WORKSAFE

A CALIFORNIA COALITION FOR WORKER OCCUPATIONAL SAFETY & HEALTH PROTECTION

September 29, 2008

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

Re: *Brinker Restaurant Corp., et al., v. Superior Court (Hohnbaum),* Case No. S166350—Letter of Amicus Curiae in Support of Petition for Review

Dear Chief Justice George and Associate Justices:

This letter in support of the above-entitled petition for review is submitted pursuant to rule 8.500(g) of the California Rules of Court,[1] by Worksafe, Inc. (Worksafe), a California-based non-profit organization dedicated to promoting occupational safety and health through education, training, technical and legal assistance, and advocacy. Worksafe and its counsel are familiar with the questions involved in this case and believe we can present additional arguments to assist the Court in deciding the important legal issues raised in the petition for review.

Worksafe believes that strong, enforceable rights to regular meal and rest breaks that afford workers a meaningful opportunity for recovery from fatigue, and for physical and mental replenishment—as the California Legislature and the Industrial Welfare Commission (IWC), clearly intended, and as the Division of Labor Standards Enforcement (DLSE) consistently interpreted and enforced them for over 50 years—are essential and integral to a safe and healthy workplace, and inextricably intertwined with the *mandatory* duties of all California employers to:

- "furnish employment and a place of employment that is safe and healthful for the employees therein" (Lab. Code, § 6400, subd. (a));[2]
- "adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful" (§6401);
- "establish, implement, and maintain an effective injury prevention program," including a "system for ensuring that employees comply with safe and healthy work practices, which may include disciplinary action" (§ 6401.7, subds. (a), (a)(6)); and

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

[2] All further statutory references are to the California Labor Code.

171 12th Street, 3rd Floor * Oakland, CA 94607
510.302.1011 (phone) * 510.663-5132 (fax) * www.worksafe.org

- "do every other thing reasonably necessary to protect the life, safety, and health of employees" (§§6401).

Indeed, as this Court recently observed, *mandatory* rest and meal breaks have "have long been viewed as part of the remedial worker protection framework," and were adopted by the IWC early in the 20th Century out of concern for the " health and welfare of employees." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, 1113 [*Murphy*], citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 724 [*IWC v. Superior Court*]; *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975, *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal. App. 3d 95, 114-115 [*California Manufacturers*]; see also *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 [wage and hours laws concern not only the health and welfare of the workers themselves, but also the public health and the general welfare].)

In *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2008) 165 Cal.App.4th 25, the Court of Appeal for the Fourth Appellate District, Division One, made a brief, passing reference to the strong public policies requiring California employers to provide meaningful meal and rest breaks as a means of protecting the health and safety of the millions of workers whose employment is governed by the IWC Wage Orders. (Slip opn. at p. 3.) However, the *Brinker* Court completely lost sight of those concerns when it effectively held that, notwithstanding the *mandatory* language in Labor Code sections 226.7 and 512, and paragraph 11 and 12 of the applicable IWC Wage Orders,[3] meal and rest breaks are entirely *optional*, that the onus is on individual employees to insist upon their rights to take legally prescribed breaks, and that California employers need do little more to fulfill their mandatory duties to "provide" meal and rest breaks than to simply adopt a policy or post a notice saying that meal and rest breaks are "allowed" or "available." (Slip opn. at p. 4, 42-46.)

In this regard, the *Brinker* Court rejected the holding of the Court of Appeal for the Third Appellate District *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, *rev. denied* (Supreme Ct. Case No. S139377, January 18, 2006), that an employer has "an affirmative obligation to ensure that workers are actually relieved of all duty" so that they can actually receive meal and rest breaks, as well as a duty under paragraph 7 of the applicable Wage Order "to record their employees' meal periods" (See slip opn. at p. 44-47.) The conflict between the *Cicairos* and *Brinker* decisions is compounded by the confusion in the federal district courts on this issue where, thanks to the so-called Class Action Fairness Act (28 U.S.C. §§1332(d), 1453 & 1711-1715 [CAFA]), many large California wage and hour class actions are being litigated. (See cases cited in Petition for Review [hereafter, the Petition] at pp. 5-6 & fn.4.)

Implicitly, the *Brinker* Court also held that the meal and rest breaks prescribed by statute and the IWC Wage Orders are always, in all industries, and in all working environments, completely *waiveable* by employees—with the corollary that meal and rest break rights can never be vindicated in a class action because, according to the *Brinker* Court, proof of "waiver"

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[3] Wage Order 5-2001, which governs this case, is codified at Cal. Code Regs., tit. 8 §11050 (hereafter, Wage Order 5).

will generally be individualized (see slip opn. at pp. 31-32, 47-50)—despite the fact that the Legislature very clearly and narrowly limited the circumstances in which meal periods may be waived. (See §§512, subd. (a).) These aspects of the *Brinker* decision create great dissonance with recent decisions from this Court and other California Courts of Appeal *favoring* the class action as a just and efficient means of resolving large numbers of small wage and hour claims—especially those brought on behalf of low-wage workers to secure their rights under unwaiveable minimum labor standards set forth in the Labor Code and Wage Orders, which could not otherwise be vindicated because of the small value of each individual claim and the low incentives for private attorneys to bring such cases one by one. (*Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 339-340; *Gentry, supra,* 42 Cal.4th at p. 456; see also *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 13-14; *Capitol People First v. Department of Developmental Services* (2007) 155 Cal.App.4th 676, 313-316.)[4]

