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

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INTRODUCTION

By statute and regulation, California workers have the right to take meal and rest breaks, and no one in this case disputes that right. Instead, Plaintiffs want this Court to declare – contrary to the plain language of the governing statutes and contrary to the Court of Appeal's well-reasoned opinion – that California employers must not only *provide* meal periods to their employees but also *ensure* that the meal periods are taken, that meal and rest periods must be scheduled according to Plaintiffs' strict formula rather than with the flexibility mandated by the Legislature, and that notwithstanding the necessarily individual reasons particular employees might have for skipping or shortening a meal period, Plaintiffs' claims are susceptible to class treatment.

The *Brinker* Court of Appeal addressed all of Plaintiffs' claims, explained that none of them is amenable to class treatment because individual issues predominate, and harmonized its conclusions with this Court's decisions in *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319 and *Murphy v. Kenneth Cole Prods.* (2007) 40 Cal.4th 1094, and the Third Appellate District's opinion in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949. That *Brinker* got it right is confirmed by the fact that nine federal courts have reached the same result.

As we will show in this brief, (1) employers need only provide meal periods, not ensure they are taken; (2) an employee's right to a meal period is determined by the total number of hours worked per day, not by the number of consecutive hours worked following the last meal; (3) a rest period must be authorized and permitted for every four hours of work "or major fraction thereof," but need be in the middle of each work period only "insofar as practicable;" and (4) none of the theories of recovery advanced by Plaintiffs is amenable to class treatment under the facts of this case.

The Court of Appeal's opinion should be affirmed.

STATEMENT OF THE ISSUES

Because Plaintiffs' framing of the issues is in many respects misleading, Brinker restates the actual issues before this Court as follows:

1. *Meal Period Compliance Issue*. The issue before this Court is *not* whether an employer must "actually relieve workers of all duty so they can take their statutorily-mandated meal periods" or whether employers may "comply simply by making meal periods 'available.'" (Opening Brief on the Merits ("OB"), p. 1.) Brinker does not dispute that employers must offer meal periods during which employees are "relieve[d] . . . of all duty." (*Ibid*.) Nor does Brinker dispute that the Labor Code mandates that employers provide meal periods to their hourly employees. The *actual* issue is whether an employee can choose, for whatever personal reason the employee may have, not to take the meal period that the employer makes available, or whether – as Plaintiffs argue – the employer must "*ensure that work stops* for the required thirty minutes" (*id.*, p. 28, emphasis added).

2. *Meal Period Timing Issue*. The issue is *not*, as Plaintiffs state, whether the Labor Code "impose[s] a timing requirement for meal periods." (OB, p. 1.) It indisputably does: Employers must provide a first meal period to employees working "more than five hours per day," and a second meal period to employees working "more than 10 hours per day." (Lab. Code, § 512, subd. (a).) The *actual* issue is whether an employee's meal period entitlement is measured by the total number of hours worked "per day," as the Labor Code states, or by the number of consecutive hours that have elapsed since the preceding meal, as Plaintiffs claim (OB, pp. 82, 84).

3. *Rest Period Timing Issues*. There are two issues about the proper timing of rest periods:

(a) Must employers determine the "total hours worked daily" and authorize rest periods "at the rate of ten (10) minutes net rest time

per four (4) hours or major fraction thereof," as the Wage Order requires (Regs., § 11050, subd. (12)(A)),[1] or must employers time rest periods at the two-hour, six-hour, and ten-hour marks of an employee's shift, as Plaintiffs claim (OB, pp. 104, 106). Contrary to what Plaintiffs state, the issue is *not* whether an employer may "compel employees to work an eight-hour shift with only a single rest break" (OB, p. 2), as both *Brinker* and the Wage Order make clear that an employee working an eight-hour shift is entitled to *two* rest periods. (July 22, 2008 Slip Opinion ("Slip Op."), pp. 24, 28, 31.)

(b) Must a rest break be permitted in the middle of each four-hour work period "insofar as practicable," as the Wage Order states (Regs., § 11050, subd. (12)(A)), or must a rest break invariably be permitted before the first meal period – even when the first meal period is scheduled early in an employee's shift – as Plaintiffs argue (OB, pp. 110-111).

4. *Survey, Statistical, or Other Representative Evidence*. Can Plaintiffs' meal period, rest period, and off-the-clock claims – which require individualized inquiries into whether a particular manager at a particular restaurant on a particular shift discouraged or prohibited a break or encouraged or permitted off-the-clock work – be decided by way of survey, statistical, or other representative evidence.

5. *Appellate Review Issues*. There are three appellate review issues before the Court:

(a) Must an appellate court reverse a certification order that rests on the erroneous legal assumption that the law applicable to

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[1] All references to "Regs." are to title 8 of the California Code of Regulations.

Plaintiffs' claims does not need to be established before deciding whether individual or common issues predominate.

(b) Must an appellate court remand a certification decision when there are no factual issues remaining to be resolved and the only issues before it are purely legal.

(c) Does an appellate court err in noting the *absence* of any evidence of a class-wide policy or practice of prohibiting meal or rest periods or requiring off-the-clock work, and holding that – without such evidence – Plaintiffs' claims, by their nature, require individual liability determinations.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. Meal Periods

Before 2000, there was no statutory meal period requirement in California; meal period regulations were found only in wage orders promulgated by the Industrial Welfare Commission ("IWC"). Moreover, before 1980, the meal period provision in the wage order covering employees in the restaurant industry applied only to women and minor employees.[2] (Plaintiffs' January 20, 2009 Motion for Judicial Notice ("MJN"), Exs. 8-17 [attaching wage orders from 1919 through 1968].) Even when that wage order's meal period provision was broadened to encompass men, it still included no enforcement or penalty provision. It simply stated, in relevant part:

> No employer shall employ any person for a work period of more than five (5) hours without

[2] While the 1976 wage order included men, this Court held in *California Hotel and Motel Assn. v. IWC* (1979) 25 Cal.3d 200, that it was invalid as promulgated for failure to include an adequate statement of basis. (*Id.* at p. 216.)

> a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

(Regs., § 11050, subd. (11)(A); Wage Order No. 5-80 (January 1, 1980) [MJN Ex. 19], ¶ 11.)[3] Violators could be sanctioned only through a court-imposed injunction or a Notice to Discontinue Labor Law Violations issued by the State Labor Commissioner.

When the Legislature decided to codify "[e]xisting wage orders" into the Labor Code, its understanding was clear: wage orders "prohibit an employer from employing an employee for a work period of more than 5 hours per day without *providing* the employee with a meal period." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, emphasis added.) Labor Code section 512, effective January 1, 2000, thus only obligated employers to *provide* meal periods, not – as Plaintiffs insist – "*ensure that work stops*" (OB, p. 28, emphasis added):

> 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 of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employee may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(Lab. Code, § 512, subd. (a), emphasis added.)

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[3] This language has remained essentially unchanged since 1952.

Less than six months after section 512 went into effect, the IWC expressly incorporated section 512's requirement that employers "*provide*" meal periods into Wage Order 5-2001.[4] As amended in June 2000, the Wage Order included a penalty provision:

> If an employer fails to *provide* an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not *provided*.

(Regs., § 11050, subd. (11)(B), emphasis added.)

After the Wage Order was amended to reflect the Legislature's determination that employers need only "provide" meal periods, the Legislature amended Labor Code section 516, cautioning that all IWC wage orders must be consistent with section 512. Section 516, as amended in September 2000, states in full:

> *Except as provided in Section 512*, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Lab. Code, § 516, emphasis added.)

In the same month, the Legislature enacted its own penalty provision applicable to both meal and rest periods, Labor Code section 226.7. Consistent with the "provide" language of section 512 and the recently amended Wage Order, section 226.7 states that employers who "*require* any employee to work during any meal or rest period," or "fail[] to *provide*

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[4] Unless otherwise indicated, "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).)

an employee a meal or rest period" owe the employee an "additional hour of pay":

> (a) *No employer shall require any employee to work during any meal or rest period* mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) *If an employer fails to provide an employee a meal period or rest period* in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not *provided.*

(Lab. Code, § 226.7, emphasis added.)

2. Rest Periods

The Wage Order's rest period provision also has remained constant since 1952:

> Every employer shall authorize and permit all employees to take rest periods, *which insofar as practicable shall be in the middle of each work period*. The authorized rest period time shall be based on the *total hours worked daily* at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose *total daily work time* is less than three and one-half (3 1/2) hours.

(Regs., § 11050, subd. (12)(A), emphasis added; Wage Order 5-52 (May 15, 1952) [MJN Ex. 14], ¶ 12.) Employers are thus directed to determine "the total hours worked daily" and authorize rest periods "at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." (*Ibid*.) Contrary to what Plaintiffs insist (OB, pp. 110-111), the Wage Order contains *no* requirement that a first rest period be scheduled before the first meal period.

In June 2000, the IWC added an "hour of pay" penalty to the rest period provision, using the same language as in its simultaneously enacted meal period penalty provision:

> If an employer fails to *provide* an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not *provided*.

(Regs., § 11050, subd. (12)(B), emphasis added.) Thus, both the meal and rest period provisions of the Wage Order, as amended in 2000, use the term "provide" to describe an employer's obligation.

Moreover, a few months later, the Legislature enacted section 226.7, which – as discussed above – penalizes employers for "*requir[ing]* any employee to work" through or "fail[ing] to provide" either a meal *or* a rest period. (Lab. Code, § 226.7, emphasis added.) The Legislature's clear intent was to establish an identical compliance standard for meal and rest periods – not two different compliance standards, as Plaintiffs would have it. (OB, p. 28.)

Unlike meal periods, which are unpaid, rest periods are paid and considered "hours worked." (Regs., § 11050, subds. (11)(A), (12)(A).) Because rest periods are "on-the-clock," there is no need to record them. "Off-the-clock" meal periods, by contrast, must be recorded so that employers can maintain "accurate information with respect to each employee," including "[t]otal hours worked." (*Id*., § 11050, subd. (7)(A).)

B. Factual Background

At the time of briefing on Plaintiffs' class certification motion, Brinker operated 137 restaurants in California, including Chili's Grill & Bar and Maggiano's Little Italy. (3PE644.) Brinker previously owned the Cozymel's Coastal Grill and Corner Bakery Cafe chains, but Cozymel's

Coastal Grill was sold December 24, 2003 and Corner Bakery Cafe was sold February 2, 2006. (*Ibid*.) Brinker also owned the Macaroni Grill chain, but it was sold November 20, 2008.

1. Brinker's Meal Period, Rest Period, And Off-The-Clock Policies

Brinker's "Break and Meal Period Policy for Employees in the State of California" includes a form to be signed by all employees. With respect to meal breaks, that form states: "I am entitled to a 30-minute meal period when I work a shift that is over five hours." (19PE5172.)

As to rest breaks, the form provides: "If I work over 3.5 hours during my shift, I understand that I am eligible for one ten-minute rest break for each four hours that I work." (19PE5172.) Contrary to what Plaintiffs argue (OB, p. 15), Brinker's policy is that a rest period must be authorized *within* – not after – every four-hour work period. (21PE5913-5915.)

Brinker's policy also states that an employee's failure to follow Brinker's meal and rest break policies "may result in disciplinary action up to and including termination." (19PE5172.)

With regard to off-the-clock work, Brinker's "Hourly Employee Handbook" states in relevant part: "It is your responsibility to clock in and clock out for every shift you work. . . . [Y]ou may not begin working until you have clocked in. Working 'off the clock' for any reason is considered a violation of Company policy." (19PE5181.) The Handbook further states: "If you forget to clock in or out, of if you believe your time records are not recorded accurately, you must notify a Manager immediately, so the time can be accurately recorded for payroll purposes." (*Id*. at 5181-5182.)

2. DLSE Investigation And Settlement

In 2002, the California Division of Labor Standards Enforcement ("DLSE") initiated an investigation regarding Brinker's alleged failure to provide meal and rest breaks, among other things. No final conclusions of

wrongdoing were reached, and Brinker admitted no wrongdoing. (2PE358-359.) Brinker entered into an injunction to ensure future compliance with wage and hour laws (18PE4840), and the Los Angeles County Superior Court overseeing the injunction has not found – nor has there been any allegation – that Brinker has violated the injunction.

C. Procedural History

1. Plaintiffs' Complaint

In 2004, Plaintiffs filed a class action complaint against Brinker on behalf of current and former hourly employees who had "experienced *Defendants' common company policy of depriving employees of rest periods and meal periods* . . . ." (1PE182 [First Amended Complaint], emphasis added.) Specifically with respect to rest periods, Plaintiffs alleged: "Defendants have had *a consistent policy of requiring* Restaurant Non-Exempt Employees within the State of California, including *Plaintiffs, to work through rest periods and failing to provide rest periods of at least ten minutes per four hours worked or major fraction thereof* . . . ." (1PE180 [First Amended Complaint], emphasis added.) With respect to meal periods, Plaintiffs alleged: "Defendants have had *a consistent policy of requiring* Restaurant Non-Exempt Employees within the State of California, including *Plaintiffs, to work through meal periods and/or work at least five (5) hours without a meal period* . . . ." (*Ibid.* [First Amended Complaint], emphasis added.)

2. The Trial Court's July 2005 Opinion On The Meal Period Timing Issue

In connection with an ongoing mediation, the parties in 2005 asked the trial court to rule on three legal issues to "assist in resolution of this putative class action lawsuit." (21PE5732.) Among the three issues was

"whether [Brinker] was required to provide a meal period for each five-hour block of time worked." (*Id*. at 5733.)

The trial court stated in a July 1, 2005 opinion that "the DLSE wants employers to provide employees with break periods and meal periods toward the middle of an employee[']s work period in order to break up that employee's 'shift.'" (21PE5726.) It concluded: "[D]efendant appears to be in violation of § 512 by not providing a 'meal period' per every five hours of work." (*Ibid*.)

Although the trial court cautioned at the time that its opinion on the meal period timing issue and the other two legal issues presented were "advisory opinions only" (21PE5724), two weeks later it stated that its "advisory ruling is confirmed by the court as an order" (1PE208). But when Brinker petitioned the Court of Appeal for review of that order, the court denied review, concluding that the ruling was advisory in nature: "The review of an advisory opinion would result in an advisory opinion. California courts generally have no power to render an advisory opinion. The petition is denied." (*Brinker Restaurant Corp. v. Superior Court* (Jan. 20, 2006, D047509 [nonpub. opn.].) In its July 22, 2008 published opinion, however, the Court of Appeal stated that its "order was erroneous as the 'advisory' opinion by the trial court was later confirmed by the court as an official order." (Slip Op., p. 35, fn. 8.)

3. Plaintiffs' Motion For Class Certification

On April 28, 2006, Plaintiffs moved to certify a class of "all present and former employees of [Brinker] who worked at a Brinker owned restaurant in California, holding a non-exempt position, from and after August 16, 2000." (2RJN7385.) The class was comprised of the following six sub-classes:

> (1) employees "who worked one or more work periods in excess of three and a half (3.5) hours

> without receiving a paid 10 minute break during which the Class Member was relieved of all duties";
>
> (2) employees "who worked one or more work periods in excess of five (5) consecutive hours, without receiving a thirty (30) minute meal period during which the Class member was relieved of all duties";
>
> (3) employees "who worked 'off-the-clock' or without pay";
>
> (4) former employees who "were not paid the amounts owed to them in a timely manner following termination of their employment";
>
> (5) "[c]lass members who signed fully or partially enforceable arbitration agreements"; and
>
> (6) "[p]resent employees entitled to injunctive relief."

(2RJN7385-7386.) Plaintiffs' putative class was estimated to include 59,451 employees. (4PE987.)

Plaintiffs recognized that the fourth, fifth, and sixth subclasses were by nature conditional. The fourth subclass for "waiting time penalties" "flow[ed] from [the meal period, rest period, and off-the-clock] violations." (1PE40.) Plaintiffs asked the court to certify the fifth "arbitration" subclass pending their receipt of "discovery responses as to how many Class members signed Arbitration Agreements" and "determination of the issue of whether or not arbitration as to the sub-class . . . is appropriate" (2RJN7386, fn. 1) – a determination that was never made. The final "injunction" subclass was based on Plaintiffs' intent "to seek Injunctive Relief prohibiting Defendants from violating [the trial court's] Orders of July 15, 2005, soon after the Class Certification Hearing." (2RJN7386, fn. 2.) Plaintiffs, however, never sought the anticipated injunction.

In support of their motion for class certification, Plaintiffs submitted the declarations and deposition testimony of 33 current and former Brinker employees. Plaintiffs' witnesses professed knowledge only of what occurred at the particular restaurants where they worked, during their particular shifts. Plaintiffs submitted no evidence from Brinker managers or executives suggesting that Brinker had violated its stated meal period, rest period, or off-the-clock policies.

Despite Plaintiffs' claim that Brinker maintained a "consistent policy of requiring [non-exempt employees] to work through meal periods and/or work at least five (5) hours without a meal period" (1PE180), a number of Plaintiffs' witnesses testified that they regularly took 30-minute, uninterrupted meal periods when they worked more than five hours. (19PE5206-5207, 5283-5284, 5371; 20PE5436, 5477, 5507.) Named Plaintiffs Romeo Osorio and June Rader testified that they were provided meal periods, but sometimes decided to skip them to finish a shift early or to maximize tips. (20PE5487-5490 [Osorio Dep. Tr.]; 5508 [Rader Dep. Tr.].)[5] Osorio further testified that at the restaurant where he worked, there were "breakers" assigned to relieve employees during their meal periods. (20PE5478, 5487-5490.) Plaintiffs' other witnesses testified that they, too, were given meal periods, albeit sometimes early in their shifts. (1PE132, 140, 163, 171; 19PE5206, 5221-5222, 5270, 5282-5284, 5310, 5371-5372.)

Even the remaining declarations did not evidence a "consistent policy of requiring" employees to work through meals. Nearly a third of

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[5] While Plaintiffs point to the absence of *written* waivers in their statement of facts (OB, p. 17), there is no statutory requirement that waivers be in writing – and Plaintiffs do not suggest otherwise. In any event, as explained in detail in section I.A.2.b, below, many employees do not "waive" meal periods within the meaning of section 512, but rather choose not to take meal periods they are offered. (Lab. Code, § 512, subd. (a).)

Plaintiffs' witnesses made no mention of meal periods at all in their declarations. (1PE92, 103, 108, 114, 122, 124, 128, 138, 143, 151.) Moreover, some declarants claimed that they "did not receive an uninterrupted off-duty 30 minute meal break for every five hours [] worked," but at their depositions admitted that they *did* in fact regularly receive meal periods when they "worked over five hours." (Compare 1PE100 with 19PE5206-5207 and 1PE110 with 19PE5310.)

As to Plaintiffs' claim that Brinker maintains "a consistent policy of requiring [non-exempt employees] to work through rest periods and failing to provide rest periods of at least ten minutes per four hours worked or major fraction thereof" (1PE180), a number of Plaintiffs' witnesses testified that they were regularly permitted to take rest breaks. (19PE5311, 5373; 20PE5511-5514.) While others testified that they were not permitted rest breaks (1PE122, 124, 138, 134), none testified – as Plaintiffs claim (OB, p. 12) – that they were not authorized a rest break until after working four hours.

Plaintiffs' evidence also did not demonstrate that "Brinker pervasively requires 'off-the-clock' work during meal periods because workers are pervasively interrupted while on break." (OB, p. 12.)[6] More than half of Plaintiffs' declarants made no reference to off-the-clock work (1PE92, 103, 108, 110, 114, 122, 124, 128, 132, 134, 138, 143, 145, 151, 156, 158, 160, 171), and several who did stated merely that they "performed job duties while clocked out for meal breaks or for the day" (1PE130, 140). Those witnesses failed to indicate whether they were *required* to work off the clock or did so by their own choice, or whether their supervisors had any inkling that they were performing work off the clock in violation of Brinker policy. Moreover, named Plaintiff Rader

[6] Plaintiffs' off-the-clock claim is limited "to time worked while clocked out for meal periods." (OB, p. 12.)

testified that "non-managerial employees" – not Brinker managers – would interrupt her meal periods to ask her questions about her tables. (20PE5502.) Another one of Plaintiffs' witnesses testified that when employees left for lunch but forgot to clock out, or returned from a meal and forgot to clock back in, managers appropriately adjusted their time cards. (19PE5288.)

