S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,
Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049331, GRANTING A WRIT OF MANDATE TO THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO, CASE NO. GIC834348
HONORABLE PATRICIA A.Y. COWETT, JUDGE

CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

FEDERAL CASES

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTRODUCTION

Suppose this Court adopted the argument advanced by Plaintiffs and their amici curiae – that employers must not only provide meal periods, but must force their employees to take them. Then suppose that a restaurant server working a seven-hour shift from 9:00 a.m. to 4:00 p.m. is scheduled to take her unpaid 30-minute meal period from 1:00 to 1:30 p.m. Her daughter is participating in a school program at 4:00 p.m., which the server wants to attend. Because it takes 25 minutes to get from the restaurant to the school, the server asks for permission to skip her lunch break and finish work 30 minutes early, at 3:30 p.m. She does not want her lunch break in any event, given that it falls during the busiest time of her shift when the opportunity for tips is greatest. But bound by this case, the server's supervisor denies her request, insisting that she take her scheduled meal period and telling her she can leave 30 minutes early if she chooses. Not willing to miss her daughter's program, the server does as she is told, turns over her tables and potential tips to another employee, takes her unpaid – and unwanted – 30-minute lunch break, and leaves work 30 minutes early, for which she is docked a half-hour's pay.

Not one of the nine amicus curiae briefs filed on behalf of Plaintiffs offers legitimate support for this unprincipled outcome – or satisfactorily addresses its detrimental effects on both the employee, who loses tip income and a half-hour's pay, and the employer, who could not be responsive to its employee's needs. Similarly, none of the other arguments advanced by Plaintiffs' amici support any of the rules Plaintiffs urge this Court to adopt. If anything, their arguments prove the opposite – that the Court of Appeal got it right, and its judgment should be affirmed.

LEGAL DISCUSSION

I. AS A MATTER OF PLAIN STATUTORY LANGUAGE, LEGISLATIVE HISTORY AND PUBLIC POLICY, EMPLOYERS MUST PROVIDE MEAL PERIODS, NOT ENSURE THEY ARE TAKEN

A. *Brinker* Is Consistent With *Murphy* – Amici's Overtime And Waiver Arguments Are Misplaced

The Brookler and CELA/CAOC amicus briefs (at pp. 8-11 and pp. 9-21, respectively) make two main points.[1]

First, relying on *Murphy v. Kenneth Cole Prods.* (2007) 40 Cal.4th 1094, both briefs insist that working through a meal period is "no different than overtime work" and that a premium wage must be paid for a missed meal period (Brookler Brief, pp. 8-9; CELA/CAOC Brief, pp. 9-12) – even if an employee freely and voluntarily chooses to skip a meal period that the employer has provided. As explained below, this argument fails because the relevant meal period statutes (Labor Code, §§ 226.7 and 512)[2] fundamentally differ from overtime wage laws, which cannot be waived by the employee because section 1194 expressly prohibits it. There is nothing remotely similar in the meal period statutes.

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[1] Our references to the Brookler and CELA/CAOC amicus briefs are to the briefs filed by Morry Brookler and by California Employment Lawyers Association ("CELA") and Consumer Attorneys of California ("CAOC"), respectively.

[2] Subsequent undesignated section references are to the Labor Code. References to "Regs." are to title 8 of the California Code of Regulations.

Second, noting that section 512 and Wage Order 5-2001[3] enumerate certain situations where an employer's obligation to provide a meal period may be "waived" by the employee, the Brookler and CELA/CAOC briefs (at pp. 11-14 and pp. 14-15, respectively) contend that employees cannot voluntarily skip a provided meal period under any circumstances other than a formal waiver. As explained in Brinker's Answer Brief on the Merits (at pp. 34-36)[4] and below, an employer's obligation to provide a meal period is entirely separate and distinct from an employee's decision whether or not to take it.

1. Neither *Murphy* nor the statutory language supports an analogy between overtime and meal periods

The Brookler and CELA/CAOC briefs (at pp. 8-9 and pp. 9-12, respectively) rely on *Murphy, supra*, 40 Cal.4th 1094, to support their claim that the meal and rest period laws must be construed the same as the overtime statutes. *Murphy* says no such thing – indeed, its entire commentary on this subject is a statement of the obvious, that an employee is entitled to an additional hour of pay "immediately upon being forced to miss a . . . meal period" because, in the context of immediate entitlement to a premium wage for a meal period violation, section 226.7, subdivision (b), is "akin" to overtime wages. (*Murphy, supra*, 40 Cal.4th at p. 1108.) The Brookler and CELA/CAOC briefs, moreover, ignore the fact that elsewhere

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[3] Unless otherwise stated, "Wage Order" refers to Wage Order 5-2001, governing all employees in the public housekeeping industry – "mean[ing] any industry, business, or establishment which provides meals, housing, or maintenance services . . . ." (Regs., § 11050, subd. (2)(P).)

[4] Brinker's Answer Brief on the Merits will hereafter be referred to as "Answer Brief".

in its opinion in *Murphy*, this Court strongly suggested that an employer violates the meal period statutes only when an employee is "forced" to forego a mandated meal period. (*Id.* at pp. 1102, 1104, 1106, 1108, 1113.)

Regardless of the reason for the extra hours, when an employee works overtime, the employer must pay a premium wage (§ 510) and employees may not voluntarily forego overtime pay (§ 1194). But there is nothing in the meal period statutes to suggest a similar limitation on an employee's ability to skip a meal period. Indeed, in briefs that purport to focus on the employer's statutory obligation to provide meal periods, the Brookler and CELA/CAOC amicus briefs offer no analysis of the statutory language at all.

An employer must pay a premium wage for overtime – with no exceptions or qualifications – because sections 510 and 1194 plainly say so. Section 510 provides:

> Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek . . . *shall be compensated* at the rate of no less than one and one-half times the regular rate of pay for an employee. (Emphasis added.)

Section 1194 provides:

> *Notwithstanding any agreement to work for a lesser wage*, any employee receiving less than . . . the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this . . . overtime compensation. . . . (Emphasis added.)

Thus, the reason an employee cannot voluntarily forego overtime pay is that the overtime statutes, in plain English, prohibit it. In contrast, the meal period statutes do not. Section 226.7 does not say that an

employer "shall" pay a premium wage for a missed meal period, only that no employer shall "require" an employee to work during a mandated meal period. (§ 226.7, subd. (a).) When an employee freely and voluntarily skips a provided meal period, the employer has not "required" the employee to work and there is no violation of the statute. This distinction makes sense: no employee would want to work overtime without pay yet employees may choose to work through lunch (and get paid) for a number of legitimate reasons. Accordingly, the argument in the CELA/CAOC brief (at pp. 9-11) to extend to an employee's right to meal periods the holding of *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456 that the right to overtime pay is not waivable is unwarranted.

Similarly, section 512 states that "an employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period...." By stating in section 512 that an employer's obligation is only to "provide" a mandated meal period, and by stating in section 226.7, subdivision (a), that an employer cannot "require" any employee to work during a mandated meal period, the Legislature imposed liability for a missed meal period only when an employer forces an employee to skip a mandated meal period. Unlike section 1194 (which prohibits a waiver of overtime compensation), nothing in the Labor Code or Wage Order prohibits an employee from skipping a provided meal period.

The CELA/CAOC brief (at pp. 19-20), again relying on *Murphy*, contends that meal and rest period premiums – like overtime compensation – are designed for "shaping employer conduct." (*Murphy, supra*, 40 Cal.4th at p. 1109.) This contention begs the question about the employer's obligation – what is the conduct to be shaped? Is the employer

required to forbid an employee from skipping a meal break in order to leave work 30 minutes early for a doctor's appointment? Brinker submits that the answer is a resounding "no."

