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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

JAIME ZEPEDA LABOR CONTRACTING, INC.,
ANTHONY VINEYARDS, INC.,
RICHARD BAGDASARIAN, INC.,
Plaintiffs, Respondents and Cross-Appellants,

vs.

DIVISION OF LABOR STANDARDS ENFORCEMENT,
Defendant, Appellant and Cross-Respondent,

APPEAL FROM THE SUPERIOR COURT FOR RIVERSIDE COUNTY
(Case No. PSC1705944)
HONORABLE JAMES T. LATTING, JUDGE OF THE SUPERIOR COURT

Western Growers Association, California Fresh Fruit Association, California Farm Bureau Federation, California Farm Labor Contractor Association, Grower Shipper Association Of Santa Barbara And San Luis Obispo Counties, and Ventura County Agricultural Association's Application for Permission to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Plaintiffs, Respondents and Cross-Appellants Jaime Zepeda Labor Contracting, Inc., Richard Bagdasarian, Inc., and Anthony Vineyards, Inc.

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Application of Western Growers Association, California Fresh Fruit Association, California Farm Bureau Federation, California Farm Labor Contractor Association, Grower Shipper Association of Santa Barbara and San Luis Obispo Counties, and Ventura County Agricultural Association For Permission to File Amicus Curiae Brief In Support Of Plaintiffs, Respondents and Cross-Appellants Jaime Zepeda Labor Contracting, Inc., Anthony Vineyards, Inc., and Richard Bagdasarian, Inc.

To the Presiding Judge:

Western Growers Association, California Fresh Fruit Association, California Farm Bureau Federation, California Farm Labor Contractor Association, Grower Shipper Association of Santa Barbara and San Luis Obispo Counties, and Ventura County Agricultural Association, through their attorneys, respectfully request leave to file the accompanying brief as amicus curiae in support of Jaime Zepeda Labor Contracting, Inc., Anthony Vineyards, Inc., and Richard Bagdasarian, Inc. and to provide an added dimension to selected matters discussed by the parties, to enhance the Court's understanding of the issues on appeal, and how it impacts the agriculture industry.

INTEREST OF AMICI CURIAE

WESTERN GROWERS ASSOCIATION

Founded in 1926, Western Growers represents local and regional family farmers growing fresh produce in Arizona, California, Colorado and New Mexico. Western Growers members grow, pack, and ship over half of the nation's fresh produce including nearly a third of America's fresh organic produce. Western Growers member companies are dedicated to providing a great variety of safe and healthy fresh fruits, vegetables and tree nuts to consumers. With offices and dedicated staff in Sacramento, California and Washington, D.C., Western Growers is a leading public policy advocate for the fresh produce industry and has a longstanding interest in employment and labor matters. The Association has filed amicus

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briefs in employment law cases raising matters of significance to its members. (*See, e.g., Gerawan Farming, Inc. v. Agric. Labor Relations Bd.* (2017) 3 Cal.5th 1118; *Hess Collection Winery v. Agric. Labor Relations Bd.* (2006) 140 Cal.App.4th 1584; *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations* (1989) 48 Cal.3d 341.) The present case is of great importance to Western Growers and its members because it represents a fundamental departure from the historical and practical timing of the payment of wages to agricultural employees, and allowing the Division of Labor Standards Enforcement (DLSE) to issue administrative citations for significant damages and penalties while denying judicial due process to agricultural employers that comply with their requirements to pay employees regularly on established paydays.

CALIFORNIA FRESH FRUIT ASSOCIATION

The California Fresh Fruit Association (CFFA) is a voluntary, nonprofit agricultural trade association that represents California's fresh fruit industry. The CFFA is the key public policy organization that represents the needs and interests of its members by advocating on their behalf on legislative and regulatory issues, at state, federal and international levels. The CFFA's membership is comprised of over 300 members, including growers, shippers and marketers of fresh grapes, blueberries and tree fruit, and also includes associate members indirectly involved with these commodities (e.g., labeling equipment, container/packaging suppliers, commodity groups, etc.). The membership is primarily located in the San Joaquin Valley, though its members are located as far north as Lake County and as far south as Coachella Valley. The CFFA-represented commodities include apricots, apples, blueberries, cherries, figs, kiwis, nectarines, peaches, pears, persimmons, plums, pomegranates and fresh grapes. Membership of the Association represents approximately 85% of the

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volume of fresh grapes and 95% percent of volume for deciduous tree fruit shipped from California.

CALIFORNIA FARM BUREAU FEDERATION

California Farm Bureau Federation ("CFBF") is a nonprofit trade association. CFBF's purposes include working for the solution of the problems of the farm and representing and protecting the economic interests of California's farmers and ranchers. CFBF is the largest organization of its kind in California. CFBF's members consist of 53 county Farm Bureau organizations, each of which is a separately incorporated trade association. Together, they represent farmers in 56 of California's 58 counties and have in total among them more than 33,600 members, including more than 24,000 agricultural (i.e., voting) members. The vast majority of those agricultural members employ their own agricultural employees to perform services necessary to the production of agricultural commodities and/or contract with farm labor contractors ("FLCs") to have the FLCs' employees perform those services. The outcome of this case will greatly affect the timing of wage payments that must be made by those agricultural members. Accordingly, CFBF is very interested in this case.

CALIFORNIA FARM LABOR CONTRACTOR ASSOCIATION,

California Farm Labor Contractor Association ("CFLCA") is a non-profit business trade association that represents the interests of over 150 farm labor contractors and agricultural growers. Since its inception in 2009, its constituency has grown considerably, and its membership includes farm labor contractors, growers, supervisors, HR personnel, and affiliated organizations throughout the state of California. For the past decade, CFLCA has served a vital role in navigating complex labor laws. It promotes best management practices and provides its members with educational opportunities to ensure safe and professional environments for

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grower clients and the farm labor workforce. CFLCA proudly represents over 50% of California's farm labor contractors.

GROWER SHIPPER ASSOCIATION OF SANTA BARBARA AND SAN LUIS OBISPO COUNTIES

The Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties ("GSA") is a non-profit, non-partisan membership organization established in 1947 and represents over 170 diverse growers, shippers, FLCs, and supporting agribusinesses in Santa Barbara and San Luis Obispo counties. GSA provides leadership on a variety of issues including those related to labor, water, and land use. It advocates for interpretation and application of labor laws that is fair and appropriate to the needs of agricultural businesses and their employees given the unique and diverse realities of agricultural occupations and activities.

GSA has read and is familiar with the briefs on the merits filed by the parties in this case, is familiar with, and a great interest in, the issues before the Court.

VENTURA COUNTY AGRICULTURAL ASSOCIATION

Ventura County Agricultural Association, is a non-profit business trade association representing the interests of over 200 agricultural and related employers in Ventura and Santa Barbara Counties since 1970. Its membership includes virtually all of the major agricultural employers, cooperatives, packinghouses, FLCs, trucking businesses and agricultural-related support industries. The Association routinely represents the interests of the above employers before the DLSE. The Association is extremely interested in ensuring the stability of decades of wage payment timing practices of its members. Further, given the tremendous labor shortages existing within the agricultural industry, the Ventura County Agricultural Association seeks to ensure the stability of employment

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relationships between agricultural employers and FLCs based upon the proper interpretation of California's wage and hour laws.