4. Brinker's Opposition To Class Certification

In opposition to class certification, Brinker submitted the declarations of 336 putative class members stating that they were regularly provided 30-minute meal breaks. (6PE1564-11PE3026.) Brinker also submitted the declarations of 716 employees stating that they were allowed rest breaks (11PE3032-13PE3598; 16PE4351-17PE4784), and 19 managers stating that they permitted their employees to take breaks (3PE699, 707, 721, 726, 736, 745, 761, 769, 783, 792, 800, 824, 842, 860, 877; 4PE896, 909, 931, 944). Ninety-seven percent of Brinker's declarants testified that their managers did not ask them to work during their meals. (4PE986.)

Brinker argued in opposition to class certification that because rest and meal periods need only be provided – not necessarily taken – it can only be determined on an individual basis whether a violation occurred. (3PE650-659.) Brinker cited the declarations of numerous putative class members who testified that they skipped breaks for a variety of personal reasons. (*Id.*, citing 3PE721-722, 780, 812, 823, 828, 834, 843-844, 861, 871, 873-874, 4PE906-907.)

5. The Trial Court's Certification Order

On July 6, 2006, the trial court granted Plaintiffs' motion for class certification. It stated:

> Defendant's arguments regarding the necessity of making employees take meal and rest periods actually points toward a common legal issue of

> what defendant must do to comply with the Labor Code. Although a determination that defendant need not force employees to take breaks may require some individualized discovery, the common alleged issues of meal and rest violations predominate.

(1PE1-2.) In its brief, conclusory order, the trial court did not mention any other common issues. (*Ibid*.)

6. Brinker's Writ Petition And The Court Of Appeal's Order To Show Cause

On September 1, 2006, Brinker sought a writ from the Court of Appeal, contending that the trial court could not have decided whether individual or common issues predominate without first determining the law governing Plaintiffs' claims. (Petition for Writ of Mandate, Prohibition, Certiorari, Or Other Appropriate Relief ("Petition"), pp. 6-7.) Brinker maintained that had the trial court decided – in keeping with the relevant Labor Code and Wage Order provisions – that it has no obligation to force its employees to take meal and rest periods, the trial court necessarily would have concluded that individual issues predominate and class certification is inappropriate. (*Ibid*.) Similarly, because an employer is only liable for off-the-clock work if it had actual or constructive knowledge that such work was performed, Plaintiffs' off-the-clock claims could only be resolved on a case-by-case basis after determining whether individual managers knew or should have known that an employee was working off the clock. (*Id*., pp. 1-2.)

In opposition to the Petition, Plaintiffs argued that Brinker's own time records, in addition to "statistical methodology and proof," would show the "widespread nature of Brinker's violations" and also manage the individual inquiries surrounding their claims. (Preliminary Opposition to the Petition, p. 2.) Plaintiffs further argued that common legal questions involving the proper timing of meal and rest periods supported the trial

court's certification order – specifically, whether an employer must provide a meal period "for each five (5) hour period an employee works," and whether an employer must provide a first rest period "prior to the meal period." (*Id*., pp. 1-2.)

In reply, Brinker urged the Court of Appeal to define the law applicable to Plaintiffs' meal period, rest period, and off-the-clock claims, and hold that Plaintiffs' theories about the proper timing of meal and rest periods have no basis in either the Labor Code or the Wage Order. (Reply Brief in Support of Petition, pp. 5-6, 10-13.) Brinker also argued that no "statistical methodology" is capable of bypassing the highly individual inquiries necessary to establish liability with respect to each class member. (*Id*., p. 3.) Brinker explained, for example, that a time card's indication of a missed meal period could mean that the meal period was prohibited, or could just as easily mean that the employee chose to skip that particular meal. (*Id*., p. 16.)

With respect to rest periods – which are unrecorded – Brinker maintained that it could only be determined on an individual basis whether a particular manager prohibited a timely break or whether an employee chose not to take it. (Reply Brief in Support of Petition, p. 2.) Similarly, without any records of off-the-clock work, the trier of fact would have to assess the credibility of the employee claiming to have performed off-the-clock work and decide whether the employee's manager knew or should have known that such work was performed. (*Ibid*.)

On December 7, 2006, the Court of Appeal issued an Order to Show Cause. In their Return to the Order to Show Cause, Plaintiffs identified another common legal question purportedly justifying certification – whether employers are obligated to permit a first meal period for every *three and one-half hours* of work. (Return to Order to Show Cause, p. 16.) Brinker responded that the Wage Order only requires a rest period for every

four hours of work (Reply to Return to Order to Show Cause, p. 29) – as Plaintiffs themselves had originally stated in their complaint and motion for class certification. (1PE23; *id*., 44, fn. 7.)

7. The Court Of Appeal's October 12, 2007 Opinion

In an unpublished October 12, 2007 opinion, the Court of Appeal agreed with Brinker that the trial court had erred in "certifying the proposed class and subclasses without first determining as to each type of claim both the theory of liability and the elements that must be proven to hold Brinker liable." (*Brinker Restaurant Corp. v. Superior Court* (Oct. 12, 2007, D049331) 2007 WL 2965604, *9.) The Court of Appeal defined the "elements that must be proven" with respect to Plaintiffs' rest period claims, holding that the Wage Order mandates a rest period for every four hours – not three and one-half hours – of work, and that a rest break before the first meal period is not required. (*Id.* at *10-11.) Because Brinker's policy is consonant with the Wage Order and because whether any particular manager at any particular restaurant on any particular shift failed to authorize a rest period is an inherently individual question, the Court of Appeal held that the trial court had abused its discretion in finding Plaintiffs' rest period claims amenable to class treatment. (*Id.* at *12.)

The Court of Appeal also held that the trial court erred in its July 2005 ruling that "early lunching" is prohibited, and that an employer must "make a 30-minute meal period available to an hourly employee for every five *consecutive* hours of work. (*Brinker*, *supra*, 2007 WL 2965604 at *13, emphasis added.) The court, however, did not address whether employers must provide or ensure their employees' meal periods, instead remanding that issue to the trial court. (*Id.* at *19.) By its express terms, the October 2007 decision was immediately final. (*Id.* at *21.)

On October 26, 2007, the Court of Appeal informed this Court that it had made a clerical error in ordering its October 12, 2007 opinion

immediately final, and asked this Court to grant review and transfer the case back to it. On October 31, 2007, this Court granted review and transferred the case to the Court of Appeal with directions that it "vacate the [original] opinion and reconsider the matter as it [saw] fit."

Contrary to the position they had previously taken, in supplemental briefing Plaintiffs joined Brinker and expressly requested that the Court of Appeal "decide the pure legal question of whether, under California law, meal periods must be 'ensured' or merely 'made available.'" (Plaintiffs' December 17, 2007 Supplemental Brief ("Supp. Brief"), p. 10.) Plaintiffs also changed their position with respect to the timing of rest periods: Although they had previously argued that employees are entitled to a 10-minute rest period every *three and one-half* hours (Return to Order to Show Cause, p. 16), Plaintiffs now maintain that employees are entitled to a first rest period after working *two* hours, a second rest period after working *six* hours, and a third rest period after working *ten*. (Supp. Brief, p. 20.)

8. The Court Of Appeal's July 22, 2008 Decision

On July 22, 2008, the Court of Appeal filed its unanimous, published decision, again holding that the trial court had erred in failing to decide the law applicable to Plaintiffs' meal period, rest period and off-the-clock claims before certifying the class. (Slip Op., pp. 22-23.) The Court of Appeal determined the elements of Plaintiffs' rest period claims as it had on October 12, 2007 (*id*., pp. 22-31), and again held that employers are not required to offer meal periods for every five consecutive hours of work (*id*., pp. 34-41). It also held that employers are obligated only to provide, not to ensure, their employees meal periods. (*Id*., pp. 41-47.)

Having defined *all* elements of Plaintiffs' claims, the Court of Appeal addressed whether the "'*theor[ies] of recovery* advanced by the proponents of certification [are], as an analytical matter, likely to prove amenable to class treatment.'" (Slip Op., p. 21, quoting *Sav-on*, *supra*, 34

Cal.4th at p. 327, original emphasis.) Deciding that they are not, the Court of Appeal granted Brinker's writ petition and directed the trial court to enter a new order denying class certification. The following paragraphs summarize the key points in the Court of Appeal's decision.

a) Plaintiffs' rest period claims

In defining the elements of Plaintiffs' rest period claims, the Court of Appeal held – based on the Wage Order's plain provisions – that an employer must offer one rest period for every four-hour work period unless the total work period is between three and one-half and four hours, in which case the employee is also entitled to a rest break. (Slip Op., p. 24.) Contrary to what Plaintiffs insist, and as explained in further detail in section III.A.2, below, the Court of Appeal did *not* hold that "an employee working an eight-hour shift would accrue just one rest break, not two." (OB, pp. 24-25.) Rather, under the court's plain language reading of the Wage Order, an employee working eight hours – two four-hour work periods – is entitled to two rest periods. (Slip Op., pp. 24, 28, 31.)

The Court of Appeal rejected Plaintiffs' argument that a rest period must be authorized every three and one-half hours, as well as their alternative contention that "employees are entitled to a second rest period after working six hours, and a third rest period after working 10 hours." (Slip Op., p. 28.) It explained: "If the IWC had intended that employers needed to provide a second rest period at the six-hour mark, and a third rest period at the 10-hour mark, it would have stated so[.]" (*Ibid*.)

With regard to Plaintiffs' claim that employers must authorize the first rest period of the shift before the first meal period, the Court of Appeal held that the Wage Order does not support Plaintiffs' theory – it states only that rest periods "'*insofar as practicable shall be in the middle of each work period*.'" (Slip Op., p. 28, quoting Regs., § 11050, subd. (12)(A),

emphasis added.) A first rest break timed after an early meal period could still fall in the "middle" of a four-hour work period. (*Ibid*.)

The Court of Appeal also confirmed that employers need only "authorize and permit," not ensure, their employees' rest periods – a point that Plaintiffs acknowledged, but that the trial court held was a "common legal issue" justifying class certification. (Slip. Op., p. 30.) The court held that if the trial court had decided that issue, it necessarily would have denied certification because a trier of fact "cannot determine on a class-wide basis whether members of the proposed class of Brinker employees missed rest breaks as a result of a supervisor's coercion or the employee's uncoerced choice. . . . *The issue of whether rest periods are prohibited or voluntarily declined is by its nature an individual inquiry*." (*Id*., p. 31, emphasis added.)

Addressing Plaintiffs' argument that the case should be remanded to allow the trial court to assess their "expert statistical and survey evidence," the Court of Appeal held that such evidence could "not show *why* rest breaks were not taken," or "*why* breaks of less than 10 uninterrupted minutes were taken." (Slip Op., p. 32, original emphasis.) It concluded that while under *Sav-on*, "courts *may* use such evidence in determining if a claim is amenable to class treatment," here such evidence would be useless because employees often voluntarily take rest periods shorter than 10 minutes, or skip them altogether. (*Ibid*., emphasis added, citing *Sav-on*, *supra*, 34 Cal.4th at p. 333.)

b) Plaintiffs' meal period claims

Plaintiffs raised two central arguments with respect to their meal period claims: first, that employees are entitled to a meal period after five *consecutive* hours of work, and second, that employers must ensure that their employees take the meal periods they offer. The Court of Appeal rejected both claims, and held that because employers need only make meal

breaks available, Plaintiffs' meal period claims – like their rest period claims – can only be litigated on an individual basis.

With respect to Plaintiffs' theory that a meal period must be provided for every five consecutive hours of work, the Court of Appeal held that under Labor Code section 512(a), employees are entitled to one meal after working "'more than five hours per day,'" and a second meal after working "'more than ten hours per day.'" (Slip Op., pp. 35-36, quoting Lab. Code, § 512(a).) It rejected Plaintiffs' theory that "early lunches" are prohibited, reasoning that neither the Labor Code nor the Wage Order contains any "restriction on the timing of meal periods." (Slip Op., p. 40.)

With regard to the "provide v. ensure" issue, the Court of Appeal held that "the plain language of section 512(a)" – stating that employers must "*provid[e]*" meal periods – makes clear that "meal periods need only be made available, not ensured, as plaintiffs claim." (Slip Op., p. 42.) It explained that *Cicairos v. Summit Logistics, Inc.* offers no support for Plaintiffs' position that employers are the guarantors of their employees' meal periods because that case addressed an employer's failure to *provide* meal periods – not its failure to ensure them. (*Id*., pp. 44-46.) The *Brinker* court also held that the obligation to "provide" meal periods means that "employers cannot *impede, discourage or dissuade* employees from taking [them]." (*Id*., p. 4, emphasis added.)

The Court of Appeal concluded that "because meal breaks need only be made available, not ensured, individual issues predominate in this case and the meal break claim is not amenable to class treatment." (Slip Op., p. 47.) It elaborated:

> It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs

> argue, because the restaurants were so inadequately staffed that employees could not actually take permitted meal breaks. As we discussed, *ante*, with regard to rest breaks, plaintiffs' computer and statistical evidence submitted in support of their class certification motion . . . could only show the fact that meal breaks were not taken, or were shortened, not why.

(*Id*., p. 48.)

c) Plaintiffs' off-the-clock claims

The Court of Appeal finally held that "as with [P]laintiffs' rest and meal break claims, their off-the-clock claims are not amenable to class treatment because, once the elements of those claims are considered, individual issues predominate." (Slip Op., p. 51.)

Plaintiffs have never disputed that "employers can only be held liable for off-the-clock claims if the employer knows or should have known the employee was working off the clock." (Slip Op., p. 51.) "Nor do they dispute that Brinker has a written corporate policy prohibiting off-the-clock work." (*Ibid*.) As a result, "Brinker 'has the right to inquire into the validity of each claim with regard to the authority of the manager to instruct the employee to work off-the-clock, store management's knowledge of the employee's having performed work off-the-clock, whether the employee, in fact, performed any work off-the-clock, [and] the reason the employee did not submit a time adjustment request form.'" (*Id*., p. 52, citation omitted.) Plaintiffs' proffered declarations, and statistical and survey evidence showing the *number* of times that employees worked during a meal period did not reveal "the reason *why* they worked off the clock" – information necessary to establish liability. (*Id*., p. 51, original emphasis.)

Ultimately, despite Plaintiffs' claim to the contrary, the Court of Appeal did *not* hold that "under no set of facts could any of [Plaintiffs']

claims be certified for class treatment." (OB, p. 25.) Instead, it held that in the absence of evidence that Brinker has a common policy of prohibiting rest or meal breaks, or requiring off-the-clock work, a widespread practice of violations could not be inferred from contradictory individual allegations that can only be assessed on an employee-by-employee basis. (See, e.g., Slip Op., p. 33 ["[O]ur conclusion that individual issues predominate does not dictate that claims asserting violations of rest break laws can never be certified as a matter of law."]; *id*., p. 49 ["[T]he evidence does not show that Brinker had a class-wide policy that prohibited meal breaks. . . . For those who did not [take meal breaks], the reasons they declined to take a meal period requires individualized adjudication."]; *id*., p. 51 [refusing to allow certification of off-the-clock claims where "Brinker has a written corporate policy prohibiting off-the-clock work" and representative evidence cannot show "the reason *why*" any given employee "worked off the clock"], original emphasis.)

The Court of Appeal directed the trial court to vacate its class certification order and enter a new order denying with prejudice certification of Plaintiffs' rest period, meal period, and off-the-clock sub-classes. (Slip Op., p. 53.)

On October 22, 2008, this Court granted review.

LEGAL DISCUSSION

I. THE COURT OF APPEAL CORRECTLY HELD THAT EMPLOYERS NEED ONLY PROVIDE MEAL PERIODS, NOT ENSURE THAT THEY ARE TAKEN.

As succinctly and correctly held by the Court of Appeal, "California law provides that Brinker need only provide meal periods," not ensure that they are taken. (Slip Op., p. 42.) That the Court of Appeal got it right is shown by the plain language of the governing statutes – Labor Code section 512, which states that an employer may not employ an employee for

specified periods "without *providing* the employee with a meal period," and Labor Code section 226.7, which imposes an extra hour's pay if "an employer fails to *provide* an employee" with a required meal period. (Lab. Code, § 512, subd. (a), emphasis added; *id*., § 226.7, emphasis added.) Neither statute even hints that employers must "*ensure that work stops* for the required thirty minutes." (OB, p. 28, emphasis added.)

Although such "clear and unambiguous" language is the beginning and end of this Court's inquiry into the statutes' meaning (*Murphy*, *supra*, 40 Cal.4th at p. 1103), their history confirms the Legislature's intent to adopt a statutory system with sufficient flexibility to address the needs of California's diverse workplaces while at the same time allowing for more specific industry-tailored regulations by the IWC. The IWC also understood this, because after section 512 was enacted, it amended the Wage Order to clarify that employers need only "provide" meal periods to their employees. (Regs., § 11050, subd. (11)(B).)

When presented with the unequivocal statutory language, this Court recognized in *Murphy* that an employer is only liable under section 226.7 when employees are "required to work" through or "forced to forgo" meal periods – *not* when employees voluntarily choose to skip or shorten the breaks they are offered. (*Murphy*, *supra*, 40 Cal.4th at p. 1104.) Without exception, every other appellate and federal court in California to decide the issue has recognized, as the *Brinker* court did, that an employer need only provide meal periods, not ensure that they are taken. This Court should affirm.

A. Under The Plain Language Of Labor Code Sections 226.7 And 512, Employers Have No Obligation To Ensure That Their Employees Take The Meal Periods They Provide.

A court construing a statute "seeks to determine and give effect to the intent of the enacting legislative body" (*People v. Braxton* (2004) 34

Cal.4th 798, 810), and begins by examining the statutory language – "generally the most reliable indicator of legislative intent" (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818, citations omitted). "The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Ibid*.)

The words of the statutes governing meal periods in California unambiguously obligate employers to provide meal periods to their employees, not to ensure that they are taken. Plaintiffs' argument that the "answer" to the "provide v. ensure" question "can be found through a careful review of the plain language of the Wage Orders and their adoption history dating back to the 1930s" (OB, p. 4) turns the rules of statutory construction on their head. The answer lies in the plain statutory language of Labor Code sections 226.7 and 512.

1. Labor Code section 226.7

Section 226.7 provides:

> (a) *No employer shall require any employee to work during any meal or rest period* mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) *If an employer fails to provide an employee a meal period or rest period* in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not *provided.*

(Lab. Code, § 226.7, emphasis added.) Section 226.7 thus makes clear that an employer must "*provide* an employee a meal period," and may not "*require* any employee to work during" it. Noticeably absent is any language compelling an employer to *ensure* that an employee takes every provided meal period notwithstanding the employee's desire to skip or

shorten it (for example, to work during a period of heavy tipping, or to leave early at the end of the day for a dentist's appointment, a meeting with a child's teacher, or for any other personal reason).

a) Plaintiffs' meritless statutory language arguments

Ignoring section 226.7's plain language, Plaintiffs argue that the statute simply compels compliance with the relevant Wage Order, which Plaintiffs erroneously contend requires employers to ensure that their employees take all offered meal periods. (OB, pp. 35-44.) From Plaintiffs' perspective, the word "provide" – used twice in section 226.7 – should not be afforded its "ordinary and usual meaning" (*Fitch*, *supra*, 36 Cal.4th at p. 818), but rather should be understood as a placeholder – a means of "incorporat[ing] the Wage Orders." (OB, p. 44.) Plaintiffs are mistaken.

Had the Legislature actually intended to penalize employers for "fail[ing] to *comply*" with the relevant Wage Order, it undoubtedly would have written that requirement into the statute. Section 226.7, however, unambiguously penalizes employers for "fail[ing] to *provide* an employee a meal period," requiring that they pay an extra hour of wages for each work day that a meal period "is not *provided.*" (Lab. Code, § 226.7, subd. (b), emphasis added.) This Court "presumes the Legislature meant what it said." (*People v. Robles* (2000) 23 Cal.4th 1106, 1111, citation omitted.)

Plaintiffs' interpretation not only disregards the word "provide," it also negates the statute's first phrase, "no employer shall *require* any employee to work during any meal . . . ." (Lab. Code, § 226.7, subd. (a), emphasis added.) Had the Legislature intended to prohibit employers "from *allowing* employees" to work during a meal period, as Plaintiffs insist (OB, p. 38, emphasis added), it would have said so. Indeed, when the Legislature wants employers to refrain from "requiring" or "permitting"

certain employee conduct, it makes its intent clear. Labor Code section 6402, for example, states:

> *No employer shall require, or permit* any employee to go or be in any employment or place of employment which is not safe and healthful.

(Lab. Code, § 6402, emphasis added, cited in OB, p. 39.) Similarly, Labor Code section 90.5 states:

> It is the policy of this state to vigorously enforce minimum labor standards in order to ensure that *employees are not required or permitted* to work under substandard unlawful conditions . . . .