The plain meaning of "require" and "provide" compel the conclusion that although an employer has the obligation to provide a mandated meal period, the employee is free to skip it. This interpretation – acknowledging that employees may, in an exercise of their free will, skip lunch to earn extra commissions, to attend to a child or sick parent, or for a variety of reasons – is compelled by sections 512 and 226.7 *and* is consistent with the numerous statements in *Murphy, supra,* 40 Cal.4th 1094, where this Court strongly suggested that liability for a missed meal period can only arise when an employee is "forced" to forego a required meal period:

- "The trial court concluded that [the employer] did not provide Murphy the required meal or rest periods and accordingly awarded Murphy an 'additional hour of pay' for each day Murphy was ***forced*** to work through a meal or rest period." (*Murphy, supra,* 40 Cal.4th at p. 1102, emphasis added.)

- "An employee ***forced*** to forgo his or her meal period . . . loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control." (*Murphy, supra,* 40 Cal.4th at p. 1104, emphasis added.)

- "In its original iteration, Bill No. 2509 proposed a dual strategy to address the problem of employees being ***forced*** to work through their meal and rest periods: (1) an explicit penalty provision, and (2) a separate payment to employees." (*Murphy, supra,* 40 Cal.4th at p. 1106, emphasis added.)

- And in describing the Senate amendments to the bill, the Court said: "Under the amended version of section 226.7, an employee is entitled to the additional hour of pay immediately upon being ***forced*** to miss a rest or meal period." (*Murphy, supra,* 40 Cal.4th at p. 1108, emphasis added.)

- "The Court of Appeal's focus on the apparent lack of a perfect correlation between the section 226.7 remedy and the employees' economic injury also ignores the noneconomic injuries employees suffer from being ***forced*** to work through rest and meal periods." (*Murphy, supra,* 40 Cal.4th at p. 1113, emphasis added.)

- "Additionally, being ***forced*** to forgo rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks." (*Murphy, supra,* 40 Cal.4th at p. 1113, emphasis added.)

In short, the plain language of sections 226.7, 512 and 1194 defeats the analogy to overtime compensation and *Murphy* does not say otherwise.

2. Section 512's waiver provisions do not prevent employees from skipping provided meal periods

As Brinker explained in its Answer Brief (at pp. 34-36), *Kenny v. Supercuts, Inc.* (N.D. Cal. 2008) 252 F.R.D. 641, 645, rejected the waiver argument now advanced by amici, holding that "waiver" as used in section 512 "applies to the employer's obligation to 'provide' a meal break, not to the employee's decision to take a meal break." (See also *Salazar v. Avis Budget Group, Inc.* (S.D. Cal. 2008) 251 F.R.D. 529, 533.)

The Locker/Broad amicus brief (at pp. 22-23),[5] citing to the agricultural wage order, Order 14 (MJN Ex. 23),[6] suggests that the difference in language between the rest period provision in the wage orders ("authorize and permit") and the meal period statute ("provide" plus specific waiver provisions) means that rest periods can be skipped by

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[5] Our references to the Locker/Broad amicus brief are to the brief filed by Miles Locker and Barry Broad.

[6] "MJN Exs." refers to the consecutively-numbered exhibits to Plaintiffs' motion for judicial notice dated January 20, 2009 and their supplemental motions for judicial notice dated April 16 and July 6, 2009.

employees but meal periods cannot. The brief is mistaken. Order 14, unlike all the other wage orders, uses "authorize and permit" in both its meal and rest break sections and also contains the specific meal period waiver language that the Locker/Broad brief argues is the only way under section 512 and the wage orders that employees can skip a meal period. The Locker/Broad brief cannot have it both ways: agreeing that "authorize and permit" allows employees to skip rest breaks yet asserting that "authorize and permit" in Order 14's meal period section allows employees to skip a meal period even though the waiver provision is also in that section. The Locker/Broad brief (at p. 13) asserts that Brinker's interpretation of "provide" and the waiver provision in the Wage Order renders the waiver provision surplusage yet somehow the waiver provision in Order 14 is not surplusage. That makes no sense. Rather, as Brinker contends, "provide" refers to the employer's obligation, which the employer and employee can agree to waive under certain circumstances, and not to the employee's choice whether to take a meal period that has been provided.[7]

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[7] See also Answer Brief, at pp. 43-44; Amicus Brief of Chamber of Commerce of the United States of America and California Chamber of Commerce (the "Chamber brief"), at pp. 27-30; Amicus Brief of National Retail Federation, National Council of Chain Restaurants, Contain-A-Way, Inc., USA Waste of California, Inc., California Building Industry Association, California Professional Association of Specialty Contractors, Western Growers Association, American Staffing Association, California Hotel & Lodging Association and National Association of Manufacturers (the "National Retail Federation brief"), at pp. 8-12.

B. Reading The Phrase "No Employer Shall Employ" With The Definition Of "Employ" Does Not Support An "Ensure" Standard

The Locker/Broad and Salazar/Shammas briefs (at p. 9 and pp. 8-9, respectively) contend the opening language in the meal period provisions of the wage orders – "(A) *No employer shall employ* any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. . . ." – coupled with the definition of "employ" in the same orders – "engage, suffer, or permit to work" – compels employers to "ensure" that employees take their meal periods (as opposed to making meal periods available).[8] Not so.

As Brinker explained in its Answer Brief (at pp. 29-30), the "no employer shall employ" language addresses the employer's obligation to not employ anyone for more than five hours without providing (making available) a meal period; it does *not* compel employers to force their employees to take every meal period offered. And because the current version of the Wage Order was promulgated *after* the enactment of section 512, this language must be read in light of section 512's definition of the employer's basic obligation to "provide" meal periods. As the Court of Appeal properly concluded, the clear meaning of the word "provide" is to make available. (Slip. Op., p. 42.) The Wage Order must be interpreted in light of section 512, not the other way around as amici suggest. (See also Chamber Brief, pp. 20-27.)

In support of its "no employer shall employ" argument, the Salazar/Shammas amicus brief (at p. 16) cites *Valenzuela v. Guimarra*

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[8] Our references to the Salazar/Shammas amicus brief are to the brief filed by Gelasio Salazar and Saad Shammas.

Vineyards Corp. (E.D. Cal. 2009) 614 F. Supp.2d 1089 and two related cases, all decided on the same day by the same judge, all making the same point, and all inconsistent with the decisions of nine other California federal district courts. (Answer Brief, pp. 55-57.) In any event, as Brinker noted in its Answer Brief (at p. 57, fn. 20), the language seized upon by amici was pure dicta and not part of the court's holding. (*Valenzuela*, *supra*, 614 F. Supp.2d at 1099 ["The court agrees that under the applicable meal period regulations, employers are required at a minimum to offer employees a meal period after a work period of five hours. Whether employers are required to do more is a question that needs not be answered"]; *Doe v. D.M. Camp & Sons* (E.D. Cal., Mar. 31, 2009, No. CIV-F-05-1417) 2009 WL 921442 at *8 [same]; *Robles v. Sunview Vineyards of California* E.D. Cal., Mar. 31, 2009, No. CIV-F-06-0288) 2009 WL 900731 at *8 [same].)

In fact, a convincing response to the Locker/Broad and Salazar/Shammas briefs' "no employer shall employ" argument is the DLSE's historical interpretation of the employer's meal period obligation, which is consistent with this Court's holding in *Murphy*, *supra*, 40 Cal.4th at p. 1113 – that employees must be free from their employers' control for meal periods to be lawful, unpaid and not counted as hours worked. (See DLSE Brief,[9] at pp. 4-14, where this point is discussed at length.)[10] If an

[9] Our references to the DLSE amicus brief are to the brief filed by the Division of Labor Standards Enforcement and Labor Commissioner Angela Bradstreet.