CONCLUSION

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

Dated: September 4, 2020 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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AMICUS CURIAE BRIEF

I.
INTRODUCTION

This case involves two questions of great significance, especially to the agricultural industry. First, the Court has been asked to determine whether farm labor contractor Jaime Zepeda Labor Contracting, Inc. (Zepeda) "discharged" its workers immediately after they completed an agricultural task for growers Richard Bagdasarian, Inc. (RBI) and/or Anthony Vineyards, Inc. (AVI) if they were not immediately scheduled for additional work at the completion of that task, even though: (1) none of the workers are hired to perform just that task; (2) none of the workers were terminated by either Zepeda, RBI, or AVI; and (3) the workers had an ongoing working relationship with Zepeda, and fully expected to receive additional assignments shortly thereafter. Second, the Court has been asked to answer whether the DLSE may use its power to issue citations for minimum wage violations to assess waiting time penalties in the absence of any underlying minimum wage violations. The answer to both questions must be "no."

In California, employees must be paid final wages upon the termination of employment—whether the employment is terminated involuntarily by discharge, or voluntarily by quitting. Here, the DLSE seeks to expand the law to create a new kind of "discharge," which does not require the termination of employment, but rather (1) encompasses an "automatic layoff" in the midst of an ongoing employment relationship when an arbitrary agricultural task is completed, and (2) becomes a "discharge" if that task is completed without the next work day already scheduled. And the DLSE seeks this expansion of the law to justify its use

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of a minimum wage citation that only assessed waiting time penalties but did not actually seek restitution of any unpaid minimum wages.

For over 40 years, farm labor contractors (FLCs) are required by law to pay their employees weekly on a regularly established payday. There is no dispute Zepeda fully complied with this long-standing weekly payday requirement, and paid all wages owed at such paydays. Though Zepeda hired the employees at issue for continuous work, and it never terminated them, the DLSE audited Zepeda's payroll records and decided Zepeda "laid off" its employees after completing some arbitrary tasks or assignments the Deputy Labor Commissioner found through internet research and deemed separate "seasons." The DLSE then decided Zepeda "discharged" those workers because they were not provided a return to work schedule or date at the completion of the arbitrarily chosen assignments—even though the workers had an ongoing working relationship with Zepeda, continued to get paid all wages on their regular weekly payday, and continued to get scheduled shifts. The DLSE's argument that such workers are "discharged" within the meaning of Section 201 is not only inconsistent with the law, public policy and decades of industry practice, but is also practically unfeasible for California agricultural employers to implement and leads to absurd results. The Court should reject the DLSE's efforts to expand the law to create a new kind of "discharge."

Further, not content with disrupting the longstanding employment relationships between Zepeda and its employees, the DLSE also punished Zepeda through its citation power for "minimum wage violations," by assessing waiting time penalties on behalf of so-called "discharged" employees. Although none of Zepeda's employees were underpaid the minimum wage—they were paid all such wages on their established weekly paydays—the DLSE nevertheless issued citations for hundreds of

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thousands of dollars in waiting time penalties. The DLSE's contorted reasoning, that the failure to *timely pay* final wages in itself becomes a *failure to pay* minimum wages contradicts statutory and case law; is wholly unsupported by public policy; and reads out the only restriction placed upon its citation power by the Legislature, rendering that limitation superfluous.

This Court should reject the DLSE's new "automatic layoff and discharge" rule as unsupported by law, unworkable, and unnecessary in practice. The Court should also reject the DLSE's dangerous expansion of its citation powers beyond enforcement of actual minimum wage violations as untethered to the express limitations provided by statute.

II.
THE FARM LABOR ECONOMY

The agricultural sector is one of the largest industry sectors in California, and its performance is vital to the economic health of the state, as well as to the nation's food supply. (California Department of Agriculture, *2018-2019 California Agricultural Statistics Review*, available at <https://www.cdfa.ca.gov/statistics/PDFs/2018-2019AgReportnass.pdf>, last accessed on September 3, 2020.) This fact has never been more evident than during the current COVID-19 pandemic, when the "essential" nature of such workers has been on stark display.

Despite the significance of agriculture to California's economy and the world's food supply, California growers struggle to source enough labor to fully grow and harvest their crops, even after substantially increasing wages and benefits. (California Farm Bureau Federation and UC Davis, *Still Searching for Solutions: Adapting to Farm Worker Scarcity Survey 2019*, available at <http://www.cfbf.com/wp-content/uploads/2019/06/LaborScarcity.pdf>, last accessed on September 3,

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2020) Because farm labor is in high demand, and most growers find it difficult to consistently source skilled farm labor, many growers utilize FLCs to provide additional access to valuable skilled labor resources. Just as with the diversity of agricultural pursuits and crops, FLCs vary widely by crop and geographic location, though many FLCs specialize in specific crops (e.g., grapes, almonds, or cherries) or particular skillsets within a crop (e.g., planting vineyards, transporting nursery starts, or trellising vines).

Accordingly, growers will work with FLCs to grow and harvest crops in a variety of ways. Some growers primarily use their own directly-hired employees if available, supplementing their workforce with workers through FLCs, as needed. Other growers keep a small directly-hired work-force (or none at all), and instead contract out much or all of their needs through FLCs. Others can fall in between. The manner in which growers and FLCs work together also depends on the task(s) to be accomplished, the skill and specialty of the particular FLC and its employees, and the grower's model for using its own directly-hired employees. In some cases, a grower may engage an FLC to perform a specific task within the season, such as pruning trees in an orchard, tarping vines in a vineyard to protect against weather, or harvesting the crop. In other instances, a grower will engage an FLC to supply the bulk of the labor needed to perform the tasks associated with growing and harvesting their crop(s). In yet other instances, a grower might engage an FLC for one-off assignments, such as three days of weeding a particular field, moving irrigation pipes from one field to another, or washing totes for the upcoming harvest.

Given the annual cycle of agriculture, many FLCs and growers have longstanding relationships and regularly work together year over year. Growers and FLCs typically negotiate annual "master" agreements which specify the hourly rates of pay, piece rates, the FLC's commission, and

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other contractual provisions, such as payment terms and allocation of responsibility for unemployment insurance, workers' compensation, and other workers' benefits. These master agreements rarely specify any particular assignment, time period, or work to be performed. Instead, the grower will engage the FLC to supply workers as and when needed, and in any myriad of ways. An FLC will have such agreements with multiple growers to keep its employees busy year round.

A. FLCs Rarely Hire Employees For Specific Assignments Or Time Periods

While an FLC will supply labor to a grower based on discrete needs, or upon request, FLCs rarely hire their own workers for any one particular assignment or time period. Like all employers, when onboarding an employee, an FLC must comply with many administrative requirements, including compliance with I-9 requirements, setting the employee up in payroll systems, enrolling the employee in worker's compensation coverage, providing the employee with all necessary notices and policies required by state and federal law, and more. Additionally, FLC workers gain critical skills and experience in a dynamic industry and with specific growers based on their work for the FLC. It simply makes no sense for an FLC to constantly incur expenses, burdens, and inefficiencies to hire for short-term assignments, especially as short-term hiring delivers no tangible benefit to the FLC. Experience has shown FLCs that farm workers hired on a short term basis are less likely to return for the next assignment, taking their valuable skills and experience elsewhere, and requiring FLCs to return to the labor pool for less experienced, less skilled replacements. So, while an FLC may meet the needs of its grower customers by shifting employees from one crew to another, and from one grower's fields to another's, it is

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counterproductive for the FLC to hire an employee to satisfy one particular assignment.