(Lab. Code, § 90.5, emphasis added.)

Here, by contrast, section 226.7 simply mandates that "[n]o employer shall *require* any employee to work" during any meal period (Lab. Code, § 226.7, subd. (a), emphasis added), and that language means what it says: An employer may not force an employee to forego a meal period. Those words cannot logically be read to prohibit an employer from *allowing* an employee to skip or shorten an offered meal period. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ."].)

b) Plaintiffs' equally groundless construction of the Wage Order that section 226.7 purportedly incorporated

Even if section 226.7 *did* "expressly incorporate[]" the applicable Wage Order, as Plaintiffs would have it (OB, p. 44), Plaintiffs' argument still fails because the Wage Order, like section 226.7, penalizes employers

only for "fail[ing] to *provide* an employee a meal period," not for failing to *ensure* that an employee takes the meal period offered:

> (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, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. . . .
>
> (B) *If an employer fails to provide an employee a meal period* in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not *provided*.

(Regs., § 11050, subd. (11), emphasis added.)

Plaintiffs argue that the Wage Order's use of the word "provide" should not be taken at face value, but rather understood as a "shorthand way to refer" to the first paragraph, which states that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period . . . ." (Regs., § 11050, subd. (11)(A)). (OB, p. 40.) That sentence, however, is entirely consistent with the provide standard established in the following paragraph and in section 226.7. It addresses an employer's obligation not to employ anyone for more than five hours without *giving* a meal period, and says nothing to indicate that an employer must force its employees to *take* every meal period offered.

Still, Plaintiffs underscore the words "[n]o employer shall employ," arguing that they "impose a strict, affirmative duty on employers." (OB, p. 38.) The Wage Order – like section 226.7 – does impose on employers a mandatory obligation to *provide* meal periods at designated intervals, but in no way indicates that employers are also obligated to *ensure* that the provided meal periods are taken. If the Wage Order actually *did* require

employers to "ensure that work stops" during meal periods – as Plaintiffs insist (*id*., p. 28) – it would sanction employers who "allow[] employees to work" during meal periods (*id*., p. 38), instead of sanctioning only employers who "fail to provide" them (Regs., § 11050, subd. (11)(B)). The IWC, like the Legislature, must be taken at its word. (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 587.)

Indeed, when the IWC wants to "ensure" that employers take specific action, it knows exactly how to do so. The 1932 Wage Order governing the restaurant industry, for example, states:

> 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 (1/2) hour*, and provided, further, that *no woman or minor shall be permitted to work an excessive number of hours without a meal period*.

(Wage Order 18 (Dec. 4, 1931) [MJN Ex. 11], ¶ 10, emphasis added; see also Wage Order 12 (July 31, 1920) [MJN Ex. 9], ¶ 1 [requiring that employers *ensure* that women and girls are paid at least $16 a week]; Wage Order 5NS (June 28, 1943) [MJN Ex. 12], ¶ 3(a) [requiring that employers *ensure* that women and children work under conditions that meet specified standards].)

Plaintiffs also attempt to graft onto the Wage Order's meal period provision a requirement that employers "ensure that work stops" by drawing a "contrast" with the Wage Order's rest period provision. (OB, p. 37.) Curiously, they argue that the Wage Order's meal period requirement is "directive," while the rest period requirement is "permissive." (*Id.*, p. 40.) Plaintiffs' position again pays no heed to the Wage Order's plain language.

First, the Wage Order – like Labor Code section 226.7 – penalizes employers for "fail[ing] to *provide*" a rest *or* a meal period, not for failing

to "ensure" either one. (Regs., § 11050, subds. (11)(B), (12)(B), emphasis added.) If, as Plaintiffs contend, the Wage Order "create[d] two different employer compliance standards for meal periods and rest breaks" (OB, p. 38), it would punish employers who "fail to *ensure*" that their employees take provided meal periods, and employers who "fail[] to *provide*" their employees required rest breaks. It does not – it prohibits only the failure to provide meal and rest periods.

Second, the Wage Order's provision that "'*[e]very employer shall authorize and permit* all employees to take rest periods'" is not, as Plaintiffs claim, "permissive" (OB p. 37, quoting Regs., § 11050, subd. (12)(A), Plaintiffs' emphasis), but rather imposes a *mandatory* obligation on employers. Although the Wage Order's meal period provision does not use the phrase "authorize and permit," the difference is immaterial because *neither* provision creates an employer duty to *ensure* that employees take the breaks available to them. The different language is easily explained by the fact that 10-minute rest periods and 30-minute meal periods necessarily entail different degrees of effort on the employer's part. While an employer must simply "authorize and permit" brief rest periods, an employer must *make* allowance for the longer meal period. (Slip Op., p. 42 [holding that meal periods must be "*made* available"], emphasis added.)

Third, the fact that employers are required to record meal periods and not rest periods – a point repeatedly emphasized by Plaintiffs (OB, pp. 37, 49) – also has no relevance here. Because unpaid meal periods are off-the-clock, while paid rest periods are considered "hours worked" (Regs., § 11050, subds. (11)(A), (12)(A)), employers must record meal periods to maintain "accurate information with respect to each employee," including "[t]otal hours worked" (Regs., § 11050, subd. (7)(A)). The difference in the recording requirement is thus only a function of the fact that the clock stops during meal periods and continues during rest periods – it in no way

signals, as Plaintiffs suggest, that one is "mandatory" and the other "permissive." (OB, p. 40.)

Thus, while Plaintiffs try to make much of the differences between the meal and rest period Wage Order provisions, they are identical in the only way that matters: Neither provision contains language indicating that employers must *force* employees to take the breaks they provide.

2. Labor Code section 512

Section 512, subdivision (a) provides:

> 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 of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employee may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(Lab. Code, § 512, subd. (a), emphasis added.) By its plain language, section 512 thus imposes on employers only the duty to "provide" meal periods. Nothing in the statutory text even hints at an additional obligation to ensure that employees take every meal period that is offered. Plaintiffs' section 512 arguments, like their arguments as to section 226.7, are based on misconstructions of the statute's actual language.

a) Plaintiffs' attempts to circumvent the statute's plain language

Plaintiffs urge this Court to ignore the straightforward provision that "[a]n 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 . . . ." (Lab. Code, § 512, subd. (a), emphasis added), and hold instead that "[a]n employer may not employ an employee for a work period of more than five hours per day without *ensuring* that a meal period is taken." This Court, however, cannot "change [a statute's] scope by reading into it language it does not contain or by reading out of it language it does." (*Vasquez v. State* (2008) 45 Cal.4th 243, 253, citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 ["[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language."], internal quotations and citation omitted.)

Plaintiffs nevertheless contend that a rewrite is necessary to avoid an "irreconcilable conflict" with section 226.7, which purportedly "incorporates the Wage Orders' differing compliance standards into the Labor Code." (OB, p. 44.) As explained above, section 226.7 does not conflict with the Wage Order, and in any event the Wage Order does not mandate that employers ensure that their employees take the meal periods they provide. Thus, contrary to what Plaintiffs contend, this Court should not disregard the "ordinary and usual meaning" (*Fitch*, *supra*, 36 Cal.4th at p. 818) of the word "provide" in section 512 to avoid purported "disharmony" with section 226.7 (OB, p. 41), because the two statutes are entirely consistent. Both impose on an employer the obligation to *provide* a meal period (Lab. Code, § 226.7, subd. (b) [establishing penalties for meal periods that are "not provided"]; Lab. Code, § 512, subd. (a) [stating that an employer may not employ an employee for more than five hours "without providing the employee with a meal period"]), and neither compels employers to *force* employees to take the meal periods they are offered.

Plaintiffs criticize the Court of Appeal for citing the dictionary definition of the term "provide" – "'to supply or make available'" (Slip Op., p. 42, quoting Merriam-Webster's Collegiate Dictionary (11th ed.

2006), p. 1001) – arguing that this Court should avoid "blind adherence to dictionary definitions" and substitute the word "ensure" in its stead. (OB, p. 42.) But this Court commonly looks to dictionary definitions to ascertain legislative intent (e.g., *Murphy*, *supra*, 40 Cal.4th at p. 1104; *Trope v. Katz* (1995) 11 Cal.4th 274, 279-280; *People v. Anderson* (1968) 70 Cal.2d 15, 26), and Plaintiffs cite no case in which this Court rejected a dictionary definition in favor of a completely distinct and unrelated word that finds no mention in the statute.

In fact, in two cases on which Plaintiffs rely (OB, pp. 42-43), this Court refused a party's cited dictionary definitions in favor of *different* dictionary definitions of the same word. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 808 [rejecting "dictionary definitions of 'custodian' that connote a legal or official caretaking function" in favor of a more "general" definition of custodian as "'[o]ne who has care or custody'"], quoting Webster's New International Dictionary (2d ed. 1958), p. 650; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 53-54 & fn. 4 [rejecting cited dictionary definitions of the word "special" in favor of the "first definition" of the word in the same dictionaries].) Here, of course, Plaintiffs are not proposing different definitions of the word "provide," but rather are asking that this Court insert the word "force" or "ensure" in its place. This Court should decline Plaintiffs' unprecedented invitation.[7]

b) Plaintiffs' misplaced reliance on section 512's waiver provisions

While Plaintiffs are correct that the employer's duty to provide a meal period may be waived "only in certain circumstances" specified in section 512 (OB, p. 45), nothing in the Labor Code prevents an employee

[7] In the third case cited by Plaintiffs, *State v. Altus Finance, S.A.* (2005) 36 Cal.4th 1284, this Court rejected the proposed dictionary definitions of the verb "to issue" because they did not resolve the meaning of the statutory phrase "issued *from*." (*Id.* at p. 1286, emphasis added.)

from skipping or shortening a provided meal period. (*Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 645 [holding that "waiver" under section 512 "applies to the employer's obligation to 'provide' a meal break, not to the employee's decision to take a meal break"]; *Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 533 [same].)

Contrary to what Plaintiffs argue, Brinker is not asking this Court to carve out additional "waiver" provisions (OB, p. 45), or to hold that "all meal periods are waivable" within the meaning of section 512 (*id.*, p. 46). Rather, it is asking this Court only to "ascertain and declare what the statute contains" (*Vasquez*, *supra*, 45 Cal.4th at p. 253): a mandate that employers provide, not ensure, meal periods at designated intervals except under specified circumstances.[8]

Section 512's waiver provisions make practical sense. An employee might choose to skip or shorten a meal period on a regular basis to accommodate a school schedule, a second job, or a family commitment. As a result of a mutual agreement to waive the meal period, the employee would have a schedule that fits his or her needs, and the employer would be relieved of the obligation to make meal periods available.

It is also perfectly logical why – as Plaintiffs underscore (OB, pp. 48-49) – the Wage Order's rest period provision contains no comparable waiver provisions. Rest periods, as opposed to meal periods, are considered "hours worked, from which there [is] no deduction from

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[8] Contrary to what Plaintiffs suggest (OB, pp. 49-50, 76-77), the issue before this Court is *not* whether employees may, under Civil Code section 3513, waive the Labor Code's meal period provisions in their entirety. Rather, the issue is how an employer's statutory meal period obligation should be defined, and whether that obligation entails forcing employees to take every meal period that is provided. How and when an employer's obligation may be waived under section 512 is not an issue before this Court.

wages." (Regs., § 11050, subd. (12)(A).) As a result, an employee cannot decline a rest period and leave a shift 10 minutes early. While an employee busy with a customer might decide to postpone or skip a particular rest period, there is no incentive for that employee to enter into an agreement with his or her employer to waive his or her rest periods. Likewise, because rest periods are significantly shorter than meal periods and require considerably less effort on the employer's part, there is no real need for waiver provisions to relieve that employer obligation.

In the end, all Plaintiffs are left with is their plea that sections 226.7 and 512 be "liberally construed with an eye to protecting employees." (OB, p. 35, quoting *Murphy*, *supra*, 40 Cal.4th at p. 1111; see also *id*., p. 71.) It is well-established, however, that "[a] mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language." (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 645, citing *Williams v. MacFrugal's Bargains-Close-Outs* (1998) 67 Cal.App.4th 479, 484 ["Courts must take a statute as they find it, and if its operation results in inequality or hardship in some cases, the remedy therefore lies with the legislative authority."], internal quotations and citation omitted.) The plain language of sections 226.7 and 512 cannot be jettisoned in favor of an "ensure" standard that finds no support in either statute or the Wage Order.

B. In Enacting Sections 226.7 And 512, The Legislature Deliberately Established A Provide, Not An Ensure, Standard.

"Although the plain language of the statute[] dictates the result here, legislative history provides additional authority." (*Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 697; see also, e.g., *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 516 ["The legislative

history . . . confirms what the language [of the statute] itself states . . . ."].) The legislative history of Labor Code sections 226.7 and 512 forcefully confirms that the Legislature intended to impose on employers the obligation to provide meal periods, not to ensure that they are taken.

1. Section 226.7's legislative history

Section 226.7's history reflects the Legislature's intent to penalize employers who "*require*" employees to work during meal periods. (See, e.g., Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as introduced Feb. 24, 2000, § 12 [stating that an employee would be paid an "amount equal to twice [the employee's] average hourly rate of compensation for the full length of the meal or rest periods during which the employee was *required* to perform any work"], emphasis added, attached as Exhibit 1 to Brinker's April 29, 2009 Motion for Judicial Notice ("Brinker's MJN"); Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended June 26, 2000, p. 5 ["This bill prohibits employers from *requiring* any employee to work during any meal or rest period mandated by an applicable IWC Order."], emphasis added, attached to Reply to Return to Order to Show Cause; Sen. Judiciary Com., Analysis of Assem. Bill No. 2509 (1999-2000 Reg. Sess.) as amended August 7, 2000, pp. 6-7 ["This bill would make any employer that *requires* any employee to work during a meal or rest period mandated by an order of the commission subject to a civil penalty . . . ."], emphasis added, attached to Reply to Return to Order to Show Cause.)[9]

[9] Indeed, a bill introduced in 2003 that would have amended section 226.7 to state that "[n]o employer shall require *or permit* any employee to work during any meal or rest period," and that an employer's obligation to provide meal and rest periods "does not require an employee to *assent* to the provision of meal and rest periods" (Sen. Amend. to Assem. Bill No. 1723 (2003-2004 Reg. Sess.) Sept. 8, 2003, emphasis added, attached as Exhibit 2 to Brinker's MJN) was never passed. "While only limited

Tellingly, nothing in section 226.7's legislative history indicates any effort to distinguish between meal and rest periods. If Plaintiffs were correct that the Legislature intended "to codify the Wage Orders' two differing compliance standards" (OB, p. 59), then surely something in the statute's voluminous history would indicate that. Instead, the Legislature spoke of meal and rest periods indistinguishably (see, e.g., Assem. Bill No. 2509 as introduced Feb. 24, 2000, *supra*, § 12; Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 2509, *supra*, p. 5; Sen. Judiciary Com., Analysis of Assem. Bill No. 2509, *supra*, pp. 6-7), making Plaintiffs' theory that the Legislature codified two different "compliance standards" untenable.

At bottom, Plaintiffs point to nothing in section 226.7's history indicating that the Legislature intended to institute an ensure standard. To the contrary, the one document they cite from section 226.7's lengthy history fully supports Brinker's position that meal periods, like rest periods, must be "provide[d]," not ensured. (OB, p. 59, quoting AB 2509, Third Reading, Senate Floor Bill Analysis (Aug. 28, 2000) [MJN Ex. 61], p. 4 [Section 226.7 "places into statute the existing provisions of the Industrial Welfare Commission requiring employers to *provide* a 10-minute rest period for every four hours and a 30-minute meal period every five hours."], emphasis added.)

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inferences can be drawn from bills that the Legislature failed to enact," the defeat of the 2003 bill "provides additional corroboration" that the Legislature did not – and did not intend to – impose an ensure standard with respect to meal periods when it enacted section 226.7. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795; see also *Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961, 968-969.)

2. Section 512's legislative history

The section 512 legislative history that Plaintiffs cite also supports a provide standard. When it enacted section 512, the Legislature recognized that "[e]xisting wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours per day without *providing* the employee with a meal period . . . ." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, cited in OB, p. 60, emphasis added.)

Plaintiffs again advance their argument that the word "provide" should be ignored – in the legislative history of sections 512 and 226.7, in both statutes' plain language, and in the second paragraph of the Wage Order's meal period provision – because the first paragraph of the Wage Order's meal period provision states that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period[.]" (Regs., § 11050, subd. (11)(A)). (OB, p. 60.) The problem with Plaintiffs' argument, as discussed above, is that even that language is entirely consistent with a provide standard, and nothing in the Wage Order supports an ensure standard.

But even if the Wage Order's language were susceptible to a different interpretation – and it is not – the determinative factor here is what the Legislature understood when it enacted sections 226.7 and 512. *All* the legislative history before this Court compels the conclusion that when the Legislature enacted those statutes, it intended to establish a rule that employers need only provide meal periods to their employees.[10]

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[10] Although Plaintiffs contend that AB 60 "was enacted to reverse a regulatory attempt, and forestall future attempts, to diminish workers' rights," the authority on which they rely mentions only the Legislature's response to the IWC's elimination of daily overtime rules – not meal or rest periods. (OB, pp. 61-62, citing *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 434 and *Collins v. Overnite Transp. Co.* (2003) 105

Finally, Plaintiffs point to a 2005 Assembly Concurrent Resolution responding to the DLSE's 2004 proposed regulations stating – among other things – that an employer is deemed to have "provided" a meal period within the meaning of section 512 if it "'[m]akes the meal period available to the employee and affords the opportunity to take it.'" (OB, p. 60, quoting *Cornn v. United Parcel Service, Inc.* (N.D.Cal., Mar. 14, 2005, No. C03-2001) 2005 WL 588431, *4 [quoting Proposed Regulation § 13700(b)(1)].) Although the Concurrent Resolution denounced the proposed regulations, claiming that they would "diminish long-standing protections . . . concerning the provision of meal and rest periods to employees" and that they were "inconsistent with existing law," the Assembly never specified *how* long-standing protections would be diminished, or what aspects of the proposed regulations were inconsistent with existing law. In fact, the 2004 proposed regulations addressed a number of meal and rest period issues – including whether section 226.7's extra hour of pay is a wage or a penalty – and the Assembly's understanding of the meal period compliance issue is entirely consistent with that of the Court of Appeal: "[T]he employer [must] *provide* a meal break to all employees within the first five hours of work unless a statutory waiver is entered into between the employer and the employee." (Assembly Concurrent Resolution No. 43 (July 18, 2005) [MJN Ex. 69], p. 2, emphasis added.)

In any event, the Concurrent Resolution is not law, only the opinion of one house of the Legislature about the meaning of sections 226.7 and 512. (*American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 709, fn.

Cal.App.4th 171, 176.) But even if the Legislature's overall purpose was to forestall *future* attempts to diminish meal and rest periods, that in no way advances Plaintiffs' claim that the Legislature intended to adopt a rule requiring that employers force their employees to take all provided meal periods.

20.) Moreover, this Court has made clear that not even the entire Legislature has authority to interpret an earlier statute:

> [A] legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. [Citations.] Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment . . . .

(*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 250; see also *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 ["The Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean."], original emphasis.)

In sum, the legislative history of sections 226.7 and 512 confirms what their plain language makes eminently clear: Employers are obligated to provide meal periods, but have no duty to ensure that they are taken.

C. Since The Effective Date Of Section 512, The IWC's Wage Orders Have Been Entirely Consistent With A Provide Standard.

Since January 2000, when section 512 took effect, the IWC has consistently embraced the Legislature's standard that employers need only "provide" their employees meal periods. (Lab. Code, § 512, subd. (a).)

1. The IWC's explicit incorporation of a provide standard in June 2000

In June 2000, only six months after section 512's effective date, the IWC amended the Wage Order's meal period provision to add a penalty

that expressly incorporates the word "provide." (OB, p. 63 & fn. 41.) As discussed above, the second paragraph of the Wage Order's meal period provision states:

> If an employer fails to *provide* an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour pay at the employee's regular rate of compensation for each workday that the meal period is not *provided*.

(Regs., § 11050, subd. (11)(B), emphasis added.)

Simultaneously, the IWC amended the Wage Order's rest period provision to include a penalty using the same "provide" language. (Regs., § 11050, subd. (12)(B) ["If an employer fails to *provide* an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour pay at the employee's regular rate of compensation for each workday that the rest period is not *provided*."], emphasis added.) Together, the June 2000 amendments to the Wage Order signal the IWC's understanding that neither meal periods nor rest periods need be ensured.