[10] See also Answer Brief, at page 44, where we explain that the sentence containing the "no employer may employ" language in the Wage Order omitted the operative verb, but the Legislature made clear how it read the Wage Order when it inserted the word "provide" in AB 60.

employee is not free to leave the premises and is still under the control of the employer, the meal period must be counted as hours worked. (DLSE Brief, p. 6.) But if an employee chooses to perform work during a provided meal period, the employer has complied with its meal period obligation so long as it pays for all time worked. (*Ibid.*)

This historical interpretation of the DLSE is plainly contrary to the position taken by the Locker/Broad and Salazar/Shammas briefs. But it was only for a brief period beginning in April 2001, when then DLSE Chief Counsel Miles Locker wrote an opinion letter (MJN Ex. 39), that the view was expressed that the wage orders imposed a burden on employers to ensure that meal periods are taken (DLSE Brief, p. 10).[11] Several years later, the DLSE returned to its pre-2001 enforcement policy as reflected in the June 1991 opinion letter issued by then Chief Counsel Cadell. (*Id.*, pp. 12-14.)

Implicitly, the DLSE does not agree that the "no employer shall employ" language coupled with the definition of "employ" requires an employer to ensure that its employees take their meal breaks. Rather, based on its long-standing policy that an employee must be free from employer control in order for the meal period to be excluded from hours worked, if an employer has relinquished control but the employee chooses to work, while the employee must be compensated, the employer "has employed the employee *with* a meal period." (DLSE Brief, p. 12.) The Locker/Broad and Salazar/Shammas briefs' "no employer shall employ" argument does

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[11] This April 2001 opinion letter by Miles Locker is directly contrary to the June 3, 1991 opinion letter issued by the DLSE's then Chief Counsel, H. Thomas Cadell (MJN Ex. 35).

not comport with either the plain language of the regulation and the statute or with the DLSE's historical enforcement position.[12]

C. Sound Policy Considerations Support The Conclusion That Meal Periods Must Be Provided, Not Ensured

Both sides contend that policy considerations support their positions on the provide vs. ensure issue. The problem with the policy arguments advanced by Plaintiffs' amici is that they are contrary to the policy choices the Legislature has already made.

The Bet Tzedek[13] and Worksafe[14] briefs (at pp. 4-25 and pp. 6-18, respectively) review the historical, sociological and political record, focusing for the most part on low-wage, underground-economy industries (garment, agriculture and the like) with a history of labor law and health and safety violations, claiming that this history supports a strict

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[12] A number of the amicus briefs filed in support of Plaintiffs cite *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949. (See Brookler Brief, p. 7; Alameda County Central Labor Council Brief (defined in fn. 18 *post*), p. 10; CELA/CAOC Brief, p. 17; Salazar/Shammas Brief, p. 1 *passim*; Worksafe Brief (defined in fn. 14 *post*, p. 3.) As discussed in Brinker's Answer Brief (at pp. 53-55), *Cicairos* is entirely consistent with *Murphy* and *Brinker*'s interpretation of provide. These briefs' reliance on *Cicairos* is misplaced.

[13] Our references to the Bet Tzedek amicus brief are to the brief filed by Bet Tzedek Legal Services, Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Centro Legal de La Raza, La Raza Centro Legal, Legal Aid Society – Employment Law Center, Maintenance Cooperation Trust Fund, National Employment Law Project, Stanford Community Law Clinic, and Wage Justice Center.

[14] Our references to the Worksafe amicus brief are to the brief filed by Worksafe Law Center, La Raza Centro Legal, the Legal Aid Society – Employment Law Center, Southern California Coalition for Occupational Safety & Health, and Watsonville Law Center.

interpretation of the meal period standard. However compelling these arguments would be if presented to the Legislature in support of contemplated legislation, they are not relevant to a judicial interpretation of existing statutes. A decision to provide extra protection for exploited workers in low-wage, underground-economy industries is one for the Legislature, not the courts.[15]

The Brookler brief (at pp. 4, 8) offers a more extreme policy argument, railing against employers who "want free labor" and are unwilling to "pay employees for the work they perform." Brinker agrees that employees should "not be treated as machines" and "should be able to take time out to eat a meal without interruption," but submits that this attack has no relevance to the issue at hand. (Brookler Brief, p. 5; see also Alameda County Central Labor Council Brief, pp. 3-8.)[16]

Employees who voluntarily skip meal periods do not provide "free labor" to their employers. Employees who skip a meal to work through the part of the day when tips are most generous must be paid for that additional

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[15] It is noteworthy that the Bet Tzedek brief (at p. 4, fn. 2) and the California Labor Federation, AFL-CIO ("CLF") brief (at p. 34) concede that some workers want the flexibility permitted by the Court of Appeal's interpretation of the meal period statute.

[16] Brinker has searched in vain for factual support for the Brookler brief's assertion (at p. 5) that a missed meal period caused the September 2008 train collision in the Los Angeles area. According to the *Los Angeles Times*, the National Transportation Safety Board received evidence that the train's engineer had sent or received 57 text messages while operating the train that day, one of which was sent 22 seconds before the collision. (Lopez & Connell, "NTSB Takes Testimony in Deadly Metrolink Train Crash" (Mar. 3, 2009) *L.A. Times* <http://latimesblogs.latimes.com/lanow/2009/03/ntsb-metrolink.html> (as of Oct. 6, 2009).)

work time. Employees who skip mid-day meals to leave early are working the same number of hours they would have worked had they not skipped lunch, the only difference being that the schedule is a product of employee choice, not employer compulsion. Relevant policy considerations support Brinker's position. (See Technet Brief, pp. 4-16; Chinese Daily News, Inc. Brief, pp. 7-11; California Employment Law Council Brief, pp. 6-9; American Trucking Associations, Inc. and California Trucking Association Brief, pp. 7-11; Children's Hospital Los Angeles Brief, pp. 5-11; Associated General Contractors of California Brief, pp. 12-14; Employers Group Brief, pp. 21-34;[17] National Retail Federation Brief, pp. 22-36.)

Several amicus briefs filed on behalf of Plaintiffs contend that employees' free choice to skip lunch breaks is a "myth" because employers have many ways to subtly discourage employees from taking their breaks. (CLF Brief, p. 2; Alameda County Central Labor Council Brief, pp. 12-16,[18] Bet Tzedek Brief, *passim*.) But as the Court of Appeal made clear, "employers cannot impede, discourage or dissuade employees from taking

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[17] Our references to the Employers Group amicus brief are to the brief filed by Employers Group, California Retailers Association, California Hospital Association, California Restaurant Association and National Federation of Independent Business Small Business Legal Center.

[18] Our references to the Alameda County Central Labor Council amicus brief are to the amicus brief filed by Alameda County Central Labor Council, Bricklayers & Allied Craftworkers Local Union No. 3, California Conference of Machinists, Communications Workers of America, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, South Bay Central Labor Council and United Food & Commercial Workers International Union Local 5 (the "Alameda County Central Labor Council brief").

meal periods" (Slip Op., p. 4), and if they do so, it is a violation of section 512.

Finally, the CLF, Alameda County Central Labor Council and Brookler briefs (at pp. 29-32, pp. 3-8 and pp. 9-11, respectively) question the assertion that it is next to impossible for employers to police many types of California workplaces. This debate is interesting but also largely irrelevant. Although it may be true in theory that an employer could close a shop to compel its employees to take uninterrupted 30-minute meal breaks, the issue to be decided is one of statutory interpretation. The Legislature has weighed conflicting public policies, considered rules that would compel employers to force employees to take meal periods without regard to the employees' wishes, rejected those rules, and instead adopted a statutory scheme that permits employees to voluntarily skip provided meal periods when the employees choose that option. The Legislature's decision respects the rights of employees to have some control over their work schedules and lives. That decision should not be judicially modified.