The *Brinker* Court does not consider, much less explain, *why* California employees—who do not have the option of "waiving" their rights to a safe and healthy workplace under the Labor Code and the regulations enforced by Cal/OSHA, such as the right to employer-provided safety equipment such as respirators when working with toxic substances, or harnesses when working on elevated surfaces from which a fall may result in serious bodily injury or death, or to adequate drinking water and shade when working outdoors in hot climates—should always and everywhere be free to waive their rights to meal and rest breaks. The *Brinker* Court's conclusory discussion on this point is not only contrary to the public policy embodied in sections 6401 et seq., but also squarely conflicts with the Legislature's determination that mandatory meal and rest breaks may be waived only in narrowly defined circumstance set forth in section 512, or in circumstances found by the IWC, based on factors specific to an industry or occupation, to be "consistent with the health and welfare of those workers." (See §516.)

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[4] The *Brinker* Court also ignored the important health and safety implications, both for workers and the public, if broad-based relief for violations of the meal and rest break laws cannot be obtained through *private* enforcement actions—especially since the Labor Commissioner has abdicated her duties under sections 90.5 and 95 to vigorously enforce these minimum labor standards to ensure employees are not required or permitted to work under substandard, unlawful conditions. (See Alameda Central Labor Council et al., Amici Letter in Support of Review, Sept. 5, 2008, at pp. 4-8; California Labor Federation, AFL-CIO, Amicus Letter in Support of Review, Aug. 29, 2008, at pp. .) In any event, civil actions brought by labor organizations and other private parties have long served as an important adjunct to enforcement efforts of the DLSE, the Employment Development Department (EDD), the Division of Occupational Safety and Health (DOSH), and other agencies within the Department of Industrial Relations (DIR) that do not—and probably never will—have adequate resources to address all of the unlawful employment practices that plague low-wage worker, especially those employed in the "underground economy" in California; indeed, legislative policy strongly supports private enforcement of wage and hour laws in this context. (See *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1092-1095 conc. opn of Moreno, J.; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430-1431; Sen. Bill 796 (2003-2004 Reg. Sess.), ch. 906, §1(c); Lab. Code, §218.)

Equally troubling is the *Brinker* Court's ruling on the so-called meal period "timing" issue. In that respect, the *Brinker* Court held that there is *nothing* in the Labor Code or Wage Orders that requires an employer to provide *meaningful* and *regular* meal and rest breaks—e.g., a 30-minute unpaid meal periods as close as possible to the mid-point of a workday of up to 10 hours, (along with paid 10-minute rest breaks as close to the midpoint of the two roughly equal work periods bisected by the meal period)—at intervals that would actually comport with the purposes underlying the long-standing meal and rest break laws. (See slip. opn. at pp. 34-41.) Indeed, the *Brinker* Court goes so far as to approve an insidious "early-lunching" practice instituted by employers in the restaurant industry and elsewhere in recent years, in a vindictive and childish reaction to effective enforcement efforts by DLSE prior to 2004 and the creation of potent monetary sanctions recoverable in private civil actions against employers who don't ensure that their employees can *actually* receive meal and rest breaks mandated by the Labor Code and the IWC Wage Orders. (See Miles E. Locker, Amicus Letter in Support of Review, Sept. 12, 2008 at p. 9.) This aspect of the *Brinker* decision conflicts with this Court's decision in *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 205, fn. 7, and cries out for review by this Court.

Perhaps the most disturbing aspect of the *Brinker* Court's decision and the cavalier (and sometimes flippant) arguments of the defendants and their amici, however, is the peculiar sense of unreality that permeates their analysis of California meal and rest break law. To read the *Brinker* opinion and the employers' briefs in this case, one gets the impression that all non-exempt California employees—those who are paid to work on a hourly or piece-rate basis, with their only protections against abusive terms and conditions of employment being the minimum labor standards set forth in the Labor Code and the IWC Wage Orders—have the luxury of working for enlightened employers who can be counted on to respect their autonomy and individual needs, and the privilege of working in modern, clean, well-lit, climate controlled, indoor work environments, where they never have to work with dangerous machinery or do any heavy lifting or contend with other significant workplace hazards, and have significant freedom to set their own schedules, to get up and stretch or use the bathroom whenever they wish, and to come in late or leave work early for a child's soccer game or a medical appointment.