At the June 30, 2000 hearing at which the IWC adopted the "hour of pay" penalty, IWC Commissioner Barry Broad explained that "it was needed to help force employers to *provide*" – not ensure – meal and rest periods. (*Murphy*, *supra*, 40 Cal.4th at p. 1110, citing Transcript, IWC Public Hearing (June 30, 2000) ("June 30, 2000 IWC Hearing Transcript"), pp. 25-26, 30, emphasis added.) Commissioner Broad elaborated:

> 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 . . . .

(*Ibid*., quoting June 30, 2000 IWC Hearing Transcript, p. 30.)

When asked at the hearing if employees would receive an additional hour of pay if they "*missed*" their meal periods, Commissioner Broad responded:

> If your employer did not *let* you have your meal period, I think, is what it says. So it's – it doesn't involve, you know, waivers of a meal period or time off or anything of that sort.

(June 30, 2000 IWC Hearing Transcript, p. 26, attached as Exhibit 3 to Brinker's MJN, emphasis added; see also *id*., pp. 25-26 ["[T]here really is no incentive . . . for employers to ensure that people are given their rights to a meal period and a rest period . . . . And what I wanted to do, and I'd to [sic] sort of amend the language that's in there to make it clearer, that what it would require is that on any day that an employer does not *provide* a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour – one additional hour of pay . . . ."].)[11]

2. Plaintiffs' irrelevant arguments regarding a 1979 amendment to a wage order governing agricultural workers

Faced with certain evidence that both the IWC and the Legislature have unequivocally endorsed a rule that employers need only provide meal periods, Plaintiffs point to a 1979 amendment to a wage order governing agricultural workers. (OB, pp. 51-53.) Plaintiffs claim that because the

[11] Plaintiffs emphasize that the Statement as to the Basis for the IWC's 2000 Amendments and the IWC's official summary of the March 2000 Interim Wage Order state that employees "must *receive* a 30-minute meal period." (OB, pp. 53-54, emphasis added.) That language, however, is entirely consistent with the opinion below and the Legislature's rule that employees must receive – but need not take – every meal period. As the Statement as to the Basis for the 2000 Amendments explains, the IWC "added a provision . . . requir[ing] an employer to pay an employee one additional hour of pay . . . for each work day that a meal period is not *provided*." (IWC Statement as to the Basis for 2000 Amendments (Jan. 1, 2001) [MJN Ex. 32], p. 20, emphasis added.)

IWC imported the "authorize and permit" language of Wage Order 14's rest period provision into the meal period provision as to agricultural workers, the original meal period language must have been intended to force employees to take every provided meal. (*Ibid*.) Nothing indicates, however, that Wage Order 14's pre-amendment meal period provision required employers to *ensure* that all offered meal periods were taken.[12]

But even if this Court were to infer – from the slender reed of a hearing transcript discussing the amendment – that the IWC two decades ago interpreted the language "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period . . ." (Regs., § 11050, subd. (11)(A)) to mean that employers must ensure their employees' meal periods are taken, all that matters is how the Legislature interpreted that same language when it "codified" it in 2000. (OB, p. 60.) As discussed above, the Legislature's clear understanding was that "[e]xisting wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours per day without *providing* the employee with a meal period . . . ." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, cited in OB, p. 60, emphasis added), and it ultimately enacted a statute that uses the word "provide" (Lab. Code, § 512, subd. (a)). The Legislature thus enacted a statute adding the missing verb – "provide" – not ensure. (Compare Lab. Code, § 512, subd. (a) with Regs., § 11050, subd. (11)(A) ["No employer shall employ any person for a work period of more than five (5) hours without a meal period . . ."].)

The IWC then proceeded to amend the Wage Order to include the word "provide" (Regs., § 11050, subd. (11)(B)), and it was *that* Wage

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[12] As discussed in section I.A.1.b, above, when the IWC wanted to "ensure" that restaurant industry employees took their meal periods, it explicitly said so. (Wage Order 18 (Dec. 4, 1931) [MJN Ex. 11], ¶ 10.)

Order that section 226.7 referenced when it was enacted in September 2000. (Lab. Code, § 226.7, subd. (a) ["No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission."].)

The notion that this Court should ignore the plain language of the statutes, which state that an employer must *provide* a meal period (Lab. Code, § 226.7, subd. (b); Lab. Code, § 512, subd. (a)), as well as the legislative history confirming that a provide standard was intended, and base its statutory interpretation instead on an inference that might be drawn from the IWC's 1979 amendment of a wage order applicable to agricultural workers is completely backward. "As in any case involving statutory interpretation, [this Court's] fundamental task is to determine the Legislature's intent as to effectuate the law's purpose." (*People v. Cole* (2006) 38 Cal.4th 964, 975, internal quotations and citation omitted.) The statutory language and legislative history before this Court leave no room for doubt that the Legislature intended for employers to provide – not ensure – their employees meal periods.[13]

3. Section 516's preclusion of an ensure standard

Moreover, even if the *current* Wage Order with its "provide" language could be interpreted to require employers to ensure meal periods – which it cannot – it would be invalid. Labor Code section 516, as amended in 2000, provides that IWC wage orders must be consistent with section

[13] Plaintiffs also highlight a 1997 amendment to Wage Order 5-89 allowing certain employees working more than eight hours a day "'to voluntarily waive their right to a meal period.'" (OB, p. 53, quoting Wage Order 5-98(11)(C) [MJN Ex. 20].) That employees always have the "freedom to choose" whether to take a meal period does not render Wage Order 5-89's waiver provisions "meaningless and unneeded," as Plaintiffs contend. (OB, p. 53.) As explained in section I.A.2.b, above, all that is waived is an employer's statutory duty to *provide* a meal period; an employee's ability to skip or shorten the meal period is constant.

512. (Lab. Code, § 516 ["*Except as provided in Section 512*, the Industrial Welfare Commission may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers."], emphasis added; see also *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 438 [holding that the IWC is not authorized "to enact wage orders inconsistent with the language of section 512"].)[14]

Plaintiffs respond that because section 226.7 was passed after section 512 and references "applicable order[s]" of the IWC, the Legislature "could not have . . . intended to eliminate the Wage Orders as a source of California meal period obligations." (OB, p. 64.) No one has maintained that it did. All the *Brinker* court held is that "*to the extent*" a wage order "is inconsistent with section 512, it is invalid." (Slip Op., p. 40, emphasis added.) As discussed, the Wage Order, particularly as amended in 2000 to include the word "provide," is completely consistent with section 512. Plaintiffs are the only ones arguing otherwise, and it is their misinterpretation – not the Wage Order itself – that is barred by section 516.

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[14] As the Court of Appeal explained, section 516's legislative history confirms that the statute was intended to "'prohibit the [IWC] from adopting a working condition order that conflicts with [section 512(a)'s] 30-minute meal period requirements.'" (Slip Op., p. 39, quoting Legis. Counsel's Dig., Sen. Bill No. 88 (1999-2000 Reg. Sess.), Stats. 2000, ch. 492 [MJN Ex. 63]; see also *ibid*., quoting Ralph Lightstone, 3d Reading Analysis of Sen. Bill No. 88 (1999-2000 Reg. Sess.) as amended June 29, 2000, p. 5 ["'This bill clarifies two provisions of the Labor Code enacted in Chapter 134. Labor Code Section 512 codifies the duty of an employer to provide employees with meal periods. Labor Code Section 516 establishes the authority of IWC to adopt or amend working condition orders with respect to break periods, meal periods, and days of rest. *This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512*.'"], emphasis added by Court of Appeal.)

D. The DLSE's Vacillating Position On An Issue Of Pure Statutory Interpretation Deserves No Deference.

An agency's interpretation of a statute is "'not binding or . . . . authoritative,'" and "the weight accorded to an agency's interpretation is 'fundamentally situational.'" (*Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1264, quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8, 12.) The DLSE's vacillating position on whether employers must provide or ensure their employees meal periods – a straightforward issue of statutory construction – warrants no deference.

First, as Plaintiffs themselves recognize (OB, pp. 56-58), the DLSE's stance on the meal period compliance issue has been anything but consistent. A 1991 opinion letter states that an employer satisfies the obligation to provide a meal period

> *[s]o long as the employer authorizes the lunch period within the prescribed period* and the employee has a *reasonable opportunity* to take the full thirty-minute meal period free of any duty.

(DLSE Opinion Letter No. 1991.06.03 [MJN Ex. 35], p. 1, emphasis added.) Another DLSE opinion letter from around the same time is consistent with a provide standard, maintaining that "unless employees are relieved of all duties and are free to leave the premises, the meal period is considered as 'hours worked.'" (DLSE Opinion Letter No. 1988.01.05 [MJN Ex. 34].)

Some 10 years later, the DLSE issued several letters indicating its changed position that an employer has the duty to ensure that its employees are "*not performing any work*" during meal periods. (DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 4, emphasis added; see also DLSE Opinion Letter No. 2002.01.28 [MJN Ex. 41], p. 1 [same]; DLSE Opinion

Letter No. 2002.09.04 [MJN Ex. 43], p. 2 ["[A]s a general rule the required meal period must be an off-duty meal period, during which time the employee . . . is not suffered or permitted to work . . . ."].)[15]

Recently, however, the DLSE reverted to its original position that meal periods need only be provided, not ensured. Its most recent statement on the subject maintains:

> Taken together, the language of the statute and the regulation, and the cases interpreting them demonstrates compelling support for the position that employers must provide meal periods to employees but do not have an additional obligation to ensure that such meal periods are actually taken.

(Memo to DLSE Staff re: Court Rulings on Meal Periods (Oct. 23, 2008) [MJN Ex. 57], p. 2.)

In deciding whether judicial deference to an agency's interpretation is appropriate, this Court looks to indications that "the agency's interpretation is likely to be correct" – specifically, "evidence that the agency has consistently maintained the interpretation in question." (*Yamaha*, *supra*, 19 Cal.4th at p. 13, internal quotations and citation omitted.)[16] "A vacillating position" – which best describes the DLSE's

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[15] The DLSE lawyer who wrote the September 4, 2002 opinion letter on which Plaintiffs rely, Miles Locker, argued as a private attorney on Plaintiffs' behalf before the Court of Appeal in this case. (Slip Op., p. 2.)

[16] This Court also considers "indications of careful consideration by senior agency officials," with the understanding that "an interpretation of a statute contained in a regulation adopted after public notice and comment is more deserving of deference than [one] contained in an advice letter prepared by a single staff member." (*Yamaha*, *supra*, 19 Cal.4th at p. 13, internal quotations and citation omitted.) The DLSE letters that Plaintiffs urge this Court to follow were "prepared by a single staff member" and were not subject to "public notice and comment."

stance on the provide v. ensure issue – "is entitled to no deference." (*Ibid*., internal quotations and citation omitted.)[17]

Deference is also unwarranted because the 2001 and 2002 opinion letters adopting an ensure standard never mention governing Labor Code sections 226.7 and 512. (*Cole, supra*, 38 Cal.4th at p. 987 [holding that "deference is unwarranted here" partly because none of the documents reflecting the agency's statutory interpretation "discusses the relevant statutory language"].)

This Court, moreover, is "less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation." (*Bonnell*, *supra*, 31 Cal.4th at p. 1265, citing *Yamaha*, *supra*, 19 Cal.4th at p. 12; see also *Cole*, *supra*, 38 Cal.4th at p. 987.) Indeed, there is no reason here to believe that the DLSE has a "comparative interpretative advantage over the courts." (*Yamaha*, *supra*, 19 Cal.4th at p. 12; see also *Cole*, *supra*, 38 Cal.4th at p. 987.) "Statutory language is not something where the materials are technical and engage an agency's expertise." (*State Bldg. and Constr. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 304, internal quotations and citations omitted.) "To the contrary, it is the judiciary which has the ultimate authority for determining the meaning of a statute." (*Ibid*., citing *Yamaha*, *supra*, 19 Cal.4th at pp. 11-12.)

Finally, this Court should pay no heed to the DLSE opinion letters that Plaintiffs champion because they are "incorrect in light of the

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[17] While Plaintiffs contend that this Court should disregard the DLSE's *current* position because it contradicts "the agency's *original* enforcement position" (OB, pp. 57-58, emphasis added), their argument ignores the fact that the DLSE's "original" 1991 position embraced a provide standard. (DLSE Opinion Letter No. 1991.06.03 [MJN Ex. 35], p. 1.)

unambiguous language of the statute[s]" governing meal periods in California – Labor Code sections 226.7 and 512. (*Bonnell*, *supra*, 31 Cal.4th at p. 1265.) This Court "do[es] not accord deference to an interpretation that is 'clearly erroneous.'" (*Ibid*., quoting *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309.)

E. This Court's Opinion In *Murphy* Fully Supports A Provide Standard.

This Court's opinion in *Murphy v. Kenneth Cole Prods.* confirms that the statutory obligation to provide a meal period means guaranteeing employees "the *right* to be free of the employer's control during the meal period" (*Murphy*, *supra*, 40 Cal.4th at p. 1104, emphasis added) – not ensuring that all employees avail themselves of that opportunity. Repeatedly, this Court emphasized that employer liability under Labor Code section 226.7 is triggered not when employees voluntarily skip or shorten the breaks they are offered, but rather only when employees are "*required to work*" through or "*forced to forgo*" meal periods. (*Ibid*., emphasis added; see also *id.* at p. 1108 ["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."], emphasis added; *id.* at p. 1113 [describing "the noneconomic injuries employees suffer from being *forced to work* through rest and meal periods"], emphasis added; *ibid.* ["[B]eing *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."], emphasis added.)

Murphy also undermines Plaintiffs' claim that there are "two differing compliance standards" for meal and rest periods. (OB, p. 59.) While Plaintiffs contend that the meal period obligation is "directive" and the rest period obligation "permissive" (*ibid*.), this Court repeatedly described an employer's obligation with respect to meal and rest periods in

identical terms. (*Murphy*, *supra*, 40 Cal.4th at p. 1104 ["Section 226.7, subdivision (b) requires that employees be paid 'one additional hour of pay' for each work day that they are required to work through a meal *or* rest period."], emphasis added; *id.* at p. 1108 ["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 meal *or* rest period."], emphasis added; see also *id.* at p. 1113 [discussing the "noneconomic injuries employees suffer from being forced to work through rest *and* meal periods"], emphasis added; *ibid.* ["[B]eing 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."], emphasis added.)

Isolating individual words out of context, Plaintiffs insist that this Court held that meal periods are "'required,'" "'mandated,'" and "'mandatory.'" (OB, p. 70, quoting *Murphy*, *supra*, 40 Cal.4th at pp. 1106, 1111, 1113.) What Plaintiffs neglect to mention, however, is that each time this Court used those words, it was *also* referring to rest periods (*Murphy*, *supra*, 40 Cal.4th at pp. 1102, 1105, 1106, 1113) – which even Plaintiffs do not argue must be ensured (OB, p. 38). Clearly, this Court was describing an employer's mandatory obligation to *provide* meal and rest periods – not an obligation to *ensure* that they are taken. (E.g., *Murphy*, *supra*, 40 Cal.4th at p. 1105 ["[T]he IWC issued wage orders *mandating the provision* of meal and rest periods . . . ."], emphasis added.) Nothing in *Murphy* suggests that employers must force employees to take the meal periods they provide.

Plaintiffs next contend that the facts of *Murphy* somehow support their ensure standard. In *Murphy*, however, the store that plaintiff managed was insufficiently staffed and plaintiff "was only able to take an uninterrupted, duty-free meal period approximately once every two weeks."

(*Murphy*, *supra*, 40 Cal.4th at p. 1100.) The *Murphy* employer thus failed to make meals *available* to his employee, and the decision to hold it liable under those facts is entirely consistent with the Court of Appeal's opinion in *Brinker*. Indeed, the *Brinker* court held that the obligation to "provide" meal periods means that "employers cannot *impede, discourage or dissuade* employees from taking [them]." (Slip Op., p. 4, emphasis added.) That the *Murphy* employer "impede[d]" its employee from taking meal periods in no way implies that an employer who actually provides its employees with meal periods must also ensure that they are taken.[18]

Finally, Plaintiffs insist that *Murphy* is consistent with an ensure standard because it holds that employers can defend against meal period claims with the time records they are required to maintain for at least three years. (OB, p. 71, quoting *Murphy*, *supra*, 40 Cal.4th at p. 1114.) In *Murphy*, the one employee claiming to have been denied meal periods worked seven days a week and "was only able to take" a meal period "approximately once every two weeks." (*Murphy*, *supra*, 40 Cal.4th at p. 1100.) That an employee misses 13 out of 14 meal periods is some evidence that meal periods were not *provided*. *Murphy*, however, does *not* hold that *every* unrecorded meal period "proves a violation." (OB, p. 71.)

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[18] Although Plaintiffs claim that "Brinker, like the *Murphy* employer, failed to provide adequate staff, causing employees to miss their meal periods and belying company policy that purportedly 'allows' them" (OB, p. 71), they have presented no evidence of a common policy or practice of impeding meal periods. In fact, one of the named Plaintiffs testified that at the restaurant where he worked, there were "breakers" assigned to relieve employees during their meal periods (20PE 5478, 5487-5490; see also 4PE 932-933), and a number of Brinker managers testified that their restaurants had meal period compliance systems (Slip Op., pp. 15-17). As discussed in section IV.B below, whether a given shift at any one of Brinker's 137 California restaurants was so insufficiently staffed on a particular day as to preclude a meal period is a quintessentially individual question defying class treatment.

Instead, the Court's remark concerning the evidentiary significance of meal period records is limited by the facts before it. (E.g., *Elsner v. Uveges* (2004) 34 Cal.4th 915, 933 ["The holding of a case is coextensive with its particular facts."].)

Murphy, in short, offers no support for Plaintiffs' ensure standard, and gives every indication that the *Brinker* court's straightforward reading of the governing statutes is correct.

F. Every Other Appellate And Federal Court In California To Decide The Issue Has Recognized, As The *Brinker* Court Did, That An Employer Need Only Provide Meal Periods, Not Ensure That They Are Taken.

1. *Cicairos* is entirely consistent with a provide standard.

In *Cicairos v. Summit Logistics, Inc*., five truck drivers sued their former employer for violating, among other things, the Labor Code and applicable wage order provisions relating to meal periods. The trial court granted the employer's motion for summary judgment; the Third District reversed. (*Cicairos*, *supra*, 133 Cal.App.4th at pp. 962-963.)

The evidence in *Cicairos* showed that although the employer closely regulated its drivers' minute-by-minute activities with an on-board computer system, it "did not schedule meal periods, include an activity code for them, or monitor compliance." (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962.) Indeed, the employer did not even record its employees' meal periods; it simply "assumed" that meal periods were taken. (*Id.* at pp. 962-963, emphasis added.) Worse yet, the employer actively discouraged meal periods by "pressur[ing] drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." (*Id.* at p. 962.) As a result, "most drivers ate their meals while driving or else skipped a meal nearly every working day." (*Ibid*.) On those facts, the Court of Appeal held that

the employer had not satisfied "its obligation to *provide* the plaintiffs with an adequate meal period." (*Ibid*, emphasis added.)

Cicairos is entirely consistent with both *Murphy* and *Brinker*. Indeed, its conclusion that employers "have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" and cannot simply "assum[e] that the meal periods were taken" (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962, quoting DLSE Opinion Letter No. 2002.01.28, p. 1), supports *Brinker*'s holding that an employer's statutory obligation to provide meal periods is active, not passive. As the *Brinker* court put it, an employer has the responsibility "to supply or *make available*" meal periods (Slip Op., p. 42, internal quotations and citations omitted, original emphasis) – meal periods are not, as the *Cicairos* employer argued, the "sole responsibility of the [employees]" (*Cicairos*, *supra*, 133 Cal.App.4th at p. 963). Under both cases, an employer may not "impede, discourage or dissuade employees from taking meal periods" (Slip Op., p. 4) or otherwise engage in conduct that would "mak[e] [employees] feel that they should not stop for lunch" (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962).

Plaintiffs claim *Cicairos* held that the employer had to "*ensure that the drivers stopped working* (i.e., were relieved of all work duties) for the required thirty minutes" (OB, pp. 66-67), but *Cicairos* held no such thing. When it stated that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962, quoting DLSE Opinion Letter No. 2002.01.28, p. 1), the Court of Appeal was describing an employer's obligation to provide its employees the opportunity to take a work-free meal period – not an employer's duty to force its employees to "stop[] working" (OB, p. 67).

