STEWART WEINBERG
DAVID A. ROSENFELD
WILLIAM A. SOKOL
VINCENT A. HARRINGTON, JR.
W. DANIEL BOONE
BLYTHE MICKELSON
BARRY E. HINKLE
JAMES RUTKOWSKI •
SANDRA RAE BENSON
CHRISTIAN L. RAISNER
JAMES J. WESSER
THEODORE FRANKLIN
ANTONIO RUIZ
MATTHEW J. GAUGER
ASHLEY K. IKEDA ••
LINDA BALDWIN JONES
PATRICIA A. DAVIS
ALAN G. CROWLEY
J. FELIX DE LA TORRE
KRISTINA L. HILLMAN •••
ANDREA LAIACONA
EMILY P. RICH
BRUCE A. HARLAND

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
TELEPHONE 510.337.1001
FAX 510.337.1023

LORI K. AQUINO ••
ANNE I. YEN
NICOLE M. PHILLIPS
CONCEPCIÓN E. LOZANO-BATISTA
CAREN P. SENCER
MANJARI CHAWLA
KRISTINA M. ZINNEN
JANNAH V. MANANSALA
MANUEL A. BOIGUES ••••
KERIANNE R. STEELE •••
ANA M. GALLEGOS
GARY P. PROVENCHER

PATRICIA M. GATES, Of Counsel
ROBERTA D. PERKINS, Of Counsel
RICHARD T. DRURY, Of Counsel

• Also admitted in Arizona
•• Admitted in Hawaii
••• Also admitted in Nevada
•••• Also admitted in Illinois

September 5, 2008

The Honorable Ronald M. George, Chief Justice
and the Honorable Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4783

Re: ***Brinker Restaurant Corporation. v. Superior Court (Adam Hohnbaum, Real Party in Interest)***
California Supreme Court Case No. S140308;
Amicus Curiae Letter in Support of Petition for Review of Decision of the Court of Appeal for the Fourth Appellate District in Case No. D049331.

Dear Chief Justice George and Honorable Associate Justices:

This letter is submitted in support of the petition for review filed by plaintiffs Adam Hohnbaum et al. in the above-referenced matter pursuant to rule 8.500 of the California Rules of Court[1] on behalf of the following amici curiae:

- Alameda Central Labor Council
- Contra Costa Central Labor Council
- Northern California Carpenters Regional Council
- SEIU United Healthcare Workers-West
- South Bay Central Labor Council

These labor organizations (hereafter, "Amici Curiae") have raised their collective voices over the past three years in opposition to the efforts by some employers and the California Labor Commissioner to weaken meal and rest break protections under California law. The Amici Curiae participated in the regulatory process initiated in 2005 by the Labor Commissioner to rewrite and weaken the rules on meals and rest breaks and submitted amici briefs in *Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094, the case that came before this court last year involving the statute of limitations that applies to claims for missed meal and rest breaks. The Amici Curiae also submitted a brief in support of Plaintiffs in this case below and believe that Supreme Court review of the decision of the Court of Appeal for the Fourth Appellate District in *Brinker Restaurant Corporation v. Superior Court of San Diego County*

[1] All further references to rules are to the California Rules of Court.

(Adam Hohnbaum, Real Party in Interest) (2008) ___ Cal.App.4th ___ (*"Brinker"*), is urgently needed to protect the fundamental workplace rights of California's employees and to settle numerous important questions of law, including these:

1. Whether employers have an affirmative obligation to ensure that employees are actually relieved of all duty during meal breaks mandated by the wage orders, as held by the Third Appellate District in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 962-963, or merely to make breaks available, as held by the Fourth Appellate District in *Brinker.*

2. Whether employers are required to follow the long-standing rule that two rest breaks are required in an eight-hour day as explained in DLSE Op.Ltr. 1999.02.16?

3. Whether class actions are impossible to certify on meal and rest break claims in all but the most egregious of fact situations?

These issues are a matter of burning interest for workers and employers throughout California, and are also now the subject of numerous splits in decisions by the California and federal courts.[2] This Court's intervention is necessary to "secure uniformity of decision" and to "settle ... important question[s] of law" within the meaning of rule 8.500(b)(1).

