No. E072704

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

NICOLE WOODWORTH,

Plaintiff-Appellant,

vs.

LOMA LINDA UNIVERSITY MEDICAL CENTER,

Defendant-Respondent.

On Appeal From The Superior Court Of California, San Bernardino
Case No. CIVDS1408640
The Honorable David Cohn, Presiding

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF; BRIEF OF *AMICUS CURIAE* CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENT

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TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

Pursuant to Rule 8.200(c) of the California Rules of Court, the California Hospital Association respectfully applies for leave to file an *amicus curiae* brief in support of the position of Defendant and Respondent Loma Linda University Medical Center ("Loma Linda"). The proposed brief is attached.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE* CALIFORNIA HOSPITAL ASSOCIATION

Amicus California Hospital Association ("CHA") represents the interests of hospitals, health systems and other healthcare providers in California. CHA includes nearly 500 hospital and health system members. CHA's mission is to improve healthcare quality, access and coverage, and create a regulatory environment that supports high-quality, cost-effective healthcare services.

Consistent with that mission, CHA consults on issues that affect the healthcare industry and advocates on behalf of hospitals, health systems, and other healthcare providers. CHA is uniquely able to assess both the impact and implications of the legal issues presented in employment cases, as California's hospitals employ over 500,000 individuals in complex workplaces. CHA regularly participates as amicus curiae in significant California appellate cases, including *Gerard v. Orange Coast Mem'l Med.*

Ctr., 6 Cal. 5th 443 (2018), which (like the present case) have a substantial practical impact on the interests of CHA members and their employees.

No party's counsel has authored this brief, either in whole or in part; nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the *amici curiae*, their members, or counsel have contributed money intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.200(c)(3).

II. PROPOSED *AMICUS CURIAE* BRIEF

The proposed *amicus curiae* brief will assist the Court in deciding two issues important to the healthcare industry.

First, the amicus brief demonstrates, through legislative and regulatory history, that: (a) the election disclosure requirements for Alternative Workweek Schedules (AWS) are not, as plaintiff Woodworth incorrectly contends, so onerous or impractical as to require healthcare institutions to anticipate and disclose each and every potential effect *and* non-effect of a proposed AWS, and (b) Wage Order 5 permits *both* healthcare employers and employees to terminate an AWS, not just employees as Woodworth incorrectly contends.

Second, CHA agrees with Loma Linda that, under Labor Code section 226, pay stubs must enable an employee to determine the total hours they worked, but are not required to list the *totaled* hours worked. In other words, as long as each of the hours worked is shown, "simple math"

is allowed. The amicus brief explains that this common sense rule makes particular sense in the healthcare industry, where (depending on a healthcare worker's schedule) pay stubs often must list numerous and varying pay-codes and pay rates, such that listing total hours worked is both impractical and unnecessary.

Dated May 4, 2021 SEYFARTH SHAW LLP

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I. Introduction

Plaintiff Woodworth seeks to invalidate hundreds of AWS elections impacting thousands of Loma Linda employees on the theory that election disclosures must detail every imaginable effect *and* non-effect of a proposed AWS arrangement. She also argues that employers have no power to terminate an AWS—even with two weeks' notice—because "only employees may terminate [an] AWS." AOB-95.

As Loma Linda persuasively explains, Woodworth's reading of Wage Order 5 is incorrect as a matter of law. CHA writes separately to discuss the legislative and regulatory history of the AWS provision, as well as case authority. Taken together, these underscore that (a) election disclosure requirements do not need to meet Woodworth's impossible standards, and (b) just like their employees, employers retain the right to terminate AWS arrangements. *See* Parts II(A), (B), below.

CHA also explains why Woodworth's onerous view of AWS requirements, if adopted, would needlessly threaten existing AWS arrangements—which are very popular among healthcare workers—and dissuade hospitals from continuing to offer them. *See* Parts II(A), (B).

Separately, Woodworth calls into question the wage statements Loma Linda issued to her, arguing that they violate Labor Code section 226 because they do not have a separate line item listing "total hours worked." But because Woodworth indisputably could derive her total hours worked

from the wage statement by doing "simple math," existing appellate authority uniformly holds that section 226 is satisfied. CHA urges this Court to refrain from creating a split of authority on this settled issue. *See* Part III(A).

CHA also writes to emphasize that mandating a redundant "total hours worked" line on a wage statement is particularly burdensome and unnecessary in the healthcare sector. *See* Part III(B). Hospital paystubs already are detailed— containing a multitude of pay rates, pay codes, and differentials—due to the unique scheduling demands in healthcare environments. Requiring yet more information would not assist healthcare employees, who (like Woodworth) understand how to read their paystubs. All it will accomplish is to add redundant information to paystubs that already are detailed and replete with pay information. Woodworth's onerous interpretation of section 226 must be rejected for this additional reason.

II. Loma Linda's AWS Disclosures Comply With Wage Order 5

A. Nothing in the Wage Order's text, history or interpretive case authority supports the type of "mega disclosure" Woodworth advocates.

Wage Order 5-2001 permits employers in the healthcare industry to "institut[e], pursuant to the election procedures set forth in this wage order a regularly scheduled alternative workweek schedule that includes work days exceeding ten (10) hours but not more than 12 hours within a 40-hour

workweek without the payment of overtime compensation." Wage Order 5-2001, 8 Cal. Code Regs. §11050, ¶3(B)(8).

Among the referenced "election procedures" is the requirement that employers, "[p]rior to the secret ballot vote," make "a disclosure in writing to the affected employees, including *the effects* of the proposed arrangement on the employees' *wages, hours, and benefits.*" *Id.*, ¶3(C)(3) (emphasis added). "Failure to comply with this paragraph shall make the election null and void." *Id.*

While the Wage Order specifically limits disclosures to "effects" on "wages, hours, and benefits," Woodworth takes the radical position that employers also must disclose an array of *non-effects* and hypothetical scenarios. ARB-82 (employers have "an obligation to disclose that the proposed AWS would *not* change wages, hours, and benefits") (emphasis in original). Woodworth's broad argument is legally and practically unsound for multiple reasons as CHA details below.

