1500

2/21

RECEIVED

FEB 22 2007

FURTH LEHMANN & GRANT LLP

D049331

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

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., a Delaware Corporation; and DOES 1 through 500, Inclusive,

Petitioners and Defendants,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, Inclusive one behalf of themselves and all others similarly situated, and behalf of the general public,

Plaintiffs and Real Parties in Interest.

Appeal from the Superior Court of California, County of San Diego
Hon. Patricia A. Y. Cowett, Judge
Case No. GIC834348

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE OPPOSITION PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI, OR OTHER APPROPRIATE RELIEF; [PROPOSED] BRIEF OF AMICI CURIAE ALAMEDA COUNTY CENTRAL LABOR COUNCIL, et al.

DAVID A. ROSENFELD, SBN 058163
WILLIAM A.SOKOL, SBN 072740
THEODORE FRANKLIN, SBN 168305
PATRICIA M. GATES, SBN 76498
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Telephone: (510) 373-1001

Attorneys For Amici Curiae

Pursuant to rule 8.200(c)(1) of the California Rules of Court, Alameda County Central Labor Council, the Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, and South Bay Central Labor Council (hereafter "Labor Amici") respectfully submit this application for permission to file the accompanying amicus curiae brief in support of the Plaintiffs Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado etc., Plaintiffs and Real Parties in Interest, and to urge this Court to deny the Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief filed Septemeber 1, 2006 by Petitioners and Defendants Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. ("Brinker").

I.

STATEMENT OF INTEREST

The Alameda, Contra Costa, and South Bay Central Labor Councils ("CLCs") are regional coordinating bodies affiliated with the California Labor Federation ("the Federation"), the California state body chartered by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), which represents more than two million workers in the State of California. The CLCs 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. Over many years, the CLCs through their unbrella organization, the Federation, have represented the interests of employees in the evolution of California labor and employment law.

Although the CLCs and the Federation directly represent

California's unionized workers, they have a long history of advocacy before the Industrial Welfare Commission in support of standards to protect all workers. From 2004 through 2006, the CLCs, through their umbrella organization, the Federation, participated in the APA rulemaking processes initiated by the Department of Labor Standards Enforcement ("DLSE") to adopt regulations designed to weaken California workers' rights to meal and rest breaks and limit the remedies provided by the Legislature (see http://www.dir.ca.gov/dlse/mrpregs.htm). The DLSE originally attempted to pass these measures in December 2004 through an emergency rule-making procedure which ignited a storm of protest from employee advocates. Among other proposed "rules," the DLSE sought to declare by administrative fiat that the remedy afforded by section 226.7 is "a penalty, not a wage." (*Ibid.*) In response to public outcry, DLSE abandoned its "emergency" regulatory effort and began a conventional APA rule-making process in early 2005. Finally, after three iterations of proposed regulations in the APA process, the DLSE withdrew its proposals in January 2006. The Federation submitted rigorous comments on four occasions, objecting to the DLSE's proposed rules both on the merits of its interpretation of section 226.7, and on the ground that, pursuant to Labor Code sections 512 and 516, *only* the Industrial Welfare Commission ("IWC"), and *not* the DLSE,[1] has the authority to adopt substantive regulations regarding California workers' meal and rest break rights.

---

[1] The Legislature subsequently endorsed this view by adopting Assembly Concurrent Resolution No. 43. (See Legis. Counsel's Dig., Assem. Conc. Res. No. 43 (2005-2006 Reg. Sess.); http://www.leginfo.ca.gov/pub/bill/asm/ab_0001-0050/acr_43_bill_20050718_chaptered.html (as of Dec. 2, 2005).) On January 13, 2006, DLSE abandoned its rulemaking proposal when the time to file the final regulations with the OAL expired. (See http://www.dir.ca.gov/DIRNews/2006/ IR2006-02.html.)

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 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 compliance effort, NCCRC has filed numerous cases both in court and before the Labor Commissioner for violations of workers' meal and rest break rights.