Given the foregoing, and the cyclical and varying nature of agricultural work, it is standard practice for FLCs to hire employees for ongoing employment, even if there is no promise of a specifically set schedule or number of weekly hours. By its nature, agricultural work is very different from typical office, retail, or manufacturing work, and can be much more dynamic and unpredictable. Agricultural work is subject to shifting working conditions, often beyond the control of the FLC or grower, and as a result might be busy one day and slow another day. For example, a table grape grower might begin the harvest with the intention of picking every last grape on its vines; but inclement weather (such as flooding) might cause a "pause" in the work for days, or even lead to an early end to the harvest. Or an FLC engaged to prune and tie up grapevines might complete the pruning process for the grower to assess which vines to tie up to trellises before commencing the tying-up process, creating a brief gap in the scheduled work. Workers and FLCs fully understand that agricultural work may sometimes be irregular; and so does the Legislature, which has carefully balanced the need for flexibility in light of the potentially irregular nature of agricultural work and the need to ensure FLC employees receive timely and dependable wages.

B. The Statutory Background For Payment of Wages to Agricultural Employees

Nearly one hundred and ten years ago, the Legislature enacted the first wage payment timing statute, requiring payment of final wages immediately when an employer discharges an employee, payment within five days when an employee quits or resigns, and payment of all other wages at least once per month. (Stats. 1911, ch. 663, §§ 1-2, p. 1268; *see*

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also Smith, *supra*, 39 Cal.4th at p. 87, n.4.) In 1919, the Legislature made the distinction between wages in "agricultural, viticultural and horticultural pursuits, in stock or poultry raising … and when the employees in the said employments are boarded and lodged by the employer," which needed to be paid once per month, and all other occupations, for which wages needed to be paid twice-monthly. (Stats. 1919, ch. 202, § 2, p. 295.)

In 1951, the Legislature recognized the important role FLCs played in agriculture, and the need for separate wage payment protections for FLC employees, when it amended Labor Code section 205 to require FLCs to pay their employees all wages once every two weeks, and include all wages earned up to an including the fourth day before such payday. (Stats. 1951, ch. 1746, § 1, pp. 4160-65.)[1] In 1976, the Legislature amended Section 205 to require employees of FLCs be paid once every week.[2] (Stats. 1976, ch. 1041, p. 4653.) Thus, for nearly forty-five years, Section 205 has required weekly wages payment for FLC employees. This well-established wage timing rule, in turn, led to the creation of specific patterns of practice in the agriculture industry.

C. The Well-Established Practices for Payment of Farm Labor Wages

In light of Section 205's weekly wage requirement for FLC employees, FLCs and growers have adopted invoicing and payroll practices to enable regular weekly payroll, despite the dynamic nature of the work.

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[1] The Legislature also enacted the first California licensing requirements for FLCs as Labor Code sections 1682-1699. (*Id*.)

[2] The Legislature also added Labor Code section 205.5, which required agricultural employees not being provided boarding be paid wages twice per month. (*Id*.)

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In general, FLCs will place their employees into a "crew," and assign the crew to perform the requested work at a grower's farm. For harvesting, field workers are often paid on a combination of hourly and piece rate, by either weight, box, or some other measurement related to the particular crop. In some instances, the grower will verify the piece count, while in others the grower will designate the packing house to verify the piece count. Similarly, the piece count might be verified at the time a particular tote is loaded onto the truck in the field, or at a later point in time when the crop is delivered and checked for quality.

Regardless of what work is performed, the FLC supervises the crews' performance, tallies their work hours and pieces, if applicable, and charges the grower for gross wages accumulated at the end of the weekly pay period in addition to any set commission in accordance with the contract between the grower and FLC. The master agreements between an FLC and grower will often specify that the FLC must submit its invoice for hours worked and pieces picked the day after the pay period, and the grower will consequently process and pay the FLC's invoice the next day so that the FLC can: (1) process payroll, (2) calculate each employee's regular rate for purposes of paying overtime, paid sick leave, and meal and rest break premiums, and (3) timely issue checks and compliant wage statements to its employees. In many cases, the FLC's supervisor delivers weekly checks to employees in the field.

These practices have not developed in a vacuum, but rather within the context of the Labor Code, and in particular Section 205. In fact, as pointed out by Respondents, the DLSE's own study guide for the FLC licensing exam emphasizes three specific wage payment timing requirements of which FLCs must be mindful: (1) paying wages immediately when firing an employee, (2) paying within 72 hours when an

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employee quits without notice, and (3) paying employees their regular wages every week. (Respondent's Joint Combined Cross-Appellants' Opening Brief and Respondents' Brief (Resp. Opening Brief), 26.)

Because of the skilled and specialized nature of the work many FLCs do, they need to make every attempt to retain workers on their payroll; if not, those workers are likely to move to another employer, forcing an FLC to hire and train new workers, and consequently impacting their ability to meet the needs of their grower customers. Ironically, while FLCs and growers are trying their hardest to retain their valuable, skilled workers by offering increased wages, benefits, and continuity of employment, the DLSE here is looking for ways to deem the worker separated from their employment.

III.
THE TRIAL COURT ERRED IN CONCLUDING THAT WORKERS ARE DISCHARGED AT THE END OF EACH GROWING "ACTIVITY"

The DLSE has put forth an "automatic layoff and discharge" theory based on a dangerous misunderstanding of two distinct authorities, *Campos v. EDD* (1982) 132 Cal.App.3d 961 and *Smith v. Superior Court* (2006) 39 Cal.4th 77. The DLSE relies on *Campos*, a nearly 40 year-old Court of Appeal decision interpreting the Unemployment Insurance Code, for the proposition that employees are discharged if "laid off" without a specific recall date, even where there is an ongoing working relationship and the next assignment is imminent or fully expected. Rather than articulate what actually constitutes a "layoff," the DLSE, and the trial court, proceeded on the erroneous assumption that the end of any specific assignment or time period is a "layoff" that triggers a potential discharge. (Combined Cross-Respondent's Brief and Reply Brief ("DLSE Combined Brief"), 10, 16-18).

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Yet, nowhere has the DLSE actually defined what a "layoff" is for purposes of applying its proposed rule(s).

Instead, the DLSE erroneously relies on *Smith*, a case interpreting discharge (not a layoff),[3] and standing for the commonsense principle that a discharge occurs at the conclusion of the parties' contracted assignment or period of time. The DLSE's proposed rule ignores the California Supreme Court's express limitation that such a discharge only occurs at the end of the assignment or time period "*for which the employee was hired*." (*Smith, supra*, 39 Cal.4th at pp. 93–94 (emphasis added).)[4] Yet, nowhere did the DLSE offer evidence that the employees in question were "hired for" any specific task or time period, nor did the trial court make any such finding. The trial court also did not consider that the Labor Code contemplates different wage payment obligations *during* ongoing employment versus at the *end* of the employment relationship.

A. In Ensuring Prompt Payment of Wages and Balancing the Needs of Employment, the Legislature Created Different Timing Requirements for the End of the Employment Relationship and Ongoing Employment

California has a public policy regarding prompt payment of wages, which "has been expressed in the numerous statutes regulating the payment, assignment, exemption and priority of wages." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325.) While the DLSE makes much of one aspect of this "prompt payment"

[3] Indeed, the plaintiff in *Smith* never even contended she was "laid off."

[4] This point was so significant that the California Supreme Court enunciated this limitation *four* separate times in *Smith*. (*Smith, supra*, 39 Cal.4th at pp. 84–85, 86, 91, 93–94.) The California Supreme Court also reiterated this principle recently in *Melendez v. San Francisco Baseball Associates LLC* (2019) 7 Cal.5th 1, 10-11.