1. *The proposed 2013 AWS had no "effects" on Woodworth's wages, hours and benefits because she has always worked the same AWS.*

This Court may affirm summary adjudication of the overtime claim solely on the basis that the proposed 2013 AWS had no "effects" on Woodworth's "wages, hours, and benefits." In the absence of any "effects" to disclose, there can be no violation of the written disclosure requirements.

Upon joining Loma Linda in December 2011, Woodworth agreed to work a three-day, 12-hour AWS in accordance with the AWS approved in a 2001 election. 7-AA-3162, 3168; 8-AA-3517-3518, 3520-3527, 3550-3556. In 2013, the proposed AWS was *identical* with respect to "wages" and "hours"—that is, both the 2001 and 2013 AWS agreements provided that Woodworth would (1) be regularly scheduled for three, 12-hour workdays per workweek (a "3/12 AWS"); (2) receive overtime at 1.5 times her regular rate of pay for hours worked in excess of 40 in a workweek and for the first eight hours worked on the seventh consecutive workday; and (3) receive overtime at two times her regular rate of pay for hours worked in excess of 12 in a workday and in excess of eight on the seventh consecutive workday. *Compare* 8-AA-3542 (Woodworth's December 2011 AWS agreement) *with* 8-AA-3573 (proposed 2013 AWS).

With respect to "benefits," moreover, Woodworth was eligible under both the 2001 and 2013 AWS's for all Loma Linda-sponsored benefits on the same basis as other employees in the same status, and the AWS did not impact her eligibility for benefits. *Compare* 8-AA-3542 *with* 8-AA-3563, ¶12.

Because Woodworth's wages, hours, and benefits were unchanged by the 2013 AWS election, there were no "effects" that Loma Linda was required to disclose. Nevertheless, Loma Linda went above and beyond Wage Order 5's written disclosure requirements, providing Woodworth

with a written disclosure that recited the terms of the 2013 AWS, including the *very same* hours, wages, and benefits to which Woodworth already was entitled. 8-AA-3563.

As the judgment against Woodworth must be affirmed based on the absence of any "effects," this Court need not even reach her arguments calling for a sweeping expansion of the Wage Order's election disclosure requirements.

2. *Woodworth's position contradicts the plain language of the Wage Order.*

"Wage orders are quasi-legislative regulations and are construed in the same manner as statutes under the ordinary rules of statutory construction." *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167, 1175 (2019) (internal quotations omitted). "Those rules dictate that [courts] begin by examining the language of the statute (or regulation) itself, giving the words their ordinary and usual meaning. When the language is clear, [courts] apply the language without further inquiry." *Id.*

Wage Order 5 requires disclosure of "the effects" of the proposed AWS. The dictionary definition of "effects" focuses on the result *caused by* an event or condition.[1] *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th

[1] *See e.g.* Cambridge Dictionary: "the result of a particular influence" (https://dictionary.cambridge.org/us/dictionary/english/effect); Merriam-Webster: "something that inevitably follows an antecedent (such as a cause or agent)" (https://www.merriam-webster.com/dictionary/effect); Dictionary.com: "something that is produced by an agency or cause; result;

257, 265 (2016) (relying on dictionary definitions of "rest" to interpret Wage Order). In other words, the Wage Order requires employers to disclose *changes* produced by the AWS on "wages, hours, and benefits." That interpretation conforms with the central purpose of the disclosure requirement, which is to allow employees to make an informed decision about whether to vote for an AWS. *See e.g. Hamilton v. Wal-Mart Stores, Inc*., 2020 WL 2041938, at *5 (C.D. Cal. Feb. 11, 2020) (Wage Order's "plain language requires employers proposing an AWS to disclose 'the effects of the proposed arrangement'—*i.e.* the anticipated impacts of the proposed AWS if enacted").

Here, Loma Linda's disclosures (both in 2001 and 2013) clearly disclosed the "effects" of the AWS on employee "wages" (entitlement to overtime), "hours" (the schedule), and "benefits," explaining:

(1) "The schedule shall consist of a regularly scheduled workweek of three workdays of 12 hours each."

(2) "Employees will not receive overtime pay for their regularly scheduled hours."

(3) "Employees will be paid one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek."

(4) "Employees will be paid two times their regular rate of pay for all hours worked in excess of 12 in a workday."

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consequence" (https://www.dictionary.com/browse/effect).

(5) "Employees will be paid one and one-half times their regular rate of pay for the first eight hours worked on the seventh consecutive day of work in a workweek and two times their regular rate of pay for all hours worked in excess of eight hours on the seventh consecutive day of work in a workweek."

(6) "Employees who work an alternative work schedule will be eligible for all Medical Center-sponsored benefits on the same basis as other employees. Employees who are regularly scheduled to work 70 hours or more per [pay period] are considered 'full time' for purposes of benefits. Employee benefits are summarized in the Employee Handbook and the summary plan descriptions given to each employee." 8-AA-3547-48, 3563.

The disclosures also advised that "[d]uly noticed meetings will be held for the specific purpose of discussing these effects," and encouraged employees to direct any questions concerning the effects of the AWS to Human Resources. *Id.*

Thus, Woodworth and others in her voting unit were clearly apprised of the effects of the AWS, could consult their Employee Handbook and summary plan descriptions (which the disclosures incorporated by reference) for more details, and were encouraged to bring any questions to the scheduled AWS meetings or to HR. Wage Order 5 does not require more.

Nevertheless, Woodworth asks this Court to contradict the plain

meaning of the Wage Order by arguing that "effects" includes *non-effects*. ARB-82 (arguing Loma Linda was obligated to disclose "whether there was a big change, a small change or *no change* to wages, hours, and benefits") (emphasis added). She essentially wants election disclosures to reproduce the entire Wage Order and Loma Linda employee handbook, irrespective of any AWS effects.

For example, she argues that Loma Linda's disclosure should have described the "rates at which monetary benefits" are paid, and the entitlement to "meal and rest periods." But neither employee benefits nor breaks were affected by the AWS—they continued to be calculated the same way whether employees voted for the AWS or not, something that was described in the Employee Handbook.