I. Interests of the Amici Curiae

The Alameda, Contra Costa, and South Bay Central Labor Councils ("CLCs") are regional coordinating bodies affiliated with amicus curiae California Labor Federation, AFL-CIO, which bring local unions from many industries together to take action on issues that affect their communities. These CLCs organize, mobilize, and give working families a voice in the political process and in the courts.

The Northern California Carpenters Regional Council ("NCCRC") is a labor organization within the meaning of the National Labor Relations Act (29 U.S.C. §152(5)), and is chartered and affiliated with the United Brotherhood of Carpenters and Joiners of America ("UBC"), one of the largest building trade unions in America. NCCRC comprises 33 local unions in Northern California with more than 35,000 members, and is the central coordinating body providing direction to and governing each local union. NCCRC is dedicated to improving the California building trades and construction industry, striving to organize to improve working

[2] Because the Petitioners have quite ably discussed the numerous decisions and splits of authority relating to these issues, Amici Curiae address only one aspect of the controversy that has erupted over these issues, namely, how the Executive Branch of California's government, including the Governor and the Labor Commissioner, has magnified *Brinker's* negative effect on working people in California. By ignoring all other precedent to the contrary and implementing the *Brinker* decision to exclude meal and rest break claims that would be remedied under the longstanding practices of the Labor Commissioner upheld by the *Cicairos* decision, the Labor Commissioner has denied California workers their right to a fair interpretation of meal and rest break rules.

conditions and raise the standard of living on behalf of all workers. As part of its commitment to serve its membership NCCRC has established and staffed a program to assure a level playing field so that contractors employing UBC members might compete effectively on construction projects thereby creating jobs for its members. As part of this program, NCCRC investigates construction projects to assure that employees working on these projects are being provided the protections that the law requires. As part of this compliance effort, NCCRC has filed numerous cases both in court and before the Labor Commissioner for violations of workers' meal and rest break rights and other underpayment of wages. The NCCRC also litigated a case against the Labor Commissioner for suspending its enforcement of all meal and rest break claims in 2005.[3]

SEIU United Healthcare Workers-West ("UHW-West") is a statewide labor organization which represents over 130,000 workers in all sectors of the California health care industry, including hospitals, nursing homes, home health, clinics, and emergency medical services. rights. UHW-West, acting through the California State Council of the SEIU, an umbrella organization which provides political and legislative representation for SEIU locals and members at the state level, has frequently given testimony before the IWC on matters relating to wages, hours, and working conditions and has participated in wage boards convened by the IWC to recommend regulations to be adopted in the form of new or amended Wage Orders. Thus, both UHW-West and its members have a strong interest in securing a final ruling of this Court which will resolve—once and for all—the conflict of decisions as to the proper interpretation of California's meal and rest break law.

II. *Brinker* Raises Extraordinarily Important Questions of Law

Before *Brinker* was issued certain rules unequivocally governed all workplaces in California. For instance, in a standard eight-hour workday with a thirty-minute lunch break (e.g., 9:00 a.m. to 5:30 p.m.) all workers could count on their rights to two rest breaks, one in the morning and one in the afternoon. Employees also knew that it was their employer's responsibility to schedule time off for their lunch break during which they would be free to leave the premises and have control over how to spend their time. Since the issuance of *Brinker* these basic workplace rights are no longer certain. Unions

[3] Concerned that hundreds of workers in the construction industry would suffer irremediable deprivations of their meal and rest break rights, NCCRC joined together with individual wage claimants represented by California Rural Legal Assistance (CRLA) to file a petition for writ of mandate in an action entitled *Corrales v. Dell,* Sacramento Sup. Ct. Case No. 05CS00421, challenging the Labor Commissioner's actions to hold meal and rest break claims in abeyance as unlawful "underground regulations." On appeal, this case, *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 64, held that the Labor Commissioner did not have the power to issue a precedent decision finding that a one-year statute of limitations applied to claims of missed breaks.

may now be required to bargain for these rights rather than bargain up from this floor of rights that was solid for decades.