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policy, it ignores the simple fact that this public policy manifests itself in different ways depending on whether a worker's employment is ongoing or has ended. (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1331 ("The Labor Code's protections are 'designed to ensure that employees receive their full wages at specified intervals while employed, as well as when they are fired or quit'."), quoting *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1085.)

From the outset, the Legislature contemplated different wage protections based on whether the employment relationship was ongoing or had ended, and thus enacted different timely wage payment requirements and related penalty policies.[5] When employment ends, "[t]he prompt payment provisions of the Labor Code impose certain timing requirements on the payment of final wages to employees who are discharged (Cal. Lab. Code, § 201) and to those who quit their employment (§ 202)." (*McLean v. State of California* (2016) 1 Cal.5th 615, 619.) As the California Supreme

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[5] This two-track policy is confirmed by reference to the biennial report published by the Bureau of Labor Statistics (BLS) in 1910, and cited in *Smith* as the impetus for Labor Code section 201. (*Smith, supra*, 39 Cal.4th at p. 87, citing BLS, 14th Biennial Rep.: 1909–1910 (1910).) That BLS report discussed the equal need for wage-related legislation for employment that was ongoing and ending:

> There should be enactment of suitable legislation providing for regular monthly settlement or payment of wage accounts by employers of labor on such certain specified days within the month and upon a date not later than may be fixed by the enactment, and to apply to all classes of labor. In other words, a date limitation for the payment or settlement of wages due for the thirty days next preceding. A reasonable provision should be made for the *immediate payment following dismissal of an employee, or at the conclusion of specified employment*.

(BLS, 14th Biennial Rep.: 1909–1910 (1910), at p. 43 (emphasis added).)

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Court noted, "[t]he Legislature's apparent purpose in enacting the prompt payment provisions was to ensure that employers make prompt payment of final wages upon the *termination of the employment* of a person who does not have a contract for a definite period—whether the employment is terminated involuntarily, by discharge (§ 201), or voluntarily, by quitting (§ 202)." (*Id*. at p. 622 [emphasis added].) Thus, the Legislature has deemed fit to apply the protections of Labor Code sections 201 through 203 at the *end of the employment relationship*.

By contrast, however, the Legislature established a different set of protections for employees engaged in *ongoing* employment, for whom prompt wage payments are governed by Labor Code sections 204, 205, 205.5, and 210. While the relationship is ongoing, there are different considerations for timing of wage payments and the needs of business, all of which the Legislature carefully assessed before establishing specified requirements for the frequency of such wages (e.g., weekly or bimonthly), and timing to take place by specified dates. Thus, during ongoing employment, an employer satisfies its wage payment obligations by following the mandates of Sections 204, 205, or 205.5, not those under Sections 201 through 203.

This case is not a false choice between whether or not to protect employees' rights to timely wages under the Labor Code; it is about *which* Labor Code protections apply. Here, the answer is found in the detailed scheme for timely payment of wages to employees who have an ongoing working relationship under Sections 204, 205 (applying even stricter requirements for FLCs), and 205.5. These protections entitle FLC employees to weekly wages on established paydays and permit for the recovery of penalties when this wage payment timing requirement is violated.

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The DLSE's position impermissibly tries a menu-style option of selecting some obligations from Column A and some from Column B, seeking to impose on employers with an ongoing working relationship those requirements applicable when the relationship has ended. But that is not the what the Legislature provided and contradicts the Labor Code as a whole.[6] Further, adopting the DLSE's proposed position would flip the Labor Code on its head, by placing the onus on employers to prove they actually *retained* their employees whenever a gap appears between their shifts.

When employees have an ongoing employment relationship, the Legislature has determined that the public policy in favor of full and prompt payment of wages (balanced against business needs) is best served by satisfying the requirements of Sections 204, 205, and 205.5. Requiring final pay under Section 201 during an ongoing working relationship runs counter to more than 100 years of consistent legislation and precedent.

B. The DLSE's Theory Defies Commonsense and Is Unsupported by Any Authority

The DLSE seeks to evade the Legislature's separate timing rules for the end of the employment relationship and ongoing employment by creating a hybrid situation in which ongoing employment is interrupted by automatic layoffs and discharges, which neither the employer nor the

[6] For example, and as discussed further *infra*, the statutory scheme requires an employee' regular rate be calculated by the workweek. (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 905.) And it is imminently possible an FLC would have assignments for two growers during the same workweek. Yet, under the DLSE's theory, an FLC would be required to repeatedly calculate the regular rate, likely using incomplete information, for such an employee after each arbitrary "discharge" for a grower.

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employee want. And it seeks to do so on the basis of minimal and irrelevant authority, purportedly relying on *Campos* and *Smith*.

1. *Campos* Neither Applies Nor Provides Any Authority For the DLSE's Newly Proposed Rule

Relying on *Campos v. EDD* (1982) 132 Cal.App.3d 961, the DLSE argues that an employee is discharged when "laid off" after finishing a task or assignment without a set schedule for the next assignment or a recall date. (DLSE Combined Brief, 10, 16-18.) Apparently, the DLSE relies on *Campos* for this position even when (1) the working relationship has not ended, and (2) additional work is fully expected and/or imminent, and simply awaiting scheduling. *Campos*, a nearly 40 year-old appellate decision interpreting the Unemployment Insurance Code, is wholly inapplicable to interpretation of Labor Code sections 201and 203 in both fact and law.

In *Campos*, unionized frozen food processors, employed on a seasonal basis, were placed on a seasonal layoff subject to possible recall, and were collecting unemployment benefits when their union went on strike against their employer. (*Campos*, *supra*, 132 Cal.App.3d at p. 965.) During the strike, the employer attempted to recall the laid-off workers, the workers refused to return to work, and EDD terminated their benefits. (*Ibid*.) As stated in *Campos*, "[t]he question presented by this appeal is whether workers on indefinite layoff are disqualified from receiving unemployment benefits when they refuse to accept recall offers in the course of a trade dispute." (*Id.* at p. 966.) The answer turned on application of two sections of the Unemployment Insurance Code: Section 1262, which disqualifies striking workers from receiving benefits, and Section 1259, which provides that workers need not accept new work as strikebreakers to qualify for benefits. (*Id*. at p. 966.) Within this specific

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context of the Unemployment Insurance Code, *Campos* found that "where workers are laid off without a definite recall date, the layoff terminates the employment relationship," such that the recall was "new work" within the meaning of Section 1259 because the work being offered was vacant due to a strike, lockout or other labor dispute. (*Id.* at pp. 974–976.) Although *Campos* analyzed the federal unemployment insurance regulations, California cases interpreting the Unemployment Insurance Code, and out-of-state cases interpreting analogous unemployment provisions, it never cited or considered any provision of the Labor Code, nor purported to create a rule beyond the specific context of unemployment benefits. (*Id*., at pp. 966-973.)

The non-utility and inapplicability of *Campos* for purposes of interpreting "discharge" under Labor Code 201 is evidenced by the fact that, although *Campos* had been published for 24 years, *Smith* never once mentioned it or the proposition for which the DLSE cites it here, when surveying the applicable authority on the meaning of "discharge" under Section 203. (*Smith*, supra, 39 Cal.4th at p. 90 & n.8.)

As the DLSE explicitly recognizes, *Campos* cannot be authority for a proposition it did not even consider, let alone discuss or rule on. (DLSE Combined Brief, 23-24.) It is a simple and basic rule of law that cases are not authority for propositions not considered therein. (E.g., *McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal.4th 321, 328.)