II. THE HISTORY OF THE WAGE ORDERS FROM THE IWC ARCHIVE DOES NOT SUPPORT THE INTERPRETATIONS OF EMPLOYER MEAL AND REST BREAK OBLIGATIONS ADVANCED BY PLAINTIFFS' AMICI

A. When The IWC Wanted Employers To Ensure Mandatory Meal Periods Of At Least 30 Minutes And Meal Periods Every Five Hours, The IWC Said So

Two of the amicus briefs in support of Plaintiffs' position, the Locker/Broad and CLF briefs, present substantially similar arguments based on the IWC's archival materials, which are discussed in the sections that follow. But there is one point that appears only in the CLF brief, and that is the claim that it is the position of both Brinker and the Court of

Appeal that "employers need only provide time off for a meal if an employee asks to take a meal period . . . ." (CLF Brief, p. 1 *passim.*) Neither Brinker nor the Court of Appeal has ever taken this position, and it is plainly a creature of CLF's imagination.[19] Brinker's position (and the Court of Appeal's holding) is simple: Employers must provide meal periods and employees do not have to ask for them – the employees simply take the meal periods or not. Brinker has *never* suggested (and the Court of Appeal did not hold) that employees have to ask for meals.[20]

1. The IWC archive supports Brinker's interpretation of "provide"

a. 1916-1943

In its introduction, the Locker/Broad brief (at p. 1) contends the historical development of the Wage Order's meal period language demonstrates the intent of the Industrial Welfare Commission ("IWC") to require "(a) mandatory meal periods, (b) of at least 30 minutes, (c) during which employees are relieved of all duties and not permitted to work, [and] (d) spaced at regular intervals during the day that eliminate work periods exceeding five hours." Although there were times in the distant past when those statements were true (Answer Brief, pp. 30, 73-74), the IWC's history shows that this mandatory language was changed in 1943. To avoid giving

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[19] The CLF brief's reference (at p. 33) to *Oliver Twist* is also imaginative, but invoking Dickensian industrial horrors is both disingenuous and hyperbolic in the context of this case. Similarly unwarranted hyperbole appears in the CELA/CAOC brief at pages 4-5. Brinker is a well-respected operator of restaurants across California and conducts its business in accordance with law. (Answer Brief, pp. 8-10.)

[20] Likewise hollow is the Worksafe brief's assertion (at p. 11) that Brinker advocates "the complete lack of meaningful breaks."

any new meaning to the language changes, the Locker/Broad brief (at pp. 2-8) and those of other amici argue without support that the language changes are meaningless, that the orders mean now what they meant in the 1920s and '30s, and that the provisions of the ancient wage orders (dating from 1916 through 1939) should still be applied today.

To demonstrate the fallacy of the approach taken in the Locker/Broad brief, the following bulleted excerpts are IWC provisions as quoted in that brief (at pp. 2, 4, 6-8), which we have bolded to show the mandatory language that no longer exists.

- 1. No person, firm or corporation shall employ or suffer or permit any woman or minor to work in any fruit or vegetable canning establishment in which the conditions of employment are below the following standards: [¶] . . . [¶] . . . (20) TIME FOR MEALS. Every woman and minor shall be entitled to *at least one hour for noon day meal*; provided, however, that **no woman or minor shall be permitted to return to work in less than one-half hour**. (Wage Order 2, ¶ 1(20) (Feb. 14, 1916, eff. Apr. 14, 1916), MJN Ex. 76, emphasis added.)

- .....[W]ithout exception where [lunch room] space is provided, **all women shall be required to leave and remain out of the workroom during the meal**. (Wage Order 4 Amended, ¶ 22 & fn.* (Jan. 7, 1919, eff. Mar. 8, 1919), MJN Ex. 78, emphasis added.)

- Every woman and minor shall be entitled to at least one hour for noon-day meal; provided, however, that **no woman or minor shall be permitted to return to work in less than one-half hour**. If work is to be continued beyond 7.30 p.m., every woman and minor shall be entitled to at least one hour for the evening meal, and **no woman or minor shall be permitted to return to work in less than one-half hour**. (Wage

Order 3a, ¶ 12 (May 11, 1923, eff. Aug. 8, 1923, amended Mar. 26, 1928, eff. Jun. 4, 1928), MJN Ex. 125.)

- **10. MEALS**

  Every woman and minor shall be entitled to at least one (1) hour for meals; provided however, that ***no woman or minor shall be permitted to return to work in less than one-half (½) hour,*** and provided, further, that ***no woman or minor shall be permitted to work an excessive number of hours without a meal period.***

  . . . *[W]ithout exception where [lunch room] space is provided,* ***all women and minors shall be required during the meal period to leave and remain out of the room in which they are regularly employed.*** (Wage Order 18, ¶¶ 10, 11 & fn.* (Dec. 4, 1931, eff. Feb. 26, 1932), MJN Exs. 11, 80, emphasis added.)

- A meal period of not less than one-half (½) hour must be given to all employees *after not more than five (5) hours of employment.* **The employer is responsible for seeing that this time is taken.** (Wage Order 9 Amended, ¶ 9(a) (Jun. 21, 1933, eff. Aug. 28, 1933), MJN Ex. 141, emphasis added; see Minutes of Meeting of IWC (Jun. 21, 1933), MJN Ex. 289 at 701443225.)

- Meal Period of **not less than one-half hour** must be given to all women working on an eight hour shift **after 4½ hours of employment**, except under the Office Order, which provides that a meal period of not less than one-half hour must be given after five hours of employment. **The employer is responsible for seeing that the time is taken.** (Minutes of Meeting of IWC (Aug. 19, 1939), MJN Ex. 291 at 701450133 (General Card No. 14), emphasis added.)

These provisions, all cited in the Locker/Broad brief, clearly demonstrate the IWC's intent – that employers were *required* to make sure employees

took their meal periods and *could not permit* their employees to return before the allotted time had elapsed – during the period 1916-1943.[21]

b. 1943

The Locker/Broad brief (at p. 8) notes that in 1942 and 1943, the IWC issued a new set of wage orders that included meal period language which the Locker/Broad brief argues remains essentially the same today. For example:

> No employer shall employ any woman or minor for a work period of more than five (5) hours *without an allowance* of not less than thirty (30) minutes for a meal. If during such meal period the employee cannot be relieved of all duties and permitted to leave the premises, such meal period shall not be deducted from hours worked. However, if the employee's work for the day will be completed within six (6) hours, such meal period need not be given. (Wage Order 5NS, ¶ 3(d) (Apr. 14, 1943, eff. Jun. 28, 1943), MJN Ex. 12, emphasis added.)

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[21] Additionally, the following paragraph appears at page 6 of the Locker/Broad brief, which we have bolded to show language that is no longer in the Wage Order:

> This order's meal period requirement combines three elements from earlier orders. Employers **may not "permit[]" employees to "return to work" in less than thirty minutes** (see Wage Order 2 (1916)); **must require employees to leave and remain out of the work room** if a lunch room is available (see Wage Order 4 Amended (1919)); and **may not "permit[]" employees to work "an excessive number of hours"** without a meal period (see Wage Order 17 (1931)).

This new meal period language is markedly different from the six bulleted excerpts quoted above and does not contain the mandatory "ensure" language ("required" and "shall not permit"). Even so, the Locker/Broad brief (at pp. 9-10) contends this language continues the mandatory requirements of the pre-1943 orders and thus "without an allowance" means the same thing as "shall not be permitted to return to work." (Locker/Broad Brief, pp. 9-10.) Basic rules of grammar and common dictionary definitions show this simply is not so.

The Locker/Broad brief (at p. 11, fn. 9) quotes the War Production Act, effective February 5, 1943: "to increase production and to win the war . . . restrictions upon the hours and conditions of work be relaxed to such an extent as may be compatible with [worker] health and safety. War Production Act (Stats. 1943, ch. 14) (Feb. 5, 1943) (MJN Ex. 357)." The Locker/Broad brief does not highlight the "without an allowance of not less than thirty (30) minutes for a meal" language in the revised 1943 orders, which is certainly a less strict standard than the language quoted in the six bulleted excerpts above. Although the War Production Act suggested that hours and conditions of work were to be relaxed, and although the language clearly differs from the pre-1943 versions, the Locker/Broad brief contends the changes did not alter the meaning of the wage orders and the IWC was simply continuing the prohibitions and requirements that existed before 1943. According to the Locker/Broad brief, employers are still required to ensure that a meal period is taken even though the 1943 language is "without an allowance" for a lunch period. (Locker/Broad Brief, pp. 11-12.) As noted above, this interpretation does not make grammatical or any sense. In fact, Brinker submits, "without an allowance" is very similar to "provide."