While such humane and civilized working conditions might prevail in the offices in which most judges, attorneys, corporate executives, and their support staff are customarily employed, the reality for millions of other California workers is *so very* different. The California workers who desperately need the protections of strong, enforceable meal and rest break laws are those who must show up on time for rigidly scheduled working hours or shifts, and who have no freedom of movement or "flexibility" to structure their activities during working hours; those who spend their working hours in cramped and poorly ventilated sweatshops; those who perform strenuous and often dangerous work involving heavy machinery on construction sites, in factories and machine shops, or industrial laundry facilities; those who are paid by the mile to drive delivery trucks, or are under such intense production quotas that they simply do not have time for regular breaks in the course of a ten- or twelve-hour shift; those who work 12-hour shifts in nursing homes and understaffed hospitals, where the economics of managed care do not allow for adequate "floater" staff to cover meal and rest breaks for the nurses assigned to particular floors or departments; those who work in garment factories or poultry processing

plants or similar jobs that require tens of thousands of repetitive hand movements per shift, and are at risk of disabling injuries without adequate breaks;[5] those who work "hand in glove" with heavy farm machinery that drives them along at an unrelenting pace, often at temperatures that soar above 90 degrees during harvest season, who must satisfy both their bosses' demands and peer pressure from younger able-bodied members of their work crews, to make enough money at "piece rate" to feed themselves and their families; those who suffer chronic health conditions such as diabetes, and require regular meals to maintain their blood sugar level; and those who dare not speak up to demand a break to go to the bathroom or to get a drink of water or a bite to eat, for fear of losing their jobs.

If the *Brinker* decision is allowed to stand, it will render meaningless the legal rights to meal periods and rest breaks for California workers that have been in place for over 50 years, and would completely nullify the Legislature's attempt in 2001 to fortify those rights with effective remedies. Worksafe agrees with plaintiffs that Supreme Court review is urgently needed to settle the important questions of law articulated in the petition. But Worksafe is especially concerned that this Court consider, and take seriously, the impacts the *Brinker* decision will have on vulnerable low-wage workers who have little or no control over their work schedules or working conditions, and for whom *guaranteed* meal and rest breaks are vitally important to their health and safety—and in some cases a matter of life or death. Given the conflict and confusion that reign in both the California Courts of Appeal and the federal district courts on these vitally important issues of intense interest to California workers *and* employers, this Court's intervention is plainly and urgently necessary "to secure uniformity of decision" *and* "to settle an important question of law" within the meaning of California Rules of Court, rule 8.500(b)(1).

I. Interests of the Amicus Curiae

Worksafe, Inc., (hereafter, Worksafe) is a California-based non-profit organization that focuses on eliminating all types of workplace hazards that impact at-risk communities in California. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers. The two principal projects of Worksafe are the Worksafe Law Center and the Worksafe Activist Network.

The Worksafe Law Center is a legal services support center funded by the State Bar Legal Services Trust Fund Program. The Worksafe Law Center provides advocacy, technical

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[5] A particularly graphic description of the horrific working conditions in U.S. meat packing industries may be found in a recent newspaper series, The Cruelest Cuts (February 10-14, 2008), The Charlotte (N.C.) Observer, http://www.charlotteobserver.com/poultry/, accessed Sept. 28, 2008. This series details both the crippling physical injuries poultry processors suffer from work involving up to 20,000 repetitive hand movements in a single working day (see *id.*, Epidemic of Pain, http://legacy.charlotteobserver.com/poultry/story/487186.html, accessed Sept. 28, 2008), and abusive employment practices used to punish workers, many of whom are undocumented immigrants, when they dare to complain about unsafe working conditions (see *id.*, Labor Law Fails to Help Workers, http://www.charlotteobserver.com/573/story/191970.html, , accessed Sept. 28, 2008.)

and legal assistance, and training to the qualified legal services projects (QLSPs) throughout California that directly serve California's most vulnerable low-wage workers. The Worksafe Activist Network is a coalition of worker health and safety activists, including representatives of labor and community groups, individual workers, occupational safety and health (OSH) and public health professionals, environmentalists, legal services providers, and other interested persons. The mission and purpose of the Worksafe Activist Network is to educate and provide technical assistance to policymakers in California on vitally important matters of worker health and safety.

Worksafe and its counsel have a long history of advocacy before the California Occupational Safety and Health Administration (Cal/OSHA), the Division of Labor Standards Enforcement (DLSE) , the Division of Workers' Compensation (DWC), and the Industrial Welfare Commission (IWC), in support of standards and enforcement policies that will effectively protect vulnerable, low-wage and immigrant workers from hazardous and unhealthful working conditions that cause injuries, illness, and even death, and give clear guidance to employers who take seriously their obligations under the Labor Code.

From 2004 through 2006, counsel for Worksafe was deeply involved in efforts to combat regulations proposed by the DLSE, which were designed to weaken California workers' rights to meal and rest breaks and limit the remedies prescribed by the Legislature in 2001. (See http://www.dir.ca.gov/dlse/mrpregs.htm). The DLSE originally attempted to pass these measures in December 2004 through an emergency rulemaking procedure, but those "emergency" rules ignited a storm of protest from employee advocates and were quickly withdrawn and replaced with a proposal under the regular Administrative Procedures Act (APA) rulemaking process. Among other proposed "rules," the DLSE sought to declare by administrative fiat that the remedy afforded by Labor Code section 226.7 is "a penalty, not a wage" (*ibid.*), an interpretation that was later rejected by this *Court in Murphy v. Kenneth Cole* (2006) 40 Cal.4th 1094 (*Murphy*).