Moreover, until the trial court below, no court to have considered *Campos* in the context of Section 203 has agreed with the DLSE, nor applied it to require final payment of wages at all. (See, e.g., *Velazquez v. Costco Wholesale Corp.* (C.D.Cal. Aug. 27, 2012) 2012 U.S.Dist.Lexis 122998, at *14–19, *Apodaca v. Costco Wholesale Corp* (C.D.Cal. Jun. 5, 2014) 2014 U.S. Dist. LEXIS 80125, *13-14.)

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Indeed, the DLSE itself publicly articulated a version of the "layoff rule" 11 years later in 1993, without citing *Campos*, when responding to an inquiry regarding an employer's plans to shut its facility for short periods of time. (DLSE, O.L. 1993.05.04.) The DLSE opined that an "employee is *not* considered terminated," and no final pay would be owed, if the plant shutdown did not exceed ten days and a definite date for return to work is given. (*Ibid*. (emphasis added).) No rational factual or legal basis was articulated for either the ten-day limitation nor the definite return-to-work requirement. (*Ibid*.) Presumably a seven-day shutdown accompanied by a return to work date 30 days later would satisfy the DLSE's then-proposed rule to avoid employment "terminations." The DLSE quickly changed its position. Within three years, the DLSE abandoned the ten-day shutdown requirement for a different test: that a layoff will trigger final pay obligations if the employee is laid off without a specific return date "*within the normal pay period*" and does not actually return to work within that same pay period. (DLSE, O.L. 1996.05.30 (emphasis in original).)

Later, in Section 3.2.2 of the DLSE Manual—which cites both the 1993 and 1996 Opinion Letters and *Campos* as supporting authority—the DLSE set forth yet another version of its "automatic layoff and discharge" rule. This time, the DLSE stated that a layoff constitutes a discharge if an employer "lays off" an employee without a specified return date in the same pay period, but "[i]f there is a return date within the pay period and the employee is *scheduled* to return to work, the wages may be paid at the next regular pay day." (DLSE Manual §3.2.2 (emphasis added).)

As noted by Zepeda, AVI, and RBI, the Labor Commissioner advocated yet another position to the California Supreme Court in December 2017: that final pay is triggered if there is no return date within the pay period *or* if the employee is not scheduled to return to work within

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10 days. (Cross-Appellants' Reply Brief, 30-31 (citing David Balter, Counsel for Cal. Labor Commissioner, letter to Chief Justice Cantil-Sakauye and Associate Justices, Dec. 15, 2017).)

Thus, in 27 years, the DLSE has changed this proposed rule four times though, astonishingly, none of the foregoing are the rule the DLSE advocates for here. Rather than tie the recall date to a specific pay period or time frame, the DLSE instead advocates for a rule in which an employee is discharged anytime he or she is "laid off" without a definite recall date or return schedule. (DLSE Combined Brief, 10, 16-18.)

Given that the DLSE has changed its position on this issue *five times* in less than three decades, and has never been able to articulate proper authority in support of those positions, the Court should view its new rule with a healthy dose of skepticism. (See, e.g., *Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1106, fn. 7 (noting that when an agency's construction of a statute or regulation contradicts its original interpretation, it is not entitled to significant deference); *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13 (noting that evidence an agency has consistently maintained the interpretation in question, especially if it is long-standing supports deference, "[a] vacillating position . . . is entitled to no deference") (citations omitted).)

Separately, the DLSE's automatic layoff and discharge rules should be disregarded because they fail to articulate *whether* a "layoff" has actually occurred so as to trigger application of its rule(s). Stated differently, the DLSE's many positions are intended to determine *which* "layoffs" constitute a discharge for purposes of Sections 201 and 203, and which "layoffs" do not. But the DLSE has never offered any guidance on how to identify whether a layoff actually occurs. *Campos* involved a formal seasonal layoff and both the 1993 and 1996 opinion letters

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responded to hypotheticals which *presumed* the occurrence of a formal layoff. (*Campos*, *supra*, 132 Cal.App.3d at p. 965; DLSE, O.L. 1993.05.04; DLSE, O.L. 1996.05.30.) Nowhere in any of the DLSE's Opinion Letters, or in its Manual, does the DLSE define what a "layoff" is or how to distinguish such a "layoff" from any other gap in ongoing employment, such as a leave of absence under the California Family Rights Act (Cal. Gov't. Code § 12945.2), sick days under the Healthy Families, Healthy Workplaces Act (Cal. Lab. Code § 246), a vacation (*Suastez v. Plastic Dress-Up Co*. (1982) 31 Cal.3d 774, 784), an absence due to an industrial injury (Cal .Lab. Code §§ 3200, *et seq*.), or lack of work for which reporting time pay is owed (IWC Wage Order 14-2001, subd. (5)).

2. *Smith* Does Not Support the DLSE's Newly Proposed Rule

In an effort to tie its newly proposed rule to existing case law, the DLSE relies on *Smith,* and its principle that there can be an "implied discharge" upon the conclusion of a worker's contractual relationship. But this reasoning is inherently flawed. *Smith* held that such discharges occur upon completion of an assignment or time period *when the employee is hired for that specific assignment or time period*. (*Smith*, *supra*, 39 Cal.4th at pp. 93–94.) Here, the DLSE seeks to have the completion of an assignment or time period trigger an "automatic layoff" *irrespective* of the work the employee was hired to perform. Thus, the trial court's reliance on *Smith* to affirm the hearing officer's determination that "discharges" occurred within the meaning of Sections 201 and 203 at the end of any assignment or activity was misplaced.

In *Smith*, L'Oreal engaged plaintiff Smith to work as a model at one of its hair shows, and "agreed to pay her $500 for one day's work at the show." (*Smith, supra,* 39 Cal.4th at p. 81.) When Smith completed her contracted assignment, L'Oreal delayed paying her the agreed-upon $500

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for more than two months. (*Ibid.*) Smith sued L'Oreal for waiting time penalties under Section 203. (*Id.* at p. 82.)

To determine if a discharge had taken place on these facts, *Smith* first looked at the terms of the parties' agreement to determine L'Oreal hired Smith for a "specific job assignment or time duration." (*Id.* at p. 81.) *Smith* then turned to whether the completion of that agreed-upon assignment or duration fell within the meaning of "discharge" under Sections 201 and 203.

Smith found that "discharge" was not defined in the Labor Code or in the regulations promulgated by the DLSE. (*Id.* at p. 84.)[7] After examining the legislative scheme as a whole, and the legislative history, the Supreme Court concluded that discharges were anticipated by the Legislature when tied to the conclusion of the contractual relationship formed by an employer and employee. (See, e.g., *id.* at p. 86 [statutory "exceptions pertain to situations anticipating the employees will complete the particular job assignment or period of service for which they were hired"]; accord *id.* at 86 – 90.)

Ultimately, *Smith* held that an employer's final wage payment obligation on discharge can be triggered in one of two ways:
(1) affirmatively, through voluntary resignation or involuntary termination, or (2) contractually, at the end of a previously established assignment or duration *for which an employee was hired*. In both types of discharge, the relationship ends—the difference is the type of relationship that is ending

[7] Section 3.2.2 of the DLSE Manual, discussed *infra*, is the same now as it was when *Smith* was decided, and presumably *Smith* determined section 3.2.2 was irrelevant to the definition of "discharge" under Labor Code section 201, either because the facts of *Smith* did not involve a "layoff" or because section 3.2.2 does not actually define "layoff."

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(i.e., ongoing vs. fixed term). (See *id*. at p. 81 ["Application of settled statutory construction principles leads us to conclude the statutory discharge element contemplates *both types* of employment terminations"] [emphasis added]; see also *id.* at p. 84 [discharge occurs when employer "formally releases the employee and ends the employment relationship at the point the job or service term is deemed complete"].)