This argument in the Locker/Broad brief is particularly curious coming from a former IWC Commissioner. In footnote 33 (at p. 33), the Locker/Broad brief cites various parts of the record in support of the argument that "provide" is a "generic way to refer to *either* the mandatory meal period *or* the permissive rest period requirement. . . ." Conspicuously absent from footnote 33 is any reference to former Commissioner Broad's comment at a June 30, 2001 IWC hearing regarding the penalty for not providing meal periods – a comment quoted by this Court in *Murphy, supra*, 40 Cal.4th at p. 1110:

> This [penalty applies to] an employer who says, 'You do not get lunch today, you do not get your rest break, you must work now.' That is – that is the intent . . . .

Brinker's interpretation of "provide" is on all fours with *Murphy*. (See also Answer Brief, pp. 41-43.)

2. In the 1947 and 1952 amendments to the wage orders, the IWC briefly adopted but soon abandoned the "rolling five" argument

In 1947, the meal period language was changed again to provide:

> No employee shall be required to work more than five (5) *consecutive* hours after reporting for work, without a meal period of not less than thirty minutes. An "on duty" meal period will be permitted only when the nature of the work prevents an employee from being relieved of all duty and such "on duty" meal period shall be counted hours worked without deduction from wages. (Wage Order 5R, ¶ 10 (Jun. 1, 1947), MJN Ex. 13, emphasis added.)

This language – that employees cannot work more than five *consecutive* hours without a meal period – introduced the concept that a work period cannot exceed five hours without a meal period (a variation on earlier

orders providing that women were not allowed to work "an excessive number of hours without a meal period"). (Wage Order 18, ¶ 10, MJN Exs. 11, 80.) The Locker/Broad brief dismisses this change as short-lived and of no consequence, claiming the 1943 language always had the same meaning as the language added in 1947. (Locker/Broad Brief, p. 12.) As demonstrated below, this is not so.

In 1952, "consecutive" was deleted and the meal period provision then provided:

> No employer shall employ any woman or minor for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes; except than when a work period of not more than six (6) hours will complete the day's work, the meal period may be waived. An "on duty" meal period will be permitted only when the nature of the work prevents an employee from being relieved of all duty, and time spent for such "on duty" meal period shall be counted as time worked. (Wage Order 5-52, ¶ 11 (Aug. 19, 1952), MJN Ex. 14.)

The Locker/Broad brief (at p. 12) again insists that the omission of "consecutive" in the 1952 Order is irrelevant because the 1947 changes were short-lived and the provision is defined by the language as it existed from 1916 to 1943. Not so. As explained in Brinker's Answer Brief (at pp. 73-74), this significant change signaled the IWC's intent to *not* impose a "rolling five" requirement for meal periods but rather to require that a meal period be provided before the beginning of the sixth hour of work (not more than five hours) and before the beginning of the eleventh hour (not more than ten hours), regardless of the interval between the two meal periods. This interpretation, which is entirely consistent with the plain

language of the orders, defeats the contention that the orders prohibit "early lunching."

At pages 23-25 of the Locker/Broad brief, a letter written by IWC Executive Officer Margaret Miller in 1982 is extensively quoted to challenge this conclusion. Of course, Miller was not a member of the IWC; she was a staff member, and this is not IWC regulatory history as such but rather the opinion of a staff member and should be approached in that vein. (See Part II.D *post.*) Curiously, the Locker/Broad brief (at p. 24) quotes the following excerpt from the letter purportedly supporting its "rolling five" argument: "but the meaning of [the meal period] section is [that] meal periods must be *provided* "at such *intervals as will result in no employee working longer than five consecutive hours without an eating period.*" The letter uses the very word – "consecutive" – that the IWC added in 1947 but deleted in 1952. How the deletion of that word can have no meaning or consequence is not explained.

The Locker/Broad brief (at pp. 24-25) repeats the contention made by the Plaintiffs that Brinker's position is that a lunch provided at any time before the tenth hour satisfies the requirement that an employee who works more than five hours is entitled to a meal period.[22] Brinker's position, as noted above, is that a meal period must be provided by the end of five hours of work. Contrary to what the Locker/Broad brief contends, this has always been Brinker's position.

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[22] This contention is also made in the amicus brief filed by CELA/CAOC, at pages 5-6 and 24.

3. The IWC archive after 1952

The Locker/Broad brief proceeds from its assumption that, notwithstanding the difference between the language of the 1943 order and those that came before it, this Court should interpret the current version of the Wage Order to conform to the language used in the orders from 1916 to 1943 (and, with regard to the "rolling five" issue, according to the language in the 1947 orders). This argument has no basis, and ignores the 1991 opinion letter from then DLSE Chief Counsel H. Thomas Cadell (MJN Ex. 35) concluding that, consistent with Brinker's interpretation of the 1943 and subsequent wage orders, the IWC meal period language does *not* require employers to ensure that a meal period is actually taken. There is also the fact that the Locker/Broad brief ignores that the "shall not be permitted to return" language was deleted from the orders in 1943, and "consecutive" was deleted in 1952. Brinker submits that an interpretation of the current Wage Order should not be based on language long ago abandoned by the IWC.

B. Wage Order Record-keeping Requirements Do Not Support An "Ensure" Standard

Tracing wage orders that date back to the 1920s, the Locker/Broad brief (at pp. 36-40) contends that the IWC has "repeatedly acknowledged that the meal period recording requirement's prime purpose is to enable easy enforcement" and that "[t]his, in turn, shows that meal periods are mandatory, that employers must ensure that workers take them, and that employees may not choose to decline them." (Locker/Broad Brief, p. 39.) There is a yawning gap in this logic, however – it does not follow that a record-keeping requirement means that employers must ensure meal periods are taken. Rather, as the material actually cited in the

Locker/Broad brief (at pp. 36-40) demonstrates, accurate records of the time actually worked make it easier to confirm that employees are properly paid.

The fact that ancient IWC references to the use of meal period records for purposes of state enforcement of employer meal period obligations prior to the enactment of sections 512 and 226.7 does not show in any way that meal periods are "mandatory," or employers must "ensure" that employees take them, or employees may not skip them. Indeed, in the context of this case, the fact that employers are required to maintain records of their employees' meal periods also allows for notice to employers that employees may be working through their meal periods and thus enables employers to confirm that meal periods are, in fact, being provided and coercive action is not being used to discourage employees from taking them.

C. The Archive Materials Do Not Support The Rigid Sequencing Of Rest Breaks That Amici Demand

The Locker/Broad brief is similarly flawed on the rest break issues – neither the IWC archive materials nor the plain text of the wage orders support the view that rest breaks are triggered at the second, sixth and tenth hours of the workday, or that the first rest break must precede the meal period.

Once again, the Locker/Broad brief (at pp. 40-41) cites pre-1943 rest break provisions that specified "a relief period shall be given every two (2) hours of not less than ten (10) minutes," and no employee "shall be required to work more than two and one-half (2½) hours consecutively without a rest period of ten (10) minutes." Although that language was modified in 1947 along the lines of the current Order – providing for a rest

break for each four hours of work – the Locker/Broad brief (at p. 41) insists that "the change in wording did not substantively alter the language triggering a rest break every two hours." This strained construction is absurd, and if anything shows that the Court of Appeal's interpretation – that the rest break provision is only triggered after three and one-half hours of work – is necessary to avoid internal inconsistency in the regulation. (Slip. Op., pp. 24-25.)