Plaintiffs also mischaracterize *Cicairos* by insisting that it specified the affirmative steps that all employers must take: "recording actual meal periods; scheduling them; and monitoring them to ensure they are taken."

(OB, p. 69.) While Plaintiffs are correct that employers are required to record meal periods, *Cicairos* does not hold that an employer must schedule and monitor meal periods in order to satisfy its statutory obligation to provide them. The *Cicairos* employer's failure to schedule or monitor meal periods was significant largely because it regulated every other aspect of its drivers' activities, including speed, starts, stops, time, road construction and heavy traffic. (*Cicairos*, *supra*, 133 Cal.App.3d at p. 962.)

In fact, a duty-free meal period can be provided without formal scheduling or monitoring. (See, e.g., *Perez v. Safety-Kleen Systems, Inc.* (N.D.Cal. 2008) 253 F.R.D 508, 515 ["Plaintiffs cite no authority . . . for the proposition that an employer is required to schedule meal breaks for its employees . . . ."]; *Kenny*, *supra*, 252 F.R.D. at p. 646 [finding "no support in the statute or the caselaw" for plaintiffs' argument that an employer is required to "affirmatively schedule meal breaks"].) *Cicairos* stands only for the proposition that an employer cannot sit passively by and "assume" that meal periods are being taken (*Cicairos*, *supra*, 133 Cal.App.4th at p. 962) – rather, as *Brinker* held, it must *make* them available (Slip Op., p. 42).

2. Nine federal courts have recognized that employers need only provide their employees meal periods, and no federal court has adopted the ensure standard proposed by Plaintiffs.

Nine federal courts have held, as the *Brinker* court did, that California employers need only provide meal periods, and need not guarantee that the provided meals are taken:[19]

- *Wren v. RGIS Inventory Specialists* (N.D.Cal., Feb. 6, 2009, No. C-06-5778) 2009 WL 301819, *29 [Spero, M.J.] [stating

[19] Although not binding, this Court considers the decisions of federal courts interpreting California law persuasive authority. (*Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 299.)

that "under California law an employer must offer meal breaks but is not required to force employees to take them"];

- *Watson-Smith v. Spherion Pacific Workforce, LLC* (N.D.Cal., Dec. 12, 2008, No. C 07-05774) 2008 WL 5221084, *3 [White, J.] [holding that "employers have an obligation to *provide* meal breaks, but are not strictly liable for any employee who fails to take a meal break, regardless of the reason"], original emphasis;
- *Kimoto v. McDonald's Corps.* (C.D.Cal., Aug. 19, 2008, No. CV 06-3032) 2008 WL 4690536, *4-6 [Gutierrez, J.] [holding that employers need only provide, not ensure, their employees meal and rest periods];
- *Gabriella v. Wells Fargo Financial, Inc.* (N.D.Cal., Aug. 4, 2008, No. C06-4347) 2008 WL 3200190, *3 [Illston, J.] [agreeing with defendants that "employers are only required to provide meal and rest periods, not to ensure that such breaks are actually taken"];
- *Perez*, *supra*, 253 F.R.D at p. 515 [Hamilton, J.] [holding that "while employers cannot impede, discourage or prohibit employees from taking meal breaks, they need only make them available, not ensure they are taken"];
- *Salazar*, *supra*, 251 F.R.D. at p. 534 [Gonzalez, C.J.] [holding that "plaintiffs must show defendants *forced* plaintiffs to forego missed meal periods"], original emphasis;
- *Kenny*, *supra*, 252 F.R.D. at p. 646 [Breyer, J.] [holding that the Labor Code "does not require an employer to ensure that an employee take a meal break," and that "an employer is not liable for 'failing to provide a meal break' simply because the

evidence demonstrates that the employee did not actually take a full 30-minute break"];

- *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 585 [Fischer, J.] [holding that neither the Labor Code nor the Wage Order "supports Plaintiffs' position that Defendant was required to ensure that Plaintiffs took meal breaks"];
- *White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1089 [Walker, C.J.] [holding that the statutory term "provide" in sections 226.7 and 512 "demonstrates that the California Legislature intended only for employers to offer meal periods – not to ensure that those meal periods were actually taken"].

Not a single federal case has gone the other way.[20]

Several of the federal decisions cited above relied on language in *Murphy* indicating that employers are liable under the Labor Code only when they "require" or "force" their employees to forego meal periods – not when they allow them to skip a meal. (*Watson-Smith*, *supra*, 2008 WL

[20] One federal court in the Eastern District of California recently stated that it "strongly suspects" that the Wage Order's "'no employer shall employ . . .' language imposes an affirmative duty on an employer to ensure that meal periods are taken." (*Robles v. Sunview Vineyards of California, Inc.* (E.D.Cal., Mar. 31, 2009, No. CIV-F-06-0288) 2009 WL 900731, *8, fn. 3; *Valenzuela v. Giumarra Vineyards Corp.* (E.D.Cal., Mar. 31, 2009, No. CIV-F-05-1600) 2009 WL 900735, *8, fn. 3 [related case]; *Doe v. D.M. Camp & Sons* (E.D.Cal., Mar. 31, 2009, No. CIV-F-05-1417) 2009 WL 921442, 921444, 921445, 921446, 921498, *8, fn. 2 [related case].) That language, however, was pure dicta, and not part of the court's holding. (*Id.* at *8 ["The court agrees that under the applicable meal period regulations, employers are required at 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 need not be answered."].)

5221084 at *2-3; *Perez*, *supra*, 253 F.R.D. at pp. 513-514; *Salazar*, *supra*, 251 F.R.D at p. 533; *Brown*, *supra*, 249 F.R.D. at p. 585.)

A number also held – as the *Brinker* court did (Slip Op., p. 47) – that *Cicairos* is entirely consistent with a rule that employers need only provide – not ensure – their employees' meal periods. (*Wren*, *supra*, 2009 WL 301819 at *29; *Watson-Smith v. Spherion Pacific Workforce LLC* (N.D.Cal., Feb. 20, 2009, No. C 07-05774) 2009 WL 426122, *2, fn. 1; *Watson-Smith*, *supra*, 2008 WL 5221084 at *3; *Perez*, *supra*, 253 F.R.D. at p. 513; *Salazar*, *supra*, 251 F.R.D at p. 532; *Kenny*, *supra*, 252 F.R.D. at p. 645; *Brown*, *supra*, 249 F.R.D. at p. 586; *White*, *supra*, 497 F.Supp.2d at p. 1089.)[21]

In sum, every federal and California appellate court to decide the issue has endorsed *Brinker*'s position that employers need only provide meal periods, not ensure that they are taken. All those courts got it right, and this Court should affirm.

G. The Legislature Has Already Weighed The Relevant Policy Considerations, And Its Judgment Cannot Be Disturbed By This Court.

When the Legislature enacted Labor Code section 512 as part of the bill titled the "Eight-Hour Day Restoration and Workplace Flexibility Act of 1999" (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 5), it presumably considered the policy implications of both an ensure

[21] Several federal courts also discounted *Cicairos* because it relied exclusively on a non-binding DLSE letter rather than on the pertinent Labor Code provisions. (*Wren*, *supra*, 2009 WL 301819 at *29; *Watson-Smith*, *supra*, 2009 WL 426122 at *2, fn. 1; *Perez*, *supra*, 253 F.R.D. at p. 513; *Kenny*, *supra*, 252 F.R.D. at p. 646; *Brown*, *supra*, 249 F.R.D. at p. 585; *White*, *supra*, 497 F.Supp.2d at p. 1088.) They noted that even the DLSE letter referenced in *Cicairos* does not "discuss or analyze the statute and only indirectly refers to the applicable Wage Order." (*Perez*, *supra*, 253 F.R.D. at p. 513; see also *Watson-Smith*, *supra*, 2009 WL 426122 at *2, fn. 1.)

and a provide meal period standard. (E.g., *People v. Bunn* (2002) 27 Cal.4th 1, 14-15 [noting that the Legislature's essential law-making function "embraces the far-reaching power to weigh competing interests and determine social policy"], citations omitted.) It ultimately decided that the interests of California employees and employers are best served by a law requiring employers to provide meal periods without compelling their employees to take them. Its judgment cannot be disturbed by this Court.

1. The Legislature's decision to adopt a provide standard is supported by sound policy considerations.

Consistent with the overall goal of the "Workplace Flexibility Act," the Legislature's provide standard allows for a flexible workplace in which employees have greater control over their lives at and away from work. Permitting employees to skip meal periods and leave work 30 minutes earlier gives them the freedom to manage their schedules and balance their commitments. To illustrate:

- A parent can choose not to take a meal period so that she can attend a child's soccer game, meet with a child's teacher, or take a child to the doctor.
- An employee can skip lunch and leave work 30 minutes earlier to attend a class that will help him improve his skills and earn a higher wage.
- A truck driver can decide to forego a 30-minute unpaid meal period and eat a sandwich during his 10-minute rest period to avoid heavy afternoon traffic.

- A nurse can choose to finish attending to a child in critical condition rather than transfer care at an inopportune moment.[22]

Conversely, there is no flexibility under Plaintiffs' proposed interpretation of the Workplace Flexibility Act, under which employers would have to force employees to take unpaid meal periods – preventing the employees from tending to important personal commitments, with serious financial consequences for many. An employee working a seven-hour shift, for example, might not be able to make it to a second job on time if compelled to take his meal period. Another employee forced to take a meal period might be late to pick up her child at day care, incurring financial penalties from the day care facility. Yet another employee in the middle of serving a large table or closing a sale might lose tips or commissions if required to stop working at a particular point in the shift.[23] By establishing a rule that employers must provide – but are not required to ensure – their employees meal periods, the Legislature afforded workers flexibility to structure their activities to fit their individual needs.[24]

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[22] Along similar lines, named Plaintiff Osorio testified that there were times when he decided not to take a meal period because he was concerned that another employee would provide inadequate service to his tables. (20PE5487-5488.)

[23] Some Brinker servers testified that they "wanted to come in, work their shift, whether it was five or seven hours, make as much money as possible, clean up their stations, and then clock out for the day. . . . [T]hey said that they lost money by having to clock out and forego tips for half an hour." (3PE780; see also *id*. at 823 [manager testifying that servers in his restaurant "resented having to take thirty-minute meal periods" because "those unpaid meal periods caused them to lose half an hour's worth of tips"].)

[24] While there are countless personal, work-related, and financial reasons why certain employees at certain times would want to skip their meal periods, there is no conceivable reason why any employee would want to accept less than the minimum wage or work overtime without being

2. Plaintiffs' policy arguments are unpersuasive.

In contrast with the many policy considerations supporting the Legislature's judgment, Plaintiffs' central claim that "mandatory meal periods" are "essential to employee health and safety" (OB, p. 72) does not withstand scrutiny. *First*, as explained above, it *is* "mandatory" for employers to provide meal periods to employees who work more than five hours. (Lab. Code, §§ 512, 226.7.) It was not unreasonable for the Legislature to allow employees to decide for themselves whether, on any particular day, they should take – rather than skip – an offered meal due to fatigue or stress.

Second, under the rule that Plaintiffs propose, employers would be forced to discipline or even terminate their employees for skipping a meal period for any one of the many legitimate personal, financial, or work-related reasons discussed above. (See, e.g., *White*, *supra*, 497 F.Supp.2d at p. 1089 [explaining that under an ensure standard, an employer "would have to find a way to force employees to take breaks . . . . suggest[ing] a situation in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee"]; Memo to DLSE Staff re: Court Rulings on Meal Periods (Oct. 23, 2008) [MJN Ex. 57], p. 3 ["[T]he lack of clarity in this area is resulting in harm to workers because employees are being disciplined and even terminated for choosing not to take their full 30 minute meal periods."].) An ensure standard would thus work to the detriment – not to the benefit – of employees.

Third, Plaintiffs' policy argument fails to account for the fact that employees who skip their meal periods can leave work earlier. (See, e.g., OB, p. 53, quoting Statement as to the Basis, Overtime and Related Issues

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paid. As a result, Plaintiffs' attempt to compare an employer's obligation to provide meal periods to the mandatory minimum wage and overtime rules (OB, pp. 56-57, 74-75) falls flat.

[Orders 1, 4, 5, 7 and 9] (April 11, 1997) [MJN Ex. 30] ("1997 Statement as to the Basis"), p. 8 ["[T]he waiver of one meal period allows an employee *freedom to choose between leaving work one half-hour earlier* or taking a second meal period on a long shift."], Plaintiffs' emphasis.) Allowing employees to shorten their shifts helps reduce the "risk of work-related accidents and increased stress." (OB, p. 72, quoting *Murphy*, *supra*, 40 Cal.4th at p. 1113.)

Fourth, Plaintiffs' claim that safety concerns are implicated when employees "voluntarily choose" not to take meal periods (OB, pp. 72-73) is at odds with their acknowledgement that employees *can* voluntarily choose to skip rest periods (OB, p. 38). If Plaintiffs are correct that skipped meal periods would compromise "'not only the health and welfare of the workers themselves, but also the public health and general welfare'" (OB, p. 72, quoting *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456), the same should hold true for rest periods. The inconsistency inherent in Plaintiffs' argument is further reason to hold – as this Court indicated in *Murphy* – that "health and safety considerations" arise only when employees are "*denied* their rest and meal periods" – not when they choose not to take them. (*Murphy*, *supra*, 40 Cal.4th at p. 1113, emphasis added.)

Finally, Plaintiffs insist that an ensure standard is necessary because otherwise employees will skip every meal period "'for fear of losing their jobs.'" (OB, p. 73, quoting Worksafe, Inc. Amicus Letter Supporting Review (Sept. 29, 2008) ["Worksafe Letter"], pp. 4-5; see also *id.*, p. 30 ["In many industries, to raise a concern about a missed meal is to risk termination."].) Plaintiffs add that many managers and supervisors "'look askance'" at employees who "'dutifully take'" breaks. (OB, p. 30, quoting Knapp, "High Court Should Give Employees a Break by Reversing Brinker," *Daily Journal* (Nov. 4, 2008).) The employer conduct that Plaintiffs describe, however, is exactly what the *Brinker* court refused to

condone. The Court of Appeal made crystal clear at the outset of its opinion that "*employers cannot impede, discourage or dissuade employees from taking meal periods*." (Slip Op., p. 4, emphasis added.) Thus, while Plaintiffs may be correct that "'[e]mployers have countless ways to *discourage* workers from taking breaks ranging from outright prohibition, to more subtle measures . . . .'" (OB, p. 30, quoting Worksafe Letter, p. 13, emphasis added), every one of those discouraging acts – subtle or not – is prohibited by *Brinker*.[25]

3. This Court's function, in any event, is to ascertain the Legislature's intent, not to question the wisdom of its policy choices.

Even if Plaintiffs' policy arguments were persuasive – and they are not – this Court cannot ignore the Legislature's considered judgment and substitute a rule that it believes would better serve employees' interests. As this Court has repeatedly emphasized: "It is not our function to inquire into the wisdom of underlying policy choices. Our task here is confined to statutory construction." (*Bonnell*, *supra*, 31 Cal.4th at p. 1263, citations and internal quotations omitted; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function."]; *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 121 ["When the Legislature has spoken, the court is not free to

[25] Plaintiffs also theorize that "[e]mployees who 'decide' never to take breaks will gain a competitive advantage in the employment market over those who do not." (OB, p. 30.) But because – as even Plaintiffs recognize – employees who skip their meal periods can leave work 30 minutes earlier than employees who take them (OB, p. 53), any meaningful "competitive advantage" is negated.

substitute its judgment as to the better policy. We are obliged to carry out the intent of the Legislature if it can be ascertained."].)

The plain language and unequivocal history of Labor Code sections 226.7 and 512 makes this Court's task a straightforward one. If Plaintiffs remain concerned that employers will abuse the Legislature's rule that meal periods need only be provided, the solution lies with the Legislature, not this Court. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 215 [holding that concerns about the possible abuse of the California Family Rights Act medical leave provisions by employees asserting stress-related claims "raise issues of policy that should be addressed to the Legislature rather than this court"].)

This Court, in sum, should affirm the Court of Appeal's decision – consistent with *Murphy* and all the other appellate and federal decisions in California to address the issue – that employers are obligated only to provide their employees meal periods, not to ensure that they are taken.

II. THE COURT OF APPEAL CORRECTLY HELD THAT LABOR CODE SECTION 512 NEITHER REQUIRES THAT A MEAL PERIOD BE PROVIDED EVERY FIVE *CONSECUTIVE* HOURS NOR PROHIBITS "EARLY LUNCHES."

Like the meal period compliance issue, the question of *when* meal periods must be provided is definitively answered by the plain language of the Labor Code. Section 512 directs that a first meal must be provided to employees working "more than five hours *per day*," and a second meal must be provided to employees working "more than 10 hours *per day*." (Lab. Code, § 512, subd. (a), emphasis added.) The statute's history confirms that an employee's right to a meal period is determined by the total number of hours worked "per day" – *not* by the number of consecutive hours following the last meal. (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2 [employers must provide a first meal period to

employees working "more than 5 hours *per day*" and a second meal period to employees working "more than 10 hours *per day*"], emphasis added.)

Plaintiffs nevertheless argue again that the statute does not mean what it says – that employers are obligated to "avoid work periods exceeding five hours" by scheduling meal periods mid-shift, ending the shift within five hours after the first meal, offering a second meal period five hours after the first, or paying an extra hour of pay. (OB, pp. 82, 84).[26] In contravention of the most basic rules of statutory construction, Plaintiffs urge this Court to ignore the Legislature's clear intent that employees' entitlement to meal periods be measured by the number of hours worked "per day," and rely instead on the Wage Order and its regulatory history. But even the Wage Order and its history are entirely consistent with section 512, offering no support for Plaintiffs' theory that employers are required to eschew early lunches or provide a second meal period five hours after the first meal. And even if the Wage Order *could* be read to support Plaintiffs' position, Labor Code section 516 – forbidding all wage orders inconsistent with the specific requirements of section 512 – would invalidate it. (Lab. Code, § 516 [authorizing the IWC to adopt orders with regard to meal periods and rest breaks "[e]xcept as provided in Section 512"].)

Section 512's plain language, in short, compels the interpretation the Court of Appeal gave it: Employers must provide one meal period when an employee works "more than five hours *per day*" and a second meal when an employee works "more than 10 hours *per day*." (Lab. Code, § 512,

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[26] Contrary to what Plaintiffs insist, there was no "misunderstanding of Plaintiffs' contentions" on the part of the Court of Appeal. (OB, p. 81.) The *Brinker* court understood perfectly Plaintiffs' argument that hourly employees are entitled to "a 30-minute uninterrupted meal period for every five *consecutive* hours of work" (Slip Op., p. 33, original emphasis), and their claim that employers could avoid offering a second meal period to employees working shifts under 10 hours if "the first meal is taken exactly mid-shift" (*id*., p. 15).

subd. (a), quoted in Slip Op., pp. 36-37, emphasis added by Court of Appeal.) Nothing in section 512 prevents an employer from either scheduling a meal period early in an employee's shift or permitting an employee to work more than five consecutive hours without a second meal period. Had the Legislature intended to include those additional strictures, it certainly knew how to do it. But where, as here, "the words themselves are not ambiguous, [this Court] presume[s] the Legislature meant what it said, and the statute's plain meaning governs." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.) The Court of Appeal got it right.

A. Under The Plain Language Of Section 512, An Employee's Meal Period Entitlement Is Determined By The Total Number Of Hours Worked "Per Day," Not By The Number Of Consecutive Hours Worked.

Labor Code section 512's plain language – the "most reliable indicator of legislative intent" (*Meyer*, *supra*, 45 Cal.4th at p. 634) – states that employers must provide a first meal period only to employees working "more than five hours per day," and a second meal period only to employees working "more than 10 hours per day":

> 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 of not less than 30 minutes . . . . An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes . . . .

(Lab. Code, § 512, subd. (a).) Plaintiffs' position that employers must "time meal periods and shift lengths so as to avoid work periods exceeding five hours" (OB, p. 84) is incompatible with that unambiguous language.

First, had the Legislature intended for employers to "avoid work periods exceeding five hours," as Plaintiffs maintain, it would have said so.

Instead, the Legislature twice said that an employee's meal period entitlement is measured by the total number of hours worked "per day." (Lab. Code, § 512, subd. (a)). This Court cannot ignore that deliberately chosen yardstick (e.g., *Manufacturers Life*, *supra*, 10 Cal.4th at p. 274 ["Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative"]), and must "presume the Legislature meant what it said" (*Wells*, *supra*, 39 Cal.4th at p. 1190).