Consider meal and rest breaks, which are determined based on a formula fixed by the Wage Order: ten minutes net rest time for every four hour period, and a 30 minute meal break for every 5 hour work period. Wage Order 5, ¶¶11(A), 12(A). Employees' entitlement to breaks in accordance with this formula would not be impacted at all by the adoption of the AWS. Similarly, the "rates" at which Loma Linda employees accrue benefits (*e.g*. vacation) are fixed by a formula set forth in the employee handbook (which the disclosure explicitly referenced). That formula would not change whether or not an employee works an AWS.

Of course, the raw number of daily meal/rest breaks taken and

vacation hours earned may increase as an employee works more hours, and vice versa. But that would be true whether or not an employee works an AWS. For example, an employee who works a 12-hour day will be entitled to additional rest and meal breaks under the above formula (compared to someone who works an 8-hour day), whether or not she works an AWS. And an employee can accrue more vacation if they work more hours, whether or not they work an AWS. Thus, these are not "effects" of the AWS; they are simply an application of existing (and unchanging) formulas.

For similar reasons, Woodworth's argument that the AWS changed benefits like jury duty and paid leave is meritless. ARB-82. The entitlement to, and formula for calculating, these benefits (which are set forth in the Handbook, 13-AA-6671-72) did not change as a result of the AWS. An employee would receive up to 8 hours of paid jury duty whether or not the employee worked an AWS, and the employee would accrue paid leave at the rate listed in the Handbook whether or not she worked an AWS.[2]

In contrast, an AWS *would* change an employee's hours (if they went from an 5/8 regular schedule to a 3/12 regular schedule). It would

[2] Further, the AWS disclosure underscores that employees "regularly scheduled to work 70 hours or more per [pay period] are considered 'full time' for purposes of benefits" and refers employees to "the Employee Handbook and the summary plan descriptions" for benefits information. 8-AA-3547-48, 3563.

also change *the formula* for calculating overtime: from 1.5 times the regular rate for hours above 8 per day (for a 5/8 schedule), to no overtime between 8 and 12 hours and double-time thereafter, among other changes (for a 3/12 schedule). Those latter changes must be (and were) disclosed.

In a similar vein, Woodworth argues that Loma Linda's written disclosure should have described the legal requirements of the Wage Order, like "the entitlement to at least four hours work per shift," and the circumstances when Loma Linda "may" require employees to work overtime. Wage Order 5, ¶3(B)(8)(c), ¶3(B)(9). But these broader legal requirements applicable to an AWS did not affect Woodworth's wages, hours, and benefits—they are contingencies that may or may not impact an employee's schedule on a particular day.

Notably, Woodworth cites no authority to support that disclosures must describe each and every legal requirement, possible contingency, and employee benefit in order to be valid. Courts have, in fact, held the exact opposite.

In *Ornelas v. Target Corp.*, 2020 WL 3213713 (C.D. Cal. May 11, 2020), for example, "Plaintiffs allege[d] the [election] disclosures were … unlawful because they never informed employees that if they enacted the AWS they would be waiving receipt of statutory overtime pay after eight hours of work in a day." *Id.* at *7.

The court held that the applicable Wage Order did *not* "require such

a specific affirmative disclosure." *Id.* Rather, it was enough that "Target's disclosures informed [employees] that they would be paid 'one-and-half times [their] regular rate of pay' for hours worked between 10 and 12 in the same workday and any work in excess of forty hours a week, and paid double their regular pay for any work in excess of 12 hours a day and for any work in excess of eight hours on days beyond the regularly-scheduled workdays established by the AWS." *Id.* The disclosures were, the court held, "in compliance with the plain language of Wage Order 7-2001." *Id.*[3]

Similarly, in *Hamilton v. Wal-Mart Stores, Inc.*, 2019 WL 1949456, (C.D. Cal. Mar. 4, 2019), plaintiff challenged an AWS disclosure because it did not disclose that moving to a 3/11.25 schedule from a 5/8 schedule would mean that the sick leave benefit (30 hours) "no longer covered three full days [of work]…" *Id.* at *11. The court found "no authority endorsing this theory," and thus "decline[d] to enter judgment for Plaintiffs on their failure to disclose sick-leave theory." *Id.*

And in a subsequent ruling in the same case, the court rejected plaintiffs' sick leave theory on the additional ground that any change in sick leave hours "was independent of the AWS election and does not constitute a change that must be disclosed before an AWS election." *Hamilton v. Wal-*

[3] *Ornelas* also dispenses with Woodworth's argument that the 2013 AWS is invalid because Loma Linda employees failed to properly repeal the 2001 AWS. *Ornelas*, 2020 WL 3213713, at *7 (rejecting contention that "the validity of the new AWS proposal turns on the validity of the old AWS").

Mart Stores, Inc., 2020 WL 2041938, *5 (C.D. Cal. Feb. 11, 2020).

Additionally, the *Hamilton* court dispensed with plaintiffs' alternate argument that the election disclosure was invalid because "it did not disclose details regarding an employee's schedule if he or she casted a 'no' vote." *Id.* at *4. The "plain language" of the Wage Order requires disclosure of "the anticipated impacts of the proposed AWS if enacted," the court held, and there was "no authority for the proposition that an employer must distribute pre-election written disclosures detailing schedules the employees would work if they failed to approve the AWS schedule." *Id.* at *5.

Together, these cases confirm that the plain language and intent of the Wage Order is for election disclosures to describe the actual effects of the AWS. The disclosures need not describe *non-effects*—that is, possible contingencies (such as the "no" vote in *Hamilton*), the nuances of every employee benefit (like the sick leave policy in *Hamilton*), or every facet of the applicable Wage Order (*Ornelas*). Woodworth goes even farther, essentially arguing that nothing less than an omnibus employee handbook and legal treatise would satisfy the election disclosure requirement. No court has ever taken such a far-reaching view, and this Court should decline to be the first to do so.[4]

[4] Woodworth's reliance on *Maldonado* is misplaced because the disclosures there were non-existent, and the entire election process was woefully

3. *The regulatory history comports with the plain language of the Wage Order and the interpretive case authority.*

The election disclosure clause—requiring disclosure of "the effects of the proposed arrangement on the employees' wages, hours, and benefits"—has remained unchanged since 1993, when Wage Order 5 first authorized AWS arrangements in the healthcare industry. This is significant because, as explained below, even as healthcare industry and labor interests worked together to enact more detailed election procedures, they did *not* amend the written disclosure requirement. Thus, the disclosures have always been, as the plain language suggests, limited to the AWS's "effects" (not non-effects) on "wages, hours, and benefits"—not every other imagined working condition.