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. SEIU-UHW is actively involved as an advocate of better working conditions for all workers in California.

The Labor Amici have a substantial interest in the outcome of this case because a strong enforceable platform of labor rights reduces the ability of nonunion employers to compete solely on the basis of their ability to exploit substandard working conditions. The widespread noncompliance of California employers with the meal and rest break provisions set forth in the Labor Code

and the Industrial Welfare Commission's Wage Orders undermines the working conditions of all workers in the State of California. This Court's ruling on the meaning of Labor Code and wage order regulation of meal breaks will, therefore, impact all working people throughout California.

II

HOW THE PROPOSED PRESENTATION WILL ASSIST THE COURT

The Labor Amici endorse the arguments of Plaintiffs in opposition to the writ and in support of the class certification Petitioners seek to overturn. The Labor Amici will not repeat Plaintiffs' arguments here. Instead, the Labor Amici will focus on why break requirements are of great importance to California workers, why the standards for enforcing them should not be diluted, and why the State's interest in enforcing these rules is best served by the class certification granted by the trial court. The Labor Amici will provide references to the scientific literature relating to the health and safety benefits of ensuring that California workers receive the breaks to which they are entitled under the law.

III

CONCLUSION

For the foregoing reasons, Amici Curiae Alameda County Central Labor Council, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, and South Bay Central Labor Council respectfully request that the Court accept the enclosed brief for filing and consideration.

Dated: February 21, 2007

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
William A. Sokol
Theodore Franklin
Patricia M. Gates

By:
Theodore Franklin
Attorneys for Amici Curiae Alameda County Central Labor Council, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, and South Bay Central Labor Council

00001/449154

D049331

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

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P., a Delaware Corporation; and DOES 1 through 500, Inclusive,

Petitioners and Defendants,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,

Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO and ROES 1 through 500, Inclusive one behalf of themselves and all others similarly situated, and behalf of the general public,

Plaintiffs and Real Parties in Interest.

Appeal from the Superior Court of California, County of San Diego
Hon. Patricia A. Y. Cowett, Judge
Case No. GIC834348

[PROPOSED] BRIEF OF AMICI CURIAE
ALAMEDA COUNTY CENTRAL LABOR COUNCIL, et al.

DAVID A. ROSENFELD, SBN 058163
WILLIAM A. SOKOL, SBN 072740
THEODORE FRANKLIN, SBN 168305
PATRICIA M. GATES, SBN 76498
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Telephone: (510) 373-1001

Attorneys For Amici Curiae

TABLE OF CONTENTS

I. ARGUMENT 2

A. Meal and Rest Breaks Promote a Safe and Healthy Workplace 2

B. Why the Employer Must Bear the Burden of Providing Meal Breaks 5

1. The Labor Code and Wage Orders Clearly Require the Employer to Ensure That Meal Breaks Are Taken or Pay Compensation to Employees for Their Missed Breaks 5

2. Employers Can Easily Discourage Breaks While Making Them "Available" 8

C. Class Certification was Properly Granted To Serve the Purposes of Enforcing California's Meal and Rest Break Regulations 11

II. CONCLUSION 14

TABLE OF AUTHORITIES

State Cases

Bono Enter., Inc. v. Bradshaw
(1995) 32 Cal.App.4th 968 6

California Mfrs. Ass'n v. IWC
(1980) 109 Cal.App.3d 95 6

Cicairos v. Summit Logistics, Inc.
(2005) 133 Cal.App.5th 949 1

Industrial Welfare Com. v. Superior Court
(1980) 27 Cal.3d 690 .... 5, 6

Kerr's Catering Service v. Dept. of Indus. Rel.
(1962) 57 Cal.2d 319 8

Lusardi Construction Co. v. Aubry
(1992) 1 Cal.4th 976 5

Morillion v. Royal Packing Co.
(2000) 22 Cal.4th 575 7

Ramirez v. Yosemite Water Co.
(1999) 20 Cal.4th 785 5

Tidewater Marine Western, Inc. v. Bradshaw
(1996) 14 Cal.4th 557 .... 5, 6

State Statutes

Cal. Code Regs., tit. 8
§§ 11010 et seq. 5
§ 11140, subd. 2(G) 7
§ 11140, subd. 7(A)(3) 11
§ 11140, subd. 11(A) 7