Put another way, *Smith* found L'Oreal discharged the plaintiff at the end of the one-day hair modelling assignment, not because the day was over or because the show concluded, but because plaintiff was hired specifically to work as a model for a single, one-day hair show and that contract had run its course. If, for example, L'Oreal had hired Smith to work as a model at five one-day hair shows, neither the conclusion of a single show nor the end of a single day would create a discharge, and Smith's claim for non-payment of wages for two months would fall under Section 204, not Section 203.

Without the limitation of set forth in *Smith*—tying discharges to the contractual agreement of the parties—the end of any arbitrary assignment or time period during the working relationship could trigger a "discharge." And that seems to be exactly what the DLSE proposes. But here, instead of tying a discharge to the work an employee was hired to perform, the DLSE *presumes* that the completion of an agricultural task constitutes a "layoff," even though there is no evidence whatsoever Zepeda or any of the affected employees contracted for employment based on any period of time or specific task. Under its theory, this "layoff" then triggers application of the DLSE's "automatic layoff" rule, resulting in unpaid final wages and opening Zepeda, AVI, and RBI up to waiting time penalties. (Compare with *Smith*, *supra*, 39 Cal.4th at pp. 93-94 ["the discharge element of sections 201 and 203 may be satisfied either when an employee is

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involuntarily terminated from an ongoing employment relationship or when an employee is released after completing the specific job assignment or time duration *for which the employee was hired*."] (emphasis added).)

Notably, the DLSE's "automatic layoff" rule seems to conflict with its own prior guidance on this issue, which only highlights its misapplication of *Smith*. In 1997, the DLSE opined on late payment of final wages to a group of unionized actors claiming they had not immediately received wages under Labor Code § 201 at the completion of their projects. Before providing its opinion, the DLSE, warned: "it is not clear that *the completion of the work* and the date of termination are the same. It is, of course, possible for a worker to remain an employee … after completion of a particular project if there is no termination either express or implied." (DLSE Opinion Letter No. 1997.07.15, at pp. 1–2.) (emphasis in original).)

3. The Statutory Scheme under the Labor Code Contradicts Imposition of "Layoffs" During Ongoing Employment

Besides lacking support in caselaw, the DLSE's theory is contrary to the statutory scheme. The Labor Code imposes certain obligations during ongoing employment, which simply do not exist once a relationship has severed. For example, during ongoing employment, an employer must calculate the regular rate of pay for purposes of overtime and separately paying for rest and recovery time, based on a *workweek*. (*Huntington*, *supra*, 131 Cal.App.4th at p. 905; Cal. Lab. Code § 226.2(a)(3)(A).) Additionally, each paycheck to the employee must be accompanied by a itemized wage statement, which identifies various information, including the regular rate of pay. (Cal. Lab. Code § 226.)

Under the DLSE's theory, FLC employees completing work at two separate growers must be immediately paid final paychecks after each

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assignment, if they are not immediately told when their next shift will be. So, for example, an FLC employee who finishes a peach picking task on Monday, and does not know exactly when the next shift is, will be "automatically laid off" and owed final wages; and if that same employee is scheduled to pick grapes on Thursday and Friday of the same week, must be paid another separate paycheck for the latter work. Each of these paychecks will be paid at a different regular rate of pay depending on the number of pieces picked, the hours worked per day, and/or hourly rate paid by each grower. Yet, because the regular rate must be calculated on a *weekly* basis, the FLC would then be required to issue a third paycheck to cover any change in the regular rate of pay between the first two paychecks. An FLC would be in the untenable position of issuing such supplemental checks routinely, which in turn is likely to cause more confusion for the employee and prevent them from actually understanding what their actual regular rate of pay truly is. Further, each wage statement is required to list the amount of accrued paid sick leave available to the employee, but in practice none would be available because the employee would never be employed long enough to accrue any sick leave. (Cal. Lab. Code § 246.) Nor would the employee accrue any meaningful vacation, as each "discharge" would in turn require payment of all accrued vacation. (Cal. Lab. Code § 227.) Thus, the DLSE interpretation contradicts specific provisions of the Labor Code and runs counter to the statutory scheme as a whole. (*People v. Murphy* (2001) 25 Cal.4th 136, 142–143 (courts must consider the statutory framework as a whole); *Newark Unified School Dist. v. Superior Court* (2016) 245 Cal.App 4th 887, 907 (courts should avoid creating statutory conflicts and harmonize statutes wherever possible).)

Finally, constant "discharges" could create a fluctuating workforce that would lead to fluctuating coverage under employee protection laws

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based on employer size, such as the Family Medical Leave Act[8] and California Family Rights Act,[9] New Parent Leave Act,[10] or Families First Coronavirus Response Act.[11] Rather than protect employees, the DLSE's theory effectively strips them of the benefits of continuous employment. The Court should reject this absurd statutory interpretation (*People v. Jenkins* (1995) 10 Cal.4th 234, 246 (statutes should be interpreted to avoid absurd consequences).)

C. Even If the DLSE's Automatic Layoff Discharge Theory Were Legally Viable, as a Practical Matter, It Is Unnecessary and Unworkable

The DLSE's "automatic layoff and discharge" theory would upset half a century of custom in the agriculture industry and solve no real problem. Given that FLC employees are already paid on a regular weekly basis, there is no danger that workers will go "weeks or months" without pay. Thus the DLSE's theory is a solution in search of a problem, wreaks

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[8] Defining a covered employer as any person who "employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" (29 U.S. Code § 2611(4)(a)(i).)

[9] Defining a covered employer as "[a]ny person who directly employs 50 or more persons to perform services for a wage or salary." (Cal. Gov't Code § 12945.2(c)(2)(A).) The number of employees is measured as of the time leave is requested. (2 Cal. Code Reg § 11087(d)(1).)

[10] Defining a covered employer as "[a]ny person who directly employs 20 or more persons to perform services for a wage or salary." (Cal. Gov't Code § 12945.6(i)(1).) The number of employees is measured as of the time leave is requested. (2 Cal. Code Reg § 11087(d)(1).)

[11] Defining a covered employer as any person who "employs fewer than 500 employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year" (29 U.S. Code § 2620(a)(1)(B).)

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havoc on the agricultural industry, leads to absurd results and is practically impossible to implement.

1. The DLSE's Newly Proposed Rule Is Practically Impossible to Implement

Besides being untethered to the employment agreement between FLCs and their employees, the DLSE's "automatic layoff and discharge" theory is practically unworkable because it does not take into account the inherent vagaries of agricultural work.

For example, the nature of such work means that it is not always clear when the last day of any given task, activity, or assignment will be. It may be anticipated that the final day of pruning work will be Friday, but efficient work may forward that to Wednesday (a fact that might not be discovered until the fields are subsequently inspected). Alternatively, unpredictable weather may delay completing pruning. An employee may report to a field on Monday ready to work the harvest, but torrential rains prevent any work. Believing the rains will soon stop, no one treats Monday as the "last day" of the harvest– but by Friday (with the continuing storm) the grower decides the crop is lost or it no longer makes sense to harvest. It would not be known until Friday that the final day of harvest *retroactively was* Monday. In each of these circumstances, the DLSE's rule would require a final paycheck be ready immediately as soon as any potential gap in work appears unless the employee is definitively told when the storm will ease, or whether the pruning work is done or continuing. The FLC would need a crystal ball, since it will not know except in hindsight when the last day of the assignment was. The law does not require the impossible. (Cal. Civ. Code § 3531.)