Counsel for Worksafe was also part of the litigation team representing the Northern California Carpenters Regional Council in a mandamus action that challenged DLSE when it issued a memo instructing its deputies to hold all meal and rest break cases "in abeyance" while it promulgated the foregoing regulations, and failing that, later attempted to adopt a "precedent decision" under Government Code section 11425.60, which characterized the relief provided by section 226.7 as a penalty instead of a wage, and would have thus limited the statute of limitations for section 226.7 claims from three years to one. (See *Hartwig v. Orchard Commercial, Inc.* (Cal. Dept. of Industrial Relations, DLSE, May 11, 2005, No. 12-56901RB) (*Hartwig*).) These tactics were repudiated by the Court of Appeal for the Third Appellate District in *Corrales v. Bradstreet* (2007) 153 Cal. App. 4th 33, which held that the DLSE's "precedent decision" was void as an underground regulation. (*Id.* at p. 66.)

Worksafe endorses the arguments of the plaintiffs in the Petition, and will not repeat those arguments here. Rather, Worksafe will focus on why meal and rest breaks requirements are of vital importance to California workers, and why the standards for enforcing them should not be diluted. Worksafe will also provide references to some of the scientific literature

documenting the health and safety benefits of ensuring that California workers receive the types of regular meal and rest breaks to which they are entitled under the Labor Code and the IWC Wage Orders.[6]

II. Review by This Court Is Essential to Ensure that the Health and Safety Policy Concerns That Motivated the IWC and the Legislature to Establish *Mandatory, Privately Enforceable* Obligations for Employers With Respect to Meal and Rest Breaks—For the Benefit of Both Workers and the General Public—Are Effectively Addressed.

As this Court knows from *Murphy*, the IWC Wage Orders have included meal and rest break requirements since "1916 and 1932, respectively." (*Murphy, supra*, 40 Cal.4th at p. 1105.) It was not until 2001, however, that private monetary incentives were enacted to ensure employers' compliance. (*See* Wage Order 5, ¶¶11(B), 12(B), effective Oct. 1, 2000 [additional hour of pay for missed breaks]; §226.7, effective Jan. 1, 2001 [same].) As we have already noted, moreover, important "health and safety considerations ... are what motivated the IWC to adopt mandatory meal and rest periods in the first place." (*Murphy, supra*, 40 Cal.4th at p. 1113; see also *Gentry, supra,* 42 Cal.4th at p. 456 [wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare,"]; *Kerr's Catering Service v. Dept. of Indus. Rel.* (1962) 57 Cal.2d 319, 330 [The purpose of meal and rest break requirements is to foster the general health and welfare of employees.].)

Although couched in terms that purport to honor workers' autonomy and individual dignity, upon closer examination, Brinker's word games about what it means to "provide" a meal period or rest break, and its pious pronouncements about wanting to give workers "flexibility" and accommodate their "personal choice" to forego a 30-minute meal period so they can leave early for a dentist's appointment, betray a callous disregard for the health and safety and well-being not only of its own workers, but of the millions of other nonexempt workers in the state whose employment is governed by the IWC Wage Orders and who will be severely and adversely impacted by the *Brinker* decision if it is allowed to stand as the law of California.

A. Regular Meal and Rest Breaks Promote a Safe and Healthy Workplace

There is an ample body of scientific literature, much of it dating back to the early 20th Century, which demonstrates that by counteracting fatigue and providing a respite from stress, meal and rest breaks play an important role in preventing injuries and maintaining a safe and healthy workplace. According to Pam Tau Lee, a researcher at the Labor Occupational Health

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[6] Worksafe will not address the fifth and sixth issues for review relating to the evidentiary and procedural rules governing certification of meal and rest break class actions, which are discussed in the Petition at pages 2-3 and 26-31. However, Worksafe enthusiastically endorses the position of the plaintiffs as to those issues, as well as the arguments laid out in an amicus curiae letter in support of the Petition dated September 22, 2008, which was submitted by the Impact Fund on behalf of itself and several other legal services programs, including Equal Rights Advocates, Lawyers Committee for Civil Rights of the San Francisco Bay Area, and Public Advocates.

Program at the University of California, Berkeley, the consequences of fatigue range from the global to the personal. (Testimony of P. Lee, DLSE Hrg., Feb. 8, 2005, as summarized at http://www.lohp.org/In_The_Spotlight/Meal_Breaks/meal_breaks.html, accessed Sept. 28, 2008.) It has been well documented that fatigue can lead to accidents. Official investigations of the Chernobyl and Three Mile Island disasters found that employee fatigue played a very significant role in these tragic incidents. (*Ibid.)* More recently and closer to home, fatigue has been implicated as a factor in a commuter train accident that killed 25 people in Los Angeles on Sept. 12, 2008. (See http://www.latimes.com/news/local/traffic/la-me-traincrash-sg,0,4385527.storygallery, accessed Sept. 28, 2008.)[7] But fatigue is also a concern for the ordinary employee, whether she or he works in an office, factory, hospital, or construction site, or drives a bus, or works in the agricultural fields, or cleans buildings, or serves food or drinks. Fatigue, if allowed to build up, can result in serious injuries, disease, lost time, and medical costs. (Testimony of P. Lee, DLSE Hrg., Feb. 8, 2005.)