Specifically, in 1993, CHA and other health care providers petitioned the IWC to "clarify and expand regulations regarding flexible schedules and overtime." Statement as to the Basis of Amendments to

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inadequate. As the Court of Appeal explained, there were "specific problems with the adoption [of the AWS] in each of the four periods," including: "In the first period, there was no written disclosure, no meeting, no voting, no 30-day waiting period, and no report to the state within 30 days. In the second period, the meeting was the same day as the vote, not 14 days before; and the AWS was implemented six days, not 30 days later. For the third period, there was no vote at all or any other attempt to comply with the procedures. For the fourth period, the AWS had been implemented before the vote." *Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1319 (2018). *Maldonado* thus provides no support for Woodworth's nit-picking of Loma Linda's detailed disclosures.

Sections 2, 3, and 11 of IWC Order 5-89 (effective August 21, 1993).[5] After three public hearings, the IWC amended Wage Order 5-89, for the first time permitting AWS arrangements whereby healthcare employees could work 12-hour shifts (provided certain criteria, including secret ballot elections, were met). *See* Amendments to Wage Order 5-98, ¶¶ 3, 11.[6]

The AWS provision, including the disclosure requirements, continued in the 1998 version of Wage Order 5. *See* Wage Order 5-98. Then, in response to the IWC abolishing daily overtime in certain wage orders, the Legislature enacted the Eight–Hour–Day Restoration and Workplace Flexibility Act of 1999, sometimes referred to as AB 60, "which restored daily overtime, nullified IWC-approved alternative workweek schedules, and directed the IWC to re-adopt conforming wage orders." *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1036-37 (2012).

The IWC "held public hearings" regarding new wage orders, *id.* at 1045, in which CHA participated in order to present the views of healthcare providers and employees. CHA also worked extensively, in collaboration with healthcare labor unions, to come up with a proposal regarding AWS

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[5] See https://www.dir.ca.gov/iwc/Wageorder5_89_Amendments.html. The document is also attached as Exhibit A to the concurrently-filed Motion For Judicial Notice.

[6] Before 1993, Wage Order 5 did not permit employees to work an AWS. *See e.g.* Wage Order 5-89. Rather, it assumed a regular work day consisted of 8-hour shifts, with a right to overtime for hours worked in excess of eight in a day or forty in a week. *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1043-44 (2012).

post-AB 60. *See* IWC Statement as to Basis (Jan. 1, 2001), pp. 11-12 ("Following several public meetings and hearings, employer and employee representatives decided to work together and attempt to resolve several issues regarding the health care industry and to draft proposed language for consideration by the IWC.").[7]

"Based on testimony it received during public meetings and hearings, as well as its consideration of proposals of election procedures that were submitted, the IWC determined its wage orders should have more extensive procedures and safeguards," including: "an employer must provide disclosure in a non-English language if at least five (5) percent of the affected employees primarily speak that non-English language"; the "[w]ritten disclosure and at least one meeting must be held at least fourteen (14) days prior to the secret ballot vote"; elections must be held "at the work site of the affected employees"; "employers must bear any election costs"; and authorizing "the Labor Commissioner to investigate employee complaints." IWC Statement as to Basis (Jan. 1, 2001), pp. 14-15 (Election Procedures).

Notably, however, the requirements for the content of the written disclosures remained unchanged. At one point in the public hearing process, the IWC and stakeholders considered a proposal for a *more*

[7] Available at https://www.dir.ca.gov/iwc/statementbasis.pdf and attached as Exhibit B to CHA's Motion For Judicial Notice.

detailed election disclosure, which was *not* adopted:

> (D) At least fourteen (14) days prior to an election on a proposal to adopt or repeal an alternative work schedule, the employer shall provide each affected employee with a written disclosure *of the time and location of balloting*, the effects of the adoption of the proposal on the wages, hours, and benefits of the employee, *the right of employees to repeal the proposal, the neutral party selected to conduct the election pursuant to subsection (G) and the right of employees to request review by the Labor Commissioner of the appropriateness of any designated work unit*. This written disclosure shall be distributed at a meeting held during the regular work hours and at the work site of the affected employees.

See Notice of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (Apr. 25, 2000) (Election Procedures) (emphasis added).[8]

As the minutes for the May 26, 2000 meeting show, the "motion died for want of a second." Minutes of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (Jul. 5, 2000).[9]

Instead, the IWC adopted the "alternative compromise that the industry and its participants and labor have reached," which left the written disclosure requirement unchanged (but added protections like translated disclosures, duly-noticed meetings, etc., as described above). *See*

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[8] Available at https://www.dir.ca.gov/iwc/52600hearingnotice.html, and attached as Exhibit C to CHA's Request For Judicial Notice.

[9] Available at https://www.dir.ca.gov/iwc/Minutes52600.html and attached as Exhibit D to CHA's Request For Judicial Notice.

Attachment A to Transcript of June 30, 2000 IWC Public Hearing (proposal mirroring disclosure language adopted in Wage Order 5-2001, ¶3(B)(8)).[10]

At the public hearing, various IWC commissioners remarked that the compromise "demonstrates very good faith on the part of both sides on some very difficult issues," and "was an example of how the various interests involved in these issues can get together and negotiate something that works for everyone." Transcript of June 30, 2000 IWC Public Hearing, pp. 12:13-13:25.[11]

That sentiment was echoed by union representatives, all of whom (along with CHA) urged the IWC to accept the proposal they had negotiated with management-side interests. *Id.* at 17-18 (SEIU: "very pleased" that, "together with the management side of the operation," "we were able to create an agreement that I think accomplishes our major goals, in terms of …creating fairness in the election process"), 21 (CHA: compromise "is very fair with respect to election procedures").

