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June 7, 2013

VIA OVERNIGHT MAIL

Chief Justice Tani G. Cantil-Sakauye and
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Gonzalez v. Downtown LA Motors L.P.*, Supreme Court Case No. S210681; Court of Appeal Case No. B235292
Amicus Letter In Support of Petition for Review

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of California:

Pursuant to Rule 8.500(g) of the California Rules of Court, the undersigned submits this letter on behalf of the Retail Litigation Center, Inc. ("RLC") in support of the petition for review filed by Downtown LA Motors in the above case.

Interest of the Amicus Curiae Retail Litigation Center

The RLC is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Ninety percent of the RLC's members have facilities in California and employ Californians. The RLC has filed amicus briefs or supporting letters in many important cases, such as: *Iskanian v. CLS Transportation of Los Angeles*, Case No. S204032; *Duran v. U.S. Bank*, Case No. S200923: *Wal-Mart Stores, Inc. v. Dukes* (U.S. Supreme Court); *Standard Fire Insurance, Co. v. Knowles*

(U.S. Supreme Court); *Comcast Corp. v. Behrend* (U.S. Supreme Court). Downtown LA Motors is not a member of the RLC.

The wage orders contain a simple basic requirement that an employer must pay each employee "not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." IWC Wage Order Nos. 1-16, subd. 4(B). Consistent with this flexible requirement, California employers for many years have used a wide variety of compensation systems to pay their employees at least, and in most cases, much more than, the required minimum wage (currently $8.00 an hour). However, the holding in *Gonzalez,* and in several prior decisions that *Gonzalez* relies upon, collectively amount to judicially created amendments to the wage orders and California Labor Code that impose super-minimum wage burdens on California employers. These decisions also create onerous time-recording obligations on employers and employees alike that are nowhere to be found in any of the over 9,000 sections of the Labor Code nor in any of the seventeen wage orders promulgated by the Industrial Welfare Commission.

This Court has "long recognized" that:

> "a court's 'overriding purpose' in construing a statue is 'to give the statute a *reasonable* construction conforming to [the Legislature's] intent ...' " "The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable." . . . "When a statute is capable of more than one construction', ' "[W]e must ... give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." ' "

Gattuso v. Harte-Hanks Shoppers, Inc., 42 Cal.4th 554, 567 (2007). (citations omitted) The holding in *Gonzalez* and the cases relied on by *Gonzalez* violate these sound principles in countless ways, by unreasonably construing the minimum wage law in an impractical and technical way, which upon application would result in unwise policy, mischief and absurdity. For example:

- The requirements imposed by these courts will deny employers and employees the benefits of a pure piece rate or commission based compensation system, in direct contravention of Labor Code Section 200 which clearly allows wages to be determined by the standard of "piece, commission basis, or other method of calculation."

- They will force employers who use piece rate or commission systems to pay hourly wages on top of piece rate or commission wages, no matter how much an employee is paid under either system.

- They lead to absurd results, such as the California District Court's conclusion in *Cardenas v. McLane FoodServices, Inc.*, 796 F. Supp. 2d 1246 (C.D. Cal. 2011), that truck drivers earning an average of $75,000 per year are not being paid minimum wage under California law. (*See Cardenas,* No. 8:10-cv-00473-DOC-FFM, Dkt. No. 90 at p.6, ¶13).

- They will require employers and employees alike to navigate amorphous concepts of "productive" and "non-productive" tasks and then attempt, like an attorney, to record their times spent on various specific activities throughout the working day when they are purportedly engaging in each type of task, including any "waiting time."

- They will require employers and employees to monitor and record when duty-free rest breaks are taken, even though there is ***no*** requirement to do so in the Labor Code or wage orders.