Compounded by America's lengthening work hours (see Golden & Jorgensen (2002) *Time After Time—Mandatory overtime in the U.S. economy*, Economic Policy Institute, http://www.epinet.org/briefingpapers/120/bp120.pdf, accessed Sept. 28, 2008), the effects of increasing job stress are mounting for workers in many sectors of our economy. Immediate effects of job stress include headaches, sleep disturbances, difficulty in concentrating, short tempers, and upset stomachs. (See National Institute for Occupational Safety and Health (1999) *Stress ... At Work*, DHHS (NIOSH) Pub. No. 99-101, http://www.cdc.gov/Niosh/stresswk.htmlm accessed Sept. 28, 2008.) Evidence is rapidly accumulating to suggest that work-related stress plays an important role in several types of chronic health problems—especially cardiovascular disease, musculoskeletal disorders, and psychological disorders. (*Id.* at pp. 10-11.)

The impact of missed breaks affects employees in many industries. In a decision upholding a state law that requires hotels to permit hotel room cleaners three breaks per shift, an Illinois appellate court recently recognized that hotel room cleaners can suffer from work-related neck and lower back pain when forced to skip breaks. (*Illinois Hotel & Lodging Ass'n v. Ludwig* (2007) 374 Ill.App.3d 193.) Workers in high-temperature work environments such as warehouses, bakeries, laundries, and agricultural fields, risk heat illness—and even death—when they do not receive sufficient and timely breaks. (See Cal. Code Regs., tit. 8, §3395.)

According to a recent report on heat illness by DOSH, the agency conducted 38 investigations of confirmed heat illness in 2006 and, of those 38 instances of heat illness, 8 resulted in death. (Prudhomme & Neidhardt (June 1, 2007) *2006 Heat Illness Case Study*, presentation at Occupational Safety and Health Standards Board meeting, Oakland, CA.) Both the United States military and the American Conference of Governmental Industrial Hygienists have developed detailed protocols to prevent heat illness in hot working environments, including charts to illustrate rest-to-work ratios that should be adopted for that purpose. (U.S. Surgeon

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[7] Adding insult to injury, the contractor who provides engineers to operate the Metrolink trains spent $105,000 during the last two years lobbying state lawmakers to give it "flexibility" to delay meal breaks for employees. (See http://www.latimes.com/news/local/traffic/la-me-veolia20-2008sep20,0,4347335.story, accessed Sept. 28, 2008)

General (2005) *Heat Injury Prevention Program Memorandum*, Appendix. 1, http://chppm-www. apgea.army.mil/heat/, accessed Sept. 28, 2008; Am. Conf. of Gov. Indus. Hygienists (2001) Heat Stress and Strain, Threshold Limit Values.)

Despite the advantages to employers of safe and healthy workplaces, employers seem to believe they must, as a result of economic pressure, intensify the workday. "Over the last two decades, American workers have been clocking more and more hours on the job, and they now work more hours than workers in any other industrialized country." (Golden & Jorgensen, *supra*, at p. 2.) In addition to scheduling longer workdays and workweeks, employers have sought to increase productivity by speeding up production lines, providing incentives for increased output, maintaining a leaner workforce, and simply pressing workers to work harder, increasingly through the use of sophisticated computer tracking that records employee performance and provides a basis for imposing discipline on employees whose performance lags behind the desired pace. (*Ibid.*) Indeed, noting that trends in the economy have led to a restructuring of traditional employment practices, the authors of a NIOSH study recently reported that "the average work year for prime-age working couples has increased by nearly 700 hours in the last two decades (citations) and that high levels of emotional exhaustion at the end of the workday are the norm for 25% to 30% of the workforce (citation)." (NIOSH (2006) *The Changing Organization of Work and the Safety and Health of Working People*, NIOSH Publication No. 2002-116, at p. 1, http://www.cdc.gov/niosh/docs/2002-116/, accessed Sept. 28, 2008; see also National Institute for Occupational Safety and Health (2004) *Overtime and Extended Work Shifts*, NIOSH Publication No. 2004-143 [summarizing results of 52 studies published between 1995 and 2002].)

As the workload increases and the pace of work intensifies, the risk of accidents and serious health impacts increases as well. Although risks differ from job to job and workplace to workplace, the evidence overwhelmingly supports the importance of counteracting these risks with breaks. For example, a team of scientists conducted numerous studies of municipal bus drivers in San Francisco with the cooperation of the San Francisco Municipal Transit Railway and Local 250A of the Transport Workers Union, AFL-CIO. (Greiner, B.A., et. al. (1997) *Objective measurement of occupational stress factors — An example with San Francisco urban transit operators*, J. Occup. Health Psychol. 2:325-342.) Their studies confirmed that drivers whose routes placed them under greater time pressure had higher rates of hypertension, after taking into account age, gender, and seniority. (Greiner, B.A. (2004) *Occupational stressors and hypertension: a multi-method study using observer-based job analysis and self-reports in urban transit operators*, Social Science and Medicine, 59:1081-1094.) These same researchers posit that the lack of guaranteed rest breaks combined with inflexible time scheduling causes fatigue, a principal factor in accident causation for bus drivers. (Greiner, B.A. et al. (1998) *Objective stress factors, accidents, and absenteeism in transit operators: a theoretical framework and empirical evidence*, J. Occup. Health Psychol. 3(2): 130-46.)

