No. S279397

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GUSTAVO NARANJO, et al.,
Plaintiffs and Appellants,

vs.

SPECTRUM SECURITY SERVICES, INC.,
Defendant and Appellant.

After a Decision by the Court of Appeal of the State of California
Second Appellate District, Division Four
Case No. B256232

Superior Court for the State of California,
County of Los Angeles, Case No. BC372146
The Honorable Barbara M. Scheper

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE U.S. CHAMBER OF COMMERCE AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT SPECTRUM SECURITY SERVICES, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

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Pursuant to California Rules of Court, rule 8.520(f), the Chamber of Commerce of the United States of America and the California Chamber of Commerce respectfully request permission to file the attached amici curiae brief in support of Defendant-Appellant Spectrum Security Services, Inc.[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It

[1] No party or counsel for a party authored this proposed brief in whole or in part, and no person or entity other than amici curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The California Chamber of Commerce (CalChamber) is a non-profit business association with approximately 13,000 members, both individual and corporate, representing 25% of the state's private sector workforce and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70% 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 business on a broad range of legislative, regulatory, and legal issues.

Amici's members and affiliates include national or California companies that are subject to California Labor Code section 226, which requires employers to provide their employees with timely and accurate itemized wage statements. Amici have a strong interest in the proper interpretation of that statute, including its provision authorizing statutory penalties for a "knowing and intentional" failure to comply with the law. A ruling that does not take account of employers' good-faith efforts

to comply with section 226 would permit the imposition of substantial and unwarranted statutory penalties and would raise significant practical and fairness concerns for businesses of all sizes.

Amici respectfully submit that the proposed brief will be helpful to the Court. It presents arguments and authorities, not discussed by the parties, supporting the Court of Appeal's construction of the statute and explaining the significant policy concerns arising from plaintiff's reading of the statute.

Respectfully submitted,

DATED: November 9, 2023

MUNGER, TOLLES & OLSON LLP

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AMICI CURIAE BRIEF OF THE U.S. CHAMBER OF COMMERCE AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT SPECTRUM SECURITY SERVICES, INC.

INTRODUCTION

Labor Code section 226, subdivision (a) requires employers to provide their employees with accurate statements itemizing wages, deductions, and hours worked, among other categories of information. Those statements assist employees in understanding the basis for their compensation, and employers commit substantial resources to preparing the statements in compliance with the Labor Code's requirements.

Those requirements are complex and subject to ongoing interpretation by the courts. Even the most diligent employer faces the risk that its efforts to comply with the law will later be held to have been incorrect. When that occurs, employers must

change their practices going forward and compensate employees for any wages that were not properly paid. But the Labor Code does not, in addition, impose statutory penalties when employers have a good-faith belief that they complied with their obligation to provide an accurate wage statement.

Under Labor Code section 226, an employer is subject to penalties only for a "knowing and intentional failure" to comply with section 226(a). The text and context of section 226(e) demonstrate that the provision seeks to address culpable conduct—not situations where the employer has a good-faith basis for believing it has complied with the law.

A contrary reading of section 226(e) would disserve the statute's purpose and raise serious practical concerns for both employers and employees. It would unfairly expose employers to potentially substantial penalties in the face of genuine uncertainty in the law and notwithstanding good-faith efforts to comply. And it could lead to more-confusing and less-useful wage statements, as employers may seek to avoid penalties by including extraneous information and disclaimers. The Court of Appeal correctly construed the statute to avoid these results.

ARGUMENT

I. An employer is not liable for penalties if it acted in good faith to comply with the requirements of section 226

Labor Code section 226, subdivision (a) requires employers to provide their employees, semi-monthly or at the time of each payment of wages, an "accurate itemized statement in writing" showing various enumerated items, including the employee's

gross and net wages, total hours worked, deductions, and dates of the relevant pay period, among other information. (Lab. Code, § 226, subd. (a).) An employer must maintain copies of the statement and a record of deductions. (*Ibid.*)

Section 226 contains two different remedies for employees who do not receive an accurate statement. First, an employee "may . . . bring an action for injunctive relief to ensure compliance" and may obtain an award of costs and attorneys' fees in any such action. (*Id.*, § 226, subd. (h).) Second, under section 226, subdivision (e), an employee "suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees." (*Id.*, § 226, subd. (e)(1).)