Similarly, there is nothing in the text of either the meal or rest break provisions that requires one to precede or follow the other. The Locker/Broad brief's references (at pp. 45-46) to IWC materials discussing the "general welfare of employees" and breaking up "long stretches of physical and/or mental exertion" simply do not support that brief's assertion that rest breaks must precede and follow a meal period at the mid-point of a typical eight-hour day. The goal of breaking up a long day can be achieved with a lunch break followed by two rest breaks or two rest breaks followed by a meal break, and nothing in the Wage Order compels the rigid sequence the Locker/Broad brief demands. (See Answer Brief, pp. 87-98.)

D. Concluding Thoughts On The IWC Archive

Having gone to great lengths to mine the IWC archive for materials supporting its position on meal and rest breaks, the Locker/Broad brief comes up dry. In reality, the language changes to the meal and rest period provisions that the IWC made over time support Brinker's contention that the strict standards of the IWC in the 1920s, '30s and early '40s have been relaxed, as confirmed by the 1991 opinion letter from the DLSE's former Chief Counsel. (MJN Ex. 35.) While the Locker/Broad brief argues that

the Court of Appeal never reviewed the IWC materials and, had it done so, would have decided this case differently, it is clear these materials do not alter the correct outcome the Court of Appeal reached.

There are several other issues raised by the Locker/Broad amicus brief, which Brinker notes briefly below.

First, on July 7, 2009, this Court received Plaintiffs' over-sized Reply Brief on the Merits. By order dated July 9, the Court rejected Plaintiffs' over-sized brief and ordered Plaintiffs to file a reply brief not exceeding 14,000 words. Although the Locker/Broad brief was purportedly written by a former Commissioner of the IWC and a former Chief Counsel of the Labor Commissioner's Office, this simply is not so – the Locker/Broad amicus curiae brief is virtually identical to pages 6 through 50 of the rejected over-sized reply brief.

To be sure, in their application for permission to file an amicus brief (at p. 5), amici disclosed that "the proposed brief was authored ***in part*** by Plaintiffs' counsel and was intended to be part of Plaintiffs' reply brief on the merits. . . ." (Emphasis added.) Given that only five or six sentences out of 44 pages differ from Plaintiffs' rejected reply brief, the Locker/Broad brief gives new meaning to the words "in part." This is troubling not just in the abstract but because the Locker/Broad application affirmatively represented that the proposed amicus brief represented *amici's* views, not those of someone else, and that because of their backgrounds, amici "are uniquely situated to provide assistance to the Court." (Locker/Broad App., p. 3.)

Second, although both sides have cited to materials from the IWC archive, Brinker offers a respectful word of caution about reliance on these materials. An index helps with searching the archive (which is maintained

in numbered files stored in bankers' boxes) (Plaintiffs' Supp. MJN, April 16, 2009, Ex. 2), but the IWC, which historically had a very small staff, was defunded by the Legislature in 2004 and it is impossible to determine whether the archive of this 100-year old agency is complete.[23] And, although the archival materials are of historical interest, it is debatable whether much of it qualifies as citable legislative or regulatory history – for example, the random letters from the public and reports submitted by IWC staff and wage boards that the Locker/Broad brief cites, which do not necessarily reflect the thinking of the IWC or its constituent members.[24]

Third, the relevance of the IWC regulatory history must also be viewed through the perspective of the lack of any remedy except an injunction to enforce missed meal and rest breaks until enactment of section 512 in 2000 and section 226.7 in 2001. Thus, as the DLSE amicus brief (at pp. 3-4) notes, there was no basis until these statutes were enacted to consider the circumstances that trigger an employer's obligation to pay an employee an additional hour of pay for a missed meal or rest break. The regulatory history pre-dating sections 512 and 226.7 developed during a different regulatory regime.

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[23] Of course, the IWC archive must be distinguished from the actual regulatory language that is reviewed in Part II.A *ante*.

[24] (See, e.g., *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172 ["'[W]ithout knowing who prepared the documents and for what purpose', we doubt very much the document helps ascertain legislative intent"]; *Wolski v. Fremont Inv. & Loan* (2005) 127 Cal.App.4th 347, 356 [court may not take judicial notice of letters from industry groups, elected officials and the like].)

III. THE COURT OF APPEAL GOT IT RIGHT – THIS CASE CANNOT BE ADJUDICATED ON A CLASS-WIDE BASIS

A. The *Teamsters* Pattern-Or-Practice Method Of Proof Does Not Apply To This Case

The Impact Fund amicus brief (at p. 2)[25] demonstrates a misunderstanding of the proceedings below, and mistakenly assumes that the pattern-or-practice theory described in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324 was "asserted by plaintiffs" in this case. Indeed, the Impact Fund brief (at pp. 4, 7) asserts that the "*Teamsters* pattern and practice approach was adopted by this Court" in *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 333-334, and claims that the Court of Appeal erred by "ignor[ing] the theory of plaintiff's case – that there was a pattern or practice of denying meal and rest periods." The Impact Fund brief (at p. 9) suggests that "[t]his Court should use this case to emphasize that lower courts cannot cavalierly reject the pattern or practice theory or pattern evidence at the class certification stage where such evidence demonstrates common proof that could be proffered by the plaintiffs." There are multiple problems with Impact Fund's position, discussed below.

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[25] Our references to the Impact Fund amicus brief are to the brief filed by Impact Fund and joined by Asian Law Caucus, Asian Pacific America Legal Center, Equal Rights Advocates, Lawyers' Committee for Civil Rights, Legal Aid Society – Employment Law Center, Mexican American Legal Defense & Educational Fund, Public Advocates, and Women's Employment Rights Clinic of Golden Gate University School of Law.

1. This is not a *Teamsters* case

This case is not, and never has been, a *Teamsters* pattern-or-practice case, and there is nothing in the record to suggest that Plaintiffs were proceeding on a *Teamsters* pattern-or-practice theory. (See, e.g., 1PE15-28 [Complt.], 1PE29-31 [Plfs' Notice of Mot. for Class Cert.], 1PE32-57 [Plfs' Mem. of Pts. & Auths. in Supp. of Mot.], 21PE5681-5706 [Plfs' Reply Mem. in Support of Mot.], 26PE7034-7083 [Tr. of Hrg. on Mot. for Class Cert.], 1PE1-14 [Order on Mot. for Class Cert.].) The Impact Fund brief implicitly admits as much, qualifying its argument by noting elsewhere that "plaintiffs *essentially* asserted that Brinker engaged in a pattern or practice of violating California's labor laws" (Impact Fund Brief, p. 2, emphasis added.) But it is disingenuous at best for the Impact Fund brief to accuse the Court of Appeal of ignoring that this is a *Teamsters* pattern-or-practice case – and to ask this Court to decide the case on that basis – when it is no such thing.[26]

2. This Court did not "adopt" *Teamsters* in *Sav-on*

The Impact Fund brief goes too far when it claims this Court "adopted" the *Teamsters* pattern-or-practice approach in *Sav-on* and, by implication, that the *Brinker* Court of Appeal should have "adopted" it too.

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[26] Indeed, the apparent motivation of the Impact Fund brief in advancing this argument has nothing to do with this case. As conceded in its application for leave to file its amicus brief (at p. 2), Impact Fund's "interest in this matter is to further preserve the ability of victims of discrimination to use pattern and practice evidence at the class certification and merits stages of litigation." Of course, there is also the fact that the Impact Fund is lead counsel for plaintiffs in *Dukes v. Wal-Mart Inc.* (9th Cir. 2009) 556 F.3d 919, the nationwide gender discrimination class action pending *en banc* review before the United States Court of Appeals for the Ninth Circuit, where the pattern and practice theory *is* an issue.

Sav-on was not a *Teamsters* pattern-or-practice case any more than this case is. All this Court did in *Sav-on* was acknowledge that courts have "considered pattern and practice evidence . . . and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate," citing *Teamsters* for the proposition that "statistics bolstered by specific incidents 'are equally competent *in proving employment discrimination.*'" (*Sav-on, supra*, 34 Cal.4th at p. 333 & fn. 6, emphasis added.)[27] The Impact Fund brief (at pp. 6-7) is simply wrong when it suggests the Court of Appeal failed to follow *Sav-on.* To the contrary, the *Brinker* court followed *Sav-on* to a tee. (Answer Brief, pp. 116-117.)