Research has also shown that breaks are effective in reducing the risk of accidents. (Tucker et al. (February 22, 2003) *Rest Breaks and Accident Risk*, The Lancet, Vol. 361, No. 9358, p. 680; see also Hamed, M.M. et al. (1998) *Analysis of commercial mini-bus accidents*, Accident Analysis and Prevention, 30:555-567 [mini-bus drivers who had too few rest breaks

had higher accident rates]; Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers* (2001) 44 pt. 2 Ergonomics, pp. 164-174; Kenner, *Working Time, Jaeger and the Seven-Year Itch* (2004/2005) 11 Colum. J. Eur. L. 53, 55..)

As this Court noted in *Gentry*, the risk of accidents falls not only on employees who miss breaks, but on other workers and members of the public as well. (42 Cal.4th 443 at p. 456; see also *Murphy, supra,* 40 Cal.4th at p. 1113.) Against this backdrop, employers' claims to represent the best interest of employees by championing flexibility and autonomy in scheduling working time appear hollow and self-serving at best. As this Court recently observed:

> "Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor [citations omitted] ... Additionally, being forced to forego rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks. (*Morillion v. Royal Packing Co.* [(2000)] 22 Cal.4th [575,] 586.)"

(*Murphy, supra,* 40 Cal.4th at p. 1113, citing Tucker, Dababneh, and Kenner, *supra.*)

The *Brinker* Court, the defendants in this case, and the employer amici who have been involved to date, are either unaware of or indifferent to the foregoing body of scientific research. Worksafe submits that these studies, and other such materials that may be provided for this Court's consideration upon a grant of review, are critical to a proper resolution of the legal issues presented in this case. Accordingly, Worksafe urges this Court to grant the Petition so that it will have the benefit of a full exposition of the health and safety policies underlying the Legislature's determination that California workers need strong, privately enforceable rights to regular meal and rest breaks as set forth in the IWC Wage Orders.

B. Employers Must Bear the Burden of Providing Regular Breaks That Comply With the Requirements of the Labor Code and Wage Orders

Worksafe believes that there is at least one additional aspect of the *Brinker* decision that has grave implications for worker health and safety in hazardous workplaces and industries, and thus deserves careful consideration as this Court is weighing the plaintiffs' Petition. Whether or not it consciously intended to do so, the *Brinker* Court has effectively shifted the burden to California employees—including many vulnerable, low-wage and immigrant workers employed in key California industries, including construction, garment manufacturing, janitorial and housekeeping services, trucking, and agriculture—to insist day-to-day that their employers comply with their mandatory duties under the Labor Code and IWC Wage Orders with respect to meal and rest breaks, while it simultaneously diluted and hobbled private enforcement of those rights by holding, in effect, that failure to do so will constitute a waiver of those rights. The *Brinker* decision would also allow employers to use subterfuge, such as the "early lunching" practice approved in this case, to avoid with their obligations to provide regular, meaningful meal and rest breaks under the Labor Code and Wage Orders. In these respects, the *Brinker* decision is both untenable and inhumane.

This Court has, time and again, explained that the purpose of the Labor Code is to protect workers (see, *e.g.*, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985), and that "the statutory provisions are to be liberally construed with an eye to promoting such protection." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702.) Pursuant to the Labor Code, the IWC was "empowered to formulate regulations (known as wage orders) governing employment in the State of California." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 561, citing Lab. Code, §§ 1173, 1178.5, 1182.) The wage orders comprise 16 industry-specific orders and one general order dealing with the minimum wage. (See Cal. Code Regs., tit. 8, §§ 11010 et seq. [codifying the 17 wage orders].) This Court has also consistently upheld the IWC's constitutional and statutory authority to create the Wage Orders. And, as recognized by this Court in *Murphy*, the State has sought to ensure that California workers actually receive meal and rest breaks since the early 20th century.

The IWC wage orders have required that employers provide regular meal periods since 1916 and rest periods since 1932. (*California Mfrs. Ass'n, supra,* 109 Cal.App.3d at pp. 114-115; *IWC v. Superior Court, supra,* 27 Cal.3d at p. 715.) Long recognized as "obvious" necessities for the protection of employees' health and welfare (see *California Mfrs. Ass'n, supra,* 109 Cal.App.3d at p. 115), meal and rest breaks have become a part of California's basic worker protection framework. (See *IWC v. Superior Court, supra,* 27 Cal.3d at p. 724 [rejecting challenge to IWC's authority to promulgate numerous provisions, including meal and rest break provisions, based on their "remedial purpose"]; see also *Bono Enterprises, supra,* 32 Cal.App.4th at p. 975 [duty-free meals necessary for employee welfare]; *California Mfrs. Ass'n, supra,* 109 Cal.App.3d at p. 115 [holding that employee welfare demands regarding mandatory rest breaks are "obvious"].)