Thus, the fact that industry and labor interests, along with the IWC, considered and *rejected* a more detailed written disclosure requirement confirms that these disclosures were never intended to be hyper-technical

[10] The proposal is attached as Exhibit E to CHA's Request For Judicial Notice.

[11] Available at https://www.dir.ca.gov/iwc/PUBHRG6302000.pdf and attached as Exhibit F to CHA's Request For Judicial Notice.

and detailed recitations of every working condition and contingency.[12] Their rejection also reflects a determination that the existing disclosure requirements provided employees with sufficient information on which to make a reasoned decision concerning AWS's.

4. *Requiring "mega disclosures" will discourage AWS's and expose healthcare institutions to massive liability exposure.*

While the plain language of the Wage Order answers the question, the Court also "may consider … public policy" and "the consequences that will flow from a particular interpretation" of the election disclosure provision. *Ward*, 31 Cal. App. 5th at 1175. CHA writes to explain why Woodworth's onerous interpretation of the disclosure requirement must be rejected for multiple policy reasons.

First, Woodworth's position is an unfair and dangerous trap for hospitals. If it were adopted, hospitals would face the prospect of having their AWS elections declared "null and void" whenever a single employee decides *retrospectively* that a disclosure should have included some imagined, hyper-technical non-effect. That would expose hospitals to a flood of expensive class action litigation, judicial micromanagement of

[12] As Loma Linda points out, the plain language and regulatory history also is consistent with the DLSE Enforcement Policies and Interpretations Manual ("DLSE Manual"), which provides that only "serious violations" of AWS elections procedures render an election invalid. (4AA1803.) Thus, hyper-technical non-disclosures are not sufficient to invalidate an election.

AWS disclosures, and the potential for massive, retroactive overtime liability.

Indeed, thousands (if not tens of thousands) California employees vote in AWS elections every year.[13] Under Woodworth's view, these elections would be under risk of nullification and require DLSE and/or judicial micro-management even where, as here, the disclosures are highly detailed and the AWS's are broadly popular. That result would benefit no one—especially not the affected employees who voted for these AWS schedules.

This case starkly illustrates the unfairness of Woodworth's position. One of the two AWSs at issue here has been in place for two decades, and the other for almost a decade. And, when employees were given the opportunity to vote for the AWSs, the positive vote well exceeded the required two-thirds—achieving 86% and 100% support, respectively.

Hundreds (if not thousands) of employees have relied on, and arranged their lives around, these popular schedules—only to have Woodworth nit-pick the disclosures years after they were implemented. There is no public policy benefit to be had from endorsing such a disruptive

[13] As reported by the Department of Industrial Relations, there were more than 1,700 AWS elections in 2020 and more than 2000 AWS elections in 2019—many of them in the healthcare sector. The data is available by clicking on the "ORPL - AWE.zip" link on the following website: www.dir.ca.gov/databases/oprl/DLSR-AWE.html. These numbers do not include AWS arrangements negotiated in collective bargaining agreements.

(and arguably untimely) maneuver.

Second, Woodworth's view of the disclosure requirement is immensely and unnecessarily burdensome and duplicative. Requiring disclosures to list every foreseeable "non-effect" and contingency, and to describe every possible benefit, would make such disclosures the equivalent of an omnibus employee handbook and Wage Order, totaling hundreds of pages in length.

Such a requirement would burden hospitals (which often have multiple AWS arrangements in various voting units) and would not benefit California workers, who already receive employee handbooks, have access to posted Wage Orders in the workplace, and can attend a pre-vote disclosure meeting to ask any questions relating to the proposed AWS. Indeed, an over-long and over-detailed disclosure would be *less* helpful to employees as the actual, relevant effects would be buried in hundreds of pages of non-effects and contingencies.

Third, Woodworth's position would lead to absurd results. If every conceivable "change" in the work environment must be disclosed (even if the formula and eligibility requirements remain unchanged), then the disclosures arguably would need to list such trifles as the on-site cafeteria hours, just in case the AWS schedule does not overlap to the same extent with the (unchanged) cafeteria hours. Such absurdities must be avoided when interpreting statutes and regulations. *Soto v. Motel 6 Operating, L.P.*,

4 Cal. App. 5th 385, 390 (2016) (courts "will reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity").

Finally, the uncertainty, administrative burden, and risk of class-wide liability exposure resulting from Woodworth's position is likely to make healthcare institutions less willing to adopt AWS's. After all, a single nullified AWS election would result in overtime liability for every hour over eight in a day for every single affected employee, going back three (or perhaps even four) years. And given the prevalence of AWS arrangements in the healthcare sector, liability exposure would be significant.

An industry-wide retreat from AWS arrangements would not benefit anyone, as AWS's are very popular in the healthcare industry. These arrangements benefit patients and hospitals by, among other things, allowing for continuity of care because longer shifts mean fewer patient handoffs between nurses. Nurses also generally like AWS's (most commonly, the 3/12 schedule) because it means a shorter workweek, less commuting, longer weekends, and more flexibility.

Indeed, when AWS arrangements in the healthcare sector were first authorized in 1993, the IWC noted that they "permit[ted] employers and employees maximum daily and weekly scheduling flexibility," benefitting both healthcare providers and employees. *See* Statement as to the Basis of Amendments to Sections 2, 3, and 11 of IWC Order 5-89.

At a public hearing in connection with the new wage orders required by AB 60, the IWC again noted the benefits of AWS arrangements, both to the industry and employees. *See* Transcript of June 30, 2000 IWC Public Hearing, p. 22 (Commissioner Coleman: "the key thing to keep in mind is the flexibility that this affords not only … the industry, but it is flexibility for the -- for the workforce to be able to do this. So, I think this is a human issue…").[14] The subsequent Statement as to the Basis also noted:

> "The IWC received testimony and correspondence from numerous employees, employers, and representatives of the health care industry regarding alternative workweeks. Citing *personal preference, commuter traffic, mental and physical wellbeing, family care, and continuity of patient care issues*, the vast majority of testimony from health care employees urged the retention of the 12-hour workday. Advocates of 12-hour workdays also noted that 8-hour shifts were impractical for hospital and home health care services, and that their industry should be afforded greater flexibility.