Second, under Plaintiffs' theory that employers must provide a meal period for every five consecutive hours of work, there would be no need ever to assess whether an employee worked "more than 10 hours per day" – the clock would be reset upon the employee's return from the first meal. To adopt Plaintiffs' construction, this Court would have to strike not only the words "per day" from the statute, but also the provision entitling employees working "more than 10 hours per day" to a second meal period:

> 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 of not less than 30 minutes . . . . ~~An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes~~ . . . .

(Lab. Code, § 512, subd. (a), strikethroughs added.) It is black letter law that such interpretations that "render words surplusage are to be avoided." (*Woods v. Young* (1991) 53 Cal.3d 315, 323; see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1155 ["'[C]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'"], quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.)

Plaintiffs try to resolve the surplusage problem inherent in their interpretation by arguing that employers could avoid providing a second meal period to employees working *fewer* than "10 hours per day" if they "appropriately tim[ed] the first meal period . . . [to] avoid a pre- or post-meal work period that exceeds five hours." (OB, p. 81.) "For an eight-hour shift, for example, the meal period could be scheduled to start any time during the fourth or fifth hours worked. For a ten-hour shift, the meal period would have to be scheduled to start at the beginning of the fifth hour." (*Id*., p. 82.) But even if Plaintiffs' proposed scheduling were possible, if the governing rule is that "work periods exceeding five hours" must be avoided (*id*., p. 84), there *still* would be no need to consider how many hours an employee worked "per day," or whether someone was employed "for a work period of more than 10 hours per day" (Lab. Code, § 512, subd. (a)). In short, there is no way around the fact that Plaintiffs' construction erases approximately half the relevant statutory language.

Third, the notion that employers must time their employees' meal periods close to "the mid-point of the day's shift" (OB, p. 82) finds no support in the statutory language. Indeed, *nothing* in section 512 suggests that meal periods must be provided at a certain time – much less at the shift's "mid-point." When section 512 was enacted in 1999, the Legislature knew that the Wage Order then in effect stated that *rest* periods "insofar as practicable shall be in the *middle of each work period*" (Regs., § 11090, subd. (12)(A), emphasis added). (*Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 129 [presuming that Legislature was aware of relevant regulatory framework at time of statutory enactment].) The Legislature opted not to include an analogous timing restriction in section 512, and its deliberate choice must be respected. (*Meyer*, *supra*, 45 Cal.4th at p. 640 ["'If the statutory language is clear and unambiguous [this Court's] inquiry ends.'"], quoting *Murphy, supra*, 40 Cal.4th at p. 1103.)

B. Section 512's Legislative History Confirms The Statute's Plain Meaning.

1. The Legislature unmistakably intended an employee's meal period entitlement to be measured by the number of hours worked "per day," not by the number of consecutive hours worked since the last meal period.

Although section 512's clear and certain language resolves the meal period timing issue (*People v. Licas* (2007) 41 Cal.4th 362, 367 ["[I]f there is 'no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said,' and it is not necessary to 'resort to legislative history to determine the statute's true meaning.'"], quoting *People v. Cochran* (2002) 28 Cal.4th 396, 400-401), the statute's history nevertheless confirms that the Legislature intended to measure employees' entitlement to a meal period by the number of hours worked "per day," not – as Plaintiffs insist – by the number of consecutive hours worked. As explained in the Legislative Counsel's Digest describing section 512 at the time of its enactment:

> Existing wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours *per day* without providing the employee with a meal period of not less than 30 minutes, with the exception that if the total work period *per day* of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.
>
> This bill would codify that prohibition and also would further prohibit an employer from employing an employee for a work period of more than 10 hours *per day* without providing the employee with a second meal period of not less than 30 minutes, with a specified exception.

(AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, cited in OB, pp. 91-92 & fn. 50, emphasis added.) Thus, "[a]lthough the plain language of the statute[] dictates the result here, legislative history provides additional authority" (*Barratt American*, *supra*, 37 Cal.4th at p. 697) that the Legislature intended for employers to provide a first meal only to employees working "more than five hours per day" and a second meal to employees working "more than 10 hours per day." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2.)[27]

2. The Wage Order that the Legislature codified is entirely consistent with section 512.

Still, Plaintiffs argue that because the Legislature "'codif[ied]'" the Wage Order (OB, p. 91, quoting AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2), it must have intended for employers to time meal periods and shift lengths so as to "eliminat[e] all work periods that exceed five hours" (*id*., p. 82). The Wage Order, however, on its face requires one meal period for every five hours of work – not, as Plaintiffs claim, one meal period for every five *consecutive* hours of work. The Wage Order states, in relevant part:

> 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 . . . .

(Regs., § 11050, subd. (11)(A).) The Legislature's reading of the Wage Order – that employees who work one five-hour period in a day are entitled to one meal period, and employees who work two five-hour periods in a day are entitled to two meal periods (Lab. Code, § 512, subd. (a); AB 60,

[27] None of the other legislative history – including the materials cited by Plaintiffs – suggests an intent to adopt a rule requiring employers to provide a meal period for every five *consecutive* hours of work. (OB, pp. 91-92.)

Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2) – is entirely consistent with its plain language.

The Statement as to the Basis for the 2000 Amendments to the Wage Order confirms that the Wage Order, like section 512, measures an employee's meal period entitlement by the number of hours worked "in a day," not by the number of consecutive hours worked. (Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order [MJN Ex. 32], p. 20.) It states, in relevant part:

> Any employee who works more than six hours *in a workday* must receive a 30-minute meal period. If an employee works more than five hours but less than six hours *in a day*, the meal period may be waived by the mutual consent of the employer and employee.

(*Ibid.*, emphasis added.)

Had the IWC intended for meal periods to be "precisely timed" according to Plaintiffs' specifications (OB, p. 91), it certainly could have done so. It could have simply adopted the language that Plaintiffs would have this Court read into the Wage Order, namely, that "[f]or an eight-hour shift . . . the meal period could be scheduled to start any time during the fourth or fifth hours worked," and "[f]or a ten-hour shift, the meal period would have to be scheduled to start at the beginning of the fifth hour." (OB, p. 82.) The IWC, however, said none of those things.[28]

The IWC, of course, knows how to require that breaks be scheduled at certain points in an employee's shift. The Wage Order mandates that

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[28] Plaintiffs point to section 512(b)'s provision that the IWC "may adopt a working condition order permitting a meal period to commence after six hours of work if [it] determines that the order is consistent with the health and welfare of the affected employees" (Lab. Code, § 512, subd. (b)), but that language in no way advances Plaintiffs' argument that employers must "precisely time" their employees' meal periods to avoid all work periods exceeding five hours (OB, p. 92).

employers time *rest breaks* "insofar as practicable . . . *in the middle of each work period*." (Regs., § 11090, subd. (12)(A), emphasis added.) The IWC easily could have included an analogous "timing requirement" (OB, p. 81) in the Wage Order's meal period provision, but did not. "[M]indful of the rule of construction that significant differences in language imply a difference in meaning, it is reasonable to conclude that the IWC intended a different result . . . ." (*Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 399, cited in OB, p. 27.)

In fact, Plaintiffs' theory that a meal period should be provided after a certain number of consecutive hours of work is expressly written into the wage order governing employees in the entertainment industry:

> No employer shall employ any person for a work period of more than six (6) hours without a meal period of not less than 30 minutes, nor more than one (1) hour. *Subsequent meal period for all employees shall be called not later than six (6) hours after the termination of the preceding meal period.*

(Regs., § 11120, subd. (11)(A), emphasis added.) The IWC likewise could have tied restaurant industry employees' entitlement to a meal period to the number of hours worked "after the termination of the preceding meal period," but chose not to do so.

In the end, the Legislature correctly understood that the IWC did not intend to require a meal period for every five consecutive hours of work, and it is *that* understanding that was "codified" in section 512. While Plaintiffs urge this Court to adopt *their* interpretation of the Wage Order (OB, pp. 93-94), this Court's "fundamental task" in construing a statute "is to determine the *Legislature's* intent." (*Cole, supra*, 38 Cal.4th at p. 974, internal quotations and citation omitted, emphasis added.) That intent can be clearly ascertained from the plain language and legislative history of

section 512, and this Court is "obliged to carry [it] out." (*City and County of San Francisco, supra*, 12 Cal.4th at p. 121.)

C. Contrary To What Plaintiffs Argue, Nothing In The Regulatory History Suggests That The IWC Intended Meal Periods To Be Provided Every Five Consecutive Hours.

As discussed, the Wage Order explicitly requires a meal period for every five hours of work – not, as Plaintiffs insist, a meal period for every five *consecutive* hours of work. (Regs., § 11090, subd. (11)(A).) Plaintiffs contend, however, that the "history of this language illuminates its meaning," and demonstrates that employers are obligated to "*time* meal periods and shift lengths so as to avoid work periods exceeding five hours . . . and to prohibit [] 'early lunching.'" (OB, pp. 83-84, original emphasis.) Plaintiffs' regulatory history arguments are without merit.

1. The 1947 and 1952 amendments to the Wage Order

First, Plaintiffs point to the fact that the IWC originally in 1943 required that a meal period be provided to employees working "for a work period of more than five (5) hours" (Wage Order 5NS (June 28, 1943) [MJN Ex. 12], ¶ 3(d), cited in OB, p. 83), and then in 1947 re-worded the rule to require that a meal period be provided to employees working "more than five (5) *consecutive hours after reporting for work*" (Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 10, cited in OB, p. 83, Plaintiffs' emphasis). Plaintiffs argue that because in 1952 the IWC "restored" the original language from the 1943 order – "prohibiting employers from employing workers 'for a work period of more than five (5) hours without a meal period'" (OB, pp. 83-84, quoting Wage Order 5-52 (Aug. 1952) [MJN Ex. 14], ¶ 11) – it must have intended to "require[] a meal period for *any* work period exceeding five hours, regardless of when that work period began" (*id*., p. 84, original emphasis).

There is no basis for the inference that Plaintiffs draw from the IWC's re-phrasing of the Wage Order over half a century ago, and Plaintiffs cite nothing – no hearing transcripts, no statements, no correspondence – in its support. An equally likely – and far more logical – explanation for the 1952 wording change is that the IWC thought the original 1943 language made it sufficiently clear that a meal period must only be provided for every five hours of work, and that the 1947 Wage Order's clarification that those five hours start once an employee "report[s] for work" was unnecessary. (Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 10, cited in OB, p. 83.)

Indeed, if the IWC in 1952 meant to signal that it was requiring employers to offer a meal period for every five *consecutive* hours of work (OB, p. 83), it would have retained the word "consecutive" in the Wage Order, not deleted it. The rule that Plaintiffs claim the IWC intended could have been clearly and easily expressed by simply removing the words "after reporting to work" from the 1947 version:

> 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 (30) minutes.

(Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 10, strikethroughs added.) The IWC, however, opted not to establish an "every five consecutive hours" standard, choosing instead to measure employees' entitlement to a meal period by the *total* number of hours they work.

2. Wage Order 5-76

Next, Plaintiffs turn to Wage Order 5-76, which this Court summarized in a footnote in *California Hotel and Motel Assn. v. IWC* (1979) 25 Cal.3d 200, as follows: "A meal period of 30 minutes per 5 hours of work is generally required." (*Id.* at p. 205, fn. 7, quoted in OB, p. 84.) That summary, however, indicating that employees are entitled to a

meal period for every five hours that they work, is completely consistent with the language of section 512 stating that employees earn one meal period when they work "more than five hours per day," and a second meal period when they work "more than 10 hours per day." (Lab. Code, § 512, subd. (a).) In fact, Plaintiffs concede that Wage Order 5-76's "actual text" is "identical to the current Wage Order" (OB, p. 88), which is compatible with section 512 for all the reasons discussed above.[29]

3. The 1993 and 1998 amendments to the Wage Order's waiver provisions

Plaintiffs finally point to the 1993 and 1998 amendments to the Wage Order, which they claim prove that the IWC "interprets the Wage Orders to require a second meal period if a work period exceeding five hours follows the first one." (OB, p. 84.) Plaintiffs' "proof" is non-existent.

Until 1993, a meal period could be "waived by mutual consent of employer and employee" only by employees working shifts of not more than six hours. (Wage Order 5-80 (Sept. 7, 1979) [MJN Ex. 19], ¶ 11(A).) In 1993, the IWC expanded the waiver provision for employees in the health care industry, allowing them to "voluntarily waive their right to a meal period" even when they worked "in excess of *eight* (8) total hours in a workday." (Wage Order 5-98 (Jan. 1, 1998) [MJN Ex. 20], ¶ 11(C), quoted

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[29] That the Court of Appeal thought *California Hotel and Motel Assn.* "distinguishable" because it concerned "an IWC Wage Order (No. 5-76) that is not involved in the present case" (Slip Op., p. 38, cited in OB, p. 88) is of no import. This Court routinely agrees with the Court of Appeal's conclusion without adopting all of its reasoning. (E.g., *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 493 ["[W]e agree with the Court of Appeal's conclusion (although not with all its reasoning) . . . ."]; *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1146 ["We agree with the result reached by the Court of Appeal, but disagree in part with its reasoning."].)

in OB, p. 84, emphasis added.) The IWC mandated, however, that employees working shifts longer than eight hours could waive a meal period only under "certain protective conditions." (1997 Statement as to the Basis, p. 8.) Specifically, employees working shifts longer than eight hours were required to "document[]" their waiver in a written, "voluntarily signed" agreement with their employer, which they could revoke "at any time by providing the employer at least one day's written notice." (Wage Order 5-98 (Jan. 1, 1998) [MJN Ex. 20], ¶ 11(C); see also 1997 Statement as to the Basis, p. 8.) In 1998, the 1993 waiver provision with its "protective conditions" was extended to all employees in the public housekeeping industry. (*Ibid*.)

Contrary to what Plaintiffs argue, nothing in the 1993 and 1998 amendments suggests that employees are entitled to a "second meal period if a work period exceeding five hours follows the first one." (OB, p. 84.) The amended Wage Order simply states that employees working more than eight hours can "voluntarily waive their right to a meal period" – not that employees working fewer than 10 hours a day must be offered a second meal. (Wage Order 5-98 (Jan. 1, 1998) [MJN Ex. 20], ¶ 11(C).)

The Statement as to the Basis and IWC Charge to the 1996 Wage Boards cited by Plaintiffs (OB, p. 85) likewise provide no support for their theory that a second meal period is due five hours after the employee's return from the first. The Statement as to the Basis emphasizes that the purpose of the amended Wage Order was to allow employees working shifts longer than eight hours to waive "*a* meal period" (1997 Statement as to the Basis, pp. 7-8, emphasis added) – something that had not been permitted under the pre-amendment Wage Order, which confined waivers to employees working shifts of six hours or less. The Statement as to the Basis nowhere states that an employee working fewer than 10 hours is entitled to a second meal period.

Equally unsupportive of Plaintiffs' meal period timing theory, the IWC Charge to the 1996 Wage Boards states, in relevant part:

> The IWC also found prejudicial conditions may exist in Orders 1, 4, 5, 7, and 9 in *Section 11, Meal Periods*, because the language in that section does not permit employees to waive their second meal periods on a shift. The IWC requests the wage boards for those orders to recommend language to amend that section so employees may voluntarily waive their rights to a meal period, under certain protective conditions.

(IWC Charge to the 1996 Wage Boards, IWC Orders No. 1, 4, 5, 7, and 9 (June 28, 1996) [MJN Ex. 29], original emphasis.) Noting that the Wage Order does not permit the waiver of the "second meal period[] on a shift," the IWC Charge never ties an employee's entitlement to the second meal to any particular number of hours worked. Rather, it simply recommends that the IWC allow employees working longer shifts to "waive their rights to *a* meal period, under certain protective conditions." (*Ibid*., emphasis added.)

The Wage Order's regulatory history, in sum, gives no credence to Plaintiffs' claim that the IWC intended for a meal period to be provided for every five consecutive hours of work.

D. The Court Of Appeal Correctly Held That If The Wage Order Can Be Read To Require That Meal Periods Be Provided Every Five Consecutive Hours, Section 516 Invalidates It.

The *Brinker* court explicitly stated that its interpretation of section 512 – requiring that employers provide a first meal period when their employees work "more than five hours per day" and a second when their employees work "more than 10 hours per day" (Lab. Code, § 512, subd. (a)) – "is consistent with the plain language set forth in IWC Wage Order No. 5-2001." (Slip Op., p. 36.) It nevertheless held that "to the extent" the

Wage Order can be read to require a meal period every five consecutive hours – as Plaintiffs insist – it is "inconsistent with section 512," and thus "invalid." (*Id*., p. 40, citing *Bearden*, *supra*, 138 Cal.App.4th at pp. 438-444.) The Court of Appeal got it right.[30]

As with the meal period compliance issue, Plaintiffs are the only ones arguing that the Wage Order says something different than section 512. They contend that section 512 creates a "minimum" standard, or a "compliance floor," and that the Wage Order proscribes "more frequent or more precisely timed" meals. (OB, pp. 90-91.) Their interpretation of the Wage Order is not only contrary to its plain language, as explained above, but also runs afoul of Labor Code section 516, which mandates that all wage orders "be consistent with the specific provisions of Labor Code section 512." (*Bearden*, *supra*, 138 Cal.App.4th at p. 438; Lab. Code, § 516.)

1. Section 516 precludes all wage orders inconsistent with section 512's requirements.

As amended in 2000, section 516 states:

> Except as provided in Section 512, the [IWC] may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest for any workers in California consistent with the health and welfare of those workers.

(Lab. Code, § 516.) Had the Legislature intended only "to prohibit the IWC from *weakening*" the statutory standard, as Plaintiffs insist (OB, p. 99, original emphasis), it could and most certainly would have said so. Instead, the Legislature mandated absolute consistency with section 512, and it must

[30] Because the Court of Appeal maintained that section 512 is "consistent with the plain language" of the Wage Order (Slip Op., p. 36), it did *not* hold that "section 516 effectively invalidated the Wage Order's meal period language," as Plaintiffs claim. (OB, p. 95.)

be taken at its word. (E.g., *Murphy*, *supra*, 40 Cal.4th at p. 1103 ["If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs."].)

The history of section 516 confirms that the Legislature never meant to allow the IWC to impose "more restrictive" meal period requirements on employers, or to establish "greater protections" for employees. (OB, p. 96.) Rather, section 516 was intended to preclude wage orders that "*conflict*[] with" section 512. (Legis. Counsel's Dig., Sen. Bill No. 88 (1999-2000 Reg. Sess.), Stats. 2000, ch. 492 [MJN Ex. 63], quoted in Slip Op., p. 39; see also Slip Op., p. 39, quoting Ralph Lightstone, 3d Reading Analysis of Sen. Bill No. 88 (1999-2000 Reg. Sess.) as amended June 29, 2000, p. 5 ["*This bill provides that IWC's authority to adopt or amend orders under Section 516 must be consistent with the specific provisions of Labor Code Section 512*."], emphasis added by Court of Appeal.)[31]

Plaintiffs venture that there is no conflict because "nothing in section 512(a) prohibits employers from 'providing' more meal periods than the minimum number stated." (OB, p. 90.) While individual employers, of course, are entitled to provide their employees meal periods as frequently as they like – as long as the statutory minimum is satisfied – the Wage Order

[31] Plaintiffs stitch out of whole cloth the theory that because the Legislature amended section 516 at the same time it enacted section 512(b), authorizing the IWC to permit "a meal period to commence after six hours of work" instead of five under certain conditions (Lab. Code, § 512, subd. (b)), it intended for section 516 to prevent the IWC from "weaken[ing] the Wage Orders' meal period requirement . . . beyond the six-hour minimum of section 512(b)." (OB, p. 98.) There is no proof in either the statute or the legislative history suggesting that section 516's purpose was to bar the IWC from broadening the parameters of section 512(b). Indeed, Plaintiffs cite nothing in support of their theory that AB 60 was intended to "prohibit the IWC from weakening" – rather than strengthening – existing meal period requirements. (*Id*., p. 99.) As discussed in section I.B.2, above, Plaintiffs point only to evidence that the Legislature aimed to reverse a regulatory attempt to eliminate daily overtime rules.

cannot set a compliance standard that differs with section 512. As Plaintiffs read it, the statute permits employers to schedule the first meal period any time during the first five hours of an employee's shift, and the Wage Order requires a more "precisely timed" meal period. (OB, p. 91.) But a wage order that forces employers to satisfy such an independent benchmark cannot be deemed "*consistent with the specific provisions of Labor Code Section 512*." (Ralph Lightstone, 3d Reading Analysis of Sen. Bill No. 88 (1999-2000 Reg. Sess.) as amended June 29, 2000, p. 5, quoted in Slip Op., p. 39, emphasis added by Court of Appeal.)