Putting aside the impracticalities of determining the final day of work prospectively, it will often be equally impossible to determine what

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amount of wages would be due at the end of a work day and issue accurate final pay, especially during harvest. As discussed above, many field workers are typically paid (at least in part) on the basis of piece rate, and those pieces must be counted and (often) verified by either the grower or packer before credited to an FLC's crew. The DLSE's proposed rule would require the FLC to guess at the number of verified pieces in order to have a paycheck ready for the end of the day when that arbitrary agriculture activity ends. And even if the pieces are properly calculated and verified, there would be no way to issue paychecks immediately, short of having a team of accountants (and their computers) in the field, calculating deductions and issuing paychecks.

Simply put, the DLSE's proposed rule would require an FLC to guess at which assignments or time periods would qualify as "layoffs" when completed, and guess at the amounts of wages to pay to have those final paychecks ready in the field – and then have to retroactively correct all those estimated sums. The DLSE's proposed interpretation is antithetical to the Legislature's intent that Section 201 should apply only in cases of employment *termination*, defeats the purpose of having a separate provision for ongoing employment relationships under Section 204, flouts the specific payment timing provisions for employees of farm labor contractors under Section 205, and leads to absurd results. The trial court erred in denying Respondents' petition in this respect.

2. The DLSE's Proposed Rule Is Irrational and Leads to Absurd Results

The DLSE's newly proposed rule, even if capable of practical implementation, leads to absurd results. Under the DLSE's theory, a worker hired to work for an entire ten-month growing season is "laid off" when she finishes pruning grape vines on a Friday, and is discharged if not

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told that same day to return to work on Monday to tie up those same vines. This worker would be automatically laid off and discharged because the grower and FLC cannot provide a *specific schedule* for work at all times, even though the worker was hired to work an entire ten-month growing season and expects to, and is expected to, return to work shortly to continue that work.

Similarly, an employee might have a gap between otherwise continuous agricultural tasks because a winter storm makes the transition between pruning and tying impossible for several days, or because a summer heat wave makes field work dangerous for a week. In both instances, the FLC and grower cannot give a specific return to work schedule (what the DLSE calls a "return to work date") beyond a general statement that work will resume as soon as it is safe to do so. Yet no reasonable person would conclude that the workers in either above scenario are discharged.

Because the trial court incorrectly applied California law to the facts of the case, the trial court's denial of the petition in this respect must be reversed.

IV.
THE TRIAL COURT CORRECTLY REJECTED THE DSLE'S EFFORT TO ISSUE A CITATION UNDER LABOR CODE § 1197.1 WITHOUT AN UNDERLYING MINIMUM WAGE VIOLATION

Separate and apart from its unworkable and unnecessary automatic layoff and discharge theory, the DLSE's use of its citation powers under Section 1197.1 to assess waiting time penalties – *when there are no underlying minimum wage violations* – is wholly without merit and the trial court correctly rejected it.

The DLSE takes the position that an employer who pays its employees (allegedly) *late* final wages, has independently *failed to pay*

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minimum wages, thereby permitting the DLSE's use of a minimum wage citation. But there is no authority for such a position, especially where (as here) it is undisputed that all employees have been paid minimum wages or more. Indeed, adopting the DLSE's theory would eliminate the principal restriction placed by the Legislature on the DLSE in Section 1197.1, and allow the DLSE to unilaterally and dangerously expand its power. Besides, there is no underlying policy reason to adopt the DLSE's novel theory. As discussed *infra*, California law already provides for timely weekly wage payments for FLC employees, and semi-monthly wage payments for direct hire agricultural employees, and attendant civil penalties recoverable by both the Labor Commissioner and the employee. Amici do not propose that the DLSE is stripped of authority to assess waiting time penalties altogether, only that such penalties be tied to an underlying minimum wage violation, as required by the Legislature.

A. Alleged Late Payment of Wages Does Not Constitute an Independent Failure to Pay Minimum Wages

Labor Code section 1197.1 is part of the chapter of the Labor Code dealing with wages, hours, and working conditions in ongoing employment, including the powers of the Industrial Welfare Commission (IWC) to set and adjust the minimum wage payable to employees in California. (Cal. Lab. Code § 1173.) "The IWC is the state agency empowered to formulate regulations (known as wage orders) governing minimum wages, maximum hours, and overtime pay in the State of California." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 795.) As part of this chapter, Section 1197.1 provides an employer "who pays or causes to be paid to any employee a wage less than the minimum fixed by an applicable state or local law, or by an order of the commission," is liable for penalties and restitution. (Cal. Lab. Code § 1197.1(a).) Here, the applicable IWC wage

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order provides that "[e]very employer shall pay to each employee, *on the established payday for the period involved*, 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." (8 Cal. Code Regs. § 11140(4)(B) (emphasis added).) Under Labor Code section 1194, "any employee receiving less than the legal minimum wage … is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation … ." (Cal. Lab. Code § 1194(a).) Thus, when an employee sues to recover unpaid minimum wages under Section 1194, she "actually sues to enforce the applicable wage order." (*Martinez v. Combs* (2010) 49 Cal.4th 35, 62, 64.) Similarly, Section 1197.1 allows the Labor Commissioner to pursue remedies on behalf of employees when they have been paid "a wage less than the minimum fixed by an applicable … law." (Cal. Lab. Code § 1197.1(b).) In connection with the same, Section 1197.1 provides for four specific categories of damage: (1) civil penalties, (2) restitution of wages, (3) liquidated damages pursuant to Section 1994.2, and (4) "any applicable penalties imposed pursuant to Section 203." (*Ibid*.)

Based on the foregoing, the statutory scheme is clear: where an employer *fails to pay employees the minimum wage fixed by law* (1) employees are entitled to recover *the unpaid balance* and corresponding penalties in a civil action; and (2) the Labor Commissioner is authorized to issue a citation for *restitution* of the wages owed plus any corresponding penalties (including waiting time penalties under Section 203 "in connection" with those wages). Thus, waiting time penalties *must* be tied to an actual failure to pay employees minimum wages fixed by law. And while late payment of such wages to a discharged employee may trigger

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waiting time penalties, it does not follow that the late payment itself constitutes a failure to pay minimum wage in violation of the wage order.

1. The DLSE's Proposed Interpretation Unilaterally Removes the Primary Restriction on Its Citation Power

Notwithstanding the Legislature's above scheme and requirements, the DLSE now argues for the authority to use its minimum wage citation powers to enforce the final pay statutes even when minimum wages have undisputedly been paid in accordance with California law. Had the Legislature wanted to grant the Labor Commissioner the unencumbered authority to issue citations to enforce Section 203, it could have easily done so. In fact, the Legislature did grant the Labor commissioner such power to enforce Section 210, requiring timely wage payments during ongoing employment. (Stats 2019, ch 716, § 1.) But the Legislature chose not to do so for Section 203. Instead, the DLSE's authority to issue citations for waiting time penalties arises only where there is an underlying minimum wage violation. By arguing that the late payment of wages is itself an independent minimum wage violation, the DLSE can issue citations for late final wages without any actual minimum wage violation – as, under this theory, the claimed late final pay *will have become* a minimum wage violation in and of itself. In other words, the DLSE's current theory reads the most significant limitation on its power out of the statute. This Court should ignore any reading that makes any part of a statute, such as Section 1197.1, redundant or superfluous. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207 ("interpretations which render any part of a statute superfluous are to be avoided.")). And this Court should not permit the DLSE to unilaterally expand its authority beyond that which was given to it by the Legislature.

