gentle understatement. As this Court further recognized, "[t]he Ninth Circuit has subsequently held that under more recent applicable federal regulations, claims adjusters are exempt from the Fair Labor Standards Act's overtime requirements 'if they perform activities such as interviewing witnesses, making recommendations regarding coverage and value of claims, determining fault and negotiating settlements.'" *Ibid.* (quoting *Miller v. Farmers Ins. Exch.* (*In Re Farmers Ins. Exch.*) (9th Cir.2007) 481 F.3d 1119, 1124). Thus, the Ninth Circuit—which addresses federal wage-and-hour issues in cases involving California employers—has held that the analysis in *Bratt* is both outdated as to the law and inapplicable to the facts here.

Rather than following *Miller*—or any other decision applying the federal regulations in effect as of 2001 to claims adjusters—the Court of Appeal in *Harris II* simply identified and relied on a decision from the same vintage as *Bratt*, but from another federal circuit, the Third: *Martin v. Cooper Elec. Supply Co.* (3d Cir. 1991) 940 F.2d 896. Like *Bratt*, *Martin* did not address claims adjusters, and reached its conclusions while applying the same, superseded federal regulations applied in *Bratt* rather than the regulations adopted in the Wage Order.

Just like *Bratt*, the "persuasiveness [of *Martin*] is in doubt." 53 Cal.4th at 189. The Third Circuit has recently recognized that "changes in the Secretary's regulations make [*Martin*] inapplicable" where those changes matter, as they do here. *Smith v. Johnson & Johnson* (3d Cir. 2010) 593 F.3d 280, 286. If *Martin* no longer governs the analysis of sales personnel (at issue in both *Martin* and *Smith*) in the court that decided *Martin*, it is difficult to see how *Martin*'s analysis could trump the Ninth Circuit's decision in *Miller*, which directly addresses the status of claims adjusters under the correct set of federal regulations.

The Court of Appeal's Second Decision Elevates Form Over Substance By Repeating Its Erroneous Restriction Of The Administrative Exemption To "Work Performed At The *Level* Of Policy Or General Operations"

Viewed in light of the text of the Wage Order, the decision now presented for review is as erroneous as it is disruptive. At issue here is Wage Order 4–2001, § 1(A)(2), which exempts from wage-and-hour regulation employees who are employed in an "administrative capacity." In promulgating this Wage Order, the Industrial Welfare Commission (IWC) attempted to make that exemption precisely coextensive with its analogue in regulations promulgated under the federal Fair Labor Standards Act. 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").[1] Wage Order 4–2001, § 1(A)(2)(f). That incorporation-by-reference specifically addressed 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 the federal regulations.

Once again, the court below began from the same starting point as the federal regulations—the general terms "directly related to management policies or general business operations"—and disregarded the federal regulations' detailed guidance about "*activities* constituting exempt and non-exempt work." Once again, the court below disregarded the unified (and contrary) federal case law addressing the exempt status of claims adjusters. That case law should have confirmed 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.

In elevating its own version of the "administrative/production worker dichotomy" over the specific guidance provided in the federal regulations incorporated into Wage Order 4–

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

2001, the Court of Appeal adopted an analysis that, like *Harris I*, could drastically alter the classification of administrative employees throughout California. The court held that the administrative exemption in the Wage Order (*id.* § 1(A)(2)(a)) covers "only work performed at the *level* of *policy* or *general* operations." 207 Cal.App.4th at 1238 (first emphasis added; remaining emphasis in original). But that is not what the Wage Order says. Like the incorporated federal regulations, it 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 purely an invention of the court below.

The Court Of Appeal's Second Decision Cannot Be Reconciled With The Structure Of—Much Less The Examples Of Exempt Activity In—The Federal Regulations

In practical effect, the Court of Appeal's restriction of 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, the court appears to believe that no employee whose work has anything to do with revenue generation or cost reduction can be an administrative employee. The whole point of the administrative exemption is not to confine exempt status 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)). Indeed, by narrowing the administrative exemption to persons who make rather than execute company policy, the court to a substantial extent merges that exemption (Wage Order 4–2001, § 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). And the court below did not dispute that the claims adjusters at issue here did work of such substantial importance. *See* 207 Cal.App.4th at 1236-37, 1242.