2. Section 516 is not negated by this Court's decision in *IWC v. Superior Court*.

Plaintiffs contend that section 516 notwithstanding, this Court's decision in *IWC v. Superior Court* (1980) 27 Cal.3d 690, "empower[s]" the IWC "to adopt 'more restrictive provisions than are provided by [the Labor Code].'" (OB, p. 95, quoting *IWC v. Superior Court*, *supra*, 27 Cal.3d at p. 733.) Plaintiffs are mistaken.

In *IWC v. Superior Court*, this Court held that although Labor Code section 554 exempted agricultural workers from the statutory requirement of one day's rest in a seven-day period, the IWC could independently require that agricultural employees be given one day off a week. (*IWC v. Superior Court*, *supra*, 27 Cal.3d at p. 733.) In rejecting the argument that the IWC's wage orders "conflict with section 554 and are invalid," the Court noted that "the Industrial Welfare Orders may provide more restrictive provisions than are provided by [the general] statutes adopted by the Legislature *on this subject* [in sections 510-556]." (*Ibid*., emphasis added, internal quotations and citations omitted.)

Contrary to what Plaintiffs insist, *IWC v. Superior Court* does not hold that the IWC can now "provid[e] greater protections" than those found in section 512. (OB, p. 96.) That case involved different Labor Code

provisions, a single specialized industry, and wage orders addressing a different "subject" entirely. (*IWC v. Superior Court*, *supra*, 27 Cal.3d at p. 733.) Most importantly, *IWC v. Superior Court* was decided two decades before the current version of section 516 was enacted, forbidding wage orders inconsistent with section 512. The Court's decision that wage orders concerning agricultural workers' days off could include "more restrictive provisions than are provided by [the general statutes] adopted by the Legislature on th[e] subject" thus has no bearing on whether – following the enactment of section 516 – a wage order concerning meal periods can include "more restrictive provisions" than those found in section 512. (E.g., *Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900, fn. 7 ["It is axiomatic that cases are not authority for propositions not considered."], internal quotations and citations omitted.)[32]

Plaintiffs suggest that like the wage orders in *IWC v. Superior Court*, their interpretation of the Wage Order – requiring that meal periods be provided every five consecutive hours – has "received at least silent acquiescence from the Legislature." (OB, p. 96.) As discussed in section II.B.1, above, however, Plaintiffs' reading of the Wage Order did *not* receive the Legislature's "silent acquiescence" or any other form of endorsement. When the Legislature enacted section 512, it made perfectly clear that it intended for employers to provide a first meal to employees working "more than five hours *per day*" and a second meal to employees working "more than 10 hours *per day*." (AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2, emphasis added.)

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[32] Because *IWC v. Superior Court* addressed unrelated statutory provisions years before the Labor Code even included meal period requirements, there was no reason for the Legislature to "abrogate" the decision when it enacted section 516 (OB, p. 99). (E.g., *Elsner*, *supra*, 34 Cal.4th at p. 933 [stating that the holding of a case is "coextensive with its particular facts"].)

Finally, Plaintiffs posit that the Court of Appeal's decision in *Bearden* "demonstrates that the rule of *IWC v. Superior Court* survived section 516's amendment." (OB, p. 99.) *Bearden*, however, nowhere suggests that section 516 permits the IWC to impose "'more restrictive provisions than are provided by the Labor Code.'" (OB, p. 95, quoting *IWC v. Superior Court*, *supra*, 27 Cal.3d at p. 733.) To the contrary, *Bearden* specifically held:

> Section 516, as amended in 2000, does not authorize the IWC to enact wage orders *inconsistent* with the language of section 512.

(*Bearden*, *supra*, 138 Cal.App.4th at p. 438, emphasis added.) It further recognized that while the IWC is *generally* authorized "to adopt standard conditions through wage orders," "section 516 specifically *excepts* the requirements of section 512 from this grant of authority to the IWC." (*Id.* at pp. 437-438, emphasis added.)[33]

IWC v. Superior Court, in short, a case decided 20 years before section 516's "exception" was enacted and having nothing to do with meal period requirements, is not authority for Plaintiffs to evade the Legislature's command that wage orders addressing meal periods "be consistent with the specific provisions of Labor Code section 512." (*Bearden*, *supra*, 138 Cal.App.4th at p. 438; Lab. Code, § 516.)[34] The

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[33] Plaintiffs try to distinguish *Bearden* by arguing that the wage order at issue in that case "went into effect after section 516 was amended." (OB, p. 101.) Here, however, the applicable Wage Order *also* "went into effect after section 516 was amended." As Plaintiffs themselves point out, the Wage Order was amended January 1, 2001 (OB, p. 63, fn. 41, citing MJN Ex. 32) – after section 516 was amended (Lab. Code, § 516 [effective September 19, 2000]). Because section 516 forbids the IWC from adopting *or amending* wage orders inconsistent with section 512, the January 1, 2001 Wage Order must conform to that statute.

[34] The April 2, 2001 DLSE opinion letter that Plaintiffs cite (OB, p. 96) likewise does not support their claim that the IWC can "'establish

Court of Appeal correctly held that an interpretation of the Wage Order at odds with section 512 – requiring employers to provide meal periods every five consecutive hours – is invalid under section 516. (Slip Op., p. 40.)

E. Plaintiffs' Meal Period Timing Argument Finds No Support In A Conclusory DLSE Opinion Letter That Was Withdrawn Five Years Ago.

Although Plaintiffs fault the Court of Appeal for "rejecting thirty years of consistent and commonsense . . . administrative interpretation of California's Wage Orders" (OB, p. 89), their brief cites only a single letter addressing the issue of when meal periods must be provided. (DLSE Opinion Letter No. 2002.06.14 [MJN Ex. 42].)

That one letter from June 14, 2002 even Plaintiffs acknowledge was withdrawn in December 2004. (OB, p. 89.) Plaintiffs repeatedly state that the withdrawal was "highly politicized," citing this Court's opinion in *Murphy*. (*Ibid.*) The "highly politicized" issue to which the *Murphy* Court referred, however, was whether the additional hour of pay required by Labor Code section 226.7 constitutes a wage or a penalty. (*Murphy*, *supra*, 40 Cal.4th at p. 1105, fn. 7.) Contrary to what Plaintiffs suggest, this Court did not note any "politicization" of the meal period timing issue.

But regardless of the DLSE's reason for withdrawing the June 14, 2002 letter, the fact remains that the DLSE has not "consistently maintained the interpretation in question." (*Yamaha*, *supra*, 19 Cal.4th at p. 13, internal quotations and citation omitted.) As explained above with regard

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higher standards than those set by the statute.'" (*Id*., p. 96, quoting DLSE Opinion Letter No. 2001.04.02 [MJN Ex. 39], p. 2.) That letter was withdrawn in December 2004 (*ibid*.), signaling that the DLSE's position on the issue has wavered. (*Yamaha*, *supra*, 19 Cal.4th at p. 13.) In any event, the letter is unreliable because it fails even to address section 516. (*Cole*, *supra*, 38 Cal.4th at p. 987 [refusing to defer to agency interpretation that failed to discuss relevant statutory language].)

to the DLSE's wavering stance on the meal period compliance issue, "*[a] vacillating position . . . is entitled to no deference*." (*Ibid*., internal quotations and citation omitted, emphasis added.)[35]

Deference is also unwarranted because, like the meal period compliance issue, the timing of meal periods is an issue of pure statutory interpretation that this Court is better positioned to resolve. (E.g., *Bonnell*, *supra*, 31 Cal.4th at p. 1265 ["We are less inclined to defer to an agency's interpretation of a statute than to its interpretation of a self-promulgated regulation."]; *Yamaha*, *supra*, 19 Cal.4th at p. 12 [holding that courts deciding whether judicial deference to an agency's interpretation is appropriate should assess whether the agency has a "comparative interpretative advantage over the courts"].) Because "courts are the ultimate arbiters of the construction of a statute" (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11), there is no conceivable reason to defer to the DLSE's shifting interpretation of section 512.

The June 14, 2002 DLSE letter also carries no weight because its conclusory "analysis" of section 512 is flatly wrong. It simply states – without explanation – that section 512 is "even more unambiguous" than the Wage Order in its support of a rule that prohibits early lunches and requires a meal period for every five consecutive hours of work. (DLSE Opinion Letter No. 2002.06.14 [MJN Ex. 42], p. 3 & fn. 3.) As explained above, section 512's plain language leaves no room for doubt that an employee's entitlement to a meal period is measured in terms of the total number of hours worked "*per day*" – not the number of hours consecutively

[35] The June 14, 2002 DLSE letter was also "prepared by a single staff member" and was not subject to "public notice and comment" – further reducing the deference it might otherwise be owed. (*Yamaha*, *supra*, 19 Cal.4th at p. 13, internal quotations and citation omitted.)

worked. (Lab. Code, § 512, subd. (a), emphasis added.) This Court "do[es] not accord deference to an interpretation that is 'clearly erroneous.'" (*Bonnell*, *supra*, 31 Cal.4th at p. 1265, citation omitted.)

The other DLSE letter that Plaintiffs cite (DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40]), as the Court of Appeal recognized, "concerns the timing of rest periods, not meal breaks." (Slip Op., p. 40.) Plaintiffs point to language in that letter indicating that "a rest break relegated to the beginning or end of the day is worthless," insisting that the "same is indisputably true of meal periods." (OB, p. 89.) Plaintiffs, however, neglect to mention that the Wage Order requires that rest periods be scheduled "insofar as practicable . . . in the *middle of each work period*" (Regs., § 11090, subd. (12)(A), emphasis added), and that neither the Wage Order nor section 512 contains any comparable requirement with respect to meal periods. The 2001 letter, which never mentions the Wage Order's meal period provision or section 512, is not entitled to this Court's consideration. (*Cole*, *supra*, 38 Cal.4th at p. 987.)

The 2002 DLSE manual that Plaintiffs cite is equally irrelevant. The manual quotes the Wage Order, and adds: "The clear intent of the IWC is that the burden of insuring that employees take a meal period *within the specified time* is on the employer." (DLSE Manual (June 2002) [MJN Ex. 49] § 45.2.1, emphasis added.) "Within the specified time" refers to the Wage Order's provision that "'[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period'" (*ibid*., quoting Regs., § 11090, subd. (11)(A)) – in no way suggesting the existence of a requirement that employers "eliminat[e] all work periods that exceed five hours," as Plaintiffs insist (OB, p. 82).

F. Plaintiffs' Meal Period Timing Policy Arguments, Like Their Meal Period Compliance Policy Arguments, Should Be Addressed To The Legislature – Not This Court.

Once again, Plaintiffs' arguments are infused with demands that this Court second-guess the Legislature's judgment and "inquire into the wisdom of underlying policy choices." (*Bonnell*, *supra*, 31 Cal.4th at p. 1263, internal quotations and citation omitted.) Plaintiffs repeatedly hypothesize that allowing the first meal to be scheduled early in an employee's shift results in some employees "working more than nine hours straight without being offered a meal period." (OB, p. 81.) According to Plaintiffs, an early lunch "nullifies the salutary effects of the first meal period." (*Ibid*.)

The law is clear, however, that "the choice among competing policy considerations in enacting laws is a legislative function." (*County of Mendocino*, *supra*, 13 Cal.4th at p. 53.) "This Court's task here is confined to statutory construction." (*Bonnell*, *supra*, 31 Cal.4th at p. 1263, internal quotations and citation omitted; *City and County of San Francisco*, *supra*, 12 Cal.4th at p. 121.)

While Plaintiffs would have this Court believe that there are no policy considerations supporting the rule that the Legislature adopted, early lunches often work to the benefit of both employees and employers. A restaurant employee whose eight-hour shift begins at 2 p.m., for example, might prefer to take a meal period at 4 p.m., two hours into the shift, rather than at 6 p.m. or 7 p.m., when the restaurant is most crowded and the likelihood of earning tips is greatest. So too, a truck driver whose seven-hour shift starts at 3 p.m. might prefer an early meal period to avoid rush-hour traffic. During the remainder of their shifts, the restaurant employee and the truck driver still would be entitled to rest periods, which also have "salutary effects" (OB, p. 94). But their interests in earning extra tips and

sitting in less traffic – and their employers' interests in added staff during the dinner hours and a quicker trip – would clearly be served by an early meal period.[36]

Ultimately, the Legislature weighed the competing needs of both employers and employees and arrived at a reasonable balance. If Plaintiffs remain convinced that an early lunch "gives workers no real rest or refreshment" (OB, p. 89) and that employers should be forced to time meal periods "closer to the mid-point of the day's shift" (*id*., p. 82), those concerns "should be addressed to the Legislature rather than this [C]ourt, whose task is limited to construing the laws enacted by the Legislature." (*Lonicki*, *supra*, 43 Cal.4th at p. 215.) Section 512 and its history leave no room for doubt that the Legislature intended for an employee's meal period entitlement to be measured by the total number of hours worked "per day," and not by the number of consecutive hours worked since the last meal. (Lab. Code, § 512; AB 60, Legislative Counsel Digest (July 21, 1999) [MJN Ex. 58], p. 2.) The Court of Appeal got it right.

III. THE COURT OF APPEAL ACCURATELY DEFINED THE ELEMENTS OF PLAINTIFFS' REST PERIOD CLAIMS.

The Wage Order's rest period provision states, in relevant part:

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[36] While Plaintiffs posit that an employee working a double shift (16 hours) could be required "to take [the] first meal period at the beginning of the day, and the second at the end of the day, with fifteen uninterrupted hours in between" (OB, p. 88), they point to no evidence indicating that any Brinker employee ever worked a double shift. Moreover, Plaintiffs' hypothetical ignores the fact that California's rigorous overtime requirements mean that few – if any – employers schedule double shifts. (Lab. Code, § 510, subd. (a) [providing that "[a]ny work in excess of eight hours in one workday . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee," and "[a]ny work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee"].)

> Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the *total hours worked daily* at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose *total daily work time* is less than three and one-half (3 1/2) hours.

(Regs., § 11050, subd. (12)(A), emphasis added.) With that plain language, the IWC directed employers to determine "the total hours worked daily" and authorize rest periods "at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof." (*Ibid*.)

Plaintiffs advance two theories with respect to the timing of rest periods, neither of which is compatible with the Wage Order's straightforward text: first, that a rest break must be authorized at the second, sixth, and tenth hours of an employee's shift; and second, that a rest break must invariably be permitted before the first meal period. Plaintiffs' theories, which the Court of Appeal rightly rejected as inconsistent with the Wage Order, are discussed in turn below.

A. The Wage Order Clearly States That A Rest Period Must Be Authorized And Permitted For Every Four Hours Of Work "Or Major Fraction Thereof" – Not, As Plaintiffs Insist, At The Second, Sixth, And Tenth Hours of An Employee's Shift.

1. The Court Of Appeal correctly held the Wage Order's reference to "major fraction" of a four-hour work period must mean the time between three and one-half and four hours.

The Court of Appeal correctly concluded that because the Wage Order "limits required rest breaks to employees who work at least three and one-half hours in one work day, the term 'major fraction thereof' can only be interpreted as meaning the time period between three and one-half hours

and four hours." (Slip Op., p. 24.) To construe the term "major fraction thereof" to mean anything *less* than three and one-half hours – as Plaintiffs urge this Court to do – would render the Wage Order's rest period provision "internally inconsistent": The second sentence would require employers to authorize rest periods for employees working fewer than three and one-half hours, and the last sentence would relieve employers of that same obligation. (*Id*., pp. 25-26.)

Defining "major fraction" of four hours as "the time period between three and one-half hours and four hours" (Slip Op., p. 24), in short, is the only interpretation that harmonizes the Wage Order's rest period provision and gives meaning to every word and phrase. (*People v. Arias* (2008) 45 Cal.4th 169, 178 [holding that rules of statutory construction require "adopting the construction that best harmonizes the statute internally"]; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284 ["In interpreting [statutory] language, we strive to give effect and significance to every word and phrase."], citing *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

2. The Court of Appeal did not hold that employees are entitled to a rest period only after working four hours.

Plaintiffs mistakenly claim that under the Court of Appeal's decision, "an employee working an eight-hour shift would be entitled to a first rest break after the fourth hour, but no second one." (OB, p. 106.) The Court of Appeal held no such thing. It correctly stated that the "calculation of the appropriate number of rest breaks must 'be based on the total hours worked daily'" (Slip Op., p. 24, quoting Regs., § 11050, subd. (12)(A)), and that a rest period must be authorized for "every four hours" of work (*id.*, p. 28; see also *id*., p. 31). Under that straightforward reading of the Wage Order, an employee working eight hours – two four-hour work

periods – is entitled to *two* rest periods. (See also, e.g., *Kimoto v. McDonald's Corps.* (C.D.Cal., Aug. 28, 2008, No. CV 06-3032) 2008 WL 4069611, *3 ["[I]f an employee works an eight hour shift . . . . [t]he first ten minute break must occur within the first four-hour period, and the second must occur within the second four-hour period."].)

In arguing that the Court of Appeal's opinion affords employees working an eight-hour shift only one rest break, Plaintiffs take out of context the court's statement that an "employee is entitled to a rest period after four hours of work . . . ." (OB, p. 106, citing Slip Op., p. 24, emphasis added.) According to Plaintiffs, the Court of Appeal would allow a rest period only "after" the first four-hour work period, and the second rest period in an eight-hour shift would be permitted only after "the employee has already gone home." (*Id.*, pp. 106-107.)

Plaintiffs mischaracterize the *Brinker* opinion. The Court of Appeal explicitly recognized that, to the extent practicable, a rest period must be scheduled in the *middle* of each four-hour work period (Slip Op., p. 28), and that even employees working seven and one-half hour shifts are entitled to two rest breaks (*id*., pp. 24-25 [explaining that the Wage Order "was intended to prevent employers from avoiding rest breaks by scheduling work periods slightly less than four hours, but at the same time made three and one-half hours the cut-off period for work periods below which no rest period need be provided"].)

Thus, in stating that "the employee is entitled to a rest period after . . . . he or she has worked a full four hours" (Slip Op., p. 24), the Court of Appeal was referring to the number of working hours that trigger an employee's right to a rest break – not *when* within the four-hour work period a break must be authorized.

3. Plaintiffs' theory that rest periods are "triggered" at the second, sixth, and tenth-hour marks cannot be reconciled with the plain language of the Wage Order.

Under Plaintiffs' interpretation of the Wage Order, "major fraction" means "'any time more than two hours'" (OB, p. 106, quoting DLSE Opinion Letter No. 1999.02.16 [MJN Ex. 37], p. 1), and an employee earns a rest period after working *two* hours – not three and one-half or four (*id*., pp. 104, 106-107). Plaintiffs' theory that rest periods are "triggered" at the second, sixth, and tenth hours of an employee's shift (*id*., pp. 104, 106) ignores the plain language of the Wage Order.

First, as explained above, Plaintiffs' claim that "a rest period is triggered at two hours, even for employees who work fewer than 3 1/2 hours a day" (OB, p. 109) cannot be reconciled with the Wage Order's text relieving employers of the obligation to "authorize and permit a rest period" if the "total daily work time is less than three and one-half (3 1/2) hours" (Regs., § 11050, subd. (12)(A)). The notion that the IWC bestowed on employees the right to a rest period in one sentence only to withdraw it in the following sentence makes no sense at all. (E.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1221 ["Whenever possible, courts must construe statutes harmoniously and avoid absurd or anomalous results."].)

Second, Plaintiffs' contention that rest periods are "triggered at the second and sixth hours of a typical eight hour shift" contradicts the Wage Order's provision that a rest period is "triggered" when an employee works a four-hour period. Indeed, if the IWC had intended to adopt Plaintiffs' rest period timing rule, it easily could have specified in the Wage Order that a first rest period must be authorized at the second-hour mark, a second rest period must be authorized at the six-hour mark, and a third at the 10-hour mark. Instead, it directed employers to determine the "total hours worked daily" and authorize one rest period "per four (4) hours or major fraction

thereof," in the middle of the four-hour work period only "insofar as practicable." (Regs., § 11050, subd. (12)(A).) The Wage Order's text trumps Plaintiffs' inventive interpretation. (E.g., *Morillion*, *supra*, 22 Cal.4th at p. 587.)