The IWC Wage Orders direct employers to provide employees with meal periods of at least thirty minutes for every five hours worked, and rest periods of at least ten minutes for every four hours worked.1[8] In 1999, the Legislature codified the meal period requirement in Labor Code section 512. On paper, the rights of California employees to meal and rest breaks seemed secure. Yet, at the twilight of the twentieth century, the meal and rest provisions of the Labor Code were far from self-enforcing. Widespread violation of the meal and rest break regulations flourished as employers had little to fear from workers denied their breaks. Until 2000, the only remedy available to workers who did not receive requisite breaks was to seek an injunction from a court of law. In 2000, in order to address the lack of employer compliance, lawmakers amended the IWC Orders and the Labor Code to provide compensation for workers, and at the same time add a financial disincentive for employers, by requiring them to compensate each worker with "one hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided" in compliance with the IWC Orders. (§ 226.7.)

The statutory scheme regarding meal breaks is now quite clear and enforceable: with limited exceptions not relevant here, the wage orders now provide that "[n]o employer shall

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[8] These provisions are identical in paragraphs 11 and 12 of nearly all the IWC Wage Orders (see exceptions at Wage Orders Nos. 14, 16, and 17).

employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes." (Wage Order 5, ¶11(A), emphasis added.) According to the definition set forth in all 17 wage orders, the word "employ" in the wage orders means to "engage, suffer, or permit to work." (See *id.*, ¶ 2(G); see also *Morillion*, *supra*, 22 Cal.4th 575 [discussing at length the definition of "hours worked"].) Thus, any employer who suffers or permits employees to work more than five hours without a meal period *violates* the Wage Orders, regardless of the hypothetical "availability" of a meal period.

Similarly, employers must take steps to ensure that rest breaks are actually received, not merely promised. As the *Cicairos* Court concluded, rest periods are a "*state-mandated minimum labor standard.*" (133 Cal.App.4th at p. 954, citing DLSE Opinion Letter 1995.06.02, emphasis in original.) The Wage Orders further require employers to "authorize and permit" their employees to take the rest breaks to which they are entitled. (See, e.g., Wage Order 5, ¶12.) Employees are entitled to be paid *and* relieved of all duty for the ten-minute rest periods mandated by the wage orders. *If the employer fails to pay and relieve the employee of all duty for the requisite period of time when a break is mandated, the employer does not "permit" the employee to take the break.* The idea that hourly workers "voluntarily" skip *paid* breaks without being discouraged by conditions created by their employers is a patent absurdity. An employee who does so works without pay since the employee would have earned the same pay without performing the work. Under California law, an employer may *never* "suffer or permit" an employee to perform unpaid labor. (See *Morillion*, *supra*, 22 Cal.4th at p. 585 ["In all such cases it is the duty of management to exercise its control and see that the work is not performed if it does not want it to be performed."].)

Brinker's defense of workers' right to "waive" breaks is a smokescreen intended to divert the Court's attention from the clear legislative purpose of California's recently strengthened meal and rest break law to ensure that California workers receive breaks and not the mere abstract promise of them. The purpose of meal and rest break requirements is to foster the general health and welfare of employees. (*Kerr's Catering Service, supra,* 57 Cal.2d at p. 330.) The State's purpose is not served by employers making meal and rest breaks "available" if employees do not actually receive them. Brinker and other employers argue essentially that an employer can satisfy the "authorize and permit" requirement so long as it does not force employees to forgo breaks. This is a rhetorical device to hijack the inquiry from its proper focus on the employers' obligation to provide breaks—i.e., to relieve employees of all duty—to an illusory inquiry is whether employees are exercising due diligence in taking their breaks.

As this Court has repeatedly emphasized, "statutes governing conditions of employment are to be construed broadly in favor of protecting employees. (Citations.)" (*Murphy*, *supra*, 40 Cal.4th at p. 1103; see also *Morillion*, *supra*, 22 Cal.4th at p. 592, citing *IWC*, *supra*, 27 Cal.3d at p. 702.) One can hardly blame Brinker for trying to conjure up an interpretation of what it means to "provide" breaks that would excuse massive disregard of its employees' rights under the wage and hour laws. Not surprisingly, however, it is an interpretation that neither follows this Court's guidance nor construes Labor Code section 226.7 "broadly in favor of protecting employees."

Although many employers understand that breaks enable their employees to recover from fatigue that interferes with performance, and may also prevent accidents that can lead to higher rates of employee injuries, lost productivity, and increases in workers' compensation premiums, the elimination or discouragement of breaks is a temptation that many employers are unable to resist. If employers are permitted to design jobs that discourage breaks so long as they pay sufficient lip service to the right of their employees to take breaks, then California employees will receive a very high level of lip service and little else. The Legislature's effort to combat widespread employer noncompliance with longstanding meal and rest break law through the enactment of new remedies in 2001 will become a dead letter.