Labor Code
§ 226.7 .... 7, 11
§ 512 6
§ 1173 5

§ 1178.5 5
§ 1182 5

Federal Cases

Dukes v. Wal-Mart, Inc. (N.D. Cal. 2007) __F.3d __,
2007 WL 329022 .... 13, 14

Boggs v. Divested Atomic Corp.
(S.D.Ohio 1991) 141 F.R.D. 58 12

Federal Statutes

29 U.S.C. § 151 10

Other Authorities

Golden & Jorgesen, *Time After Time; Mandatory overtime in the U.S. economy*, Economic Policy Institute (2002) 2, 3

Greiner, B.A. et al., *Objective stress factors, accidents, and absenteeism in transit operators: a theoretical framework and empirical evidence*, J. Occup. Health Psychol. 1998;3(2): 130 4

Greiner, B.A., et. al., *Objective measurement of occupational stress factors — An example with San Francisco urban transit operators*, J. Occup. Health Psychol. 1997;2:325 4

Greiner, B.A., *Occupational stressors and hypertension: a multi-method study using observer-based job analysis and self-reports in urban transit operators*, Social Science and Medicine 2004;59:1081 4

Hamed; M.M. et al., *Analysis of commercial mini-bus accidents*, Accident Analysis and Prevention, 1998;30(5), 555 4

Monthly Labor Review, July 2001 10

Overtime and Extended Work Shifts,
NIOSH Publication No. 2004-143 3

Stress ... At Work, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 99-101 3

The Changing Organization of Work and the Safety and Health of Working People, NIOSH Publication No. 2002-116 3

Tucker et al., *Rest Breaks and Accident Risk*, The Lancet, Feb. 22, 2003, Vol. 361, No. 9358, p. 680 4

In this brief, Amici Curiae Alameda County Central Labor Council, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, and South Bay Central Labor Council (hereafter "Labor Amici") urge this Court to deny the Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief filed September 1, 2006 ("the Petition") by petitioners and defendants Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P. (collectively, "Brinker"). The Petition implicates two issues of tremendous importance to California workers: (1) whether employers can satisfy their obligations to provide meal breaks without ensuring that employees actually receive them; and (2) whether employers can stymie meaningful enforcement of California's meal and rest break regulations by forcing an individualized inquiry regarding each required break that was not actually taken.

The legal arguments for upholding the class certification order challenged by Brinker are well-stated in the Return filed by Plaintiffs on February 2, 2007 and will not be repeated here. The Return presents a compelling argument that the Court need not and should not reach the question of what it means to "provide" a meal break. However, Brinker and the Employer Amici urge the Court to reach this question despite the trial court's satisfactory resolution of the question in accord with uncontradicted appellate authority. (*See Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.5th 949, 962-963 [holding that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.' (citation)"].) If the Court decides to reach this question at all, its decision on this writ will impact many workers beyond those in the *Brinker*

class. This brief will attempt to address the broader context in which the Court's resolution of this writ petition may affect the millions of working Californians for whose benefit the statutes and regulations at issue were enacted.

I. ARGUMENT

A. MEAL AND REST BREAKS PROMOTE A SAFE AND HEALTHY WORKPLACE

By counteracting fatigue and providing a respite from stress, rest and meal 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 Program, University of California, Berkeley, the consequences of fatigue range from the global to the personal:

> "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. But fatigue is also a concern for the ordinary employee, whether she or he works in an office, factory, construction site, or hospital; drives a bus; works in agricultural fields; cleans building; or serves food or drinks. Fatigue, if allowed to build up, can result in injury, disease, lost time, and medical costs."[1]

Compounded by America's lengthening work hours,[2] the effects of increasing job stress are mounting for workers in many sectors of our

[1] Testimony of P. Lee, DLSE Hrg., Feb. 8, 2004, as summarized at http://socrates.berkeley.edu/~lohp/In_The_Spotlight/Meal_Breaks/meal_breaks.html (accessed 2/20/07).