The court below instead disregarded the regulation in 29 C.F.R. § 541.205(c) as directed at the wrong, "quantitative" question. See 207 Cal.App.4th at 1245. Rather than follow this Court's instructions to consider the pertinent federal regulations "read as a whole" (53 Cal.4th at 188), the court below considered the regulations' examples of exempt

activities to be irrelevant, as if the federal Labor Department listed job descriptions in its quantitative discussion that could not meet the Department's own qualitatitive test—as would be the case if the decision below were correct. Not only "claims agents and 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. Under the classification adopted below, this listing was a frolic, as all of these activities—especially the latter two occupations, which are largely engaged in sales of their employers' services—almost certainly would fail the qualitative test.

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 whether to pay a claim, and how much, 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.

Yet another specific example in the federal regulations excludes any limitation of the exemption to administrative activities at the highest "level" of the business as a whole. The regulations note that an "administrative assistant to an executive in the production department of the business" is "engaged in activities relating to the administrative operations of the business" (29 C.F.R. § 541.205(b))—and thus is exempt if he meets the other standards for the exemption, even though his function clearly would not meet the Court of Appeal's test.

The Court Of Appeal's Second Decision Increases Regulatory Inefficiency And Unpredictability, Thwarting The Wage Order's Intent

To justify its limitation of "administrative" type-of-work criterion to employees at a high or central "level" of an organization, the court advanced another 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* 207 Cal.App.4th at 1244-45. Like the analogous passage in the earlier opinion below, 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 court's 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.

The court below acknowledged that "a number of federal circuit and district court cases" have held that claims adjusters fall within the administrative exemption. 207 Cal.App.4th at 1246-47. And the court tellingly failed to identify a *single* federal decision that agrees with it. Thus, the decision below conflicts not only with 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.

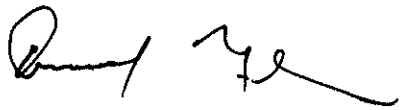
As a result, the decision of the Court of Appeal in this case thwarts the Industrial Welfare Commission's effort to bring California law on the exempt status of administrative employees into accord with federal law. To the contrary, by insisting on creating a square conflict with the Ninth Circuit's interpretation of federal law in *Miller*, the decision below ensures the precise result that the Wage Orders were designed to prevent: the same person with the same duties will be classified one way under the Labor Code and another way under the federal Fair Labor Standards Act.

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, rather than a place that large employers depart when opportunities arise elsewhere.

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.

The decision below should be reviewed and reversed.

Respectfully submitted,



Donald M. Falk

Robin S. Conrad
Shane Brennan Kawka
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Erika Frank
Heather Wallace
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814
(916) 444-6670

CERTIFICATE OF SERVICE

I, Kristine Neale, declare as follows:

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, 3000 El Camino Real, Palo Alto, California 94306-2112. On September 27, 2012, I served the foregoing document(s) described as:

AMICUS LETTER ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

I served the documents on the persons below, by placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below.

Ira Spiro
Katherine J. Odenbreit
Justian Jusuf
Spiro Moss Barness LLP
11377 W. Olympic Blvd., 5th Floor
Los Angeles, CA 92101

Steven W. Pepich
Lerach Coughlin Stoia Geller
Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, CA 92101

Timothy Cohelan
Cohelan & Khoury
605 C Street, Suite 200
San Diego, CA 92101-5305

Michael L. Carver
Law Offices of Michael L. Carver
1600 Humbolt Road, Suite 3
Chico, CA 95928-8100

Douglas R. Hart
Geoffrey D. Deboskey
Sheppard, Mullin, Richter
& Hampton LLP
333 S. Hope Street, 48th Floor
Los Angeles, CA 90071

Robert J. Stumpf, Jr.
William V. Whelan
Karin Dougan Vogel
Sheppard, Mullin, Richter
& Hampton LLP
501 West Broadway, 19th Floor
San Diego, CA 92101-3505

The Honorable Carolyn B. Kuhl
Los Angeles Superior Court
Department 323
600 S. Commonwealth Avenue
Los Angeles, CA 90005-4001

Clerk of the Court
Second District, Court of Appeal
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
San Francisco, CA 94102

Ronald A. Reiter
Supervising Deputy Attorney General
Consumer Law Section
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Consumer Law Section
Los Angeles District Attorney
210 W. Temple St., Suite 1800
Los Angeles, CA 94102

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice 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 declare under penalty of perjury that the foregoing is true and correct.

Executed on September 27, 2012, at Palo Alto, California.

Kristine Neale