Employers contend, however, that requiring them to ensure that workers actually receive their mandated meal breaks contravenes employees' best interests, which are served, say employers, by a flexible regime in which workers may skip breaks whenever they choose. The employers argue that California's meal and rest break regulations should be interpreted to maximize the opportunity for workers to decide for themselves whether to use or waive their rights to meal and rest breaks. In the name of worker autonomy, employers argue there are myriad personal reasons why employees choose to decline or shorten their meal or rest breaks: to avoid socializing with co-workers, to avoid the temptation to spend money on lunch, to avoid the temptation to smoke, or to stick to a diet plan. Thus, the employers suggest, the reason workers do not take breaks is that they prefer not to, and their choices should be honored.

The reality experienced by workers is quite different. Employers have countless ways to discourage workers from taking breaks ranging from outright prohibition, to more subtle measures such as adoption of piece rate compensation schemes that force workers to choose between rest breaks or a lower hourly rate of compensation. Some employers offer extra work only to those who complete their scheduled tasks early, assign tasks that cannot be completed within the allotted time if breaks are taken, or fail to provide temporary backup ("floaters" or "breakers") to provide complete relief from duties. Outside the unionized workplace where a collective bargaining agreement may set some of the rules, the employer has plenary control of the organization of work at the workplace. The employer controls the schedule, what shifts are offered, when work stops and starts, and whether and how a replacement is available to relieve an employee on break. Thus, it is only the employer, not the employee, who has the power to create real opportunities for meal and rest breaks.[9]

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[9] The San Francisco transit drivers studied by Greiner and her colleagues provide an excellent example. According to Greiner, ensuring that urban transit drivers have an opportunity to take breaks requires extensive planning, including ensuring the adequacy of the run schedule, allowing for predictable variations in passenger load and traffic density, dealing with unpredictable variations in the schedule, dealing with predictable barriers and obstacles (such as delay in having a vehicle ready for the run), figuring out how temporary adjustments to schedules will be made; and providing for relief by a replacement driver if all else fails. (Greiner, B.A. (2002) Are frequent rest breaks an adequate measure to reduce fatigue in urban transit operators?, San Francisco, CA: MUNI Health and Safety Project.) Only employers can structure and organize the work so that drivers actually get breaks needed to protect their health and safety, and that of the general public.

Brinker's plea for employee autonomy is based on the fallacy that individual employees can resist the subtler pressures that are created by the organization of work, which is the sole prerogative of the employer. Individual employees and their employers do not confront each other with equal bargaining power. The National Labor Relations Act was enacted in 1935 to address "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." (29 U.S.C. § 151.) But, only one-sixth of California employees enjoy the protections of collective bargaining.[10] The rest must rely on the minimum standards established by the state and federal governments to safeguard their health and safety. This Court can best effectuate the protective purposes of the Labor Code and the IWC wage orders by rejecting Brinker's argument that merely making meal and rest periods "available" to workers satisfies the requirements of California law.

III. Conclusion

In 2000, the Legislature did its best to ensure that California workers would have strong, privately enforceable rights to regular, duty-free meal and rest breaks, scheduled by their employers at intervals that provide real opportunities for recovery from fatigue, and for physical and mental replenishment. In the nearly eight years since Labor Code section 226.7 was enacted to end the widespread disregard of the meal and rest break protections afforded by the IWC Wage Orders, employers have managed to derail the Legislature's plan by playing clever, but ultimately vacuous, word games about the meaning of the word "provide," and have clung to the hope that the Courts will once again leave employees without an effective remedy. The time has come for this Court, once and for all, to put an end to the games and give these important worker health and safety laws the powerful remedial effect the Legislature intended. Accordingly, for all the foregoing reasons, Worksafe urges this Court to grant the petition for review to resolve the conflicts in the case law that the *Brinker* decision has generated, and to decide the *vitally* important issues about workers' meal and rest breaks rights presented in this case.

Respectfully submitted,
WORKSAFE LAW CENTER

By: Suzanne Murphy
M. SUZANNE MURPHY
Attorneys for Amicus Curiae
WORKSAFE, INC.

[10] See Monthly Labor Rev., July 2001, at p. 2, http://www.bls.gov/opub/mlr/2001/07/ressum2.pdf, accessed Sept. 28, 2008).

PROOF OF SERVICE
(CCP §1013)

Case Name: ***Brinker Restaurant Corp., et al., v. Superior Court (Hohnbaum),***
Supreme Court Case No. S166350
Court of Appeal Case No. D049331
Superior Court Case No. GIC834348

I am a citizen of the United States and an employee of Worksafe, Inc., in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. I am employed by Worksafe, Inc.; my business address is 171 12th Street, Suite 300, Oakland, California 94607. On September 29, 2008, I served the following document:

BRINKER RESTAURANT CORP., ET AL., V. SUPERIOR COURT (HOHNBAUM), CASE NO. S166350 – LETTER OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW

upon the Courts, the parties to this action, and the Attorney General, as follows:

BY PERSONAL SERVICE:

Clerk, California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
(1 original and 8 copies)

BY MAIL:

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 Three 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

[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 Oakland, California. I am readily familiar with the practice of Worksafe, Inc., 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 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 Worksafe, Inc., in Oakland, California. I am readily familiar with the practice of Worksafe, Inc. 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 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 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 under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on September 29, 2008.

Sophie Noero