If the Executive Branch and, in particular, the Labor Commissioner were treating *Brinker* as one of the several conflicting interpretations by the appellate courts of the meal and rest break rules, review would still be needed to settle these important questions of law; but what magnifies the importance of review is the actions of both the Governor and the Labor Commissioner in the days and weeks following the issuance of this radical decision that rewrites the rules of the workplace in California. Before discussing the reaction of the Executive Branch to the *Brinker* decision, it may prove helpful to provide some context.

The Labor Commissioner's Prior Actions in Weakening Workplace Protections

For several years, the Department of Labor Standards Enforcement ("DLSE") headed by the Labor Commissioner has participated in an employer-driven campaign to stymie private efforts at enforcement of Labor Code section 226.7, the statute that was enacted by the Legislature in 2000 to put some teeth into the law governing meal and rest breaks. Requiring premium pay for missed breaks, section 226.7 reflected the Legislature's intent to end the lawless regime in which the only relief workers could seek for denial of their meal and rest break rights was an injunction. The illusory nature of this option inspired the creation of a new remedy—payment of an additional hour's wages for each workday in which an employee is denied a meal or rest break provided by law.

Rather than step up enforcement of meal and rest breaks after this enactment, the DLSE has taken numerous steps to undermine enforcement of meal and rest break compliance. This campaign began with an abortive attempt to enact so-called "emergency regulations" that would have cut the statute of limitations on employee wage claims under section 226.7 to one year and establish a new regime of waivers that would allow employees to forfeit their rights if they signed a boilerplate form at the time they were hired. A storm of protest over the imaginary nature of the emergency led to the abandonment of this initiative.

After starting a process of enacting a similar regulation through APA procedures, DLSE switched to a speedier approach that would circumvent public opposition. For the first time in its existence, DLSE claimed the right to issue precedent decisions and immediately used this newfound power to declare a decision by one deputy labor commissioner, adopting the one-year statute of limitations, binding on all deputies throughout the State.

DLSE's "precedent decision" did not withstand the scrutiny of the courts. The Court of Appeal repudiated the division's claim of the power to issue precedent decisions. *See Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33, 64. And despite the Labor Commissioner weighing in on the employer's side, this Court unanimously and unequivocally rejected the substance of the "precedent decision," namely, DLSE's attempt to limit workers' claims for redress of missed breaks under section 226.7 to one year. *See Murphy v. Kenneth Cole* (2007) 40 Cal.4th 1094.

The *Murphy* decision was especially important to those who seek to protect workers' rights to meal and rest breaks through private enforcement of the law. Wage and hour cases often involve many workers. These cases are frequently suitable for class action treatment because of the large number of individuals who have suffered the same injury. However, the first step is for one individual to step forward and agree to be a plaintiff. As this Court has observed, current employees are often reluctant to sue their employers and risk losing their jobs. Often, the first person who will blow the whistle on an errant employer is a former employee who no longer has anything to lose. In many such cases, more than a year may pass before a former employee informs an attorney that the employer has been flouting the meal and rest break regulations and not paying the required section 226.7 payments.

Since the issuance of *Corrales* and *Murphy*, the Labor Commissioner has continued to side with employers in their efforts to weaken meal and rest break protections by seeking a wholesale revision of what it means to "provide" a meal break. The strategy was to obtain a definition of what it means to "provide" a break that eliminates a clear standard for employer compliance, places impossible burdens on employees to prove their claims in court, and eliminates effective enforcement through class litigation. And with the *Brinker* decision that goal was achieved.

The Response of the Labor Commissioner to *Brinker* Magnifies Its Negative Impact

On the very day that the *Brinker* decision was announced, the Governor issued a press release declaring that the decision "promotes the public interest by providing employers, employees, the courts and the labor commissioner the clarity and precedent needed to apply meal and rest period requirements consistently." [4] Three days later, the Labor Commissioner distributed an interpretive memorandum, saying that "*Brinker* decided several significant issues regarding the interpretation of California's meal and rest period

[4] "Gov. Schwarzenegger Issues Statement on Meals and Rest Breaks for Employees" (07/22/08) (http://gov.ca.gov/press-release/10273/, viewed 09/05/08).

requirements."[5] The Labor Commissioner also made immediate and substantial changes to the DLSE Enforcement Manual to "conform to *Brinker*" and withdrew an opinion letter cited in *Brinker*.[6]

The DLSE July 2008 Memorandum reversed decades of interpretation and practice by the Labor Commissioner and displayed a startling disregard for DLSE's role as the guardian of employee rights under California law. It commanded all staff to "follow the rulings in the Brinker decision effective immediately" and declared that, "the decision shall be applied to pending matters." (Id. at p. 3).