The text of section 226, subdivision (e)(1), read in conjunction with surrounding provisions, demonstrates that it does not authorize statutory penalties when an employer has a good-faith belief that it provided a lawful, accurate wage statement. To begin with, the plain language of the phrase "knowing and intentional failure by an employer to comply" reflects a requirement that the employer intended for the employee to receive a non-compliant statement. The dictionary definition of "knowingly" when this language was added to the

Labor Code in 1976 included "[w]ith knowledge; consciously; intelligently; willfully; intentionally." (Black's Law Dictionary 1012 (4th ed. 1968).) The word "intentional" was defined as "[w]illful." (*Id.* at p. 948.) And both of these terms in the statute modify the noun "failure by an employer to comply with subdivision (a)." (Lab. Code, § 226, subd. (e)(1).) Read together, these terms capture culpable conduct—an employer's action intended to result in a non-compliant wage statement. The statute thus does not penalize employers when they have a good-faith belief that they have complied with the law. (E.g., *Wilson v. SkyWest Airlines, Inc.* (N.D.Cal. July 12, 2021, No. 19-cv-01491-VC) 2021 WL 2913656, at *2 [adopting that construction]; *Oman v. Delta Air Lines, Inc.* (N.D.Cal. 2022) 610 F.Supp.3d 1257, 1274 [same].)

This Court has recognized that the meaning of the term "intentionally" may depend on the statutory context and intent of the Legislature. (*Estate of Kramme* (1978) 20 Cal.3d 567, 572.) Here, the context confirms that an employer does not "knowing[ly] and intentional[ly]" fail to comply with section 226(a) if it has a good-faith belief it has provided a lawful statement of wages. Most significantly, section 226 expressly permits consideration of the employer's efforts to conform its conduct to the law. Section 226, subdivision (e)(3) says: "In reviewing for compliance with this section, the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this

section." (Lab. Code, § 226, subd. (e)(3).) This provision demonstrates that the circumstances surrounding an employer's violation of section 226—including facts concerning its effort to comply—are relevant in determining whether its shortcoming was "knowing and intentional."

Emphasizing other language in section 226(e)(3), Naranjo argues that only "sporadic failures one might expect in the administration of a business, such as accidental omissions, isolated and unintentional payroll errors, or inadvertent clerical mistakes" fall outside the scope of the Legislature's definition of "knowing and intentional" failures. (OBM 27-28; see also *Gola v. Univ. of S.F.* (2023) 90 Cal.App.5th 548, 566 [adopting similar construction of statute].) As he notes, section 226(e)(3) provides that, "[f]or purposes of this subdivision, a 'knowing and intentional failure' does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake." (Lab. Code, § 226, subd. (e)(3).) That provision, however, lists only one type of action that is "not include[d]" within the meaning of "knowing and intentional failure." (See *ibid.*) It does not purport to define the term. Moreover, if the Legislature had intended for a clerical or inadvertent mistake to be the *only* exception to liability under section 226(e), it would not have additionally specified that failures to comply must be "knowing and intentional." As this Court has recognized, a "'construction making some words surplusage is to be avoided.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 357, quoting *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

Authority in other contexts further supports the conclusion that the statutory phrase "knowing and intentional failure" to comply does not impose liability on an employer that has a good-faith belief that it has provided a lawful wage statement. In *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, this Court addressed the question whether a defendant had waived attorney-client privilege over certain materials as a result of disclosures made during discovery. The Court explained that a waiver is "the intentional relinquishment of a known right." (*Id.* at p. 211.) The Court found no such intentional relinquishment because the defendant had "apparently believed in good faith that the law required the disclosures" and "no controlling authority on point existed at the time." (*Ibid.*) "An honest mistake of law, where the law is unsettled and debatable, . . . militates against a finding of waiver[.]" (*Ibid.*) Similarly here, the Legislature's inclusion of language requiring a "knowing and intentional" mental state reflects an intent to impose penalties only on employers who lack a good-faith basis for their actions.