[2] *See* Golden & Jorgesen, *Time After Time; Mandatory overtime in the U.S. economy*, Economic Policy Institute (2002), available online at http://www.epinet.org/briefingpapers/120/bp120.pdf (accessed 2/20/07).

economy. Immediate effects of job stress include headaches, sleep disturbances, difficulty in concentrating, short tempers, and upset stomachs. (*See Stress ... At Work*, National Institute for Occupational Safety and Health, DHHS (NIOSH) Publication No. 99-101, at p. 11.) 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 p. 10.)

Despite the advantages to employers of safe and healthy workplaces, employers are under economic pressure to 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. 1.) 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 warning employees whose performance lags behind the desired pace. Noting that trends in the economy have led to a restructuring of traditional employment practices, the authors of a National Institute of Occupational Safety study report 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)." (*The Changing Organization of Work and the Safety and Health of Working People*, NIOSH Publication No. 2002-116, at p. 1; *see also*, *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.[3] 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.[4] 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.[5] Research has also shown that breaks are effective in reducing the risk of accidents. (Tucker et al., *Rest Breaks and Accident Risk*, The Lancet, Feb. 22, 2003, Vol. 361, No. 9358, p. 680; *see also* Hamed, M.M. et al., *Analysis of commercial mini-bus accidents*, Accident Analysis and Prevention, 30, pp. 555-567, showing mini-bus drivers who had too few rest breaks had higher accident rates.)

---

[3] Greiner, B.A., et. al., *Objective measurement of occupational stress factors — An example with San Francisco urban transit operators*, J. Occup. Health Psychol. 1997;2:325-342.

[4] Greiner, B.A., *Occupational stressors and hypertension: a multi-method study using observer-based job analysis and self-reports in urban transit operators*, Social Science and Medicine 2004;59:1081-1094.

[5] Greiner, B.A. et al., *Objective stress factors, accidents, and absenteeism in transit operators: a theoretical framework and empirical evidence*, J. Occup. Health Psychol. 1998;3(2): 130-46.

Against this backdrop, employers' claims to represent the best interest of employees by championing flexibility and autonomy in scheduling appear hollow and self-serving at best. (*See* Prelim. Brf. of National Assoc. of Theatre Owners of Cal./Nev., Inc. ("NATO Brf.") at pp. 2-3.) In addition to harmful effects of fatigue and stress, workers who are deprived of meal and rest breaks suffer other harms such as hunger and the loss of freedom to engage in personal activities, develop social ties with fellow employees, and simply relax.

B. WHY THE EMPLOYER MUST BEAR THE BURDEN OF PROVIDING MEAL BREAKS

1. The Labor Code and Wage Orders Clearly Require the Employer to Ensure That Meal Breaks Are Taken or Pay Compensation to Employees for Their Missed Breaks

Our Supreme 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 Industrial Welfare Commission (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.) The Supreme Court has consistently upheld the IWC's constitutional and statutory authority to

create the wage orders.

The State has sought to ensure breaks for California workers since the early twentieth century. The IWC wage orders have required that employers provide regular meal periods since 1916 and rest periods since 1932. (*California Mfrs. Ass'n v. IWC* (1980) 109 Cal.App.3d 95, 114-115; *IWC v. Superior Ct.* (1980) 27 Cal.3d 690, 715.) Recognized as "obvious" necessities for the protection of employees' health and welfare (*see California Mfrs. Ass'n*, 109 Cal.App.3d at p. 115), meal and rest breaks have become a part of California's basic worker protection framework. (*See IWC*, 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 Enter., Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975 [duty-free meals necessary for employee welfare], disapproved on other grounds, *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 574.)