See Statement as to the Basis (Jan. 1, 2001), p. 11 (emphasis added).

Nurses unions have even touted their success in retaining the 12-hour shift. *See e.g. UNAC/UHCP Saves the 12 Hour Shift for California Nurses, Patients and Hospitals* (union press release: "UNAC/UHCP declared victory on October 5, 2015 in the fight to save the 12 hour shift,

[14] Available at https://www.dir.ca.gov/iwc/PUBHRG6302000.pdf and attached as Exhibit F to CHA's Motion For Judicial Notice.

beloved of RNs while also a boon for patients and hospitals.").[15] And, in Woodworth's unit, 86% of nurses approved the AWS in 2001, and 100% (575 nurses) voted in favor of the AWS in 2013. 6-AA-2521, 2530; 8-AA-3517-3518, 3520-3527, 3550-3556.

To overturn these popular and beneficial arrangements based on Woodworth's nit-picking of Loma Linda's detailed disclosures would create a harmful precedent for the healthcare sector—not to mention disrupt the schedules on which Woodworth's co-workers have relied and organized their lives since at least 2001. Accordingly, CHA argues this Court to affirm the trial court's ruling affirming the validity of Loma Linda's disclosures in this action.

B. Hospitals may retain the right to terminate AWS arrangements.

Woodworth argues that the 2001 and 2013 AWS's are invalid because Loma Linda improperly retained the right to terminate the AWS with two weeks' notice. She maintains that the Wage Order authorizes *only* employees to terminate an AWS. Wage Order 5-2001, ¶3(C)(5). Woodworth's argument does not support reversal for two reasons, as Loma Linda persuasively explains. RB-113-114.

First, even if Woodworth were correct that employers have no termination rights (she is mistaken), that would not be a basis to invalidate

[15] Available at https://unacuhcp.org/press_release/unac-uhcp-saves-the-12-hour-shift-for-california-nurses-patients-and-hospitals/

the AWS. Under the Wage Order, elections are "null and void" only for "[f]ailure to comply with *this* paragraph"—that is, the paragraph governing the content and distribution of written election disclosures and the timing of employee meetings. Wage Order 5-2001, ¶3(C)(3) (emphasis added). The termination provision on which Woodworth relies is contained in paragraph (C)(5), *not* (C)(3). Thus, Woodworth's termination argument cannot support nullification of the AWS's and reversal of the judgment.

Second, as Loma Linda points out, Woodworth cites no authority to support the sweeping view that employers have no power to ever terminate an AWS.

In California, as explained above, overtime after eight hours worked has been the longstanding, default standard. In order to give healthcare employers and employees more flexibility, the IWC permits hospitals to decide whether to offer up an AWS option. Employees then vote to decide whether to adopt the proposed AWS. Since hospitals are not required to offer an AWS option in the first place, it follows that they may repeal an AWS that no longer serves the best interests of the hospital and its patients.

Further, Wage Order 5 prescribes detailed timing and voting requirements for employees to repeal AWS's, which gives hospitals time to prepare to revert to an eight-hour schedule should employees vote for repeal. Notably, however, the Wage Order places no such limitations on employer repeal. Wage Order 5-2001, ¶3(C)(5). That is so despite the fact

that, in Labor Code §517 (enacted in AB 60 in 1999), the Legislature specifically authorized the IWC to adopt "regulations necessary to provide assurances of fairness regarding … conditions under which an adopted alternative workweek schedule can be repealed by the employer…" Lab. Code §517.

The IWC's decision *not* to regulate employer repeal of AWS's despite Section 517 is significant because, as the California Supreme Court explained in *Brinker*:

> the IWC sought to make its orders track Assembly Bill No. 60 (1999–2000 Reg. Sess.) as closely as possible and expressed hesitance about departing from statutory requirements. (See, e.g., IWC public hearing transcript (May 5, 2000) pp. 52–56.) What departures it made appear to have been conscious choices, expressly identified in the IWC's Statement as to the Basis, and frequently justified by explicit reliance on its authority to augment the Labor Code. (See IWC Statement as to the Basis (Jan. 1, 2001) pp. 19–20.)

53 Cal. 4th at 1048.[16]

Further, nothing in the DLSE's Manual, its opinion letters, or in case authority purports to limit an employer's ability to repeal an AWS—let alone prohibit employers from simply *reserving the right* to do so in its

[16] Indeed, at one point in the AB 60-mandated process, the IWC proposed adding a provision to the Wage Orders stating that "an employer may repeal an [AWS] based on business necessity," provided it gives employees 45 days' written notice. *See* Notice of Public Hearing of the Industrial Welfare Commission of May 26, 2000 (Apr. 25, 2000). The IWC ultimately did not include this limitation in the Wage Orders, thus signaling its intent not to regulate employer repeals of AWS's.

election disclosures, as Loma Linda did here. On the contrary, courts recognize that employers unilaterally may change employment policies "after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits." *Asmus v. Pac. Bell*, 23 Cal. 4th 1, 18 (2000); *accord Harris v. TAP Worldwide, LLC*, 248 Cal. App. 4th 373, 390 (2016).

CHA writes to emphasize that allowing employer flexibility with respect to AWS arrangements is particularly critical in the healthcare sector. Hospitals must continually assess scheduling and hours in order to ensure adequate staffing (including meeting mandatory nurse-patient staffing ratios) and provide quality patient care. Were an AWS arrangement not meeting these goals, or was otherwise administratively or financially burdensome, it would be essential for the hospital to have the ability to rescind the AWS.

The consequence for employees if a hospital were to repeal an AWS would simply be a reversion to the default rule of receiving overtime pay after eight hours in a day or forty hours in a week. But the consequence for a hospital if it were *not* permitted to repeal an AWS would be significant—a substantial constraint on its ability to operate and schedule employees in a way that best serves patient care. That asymmetric impact is precisely why Wage Order 5 regulates repeals of AWS's by employees, but not by healthcare institutions.