Naranjo's contrary interpretation of the statute would inject anomalies into the statutory scheme. Notably, it would mean that an employer's good faith *would* preclude penalties for the failure to timely pay wages at the end of employment but *would not* preclude penalties for the failure to provide an accurate wage statement. That incongruity would arise because, under Labor Code section 203, an employer who "willfully fails to pay" owed wages within the required time after the employee is discharged or resigns is subject to penalties. (Lab. Code, § 203,

subd. (a).) And a good-faith dispute that wages are due precludes the imposition of waiting-time penalties under that provision. (E.g., *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1201-1204.) As one district court put it, "[i]t would seem ironic if the good faith dispute defense applied to Section 203, which involves failure to timely pay wages, but not to Section 226, which involves inaccurate wage statements. If anything, failure to pay wages would seem to warrant lesser tolerance of defenses than failing to provide accurate wage statements." (*Woods v. Vector Marketing Corp.* (N.D.Cal. May 22, 2015, No. C-14-0264 EMC) 2015 WL 2453202, at *4, fn.3 (Chen, J.).)

II. Naranjo's reading would lead to adverse practical consequences and disserve the purpose of the law

This Court has looked to practical consequences when construing section 226. (*Oman v. Delta Air Lines, Inc.* (2020) 9 Cal.5th 762, 775.) Here, Naranjo's reading of the statute would unfairly penalize employers that act in good faith to comply with their statutory obligations and undermine the purpose of the law.

A. Naranjo's reading of the statute poses significant fairness concerns for employers

Employers invest substantial resources to comply with the Labor Code's requirements. Those requirements are complicated, changing, and subject to differing and evolving interpretations, including by courts. While section 226 "began as a simple requirement that employers report deductions from pay," it has "since expanded to require a detailed list of information, including hours worked, wages earned, hourly rates, and employee- and employer-identifying information." (*Naranjo v.*

Spectrum Security Services, Inc. (2022) 13 Cal.5th 93, 117.) The meaning of many of the new categories of information is legally complex and subject to significant uncertainty.

The term "wages" is a case in point. California courts routinely grapple with what constitutes a "wage" under section 226, addressing, for example, whether forms of compensation like contributions to union trust funds or vacation days qualify. (See, e.g., *Mora v. Webcor Construction, L.P.* (2018) 20 Cal.App.5th 211, 221-223 [employer's payments to union trust fund not wages]; *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 390 [earned vacation pay not wages].) And as to the particular wages at issue in this very case, whether section 226 applied at all to missed-break premium pay "generated confusion in the Courts of Appeal as well as in federal courts" until this Court resolved the question in its 2022 decision. (*Naranjo*, *supra*, 13 Cal.5th at p. 104.)

Imposing statutory penalties under section 226 in circumstances when the law is unsettled would unfairly penalize employers. When the law is uncertain, employers are not on clear notice of their legal duties. (Cf. *United States v. AMC Entertainment, Inc.* (9th Cir. 2008) 549 F.3d 760, 768 [retroactive application of regulation inconsistent with due process where "[e]xamining the conflicting decisions reached by various courts, . . . it is clear that the text of [the regulation] did not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited'"].) An employer that undertakes good-faith efforts to

comply in the face of that uncertainty should not face penalties if its reasonable, good-faith interpretation of the law later turns out to be incorrect.

Those penalties, moreover, can be substantial. Under section 226(e), an employee facing injury from a knowing and intentional violation of section 226(a) may recover the greater of all actual damages or $50 for the initial pay period, and $100 per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of $4,000. (Lab. Code, § 226, subd. (e)(1).) Adding these sums across a population of similarly situated workers, a large employer could face millions of dollars in penalties. For smaller employers, penalties of up to $4,000 per employee can quickly escalate into a significant liability and a threat to the financial health of the business.

In addition, in cases like this one where a claimed violation of section 226 is paired with an underlying allegation that the employer failed to pay owed wages, imposing wage-statement penalties on employers despite good-faith attempts to comply would multiply the employer's liability for the same error. There is no dispute that, even where the employer makes a good-faith mistake, it must compensate the employee for wages that are later determined to be owed. (See, e.g., Lab. Code, § 226.7, subd. (c).) Under Naranjo's reading, the employer would be additionally liable for statutory penalties under section 226(e) for the same good-faith, though ultimately mistaken, interpretation of the underlying wage provision.

Under his reading, the employer apparently could face the risk of criminal punishment as well. Labor Code section 226.6 provides that an employer who "knowingly and intentionally" violates section 226 "is guilty of a misdemeanor," subject to fines, imprisonment, or both, "in addition to any other penalty provided by law." (Lab. Code, § 226.6.) On Naranjo's construction of the phrase "knowing and intentional," it would appear that an employer attempting in good faith to comply with its obligations could still be exposed to the risk of criminal sanction.