To Brinker's knowledge, the *Teamsters* pattern-or-practice method of proof has never been applied to support a finding that common issues predominant for the purpose of certifying a class in a wage and hour damages class action such as this one – and the Impact Fund brief does not cite such a case. *Teamsters* itself is distinguishable because there the question was whether the employer had engaged in a "pattern of discriminatory decision-making" prohibited by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.).[28] The other "pattern or practice"

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[27] In footnote 6 in *Sav-on*, this Court cited a number of cases in addition to *Teamsters*, one of which was *In re Simon II Litig.* (E.D.N.Y. 2002) 211 F.R.D. 86. (*Sav-on, supra*, 34 Cal.4th at p. 333 fn. 6.) Brinker notes that *In re Simon II Litigation* was subsequently vacated. (*In Re Simon II Litig.* (2d Cir. 2005) 407 F.3d 125.)

[28] Furthermore, far from the sweeping reach the Impact Fund brief ascribes to it, *Teamsters* cautions that the "usefulness [of statistics] depends on all of the surrounding facts and circumstances." (*Teamsters*, 431 U.S. at p. 340.)

cases cited in the Impact Fund brief (pp. 4, 6-7) are similarly distinguishable from the case at bench and, in fact, only one of those cases – *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 – even addresses *Teamsters*, and it simply stands for the proposition that a putative age discrimination class action complaint brought under the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) may survive the pleading stage by alleging a pattern or practice of discrimination. (*Alch, supra*, 122 Cal.App.4th at pp. 378-380.)[29]

The mistake made by the Impact Fund brief in glibly importing to this case a method of proof utilized in Title VII employment discrimination cases is demonstrated by the recent opinion in *Hohider v. United Parcel Service, Inc.* (3d Cir. 2009) 574 F.3d 169. The issue in *Hohider* was whether the district court properly certified a nationwide class of employees alleging a pattern or practice of unlawful discrimination under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) ("ADA"). Analogizing to Title VII pattern-or-practice suits, the district court found that certain of the named plaintiffs' claims and the relief they requested could be adjudicated on a class-wide basis. The Third Circuit granted the

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[29] The Impact Fund brief (at pp. 6, 8) relies heavily on *Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal.App.4th 676. But as noted in Brinker's Answer Brief at page 117, *Capitol People First* (citing *Sav-on*) held that the trial court had erroneously rejected statistical evidence where "appellants' theory of recovery . . . focuse[d] on the common practices, policies, acts and omissions" of state and regional agencies in systemically failing to enforce constitutional, statutory and regulatory mandates protecting the rights of developmentally disabled persons and "only declaratory and injunctive relief [was] sought." (*Capitol People First, supra*, 155 Cal.App.4th at pp. 693, 695.) Given the appellants' theory of recovery in *Capitol People First*, that decision is unremarkable and does not assist amici.

defendant's petition for an interlocutory appeal, reversed the district court's order granting class certification, and emphasized the functional distinction between the *Teamsters* method of proof and the substantive boundaries of the applicable law:

> Thus, the *Teamsters* framework might assist a court's analysis of whether a defendant has engaged in a pattern or practice of discrimination prohibited under Title VII and, if so, to whom relief should be awarded. It is Title VII, however, that defines the scope of prohibited discrimination and sets the substantive boundaries within which the method of proof must operate. So too with the ADA. Even if the *Teamsters* framework is recognized as an acceptable method of proof for pattern-or-practice claims under the ADA, this determination would not, by its own force, affect what patterns or practices constitute discrimination prohibited by the statute. Nor would the framework, once adopted, independently dictate what substantive elements must meet the requirements of Rule 23 [of the Federal Rules of Civil Procedure] in order to reach a class-wide finding of unlawful discrimination under that statute. (*Hohider*, 574 F.3d at p. 183.)

Rather, "[i]t is the ADA, . . . and not the *Teamsters* evidentiary framework, that controls the substantive assessment of what elements must be determined to prove a pattern or practice of unlawful discrimination in this case." (*Id.* at p. 185.)

Applying these principles, the *Hohider* court concluded that because the district court did not address whether, under the ADA, the defendant's challenged conduct could amount to unlawful discrimination without a showing that the conduct affected "otherwise qualified individuals with disabilities" – one of the elements of an ADA claim – but instead erroneously "relied on the *Teamsters* evidentiary framework to excise these

inquiries from its certification analysis, while neglecting to reconcile whether the consequences of that analysis were substantively compatible with the ADA," its decision to grant class certification was an abuse of discretion and required reversal. (*Hohider*, *supra*, 574 F.3d at p. 198.)

Although *Hohider* was filed three weeks before the Impact Fund brief was filed in this case, and although the author of the brief filed here also appeared on behalf of the Impact Fund as amicus curiae in *Hohider* (*Hohider*, *supra*, 574 F.3d at p. 171), the Impact Fund brief does not mention, let alone discuss, *Hohider* or its obvious relevance to the arguments presented in the Impact Fund brief. Quoting the United States Supreme Court in *Fed. Express Corp. v. Holowecki* (2008) 128 S. Ct. 1147, 1153, *Hohider* cautions that "'we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination"'" (*Hohider, supra,* 574 F.3d at p. 190) – a caution ignored in the Impact Fund brief, which given its way would have this Court endorse a method of proof that was never alleged and which could not, in any event, be used to excise from the class certification analysis the elements of Plaintiffs' substantive claims and their impact on the critical question of whether common issues predominate.

3. Plaintiffs did not offer pattern or practice evidence showing predominance of common issues

Contrary to the assertion in the Impact Fund brief (at p. 4), Plaintiffs did *not* "offer[] common evidence of defendants' practices and policies sufficient to establish common factual issues about the illegality of defendants' conduct." The only policies Plaintiffs offered were Brinker's entirely lawful meal and rest break and off-the-clock policies (19PE5172, 5181-5182). And, the assertion in the Impact Fund brief (at p. 8) that the

evidence showed "most meal or rest breaks were never taken" is pure fantasy. According to Plaintiffs' own evidence, meal periods were allegedly missed less than 25 percent of the time – and that is so even under Plaintiffs' rigid and discredited theory that a meal period must be provided after every five *consecutive* hours of work (1PE54). Even if this case could be tried within the *Teamsters* framework – which it cannot be – this evidence hardly shows a pattern of class-wide meal period violations, and the Impact Fund brief does not point to *any* "pattern" evidence of missed rest breaks or off-the-clock work. There is none.

The claim in the Impact Fund brief (pp. 4-5) that "Plaintiffs' intended use of expert testimony, statistics, and sampling evidence is consistent with recognized methods of proof in class litigation" is also meaningless – because Plaintiffs did not explain how any such evidence would be used to effectively manage the case. (*Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432 ["It is not sufficient . . . simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question"].)[30]

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[30] The Impact Fund brief (p. 8, fn. 4) complains that "[t]he parties were precluded from obtaining merits discovery prior to class certification" and then, *following* class certification, were stopped, by the Court of Appeal's order staying the trial court proceedings, in the middle of "exchang[ing] expert reports on survey and statistical evidence," after which they were to "come back [to the trial court] to discuss how a trial could be managed." This is backwards – a decision about whether a case can be effectively managed as a class action must be shown before the class is certified, not after. (*Dunbar*, *supra*, 141 Cal.App.4th at 1432.)