Further, under the Wage Order, employees unwilling or unable to work an AWS arrangement can ask for individual accommodation (Wage Order 5-2001, ¶3(B)(4)-(6)), and if at least a third of the voting unit is dissatisfied, employees can petition for a new election (provided at least 12 months have passed since the last election). *Id.* at ¶3(C)(5). These Wage Order provisions serve to protect employees, while at the same time avoiding the disruption of frequent and/or unpopular election petitions. The employer hospital, in contrast, must have the ability to continually assess the impact of its AWS's and to retain the flexibility to rescind one if, in the hospital's judgment, it is detrimental to its employees, to patient care, or to the institution as a whole.

Woodworth asks this Court to ignore these important practical considerations, as well as the IWC's deliberate choice not to regulate in this arena. She instead wants courts to micro-manage hospitals and expose them to massive liability, simply for retaining the right to terminate an AWS in their election disclosures. Her position, if adopted, also would discourage hospitals from offering AWS's in the future. The Court should decline to tread this path.

III. Loma Linda's Wage Statements Comply With Section 226

Woodworth seeks reversal of summary judgment on her Labor Code section 226 claim on the theory that her wage statements should have included a separate line item for "total hours worked." As Loma Linda

persuasively explains, however, her contention fails as a matter of law because (a) Section 226 does not require employers to list total hours worked, so long as the total may be calculated from the information in the pay stub, and (b) Woodworth *admits* she could determine her total hours worked from her pay stubs. RB-103-05.

CHA writes to describe two broader consequences were this Court to adopt Woodworth's reading of section 226: (a) it would create an undesirable and unnecessary split of appellate authority, and (b) it would create unnecessary burdens and complexities for payroll systems in the healthcare sector.

A. This Court should refrain from creating a split of authority.

Labor Code section 226 provides a remedy if an employee cannot "promptly and easily determine from the wage statement alone" certain required information, including the "total hours worked." Lab. Code §226(e)(2)(B), (a)(2). The statute defines "promptly and easily determine" to mean "a reasonable person would be able to readily ascertain the information without reference to other documents or information." Lab. Code §226 (e)(2)(C). In other words, an employee is deemed injured for purposes of section 226 if she must refer to "other documents or information" beyond the four corners of a wage statement to find the information required by section 226, including her total hours worked.

With respect to "total hours worked," appellate authority uniformly holds that simple math is permitted—that is, the wage statement need not have a separate line item *totaling* the hours worked, so long as the total hours may be determined from other information on the pay stub.

The lead case, as Loma Linda explains and the trial court recognized, is *Morgan v. United Retail, Inc.*, 186 Cal.App.4th 1136 (2010). Like Woodworth, plaintiff Morgan "alleged that [the employer's] wage statements failed to comply with the requirements of section 226, subdivision (a) because the statements did not show the total hours worked by the employee." *Id.* at 1139. Affirming summary judgment for the employer, the Second Appellate District found no violation of section 226 because "the employee could determine the sum of all hours worked without referring to time records or other documents." *Id.* at 1147.

Specifically, "[t]he employee could simply add together the total regular hours figure and the total overtime hours figure shown on the wage statement to arrive at the sum of hours worked." *Id.* Thus, the court concluded, "[c]onsistent with the language of section 226 …, [the employer's] wage statements listed the precise, actual number of hours worked by the employee at each hourly rate of pay in effect during the pay period." *Id.* (internal quotations omitted).

Numerous appellate courts have reached the same conclusion as *Morgan*, holding that "[w]age statements comply with § 226(a) when a

plaintiff employee can ascertain the required information by performing simple math, using figures on the face of the wage statement." *Hernandez v. BCI Coca-Cola Bottling Co.*, 554 F. App'x 661, 662 (9th Cir. 2014).

In *Hernandez*, the Ninth Circuit concluded there was no section 226 violation where plaintiff "need only subtract his regular hours from total hours to determine overtime hours" and "add the two component overtime rates to determine his overall overtime rate." *Id.* at 662.

Similarly, in *Apodaca v. Costco Wholesale Corp.*, 675 F. App'x 663 (9th Cir. 2017), the court found no section 226 violation where "the total hours worked can be calculated based on the wage statement alone by adding the 'Regular Pay' hours to the 'Overtime' hours." *Id.* at 665. And in *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136 (2011), the Court of Appeal held that plaintiff's "'mathematical injury'" from having to "add up his overtime and regular hours" was not legally cognizable. *Id.* at 1142–43.

Further, the Labor Commissioner's exemplar wage statement (available at https://www.dir.ca.gov/dlse/PayStub.pdf) does *not* include a separate line item for "Total Hours Worked" and does not sum regular and overtime hours. As *Morgan* observed, "the DLSE's website supports the conclusion that [an employer's] wage statements complie[s] with section 226" by "separately listing [employees'] total regular hours worked and their total overtime hours worked during the relevant pay period." 186 Cal. App. 4th at 1147.

Despite this uniform authority, Woodworth asks this Court to hold the exact opposite: that Loma Linda violated section 226 even though (a) all of Woodworth's hours and pay rates were listed on her paystub and could be added up in order to arrive at the total hours worked, and (b) Woodworth's deposition testimony (6-AA-3143-3155, 3061-3069) confirmed that she could readily determine her total hours worked *solely* from her wage statements, without reference to other documents or information. Lab. Code §226(e)(2)(C).

Woodworth thus urges the Court to interpret section 226 in a way that is irreconcilable with existing case law, and would create a needless split of authority.[17] The Court should decline her invitation because a conflict among the appellate courts would generate confusion among California employers, who would have to pick between conflicting standards in trying to comply with their section 226 obligations. The resulting uncertainty will be widespread, as every California employer must issue wage statements in compliance with section 226.