B. Naranjo's reading would ill-serve the purpose of section 226

Imposing penalties in the case of good-faith disputes would also lead to results that are at odds with section 226's purpose. This Court has recognized that section 226's central function is "informational." (*Oman*, *supra*, 9 Cal.5th at p. 775.) The "core purpose" of the provision is "to ensure an employer documents the basis of the employee compensation payments to assist the employee in determining whether he or she has been compensated properly." (*Ward v. United Airlines, Inc.* (2020) 9 Cal.5th 732, 752, internal quotation marks and alterations omitted.)

Naranjo's reading would undermine that purpose by incentivizing employers to include on wage statements extraneous information and related disclaimers about items that are not, in fact, earned or owed wages or other required information—all in a hypercautious effort not to help employees, but instead to avoid penalties for omitting information about items that could become the subject of later dispute. And given

the number of items that must be included on a wage statement, such an incentive could lead to a multiplicity of defensive disclosures that would generate further confusion still. (See Lab. Code, § 226, subds. (a)(1)-(9) [enumerating required categories of information].)

This Court has recognized that, past an appropriate point, section 226 disclosures may hinder employees' understanding rather than help it. In *Oman*, this Court addressed employees' allegation that non-California-based employees who worked in California and elsewhere were entitled to California-compliant wage statements for the time that they worked within the state. (*Oman*, *supra*, 9 Cal.5th at p. 774.) The Court rejected the employees' claim, reasoning that, under their proposed rule, employers would need to either "accompany each California-specific wage statement with multiple similar separate statements under the laws of each and every additional state in which an employee worked during a pay period" or "issue a single wage statement, but allow California law effectively to dictate the form and contents." (*Id.* at p. 775.) The Court explained that the first option would "undermine the very purpose of section 226," because it would lead to "employees receiving a blizzard of wage statements every pay period, each documenting only a state-specific sliver of their work, and from this paper snowdrift trying to discern what they had actually been paid." (*Ibid.*) Here, too, a rule permitting penalties when the law is uncertain could lead employers to include extraneous information and disclaimers—in addition to the information that is undisputedly required—

leaving employees to struggle to "discern what they had actually been paid" or what they were owed.

Finally, Naranjo's concern that statutory penalties are necessary to assure adequate compliance with section 226(a) and related wage requirements is misplaced. (See Reply 32-38.) Under the Court of Appeal's ruling, an employer would avoid penalties under section 226(e) only if it had a good-faith basis for not having included the required information on a wage statement. An employer that knowingly disregards its obligations or whose failure is wholly unreasonable will likely be held to have knowingly and intentionally violated the law. That is because no good-faith dispute can be shown if the employer's defense, "under all the circumstances," is "unsupported by any evidence," "unreasonable," or "presented in bad faith." (Cal. Code Regs., tit. 8, § 13520 [good-faith defense to waiting-time penalties].) That standard encourages diligence and good-faith efforts to understand and comply with the requirements of section 226 and other provisions of state wage-and-hour law.

As the Ninth Circuit explained in discussing section 203 waiting-time penalties, allowing a good-faith defense in cases of uncertainty "amply serves the balance struck by the applicable statutes and regulations between incentivizing prompt payment of wages and shielding innocent mistakes from penalties." (*Hill v. Walmart Inc.* (9th Cir. 2022) 32 F.4th 811, 816-817.) So too here, a good-faith defense furthers the balance the Legislature sought to achieve through section 226(e) by encouraging employers to provide accurate wage statements, without

penalizing those who have acted in good faith to comply with evolving labor laws.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

DATED: November 9, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I hereby certify that, according to the word count feature of the software used, this brief contains 2880 words, exclusive of materials not required to be counted under California Rules of Court, rule 8.520(c)(3).

DATED: November 9, 2023

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PROOF OF SERVICE

California Supreme Court Case No. S279397

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, 50th Floor, Los Angeles, CA 90071.

On November 9, 2023, I hereby certify that I electronically served the foregoing **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF THE U.S. CHAMBER OF COMMERCE AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT SPECTRUM SECURITY SERVICES, INC.** through the Court's electronic filing system, TrueFiling. I certify that all participants in the case who are registered TrueFiling users and appear on its electronic service list will be served pursuant to California Rules of Court, rule 8.70. Electronic service is complete at the time of transmission:

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I further certify that participants in this case who are not registered TrueFiling users are served by **mailing** the foregoing document by FedEx.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 9, 2023 at Los Angeles, California.

/s/ Juana Guevara
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