The Memorandum failed even to mention the Court of Appeal's holding in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 that an employer's "obligation to provide [employees] with an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (*Id.* at pp. 962-963.) This principle articulated by *Cicairos* had guided the Labor Commissioner in countless Berman proceedings conducted pursuant to Labor Code section 98 and was always the guiding principle applied by the Labor Commissioner in employer compliance audits.[7] While heralding *Brinker* as a "binding court ruling," the DLSE July 2008 Memorandum failed to mention that it would not become a final decision of the Court of Appeal until August 21, 2008, or that there was a possibility that the Supreme Court would grant review, leaving *Cicairos* as the only published Court of Appeal case addressing the key issues of what it means to "provide" meal and rest breaks.

The Labor Commissioner's enthusiastic adoption of *Brinker* stands in stark contrast to DLSE's treatment of *Cicairos*. Despite the arrival of *Brinker*, the *Cicairos* decision, offering a more protective interpretation of meal and rest break law for California workers, remains good law, yet the *Cicairos* decision has yet to receive attention or recognition on the DLSE web site or in the DLSE Enforcement Manual. The DLSE July

---

[5] Memorandum from Labor Commissioner Angela Bradstreet, *et al.*, to DLSE Staff (Jul. 25, 2008) (hereafter "DLSE July 2008 Memorandum") found on the DLSE web pages under the heading "News/Alerts" and entitled, "Binding Court Ruling on Meal and rest Breaks" (http://www.dir.ca.gov/dlse/dlse.html, viewed 08/29/08).

[6] DLSE Enforcement Manual Revisions, July 2008 v.2, at 2-4 (revisions dated 07/25/08) (http://www.dir.ca.gov/dlse/DLSEManual/ DLSE_EnfcManual_Revisions.pdf, viewed 08/29/08); DLSE Withdrawn Opinion Letters (noting 07/25/08 withdrawal of Opn. Ltr. 1999.02.16 (cited in *Brinker*, slip op. 25)) (http://www.dir.ca.gov/ dlse/OpinionLetters-Withdrawn.htm, viewed 09/05/08).

[7] *See, e.g.*, DLSE Op.Ltr. 2002.01.28 (2RJN7564); DLSE Enforcement Manual (2002 Update) at 45-4 ("It is the employer's burden to compel the worker to cease work during the meal period.") (RJN05/11/07, Ex. 4).

2008 Memorandum mentions it only in the context of the 4th District Court of Appeal's effort to distinguish it on its facts.

Although completely ignored by the Labor Commissioner, several key holdings of *Cicairos* are now part of the basic canon of principles which are as binding on DLSE and California employers as any of the holdings of *Brinker*:

- An employer's "obligation to provide [employees] with an adequate meal period [is] not satisfied merely by assuming that the meal periods were taken because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.' [Citation.]" (*Cicairos*, 133 Cal.App.4th at pp. 962-963.)

- Failing to record meal periods, while "pressuring" employees to adhere to scheduling policies that make it "harder" to take meal breaks does not satisfy the employer's affirmative obligation. (*Id.* at p. 962.)

- Knowingly permitting employees to work through meal breaks, while not "tak[ing] steps to address the situation," and implementing "management policies" that make it "harder" to take a break, can "effectively deprive[]" employees of their breaks. (*Brinker*, slip op. at pp. 45-46, discussing *Cicairos*.)

- Even if an employer has a policy authorizing employees to take rest breaks, an employer can still be liable for failure to provide rest breaks "if the [employees do] not take their full 10-minute rest breaks because, as a practical matter, the [employer does] not *permit* the [employees] to take their rest breaks." (*Cicairos*, at p. 963.)