Accordingly, CHA argues this Court to affirm the lower court ruling,

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[17] The cases Woodworth cites (ARB-37) are distinguishable because the paystubs were *missing* information, which prevented employees from performing "simple math." *See Hamilton v. Wal-Mart Stores, Inc.*, 2019 WL 1949456 at *6 (C.D. Cal. Mar. 4, 2019) (paystub did "not list the rate of pay or hours worked."); *Magadia v. Wal-Mart Assocs., Inc.*, 319 F. Supp. 3d 1180, 1190 (N.D. Cal. 2018) ("[t]he OVERTIME/INCT item appears … as a lump sum and does not specify how many hours the employee worked or the employee's hourly rate.").

consistent with *Morgan* and the other authority cited above.

B. Requiring a specific "total hours worked" line item is unnecessary for worker protection and would only make detailed paystubs more crowded with redundant information.

CHA also writes to explain why mandating a "total hours worked" line item on every paystub would create unique and unnecessary complications in the healthcare sector, and would benefit no one.

Hospitals employ healthcare practitioners and technicians in dozens of specialties, from registered nurses to respiratory therapists, surgical technicians, housekeepers and many more.[18] Individuals within these job classifications often work shifts that cover different hours (night shift vs. day shift), days (weekdays vs. weekends), departments, and specialties. In the case of a staffing shortage or due to other patient care needs, individuals also may float to a different department for a shift, be called back into work, or be required to remain on-call.

This type of dynamic scheduling results in many different types of shift differentials and pay rates (beyond the standard "straight time" vs. "overtime" rate), including night, weekend, and holiday shift differentials, on-call pay (time spent waiting to be called back to work), call-back pay (when an employee is called back into work after completing their shift),

[18] A list of major healthcare occupations is available at: www.bls.gov/oes/current/oes290000.htm.

in-charge pay (premium for additional supervisory duties), and floating pay (premium for floating to another department).

As a result, it is not usual for hospitals to have hundreds of pay codes and pay rates in their payroll systems, and for employees to have multiple codes and rates appear on a single paycheck, depending on their schedule in the pay period. These pay differentials are necessary to reflect (and often reward) employees for their efforts during each pay period, and are therefore a benefit to employees.

And because this type of scheduling (and the resulting shift differentials and pay rates) are so common in the healthcare sector, healthcare employees know what the various wage rates, hours, and other line items on their wage statements mean. Woodworth's own testimony illustrates the point: she was able to explain every relevant line item in, and determine her total hours worked from, every paystub she was shown during her deposition. 6-AA-3058-69.

For example, Woodworth confirmed she "could tell [total hours worked] just by doing simple math, using this [February 5-18, 2012] wage statement." 6-AA-3062-64. That wage statement (6-AA-3145) shows 68.3 hours of "Training" paid at straight time, plus 0.5 hours of training paid at double-time ("Training Double"), which, Woodworth confirmed, she could add up to determine her total hours worked (68.8 hours). 6-AA-3062-64. Woodworth also understood the "Weekend Differential" (an additional

$4.00/hour for 24.20 hours) was part of—not in addition to—the 68.8 total hours worked. *Id.*

Similarly, Woodworth explained that her wage statement for April 1-14, 2012 (6-AA-3149) showed 73 hours of straight time ("Regular Pay"), 0.8 hours of overtime at a rate $67.015 in one week of the pay period ("Double Pay"), and another 0.3 hours of overtime at a rate of $67.02 in the second week of the pay period ("Double Pay")—totaling 74.1 hours worked in the pay period. 6-AA-3066-68. She also understood that the "Night Differential" (an additional $4.00/hour for 70.40 hours) was part of—not in addition to—the total hours worked. *Id.*

In short, Woodworth easily understood the various pay codes and differentials on her wage statements, the hours worked at each pay rate, and how to total up the relevant line items to arrive at her total hours worked. Her wage statements, which are quite typical in the healthcare sector, provided the necessary information from which she could derive the information required by section 226.[19] Thus, Woodworth's present call for a "total hours worked" line is trying to solve a problem that, even she must admit, does not exist.

[19] Of course, if Woodworth or any other Loma Linda employee had questions about any pay stub, they could go to Human Resources with questions. The relevant point is that, because no information was missing from Woodworth's pay stub, there was no section 226 violation.

Further, mandating a total hours worked entry even when the information is readily ascertainable from the paystub would just make the paystubs *more* crowded and, potentially, confusing.[20] Wage statements in the healthcare sector already have multiple line items detailing pay codes and hours worked, to capture the scheduling complexities described above. Those entries are necessary in order to comply with section 226's requirement that wage statements list "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee." Lab. Code §226(a)(9).

Attempting to shoehorn in yet another entry totaling hours worked would just make paystubs in the healthcare sector more cluttered, and would not help anyone because employees like Woodworth readily understand their existing paystubs.

Accordingly, CHA urges the Court to conclude that Woodworth's paystubs comply with section 226 and to affirm judgment for Loma Linda.

[20] Hospitals and other employers use a wide variety of systems to process payroll. These include Kronos, ADP, API, JBDev, Oracle and others. Some employers have proprietary systems. It is possible that some of the systems may not permit reprogramming to allow the redundant "total hours worked" entry sought by Woodworth.

IV. Conclusion

For the foregoing reasons, CHA respectfully requests that the Court affirm in all respects the judgment for Respondent Loma Linda University Medical Center.

Dated: May 4, 2021 SEYFARTH SHAW LLP

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of this Brief consists of 8,127 words as counted by the Microsoft Word processing program used to generate the Brief.

Dated: May 4, 2021 SEYFARTH SHAW LLP

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PROOF OF SERVICE

Nicole Woodworth v. Loma Linda University Medical Center.

Appeal Case No. E072704

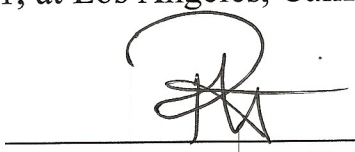
I, Rachel D. Victor, state:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2029 Century Park East, Suite 3500, Los Angeles, California 92101.

On May 3, 2021, I served the following document described as ***APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF; BRIEF OF AMICUS CURIAE CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF POSITION OF RESPONDENT*** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

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

Executed on May 3, 2021, at Los Angeles, California.



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