If the Legislature had elected to impose these onerous burdens on California employers and employees that would be one thing. But it has not. The purported requirements that employees must keep separate time records, and employers must separately pay minimum wage on an hourly basis, for any time "waiting for vehicles to repair . . . cleaning their work areas, obtaining parts, participating in on-line training, and reviewing service bulletins" (*Gonzalez* at p. 17); performing "pre- and post-shift duties" such as vehicle safety checks, and paperwork (*Cardenas*, 797 F.Supp.2d at 1253); duties "incidental" to sales such as "stocking, pre-opening, or post-closing time" (*Balasanyan v. Nordstrom, Inc.*, Nos. 3:11-cv-2609, 3:10-cv-2671, 2013 WL 903267, at *4 (S.D. Cal. Mar. 6, 2013)); attending meetings and training sessions, setting up work stations, and taking rest breaks (*Ontiveros v. Zamora,* No. 5-08-567, 2009 WL 425962, at *4 (E.D. Cal. Feb. 20, 2009)); are entirely judge-created. The Labor Code merely requires that employers maintain "payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate to, employees . . ." Labor Code Section 1174(d). Employees must also be allowed to "maintain[] a personal record of hours worked, or if paid on a piece-rate basis, piece-rate units earned." *Id.* The wage orders promulgated by the Industrial Welfare Commission merely require that employers keep "[t]ime records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded." *See* Section 7 of the wage orders. None of these provisions state or even suggest that employers must keep time records of waiting time, training time, meeting attendance, paperwork duties or rest breaks. Yet *Gonzalez* and other cases mentioned above create all these time-recording requirements for any employee paid on a piece rate or commission basis.

Further, these requirements would not "serve the public policy of safeguarding employee wages." *Prachasaisoradej v. Ralphs Grocery Co., Inc.*, 42 Cal.4th. 217, 241 (2007). In this regard, employers could respond to such requirements by changing their systems either to eliminate piece rate or commission pay entirely, or by paying a base minimum wage for all hours worked, and then lowering the formulas for calculating piece rate or commission pay to take into account the separate hourly payments. Either approach would result in the payment of minimum wage for "all hours worked" consistent with the *Gonzalez* requirements, but it would not increase the bottom line earnings of a single employee.

This was precisely the situation faced by this Court in *Prachasaisoradej.* There, this Court rejected a requirement imposed by a lower court that would have prevented employers from taking into account certain business costs in calculating employees' incentive compensation. Employers could concededly have compensated for any requirement to eliminate certain expenses from the incentive compensation calculation "simply by lowering the percentage of the resulting 'profit' figure that was payable to employees." *Id.* In rejecting such a requirement, this Court declared: "We see nothing in the wage-protection laws, or the policies they promote, that requires such meaningless figure-juggling." *Id.* at 241-242. The same situation is present here. Employers could compensate for the purported minimum wage requirement of *Gonzalez* by the same sort of "meaningless figure-juggling," in which base hourly pay of at least minimum wage is added to a compensation system, but the percentages used to calculate future piece rate or commission earnings are lowered to offset the "base minimum wage" earnings.

Indeed, the changes in compensation systems that would inevitably occur in response to the requirements imposed by *Gonzalez* would "defy reason and common sense" by ***lowering*** the compensation of an employer's most productive employees. *Id.* at 237. For example, under a piece rate system that has been used by employers and employees for countless years, an employee may earn $20 for every job completed. On average, employees complete one job per hour, but a more productive employee completes ten jobs in an eight hour day, earning $200. However, if the requirements of *Gonzalez* were to be the law, the employer could and likely would change its system to pay employees $8.00 per hour for all hours worked, plus a lower piece rate of $12.00 per job to take into account the expectation that an "average" employee will complete one job per hour while also earning $8.00 in "hourly" minimum wage. Under that scenario, the same employee who completes ten jobs in an eight hour day will only earn $184.00 for the day, which is $16 ***less*** than he would have earned under a system that, according to *Gonzalez*, would not be paying him minimum wage for "all hours worked." The idea that an employee can be paid less money and found to be earning the minimum wage, or more money and not be earning minimum wage, ***for exactly the same work***, is precisely the sort of "absurdity upon application" that this Court has repeatedly rejected in construing statutory provisions.

For these reasons, the RLC urges this Court to grant review of *Gonzalez* and provide an interpretation of the minimum wage requirements that is workable and reasonable, and that avoids the "mischief or absurdity" of the requirements imposed by certain courts.

Respectfully submitted,
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cc: *See* attached Proof of Service.

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