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.[6] 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 were 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 break regulations flourished as employers had little to fear from workers denied their breaks. Until 2000,

---

[6] These provisions are identical in §§ 11 and 12 of nearly all seventeen Wage Orders (see exceptions at Wage Orders Nos. 14, 16, and 17).

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. (AB 2509, as Amended, August 25, 2000; codified at Lab. Code § 226.7.) Thus, effective October 1, 2000, the IWC added separate "one hour pay" provisions to wage order sections 11 (regarding meal breaks) and 12 (regarding rest breaks).

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 *employ* any person for a work period for a work period of more than five (5) hours without a meal period of not less than 30 minutes." (Cal. Code Regs., tit. 8, § 11140, subd. 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, e.g.*, Cal. Code Regs., tit. 8, § 11140, subd. 2(G); *see also Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 [discussing complementary definition of "hours worked"].) Thus, any employer who suffers or permits employees to work more than five hours without a meal period is in violation of the wage orders, regardless of the hypothetical availability of a meal period.

The employers' feigned concern for workers' autonomy is merely intended to divert the Court's attention from the clear legislative purpose of California's recently strengthened law of meal and rest breaks to ensure that

California workers receive breaks and not the mere abstract promise of them. The purpose of meal and rest period requirements is to foster the general health and welfare of employees. (*Kerr's Catering Service v. Dept. of Indus. Rel.* (1962) 57 Cal.2d 319, 330.) The State's purpose is not served by employers' making meal and rest breaks "available" if employees do not actually receive them.

2. Employers Can Easily Discourage Breaks While Making Them "Available"

Although many employers understand that breaks enable their employees to recover from fatigue that interferes with performance, 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 will have a very high level of lip service and not much more. The State's effort to combat widespread noncompliance through the enactment of new remedies in 2000 will become a dead letter.

Employers contend that requiring them to ensure that workers actually take 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 the language of 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. (*See*, *e.g.*, NATO Brf., at p. 3 ["The possible reasons for not taking a full break are as varied as employees themselves, and as employers, we cannot pretend to know them all. What we do know, however, is that the choice—

a choice that carries personal and financial consequences—must remain in the hands of employees themselves."].) In support of this call for worker autonomy, NATO asserts there are "myriad personal reasons" why employees choose "to decline or shorten their meal or rest breaks: for example, 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." (*Ibid.*) Thus, the employers suggest, the reason workers do not take breaks is that they prefer not to.

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, offering extra work only to those who complete their scheduled tasks early, assigning tasks that cannot be completed within the allotted time if breaks are taken, or failing to provide temporary backup 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 the employee on break. Thus, the employer, not the employee, has the power to create real opportunities for meal and rest breaks.[7]

---

[7] An excellent example is provided by the San Francisco transit drivers studied by Greiner and her colleagues. 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

The employers' 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 have the benefit of collective bargaining. (*See* Monthly Labor Review, July 2001, at p. 2, available online at http://www.bls.gov/opub/mlr/2001/07/ressum2.pdf (accessed 2/14/07).) The rest must rely largely on minimum standards established by the state and federal governments to safeguard their health and safety.

If this Court reaches the issue at all, the 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 periods available to workers satisfies the requirements of California law.

---

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., *Are frequent rest breaks an adequate measure to reduce fatigue in urban transit operators?*, San Francisco, CA: MUNI Health and Safety Project; 2002.) Only the employer can structure and organize the work so that drivers actually get the breaks they need to protect their health and the safety of the general public. The abstract right to a break, rather than an actual break, is small consolation for a bus driver who is trying to make up for time lost due to a traffic snarl or having to deal with an intoxicated passenger.

C. CLASS CERTIFICATION WAS PROPERLY GRANTED TO SERVE THE PURPOSES OF ENFORCING CALIFORNIA'S MEAL AND REST BREAK REGULATIONS

After the 2000 enactments obligating employers to compensate their workers when they fail to provide breaks, employers obviously have economic and legal interests in minimizing their obligations under the law and ensuring that it is rarely enforced. The most effective way to undermine enforcement of wage and hour laws is to frustrate efforts to aggregate the typically small claims that result into class actions. Under Labor Code section 226.7, a single violation of the meal and rest break rules triggers an obligation to pay one additional hour of compensation, as little as $7.50 under the State's minimum wage statute. Thus, many claims are simply too small to warrant the expense and peril of litigating a case against one's employer.