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2. There Is No Case Law Supporting the DLSE's Position

As with the statutory scheme, there is also no support for the DLSE's position in case law. No California or federal case has found a minimum wage violation occurs if an employer fails to timely pay final wages when due.[12] Similarly, no California or federal regulation, nor any DLSE opinion letter or published interpretation, exists for the proposition that a late payment of final wages constitutes an independent failure to pay minimum wages. In fact, the authorities the DLSE relies on, *White v. Davis* (2003) 30 Cal.4th 528 and *Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537, support the finding that California's minimum wage laws only require payment of minimum wages on established paydays. Both cases, when interpreting the obligations of the State of California to make timely minimum wage payment obligations to current state employees under the FLSA, held that "the FLSA is violated unless the minimum wage is paid on the employee's *regular payday*." (*Biggs*, *supra*, 1 F.3d at p. 1541

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[12] In fact, as Zepeda, AVI, and RBI point out, an Oregon court considered an identical argument and held that the failure to pay minimum wage on discharge does not give rise to an independent minimum wage violation. (Resp. Opening Brief, 95-97 (citing *Hurger v. Hyatt Lake Resort* (2000) 170 Or.App. 322.) *Hurger* put the matter succinctly:

> When a worker's employment ceases, of course, all wages--including the minimum wage component-must be paid within the times specified by ORS 652.140 [the final wage statute]. However, plaintiffs argue that a payment that would otherwise have satisfied the minimum wage statutes in both its timing and amount becomes separately untimely and separately sanctionable, if the employee has been terminated and the final payment is not made within the time limits of [the final wage statute]. *In our view, plaintiffs' argument is a tail-wagging-the-dog exercise that is not supported by the text of the statute*.

(*Hurger*, *supra*, 170 Or.App. at p. 325 (emphasis added).)

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(emphasis added); see also *White*, *supra*, 30 Cal.4th at p. 545.) Here, there is no dispute Zepeda fully complied with its obligations under the applicable Wage Order to pay its employees minimum wages on their regularly established weekly payday.

Rather than accepting this precedent, the DLSE contorts *White* and *Biggs* to support its theory that California's minimum wage law is violated when final wages are not paid timely, even though neither case considered *California's* minimum wage law nor an employer's obligations to pay final wages. (Appellant's Opening Brief ("DLSE AOB"), 39-40 (citing *White*, *supra*, 30 Cal.4th at p. 577-78; *Biggs*, *supra*, 1 F.3d at p. 1544.) The facts in *White* and *Biggs* were limited to the specific issues of: (1) whether public employees were entitled to their wages during budget impasses, in which the State Controller was not authorized by the Legislature to pay wages, and (2) what amount of such wages had to be paid, if any. *White* and *Biggs* analyzed the issue within the context of the FLSA, and not California law, because "*Labor Code section 204*, which imposes an obligation of timely payment of wages upon employers in California generally, is not applicable to the payment of wages of employees who are directly employed by the state." (*White*, *supra*, at p. 569, n.16 (emphasis added).) In other words, the California Supreme Court recognized the issue at stake was a question of timely payment of wages on regular paydays (under Section 204), not one of final wages (under Section 203).

3. There Is No Public Policy Supporting the DLSE's Position

In addition to lacking any legal basis, there is no public policy reason to adopt the DLSE's position. The DLSE argues, without any evidence, that employers would deprive their employees of the necessities of life if it is unable to assess waiting time penalties through citations. This unsupported assertion is fatally flawed for a few reasons.

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First, there is no basis for the proposition that employees will go "weeks or months" without payment of wages—and thus without life's necessities—if the DLSE is not allowed to act. As discussed above, since 1976, when the Legislature amended Section 205 to provide for weekly pay for *all* FLC employees, FLCs and growers have created practices to promptly pay wages weekly. As noted above, all of Zepeda's employees were paid, in full, on or before their regular *weekly* paydays. The wage payment timing rules functioned as intended and there is no evidence any of Zepeda's employees were ever actually harmed by Zepeda's practice of timely paying all wages on the regular weekly payday.

Second, waiting time penalties are not the only mechanism to ensure prompt payment of wages: untimely payment of wages in *ongoing* employment is penalized under Section 210. The Labor Commissioner can issue citations for civil penalties under that section and employees are empowered to bring a civil action for unpaid wages, penalties, and attorneys' fees and costs. Thus the DLSE's stated need for standalone waiting time penalties—through its citation power as the only way to ensure prompt payment of wages—is belied by existing remedies available under the law. The DLSE's proposed automatic layoff and discharge theory is wholly unnecessary because a remedy already exists for the late payment of wages under Section 210, among other remedies. (Cal. Lab. Code § 210(a) & (b).)

Third, simply because the DLSE cannot assess waiting time penalties by citation without an underlying minimum wage violation, does not mean waiting time penalties are wholly unavailable (where appropriate). For example, an employee fired on a Monday but not paid until their regular payday on Friday would be paid minimum wages in full compliance with California law, but may still recover three days of waiting

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time penalties for the separate and independent failure to timely pay final wages under Sections 201 and 203. And, if that same employee quits without adequate notice on Monday and waits until Friday to be paid, they may still recover one day of waiting time penalties under Sections 202 and 203.[13]

V.
CONCLUSION

For all of these reasons, Amici Curiae respectfully request that this Court: (1) reverse the trial court's order denying the petition with respect to the finding that Respondents "discharged" any employees; and (2) affirm the petition with respect to the finding the DLSE exceeded its authority to issue citations under Labor Code section 1197.1.

[13] Separately, it should be noted that, under California law, where the basis for waiting time penalties is violation of the minimum wage law (and not a contractual wage rate), it is well-established that the minimum wage is the applicable basis for calculating the amount of the penalties, not the daily pay of the affected employee. (See *Armenta v. Osmose, Inc.* (2006) 135 Cal.App.4th 314, 326 ["Because respondents were claiming a violation of the minimum wage law, we agree that penalties under section 203 must be assessed by arriving at a daily wage using the minimum wage claimed by each respondent."]) The DLSE citations are, at a minimum, also fatally flawed for this deficiency in calculating the amount of applicable waiting time penalties.

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Dated: September 4, 2020 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached: **Western Growers Association, California Fresh Fruit Association, California Farm Bureau Federation, California Farm Labor Contractor Association, Grower Shipper Association of Santa Barbara and San Luis Obispo Counties, and Ventura County Agricultural Association's Application For Permission to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Plaintiffs, Respondents and Cross-Appellants Jaime Zepeda Labor Contracting, Inc., Richard Bagdasarian, Inc., and Anthony Vineyards, Inc.** is proportionately spaced, has a typeface of 13 points, and contains 12,622 words, according to the counter of the word processing program with which it was prepared.

Dated: September 4, 2020 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: */s/ Babak Yousefzadeh*
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PROOF OF SERVICE

I am employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111. I am readily family with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On September 4, 2020, I served a true and correct copy of the document(s) described as:

Western Growers Association, California Fresh Fruit Association, California Farm Bureau Federation, California Farm Labor Contractor Association, Grower Shipper Association Of Santa Barbara and San Luis Obispo Counties, and Ventura County Agricultural Association's Application For Permission to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Plaintiffs, Respondents and Cross-Appellants Jaime Zepeda Labor Contracting, Inc., Richard Bagdasarian, Inc., and Anthony Vineyards, Inc.

on the interested parties in this action as follows:

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☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address eruiz@sheppardmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on September 4, 2020, at San Francisco, California.

/s/ Elena E. Ruiz
Elena E. Ruiz

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