- The requirement to "permit" rest breaks may not be satisfied where rest breaks are unpaid, where the employer encourages employees to skip rest breaks, and where the employer is aware that some employees are not taking rest breaks. (*Ibid.*)

None of this interpretive guidance is discussed in the DLSE July 2008 Memorandum or in the recent revisions to the DLSE Enforcement Manual.[8] These omissions reflect an unfortunate disregard by the Labor Commissioner of DLSE's core mission to protect employees and ensure widespread compliance with the State's wage and hour laws. The Labor Commissioner is charged with the duty "to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under

[8] Not only DLSE staff but also employers, employees, and the courts look to the DLSE Enforcement Manual and the opinion letters for guidance in writing employment policies, drafting collective bargaining agreements and interpreting laws and regulations governing the workplace. This hasty implementation of the *Brinker* standards impacts all Californians.

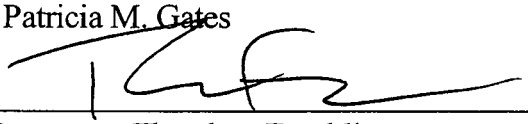
standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions ... and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (Lab. Code § 90.5(a); see also Business Wire, "CA Labor Commissioner Cites Riverside & San Bernardino Restaurants for Labor Violations, quoting A. Bradstreet ["It's our duty to protect workers and level the playing field for those [employers] who do follow the law."].)[9] The Labor Commissioner is, therefore, the one state official who owes an unambiguous duty to California workers to marshal the published cases of our appellate courts for their protection.

III. Conclusion.

For the reasons stated above, Amici Curiae believe that this case urgently requires this Court's attention. The Court should grant the plaintiff's petition for review.

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD, A
Professional Corporation
David A. Rosenfeld
Theodore Franklin
Patricia M. Gates



By: Theodore Franklin
Attorneys for the *Amici Curiae*

115945/502237

[9] Available at
http://findarticles.com/p/articles/mi_m0EIN/is_2008_April_23/ai_n25343031 (8/19/08).

PROOF OF SERVICE

I am a citizen of the United States, and a resident of the State of California. I am over the age of eighteen years, and not a party to the within action. My business address is 1001 Marina Village Parkway, Suite 200 Alameda, CA 94501-1091. On September 5, 2008, I served upon the following parties in this action:

Karen J. Kubin, Esq. MORRISON & FOERSTER, LLP 425 Market Street San Francisco, CA 94105	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
Rex S. Heinke, Esq. Joanna R. Shargel, Esq. AKIN GUMP STRAUSS HAUER & FELD LLP 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Counsel for Defendants and Petitioners Brinker Restaurant Corp. et al.
L. Tracee Lorens, Esq. LORENS AND ASSOCIATES 1202 Kettner Blvd., Suite 4100 San Diego, CA 92101	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Robert C. Schubert, Esq. Kimberly A. Kralowec, Esq. SCHUBERT JONCKHEER KOLBE & KRALOWEC LLP One Embarcadero Center, Suite 1650 San Francisco, CA 94111	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.

William Turley, Esq. Robert Wilson, III, Esq. THE TURLEY LAW FIRM, APLC 555 West Beech Street, Suite 460 San Diego, CA 92101-3155	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Timothy D. Cohelan, Esq. Michael D. Singer, Esq. COHELAN & KHOURY 605 C Street, Suite 200 San Diego, CA 92101	Counsel for Plaintiffs, Real Parties in Interest, and Petitioners Adam Hohnbaum et al.
Hon. David B. Oberholtzer San Diego County Superior Court Hall of Justice, Department 67 330 W. Broadway San Diego, CA 92101	Superior Court of California, County of San Diego
California Court of Appeal Fourth Appellate District, Division One Symphony Towers 750 B Street, Suite 300 San Diego, CA 92101	California Court of Appeal

copies of the document(s) described as:

AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT IN CASE NO. D049331

[X] **BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

[ ] **BY PERSONAL SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused the same to be delivered by hand to the offices of each addressee.

[ ] **BY OVERNIGHT DELIVERY SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as

indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

[ ] **BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I certify that the above is true and correct. Executed at Alameda, California, on September 5, 2008.

Karen Scott

Karen Scott

115945/504670