To prevent meaningful enforcement of these important employee protections, Brinker conjures up artificial individualized defenses requiring presentation of separate evidence for every missed meal break "given that each [class] member's right to recover will turn on the particularized circumstances of each alleged missed break." (Petitioners' Reply Brf., at p. 8.) This, of course, is not true if the wage order is upheld, and Brinker is required to show that it relieved employees of their duties for at least 30 minutes in order to "provide" each meal break.[8] Brinker, citing unpersuasive Ohio authority, suggests that "individual inquiries would be

---

[8] Imposing this burden on Brinker need not lead to hundreds of thousands inquiries regarding individual meal breaks as Brinker was required by the applicable wage order to keep accurate records with respect to each employee meal period it provided. (*See* Cal. Code Regs., tit. 8, § 11140, subd. 7(A)(3).)

necessary to ascertain whether a particular employee actually missed a meal or simply forgot to clock out," and that individual issues would predominate. (Petitioners Reply Brf., at pp. 16-17.) California cases provide little support for the notion that class certification, and effective prosecution of meal break violations, can be defeated by raising a single issue that merely impacts the damages to which individual class members might be entitled. In that vein, our Supreme Court has emphatically rejected the idea that certification is not available where some individualized issues arise, but instead reminds us that the correct test for commonality is comparative and requires weighing "the issues which may be jointly tried" against "those requiring separate adjudication." (*See Sav-On Drug Stores, Inc. v. Superior Ct.*(2004) 34 Cal.4th 319, 339.)

Citing public policy considerations that weigh in favor of the use of class actions in wage and hour cases, the Supreme Court strongly urged trial courts to be procedurally innovative in finding ways to manage individual questions so that they do not render class actions unworkable. (*Sav-On, supra,* at 339-340.) In words that apply with great force to the present case, the Supreme Court described the proper considerations that guide class certification in California:

> "Many of the issues likely to be most vigorously contested in this dispute ... are common ones. Absent class treatment, each individual plaintiff would present in separate, duplicative proceedings the same or essentially the same arguments and evidence, including expert testimony. The result would be a multiplicity of trials conducted at enormous expense to both the judicial system and the litigants. 'It would be neither efficient nor fair to anyone, including defendants, to force multiple trials to hear the same evidence and decide the same issues.' (*Boggs v.*

> *Divested Atomic Corp.* (S.D.Ohio 1991) 141 F.R.D. 58, 67.)" (*Sav-On, supra*, at 340.)

Illustrating this same pragmatic approach, in early February 2007, the United States Court of Appeals for the Ninth Circuit upheld a class certification order covering a "broad and diverse' class, encompassing approximately 1.5 million women, in both "salaried and hourly" positions, "who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. The plaintiffs contended, the district court found, and the court of appeals affirmed "that the large class is united by a complex of company-wide discriminatory practices against women." (*Dukes v. Wal-Mart, Inc.* (N.D. Cal. 2007) __F.3d __, 2007 WL 329022, *4.)

Although the *Dukes* case involves a broader range of factual issues potentially requiring individual analysis than this straightforward meal and rest break case, the Ninth Circuit found that common issues predominated over individual issues and, noting that Federal Rule of Civil Procedure, Rule 23(a)(2), which articulates the commonality requirement, has been "construed permissively," clarified the correct approach to determining whether common issues of fact or law predominate:

> "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class. (Citation.) ... The commonality test is qualitative rather quantitative—one significant issue common to the class may be sufficient to warrant certification. (Citations.)" (*Ibid.*)

The court found that, although the case involved the largest certified class in history, proceeding as a class action would not deprive Wal-Mart of defenses, alter substantive law, or violate due process by failing to provide

individualized analysis or hearings. (*Dukes*, at *16-*19.) In rejecting a defense argument that individual hearings would be needed to establish each worker's monetary recovery, the *Dukes* court observed that, "in fact, statistical methods can be more accurate than other methods for determining class member remedies." (*Dukes*, at *18.)