Plaintiffs' conflation of these distinct concepts further undermines the Impact Fund brief's assertion.[31]

The Impact Fund brief (at p. 5) also goes too far when it contends, again based on *Teamsters*, that "[i]n reviewing the trial court's class certification ruling, the Court of Appeal categorically rejected the lower court's reliance on statistical and similar pattern evidence and proposed survey evidence" and erred "in assuming that an individualized inquiry for each class member would be required to determine class liability in a pattern or practice case." In fact, nothing in the trial court's order granting class certification shows that the court "relied on statistical and similar pattern evidence" (1PE1-14),[32] and the Court of Appeal properly excluded Plaintiffs' "proposed survey evidence" because it was not part of the class certification record (Answer Brief, p. 109, fn. 44). Likewise, it cannot constitute error for the Court of Appeal not to have sanctioned a *Teamsters* pattern-or-practice methodology to prove Plaintiffs' claims on a class-wide basis when this case has never proceeded on that basis. Indisputedly, the Court of Appeal correctly acknowledged that courts may use statistical and survey evidence in determining whether a claim is amenable to class treatment. (Slip Op., p. 32.) The point simply is that the Court of Appeal

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[31] For a full discussion of the problems associated with the approach the Impact Fund brief takes to "representative, sampling, statistical, and survey" evidence, Brinker invites the Court's attention to the amicus brief filed by the National Retail Federation, at pp. 37-55.

[32] In fact, the passage from the Court of Appeal's decision quoted in the Impact Fund brief is found in the context of that court's discussion of Plaintiffs' rest break claims (Slip Op., p. 32), as to which *no* "statistical or similar pattern evidence" was proffered by Plaintiffs. Necessarily, then, the trial court could not have "relied" on such evidence.

concluded that such evidence "does not change the individualized inquiry in determining if Brinker allowed rest breaks, or forbid employees from taking them," which made those claims not amenable to class treatment. (*Ibid.*) The Court of Appeal got it right.

B. A Decision Allowing Class-Wide Adjudication Of Plaintiffs' Claims Through Survey and Statistical Proof Would Deprive Brinker Of Its Right To Due Process

The Alameda County Central Labor Council brief (at pp. 3-8) makes the sweeping accusation that Brinker seeks to eliminate class actions as a means to vindicate worker rights. Not so. Brinker's position is that this Court's approval of a trial methodology that would adjudicate *in this case* Plaintiffs' meal period, rest break and off-the-clock claims on a class-wide basis through survey and statistical proof, as the Impact Fund brief (at pp. 2-5) advocates, would be unsupported by the factual record and without legal precedent, and in addition to all the other reasons why these claims cannot be adjudicated class-wide (see Answer Brief, pp. 105-126), would deprive Brinker of its right to due process.

In *City of San Jose v. Superior Court* (1947) 12 Cal.3d 447, 462, this Court recognized that while class actions were "designed to foster justice, [they] may create injustice. The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." Thus, this Court has recognized that "once the issues common to the class have been tried . . . each plaintiff must still by some means prove up his or her claim, allowing the defendant an opportunity to contest each individual claim on any ground not resolved in the trial of common issues." (*Johnson v. Ford Motor Co.* (2005) 35

Cal.4th 1191, 1210, citing *Sav-on, supra*, 34 Cal.4th at pp. 334-335, 339-340.)

Indeed, this Court has consistently held that a party cannot be denied a substantive state law defense merely because a case is brought as a class action. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 749 ["it is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen"]; *City of San Jose, supra*, 12 Cal.3d at p. 462 ["We decline to alter [a] rule of substantive law to make class actions more available. Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going"]; *Washington Mut. Bank v. Superior Court* (2001) 24 Cal.4th 906, 918 [same].) To allow Plaintiffs to establish liability on a class-wide basis through survey and statistical proof without giving Brinker a meaningful opportunity to prove its defenses on an individual basis would accomplish what this Court has repeatedly said is not allowed – and thus would violate Brinker's state constitutional right to due process. It would violate Brinker's federal constitutional right to due process as well.

The Fourteenth Amendment's guarantee that a person be afforded "due process of law" before deprivation of property requires that parties to a civil case be given "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Indeed, the United States Supreme Court recently vacated an award of punitive damages based on a denial of procedural due process, explicitly reaffirming that federal due process "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to

present every available defense.'" (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353; see also *Western Elec. Co. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199 [defendant has a federal due process "right to present a full defense," including a right to present "any relevant rebuttal evidence," such as evidence that there was no violation "against one or more members of the class"].) Even when multiple plaintiffs have similar claims, the Due Process Clause's guarantee of individualized justice prohibits the certification of class actions on questions of liability when those issues (including potential defenses) are subject to individualized proof. (*McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 232 [when class certification or other procedural devices are used "to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation"].)

Because due process gives Brinker the right to prove all of its defenses separately as to each individual member of the class, Brinker's liability to a particular class member cannot be determined on the basis of survey or statistical evidence. If Plaintiffs were allowed to prove liability with such evidence, and if a verdict were returned in favor of the class, Brinker would be forced to pay section 226.7 missed meal and rest break premiums to class members who never proved that they (as opposed to other class members) had valid claims that could survive Brinker's defenses applicable to them. Such a procedure would not afford Brinker an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" (*Mathews*, *supra*, 424 U.S. at p. 333), or to "present every

available defense" as required by the Fourteenth Amendment's guarantee of due process. (*Philip Morris USA*, *supra*, 549 U.S. at p. 353.)[33]

C. The Court of Appeal Applied The Proper Standard Of Review And Correctly Decided That Remand Is Unnecessary

The Impact Fund amicus brief (at pp. 10-11) argues that the Court of Appeal contravened this Court's decision in *Sav-on*, *supra*, 34 Cal.4th 319, first by "fail[ing] to defer to the trial court's findings" and then by not remanding "to allow the trial court to apply its newly minted legal rule." (Impact Fund Brief, p. 10.) The Impact Fund brief has it wrong.

As discussed in Brinker's Answer Brief (at pp. 102-103), the *Brinker* Court of Appeal vacated the trial court's class certification order solely on the ground that the trial court used improper criteria or made erroneous legal assumptions in granting class certification without first determining the elements of Plaintiffs' claims. The trial court's purely legal errors required reversal of the certification order, because it was thus based "upon an incomplete and erroneous analysis of factors relevant to certification" (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 911-912), and *Sav-on* does not hold otherwise. To the contrary, *Sav-on* confirms that even if supported by "substantial evidence," a certification order that relies on "improper criteria" or "erroneous legal assumptions" cannot stand. (*Sav-on*, *supra*, 34 Cal.4th at p. 327.) Because *Brinker* hinged on the legal errors underlying the trial court's certification decision,

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[33] For a full discussion of the consequences of adjudicating Plaintiffs' meal period claims on a class-wide basis, Brinker invites the Court's attention to the amicus brief filed by the Chamber, at pages 30-57.

the Impact Fund brief's assertion that the Court of Appeal "failed to defer to the trial court's findings" is simply misplaced.

Likewise misplaced is the Impact Fund brief's argument that the Court of Appeal should have remanded the case to the trial court to consider class certification anew in the light of its "newly minted legal rule." *Sav-on* does not stand for this proposition, and the Impact Fund brief does not offer any other authority to support it. To the contrary, as discussed in Brinker's Answer Brief (at pp. 126-127), nothing in a renewed class certification motion could change the fact that Plaintiffs' "theor[ies] of recovery" are not "amenable to class treatment." (*Sav-on*, *supra*, 34 Cal.4th at p. 327.) In this context – with no unanswered factual or evidentiary questions – the Court of Appeal ordered class certification denied with prejudice. (See cases cited in Brinker's Answer Brief, at page 127.) The Court of Appeal got it right.

CONCLUSION

Brinker respectfully submits that for all of the reasons set forth above and in its Answer Brief on the Merits, this Court should reject the arguments advanced by Plaintiffs and their amici and affirm the judgment of the Court of Appeal in its entirety.

Respectfully submitted,

Dated: October 8, 2009

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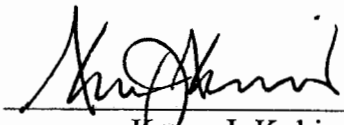
By 
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CERTIFICATE OF COMPLIANCE

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

This brief consists of 13,198 words as counted by the Microsoft Word version 2003 word processing program used to generate the brief.

Dated: October 8, 2009

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