In summary, the court in *Dukes* found the class action vehicle to be the most efficient and effective manner for addressing widespread violations and avoiding "clogging the federal course with innumerable individual suits litigating the same issues repeatedly." (*Dukes*, at *21.)

II. CONCLUSION

For all the foregoing reasons, the Labor Amici respectfully request that this Court deny the writ.

Dated: February 21, 2006

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
William A. Sokol
Theodore Franklin
Patricia M. Gates

By:

Theodore Franklin
Attorneys for Amici Curiae Alameda County Central Labor Council, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, and South Bay Central Labor Council

CERTIFICATE OF COMPLIANCE

Pursuant to rule 14 of the California Rules of Court, counsel for amici curiae Alameda County Central Labor Council, et al. certifies that this brief contains 3,847 words in proportionately-spaced, 13-point Times New Roman type, exclusive of tables of contents and certificate of service, and that the word processing system used in the preparation of this brief is Microsoft Word 2002.

Respectfully submitted this 21st day of February, 2007.

WEINBERG, ROGER & ROSENFELD
A PROFESSIONAL CORPORATION
David A. Rosenfeld
William A. Sokol
Theodore Franklin
Patricia M. Gates

By:
Theodore Franklin
Attorneys for Amici Curiae
Attorneys for Amici Curiae Alameda County Central Labor Council, California Conference of Machinists, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, South Bay Central Labor Council

00001/446128

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, 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, California 94501-1091. On February 21, 2007, I served upon the following parties in this action:

Rex S. Heinke
Akin Gump Strauss Hauer & Feld
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Karen Joyce Kubin
Akin Gump Strauss Hauer & Feld LLP
580 California Street, Ste 1500
San Francisco, CA 94104

L. Tracee Lorens
Lorens & Associates
1202 Kettner Blvd., Suite 4100
San Diego, CA 92101

Timothy D. Cohelan
Cohelan & Khoury
605 C Street
Suite 200
San Diego, CA 92101-5305

William Turley
The Turley Law Firm, APLC
555 West Beech Street, Suite 460
San Diego, CA 92101

Frederick P Furth
Furth Lehmann & Grant LLP
225 Bush Street, 15th Floor
San Francisco, CA 94104

John Collins
Matthew W. Holder
Sheppard, Mullin, Richter & Hampton, LLP
12544 High Bluff Dr., Suite 300
San Diego, CA 92130

Julie Dunne
David Chidlaw
Sheppard, Mullin, Richter & Hampton, LLP
501 W. Broadway, 19th Fl.
San Diego, CA 92101

Gregory F. Hurley
Greenberg Traurig LLP
650 Town Center Drive, Suite 1700
Costa Mesa, CA 92626

Clerk
San Diego County Superior Court
333 W. Broadway
San Diego, CA 92101

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783
(4 copies)

copies of the document(s) described as:

APPLICATION FOR PERMISSION TO FILE BRIEF OF AMICI CURIAE OPPOSITION PETITION FOR WRIT OF MANDATE, PROHIBITION, CERTIORARI, OR OTHER APPROPRIATE RELIEF; [PROPOSED] BRIEF OF AMICI CURIAE ALAMEDA COUNTY CENTRAL LABOR COUNCIL, et al.

[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.

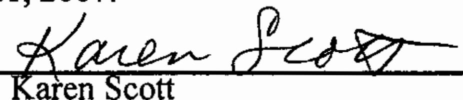
[ ] **BY PERSONAL SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused the same to be delivered by hand to the offices of each addressee.

[ ] **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 under penalty of perjury that the above is true and correct.

Executed at Alameda, California, on February 21, 2007.



Karen Scott

00001/449077