4. Plaintiffs' rest period timing theory finds no support in either a 1999 DLSE letter or the 1943 Wage Order.

Faced with a Wage Order that contradicts their timing argument, Plaintiffs turn to a February 16, 1999 DLSE opinion letter to support their claim that rest periods are "triggered" at the second, sixth, and tenth hours of a shift. (OB, pp. 105-106.) That one-page letter summarily concludes that a rule requiring that rest periods be authorized when "employees work any time over the midpoint of each four hour block of time" "provides a bright line that makes employer compliance easier." (DLSE Opinion Letter No. 1999.02.16 [MJN Ex. 37], p. 1, original emphasis.) It nowhere explains why the Wage Order's rule – that employers must authorize rest periods for every four hours of work, and in the middle of the four-hour work period insofar as practicable – is any harder for employers to follow.[37]

Without any independent analysis, the 1999 DLSE letter simply quotes a 60-year-old manual indicating that rest periods must be permitted at the two-hour, six-hour, and 10-hour marks. (DLSE Opinion Letter No. 1999.02.16 [MJN Ex. 37], p. 1.) Significantly, however, as the Court of Appeal recognized, the 1948 manual on which the DLSE's 1999 letter relies was written *before* the Wage Order "contain[ed] the sentence

[37] Plaintiffs also cite the 2002 DLSE Manual, which simply recites the February 16, 1999 letter's conclusion without offering any analysis of its own. (OB, pp. 105-106, citing DLSE Manual § 45.3.1 (June 2002) [MJN Ex. 49] ["DLSE follows the clear language of the law and considers any time in excess of two (2) hours to be a major fraction mentioned in the regulation. (O.L. 1999.02.16.)."].)

providing 'a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours.'" (Slip Op., p. 26, quoting Regs., § 11050, subd. (12)(A).) When in 1952 the IWC added the provision that employees working fewer than three and one-half hours are not entitled to a rest period (Wage Order 5-52 (Aug. 1952) [MJN Ex. 14], ¶ 12, cited in OB, pp. 107-108), it foreclosed Plaintiffs' argument – and the DLSE's predecessor agency's 1948 position – that a rest period is "triggered at the second" hour of a shift (OB, p. 104).

Finally, Plaintiffs point to the language of the public housekeeping industry's first rest period provision, a 1943 Wage Order stating that no woman or minor "whose work requires that she *remain standing* shall be required to work more than two and one-half (2 1/2) hours consecutively without a rest period of ten (10) minutes." (Wage Order 5NS (June 28, 1943) [MJN Ex. 12], ¶ 3(e), quoted in OB, p. 107, emphasis added.) In 1947, the IWC deleted the "standing" provision and adopted a version similar to today's Wage Order: "Every employer shall authorize all employees to take rest periods which, insofar as practicable, shall be in the middle of each work period. Rest periods shall be computed on the basis of ten minutes for four hours working time, *or majority fraction thereof*." (Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 11, quoted in OB, p. 107, Plaintiffs' emphasis.)

Plaintiffs blithely insist that the 1947 Wage Order's "new triggering language – four hours 'or majority fraction thereof' – is about the same as the 2 1/2-hour limit from 1943." (OB, p. 107.) The 1943 Wage Order's two and one-half hour limit, however, applied to employees "*remain[ing] standing*" without a rest period (Wage Order 5NS (June 28, 1943) [MJN Ex. 12], ¶ 3(e)), whereas the 1947 Wage Order's "four hour[] . . . or majority fraction thereof" limit applied to employees *working* without a rest period (Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 11). Because the

IWC logically imposed a stricter limit on the time women and minors could "remain standing" without a rest period, Plaintiffs' argument that the 1943 Wage Order's two and one-half hour limit somehow illuminates the meaning of the term "majority fraction" in the 1947 Wage Order is meritless.[38]

The IWC *did* signal the meaning of "majority fraction" in its 1952 Wage Order, which added the provision that "a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours." (Wage Order 5-52 (Aug. 1952) [MJN Ex. 14], ¶ 12, quoted in OB, p. 108.) As explained above, there is no way to reconcile the Wage Order's directive that employees working fewer than three and one-half hours are *not* entitled to a rest break with Plaintiffs' theory that employees working merely two hours *are* entitled to a break. The Court of Appeal's decision that employees earn one rest period for every four hours worked – unless they only work a period between three and one-half and four hours, in which event they are *also* entitled to a rest period (Slip Op., p. 24) – is the only one that harmonizes and makes sense of all the Wage Order's provisions. (*Arias*, *supra*, 45 Cal.4th at pp. 177-178; *Copley Press*, *supra*, 39 Cal.4th at p. 1284.)[39]

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[38] Plaintiffs also contend that "[t]he primary distinction between the two versions is that the 1943 language was directive, prohibiting employers from employing workers beyond the 2 1/2-hour limit, while the 1947 language ('authorize and permit') is permissive." (OB, p. 107.) Plaintiffs are mistaken. Both versions *compel* employers to provide employees working a certain amount of time the *opportunity* to take a rest period. (Wage Order 5NS (June 28, 1943) [MJN Ex. 12], ¶ 3(e) ["No employee . . . shall be required to work more than two and one-half (2 1/2) hours consecutively without a rest period . . . ."]; Wage Order 5R (June 1, 1947) [MJN Ex. 13], ¶ 11 ["Every employer shall authorize all employees to take rest periods . . . ."].)

[39] Federal decisions interpreting the Wage Order's rest period provision confirm that "[a]n employer must . . . provide a ten minute break

B. There Is No Support For Plaintiffs' Claim That The First Rest Break Must Be Authorized Before The First Meal Period.

Plaintiffs' theory that a rest break must always be taken before the first meal period (OB, pp. 110-111) likewise has no basis in the Wage Order. The Wage Order states only that rest periods "*insofar as practicable shall be in the middle of each work period*." (Regs., § 11050, subd. (12)(A), emphasis added.) It says *nothing* suggesting that the first rest break must be taken before the first meal period. Indeed, an employee could take a meal period one hour into a shift and still take an after-meal rest break "in the middle of [the four-hour] work period." (*Ibid*.) Had the IWC intended to compel employers to provide a rest break before the first meal period, as Plaintiffs insist, it certainly would have said so. As written, however, the Wage Order simply directs employers to schedule rest periods in the middle of the four-hour work period "insofar as practicable," and it must be interpreted consistent with that plain language. (E.g., *Morillion*, *supra*, 22 Cal.4th at p. 587.)

Ignoring the Wage Order's actual text, Plaintiffs rely instead on a September 17, 2001 DLSE letter stating that "[a]s a general matter, the first rest period should come sometime before the meal break and the second rest period should come sometime after the meal break." (DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 4, quoted in OB, p. 111.) Like all the other DLSE letters on which Plaintiffs depend, the September 17, 2001 letter is unreliable for a number of independent reasons.

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for each four hour period an employee works" – not, as Plaintiffs insist, at the two-hour, six-hour, and 10-hour marks. (*Corder v. Houston's Restaurants, Inc.* (C.D.Cal. 2006) 424 F.Supp.2d 1205, 1207, citing Regs., § 11050, subd. (12)(A), emphasis added; *Kimoto*, *supra*, 2008 WL 4069611 at *3-4 [holding that a rest period must be authorized within each "four-hour period"].)

First, the portion of the letter that Plaintiffs quote responds to the following question:

> *If an employer regularly requires employees to work five hours prior to their 30 minute lunch break*, could that employer provide a ten minute rest period after two hours, followed by a second ten minute rest break upon the fourth hour, and then work a fifth hour, break for lunch and then work the final three hours of the eight hour day without another break?

(DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 4, emphasis added.) The DLSE was thus addressing whether an employer that "regularly requires employees to work five hours prior to their 30 minute lunch break" can authorize two rest breaks before the first meal period. Here, by contrast, the question is whether an employer that schedules a meal period "within two hours after the shift begins" must authorize a first rest break before the first meal period. (OB, p. 110.) Because the DLSE did not address that issue, its opinion is not relevant authority.[40] (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [holding that DLSE "interpretations that arise in the course of case-specific adjudication .

[40] Moreover, the DLSE letter itself states that "the first rest period should come sometime before the meal break" as "a *general* matter" (DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 4, emphasis added) – thus acknowledging that there may be circumstances where it is inappropriate to authorize a first rest break before the first meal period. In any event, the DLSE's opinion that the first rest break should "generally" occur before the first meal when an employer "requires employees to work five hours prior to their 30 minute lunch break" (*ibid*.) is compelled by the plain language of the Wage Order. If an employer were to allow five hours to elapse before authorizing a first rest period, it would violate the Wage Order's directive that a rest break must be authorized for every four-hour work period. As discussed above, however, the Wage Order says nothing to suggest that an employer is obligated to offer a first rest break before the first meal period.

. . may be persuasive as precedents in *similar* subsequent cases"], emphasis added.)[41]

Second, Plaintiffs' contention that even if the DLSE letter does not consider the "early lunch" scenario, "[t]he rationale behind the DLSE's opinion is identical whether the overlength work period comes before or after the meal" (OB, p. 111), makes no sense. If an employee's meal period is scheduled one hour into the shift and a rest period is scheduled two hours later, the spacing of breaks would eliminate any "overlength work period." If, however, a meal period is scheduled one hour into the shift and the first rest break is scheduled *before* that meal, as Plaintiffs propose, the breaks would be condensed and an "overlength work period" would follow the meal.

Apparently recognizing the problem inherent in their position, Plaintiffs maintain that "[t]he solution is to move the meal period near the midpoint of the workday, and provide rest breaks before and after the meal, thereby eliminating all overlength work periods." (OB, p. 111.) Plaintiffs' "solution," however, is nothing more than a restatement of their position that meal periods should be scheduled mid-shift. As discussed above, neither the Labor Code nor the Wage Order supports Plaintiffs' meal period timing argument.

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[41] The Court of Appeal thus correctly dismissed the September 17, 2001 letter on the ground that it did not address the facts before it: an employer allegedly "requiring its employees to take their meal periods soon after they arrive for their shifts . . . ." (Slip Op., p. 29.) Plaintiffs nevertheless fault the court for also pointing out that the letter applies on its face only to "'persons employed in the on-site occupations of construction, drilling, logging, and mining" (*id.*, p. 29, quoting DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 1), arguing that the cited portion of the letter "appl[ies] to all" employees (OB, p. 111). Regardless, this Court frequently agrees with the Court of Appeal's conclusion without adopting all of its reasoning. (E.g., *In re Episcopal Church Cases*, *supra*, 45 Cal.4th at p. 493; *Balboa Island*, *supra*, 40 Cal.4th at p. 1146.)

Third, the DLSE's opinion that "[a]s a general matter, the first rest period should come sometime before the meal break" (DLSE Opinion Letter No. 2001.09.17 [MJN Ex. 40], p. 4) does not warrant this Court's deference because it does not take into account the relevant language of the Wage Order. (*Cole*, *supra*, 38 Cal.4th at p. 987 [refusing to defer to agency interpretation that failed to discuss relevant statutory language].) If it had, the DLSE certainly would have concluded that a first rest break is only required before the first meal period when that meal is scheduled *after* the first four-hour work period. (Regs., § 11050, subd. (12)(A).) The DLSE's opinion that the first rest break should generally be authorized before the first meal – regardless of when the first meal is scheduled – is not based on the language of the Wage Order and is not entitled to this Court's deference. (*Bonnell*, *supra*, 31 Cal.4th at p. 1265; *People ex rel. Lungren, supra*, 14 Cal.4th at p. 309.)

Ultimately, the Wage Order's rest period provision was written with California's disparate workplace settings in mind. While a rule requiring that rest periods be timed at the second, sixth, and tenth hours of a shift – and invariably before the first meal period – might be appropriate for employees working a traditional 8 a.m. to 5 p.m. schedule (with a break for lunch at noon and rest periods mid-morning and mid-afternoon), many employees work shifts of different lengths and at different hours. The IWC adopted a more flexible approach to account for the diversity of the modern workplace, and the Court of Appeal respected that choice. Its straightforward interpretation of the Wage Order – that rest periods need be authorized only every four hours, and timed in the middle of that four-hour work period only insofar as practicable – is correct and should be affirmed.

IV. THE COURT OF APPEAL CORRECTLY HELD THAT PLAINTIFFS' MEAL PERIOD, REST PERIOD, AND OFF-THE-CLOCK CLAIMS CANNOT BE DECIDED ON A CLASS BASIS.

In certifying a 60,000-member class, the trial court in this case identified a single common question: "what defendant must do to comply with the Labor Code." (1PE1.) The Court of Appeal correctly held that the trial court based certification on the "erroneous legal assumption" that it did not have to answer that question or define the elements of Plaintiffs' claims before deciding whether a class action was proper and accordingly reversed. (*Sav-on*, *supra*, 34 Cal.4th at p. 327 [holding that a certification order resting on "erroneous legal assumptions" or "improper criteria" requires reversal].)

Following this Court's decision in *Sav-on*, the Court of Appeal accurately reasoned that the "critical inquiry" on class certification is whether "'the *theory of recovery* advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" (Slip Op., p. 21, quoting *Sav-on*, *supra*, 34 Cal.4th at p. 327, emphasis added by Court of Appeal.) A court "'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged'" in order to "determine whether common questions of law or fact predominate." (*Ibid.*, quoting *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

The Court of Appeal proceeded to "determin[e] the applicable law" – answering pure legal questions that are a necessary prerequisite to any predominance analysis. (*Washington Mutual Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 912.) It held that employers need only "provide" meal periods, not ensure that they are taken. It also held that employers need only "authorize and permit" rest periods, not force them on employees – a point that Plaintiffs never disputed, but that the trial court

had deemed an open question justifying certification (1PE1). Finally, the Court of Appeal held that an employer is only liable for off-the-clock work if it knew or should have known that employees were working off the clock – a standard that Plaintiffs also have never challenged.

Having decided the elements of Plaintiffs' claims, the Court of Appeal reached the inevitable conclusion that whether any particular manager at any particular restaurant on any particular shift discouraged or prohibited a break – or encouraged or required off-the-clock work – can only be gauged on an individual basis, not class-wide. Where, as here, there are no company-wide policies or practices prohibiting meal or rest periods or requiring off-the-clock work, there are no questions common to the class justifying certification. The Court of Appeal got it right, and Plaintiffs' attempts to find fault with its decision are all misguided.

First, Plaintiffs' efforts to draw comparisons with *Sav-on* fall flat. *Sav-on* hinged on whether there was substantial evidence to support certification, while the Court of Appeal's decision turned on the trial court's incorrect legal assumption that it was not required to decide the law applicable to Plaintiffs' claims before certification. *Sav-on* is also inapposite because in that case there was "substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice" (*Sav-on*, *supra*, 34 Cal.4th at p. 330), whereas here there is no evidence that Brinker prohibited meal or rest periods or required off-the-clock work on a company-wide basis.

Second, contrary to what Plaintiffs argue, no survey or statistical methodology could eliminate the inherently individualized issues surrounding Plaintiffs' meal period, rest period, and off-the-clock claims. Federal courts in California have uniformly held – for the same reasons the *Brinker* court did – that Plaintiffs' claims, which require a determination of *why* any given employee missed a break or worked off-the-clock, are not

susceptible to class-wide proof. Contrary to what Plaintiffs suggest, *Sav-on* does not compel the use of representative evidence, but merely requires that courts examine whether "the theor[ies] of recovery advanced by the proponents of certification" are amenable to class treatment (*Sav-on*, *supra*, 34 Cal.4th at pp. 333, 327) – exactly what the Court of Appeal did here, properly deciding that they are not.

Third, despite what Plaintiffs claim, certification cannot be justified by pointing to "common legal issues" involving the proper timing of meal and rest periods – questions that Plaintiffs have asked this Court to decide. This Court's decision will eliminate those common legal issues from the case, and individual factual issues will predominate regardless of how they are decided.

Fourth, Plaintiffs are mistaken that the "affirmative defense of waiver" cannot independently defeat class certification. Whether a particular manager provided a particular meal period or authorized a particular rest break is an element of Plaintiffs' substantive causes of action – not an affirmative defense. But even if it were, no case supports Plaintiffs' theory that the "affirmative defense of waiver" cannot raise sufficiently substantial and numerous individual issues to determine the outcome of a predominance analysis.

Finally, the Court of Appeal correctly decided that the pure legal issues before it did not warrant remand, and *Washington Mutual* does not hold otherwise.

In the end, while appropriately certified class actions may assist the "effective enforcement of California's wage and hour laws" (OB, p. 113), Plaintiffs cannot build a class action on claims that require individual-by-individual liability determinations. This Court does not "alter [the] rule of substantive law to make class actions more available." (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 462.)

A. Unlike *Sav-on*, The Court Of Appeal Based Its Decision On The Trial Court's Erroneous Legal Assumptions And The Absence Of Any Evidence Of Class-Wide Policies Or Practices Violating California Law.

Plaintiffs rely heavily on this Court's decision in *Sav-on*, but the very different circumstances of that case preclude any meaningful comparison.

First, unlike *Sav-on*, the *Brinker* court reversed solely on the ground that the trial court failed to consider the elements of Plaintiffs' claims in determining whether they were susceptible to class treatment – an "improper criteria" or "erroneous legal assumption" issue, not a question of "substantial evidence." (Slip Op., pp. 3-4; see also *id*., pp. 30, 34, 40-41.) The Court of Appeal got it right. As this Court held in *Washington Mutual*, a certification order must be reversed when it is "based upon an incomplete and erroneous analysis of factors relevant to certification." (*Washington Mutual*, *supra*, 24 Cal.4th at pp. 911-912.) Thus, although certification must be sought before there is a resolution of the merits of a putative class action (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1083), a trial court may nevertheless not "reach an informed decision on predominance and manageability" without first "determining the applicable law or delving into manageability issues." (*Washington Mutual*, *supra*, 24 Cal.4th at p. 926.) What this means is that, before certification, the trial court must examine the issues framed by the pleadings and the law governing the causes of action alleged. As the Court of Appeal correctly determined, that is not what happened here – and its determination has nothing at all to do with whether the trial court considered the "predominance evidence . . . 'less than determinative or conclusive'" (OB, p. 118, quoting *Sav-on*, *supra*, 34 Cal.4th at p. 338), or whether its order was supported by "substantial evidence" (OB, p. 117).

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, citations omitted.)[42] Because *Brinker* hinged on the legal errors underlying the trial court's certification decision, the *Sav-on* Court's admonitions about "[p]resuming in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce from the record," and not "substitut[ing] our own judgment for the trial court's respecting . . . any . . . conflict in the evidence" (*id.* at pp. 329, 331, quoted in OB, pp. 119, 121) are inapplicable here, where the trial court mistakes are pure legal ones.

Second, in *Sav-on* – unlike in *Brinker* – there was company-wide evidence of wrongdoing. The issue in *Sav-on* was whether two groups of employees – operational managers ("OM's") and assistant managers ("AM's") – were intentionally misclassified as exempt from California's overtime laws as a result of uniform policies and practices followed in all Sav-on stores. (*Sav-on*, *supra*, 34 Cal.4th at p. 327 [alleging that "pursuant to defendant's uniform company policies and practices, [AM's and OM's] consistently worked overtime hours and, at least partly as a consequence of operational standardization imposed by defendant among its various stores, in fact spent insufficient time on exempt tasks to justify their being so classified"]; *id.* at p. 330 ["The record contains substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice."]; *id*., p. 337 ["[D]efendant allegedly promulgated exempt job descriptions, but implemented policies and practices that failed to afford its

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[42] Although class certification orders are "reviewed for abuse of discretion" (OB, p. 117), a trial court automatically abuses its discretion if it bases certification on "improper criteria or erroneous legal assumptions." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 436 ["[A]n order based upon improper criteria or incorrect assumptions calls for reversal even though there may be substantial evidence to support the court's order."].)

AM's and OM's true managerial discretion, and standardized store operations so that managers were obliged to spend over 50 percent of their time doing the same tasks as their subordinates."].)

Here, by contrast, "the evidence does not show that Brinker had a class-wide policy that prohibited meal breaks. The evidence in this case indicated that some employees took meal breaks and others did not." (Slip Op., p. 49.)[43] Thus, while in *Sav-on*, a "reasonable court" could conclude that "issues respecting defendant's policies and practices and issues respecting operational standardization, are likely to predominate in a class proceeding" (*Sav-on*, *supra*, 34 Cal.4th at p. 331), here there are no "policies and practices" denying breaks or requiring off-the-clock work, and no reasonable court could conclude that common issues predominate. Whether any given employee on any given day declined to take a meal or rest period – or was discouraged or prohibited by a manager from doing so – is a quintessentially individual question that defies class resolution.

Like *Sav-on*, the other meal period, rest period, and off-the-clock cases on which Plaintiffs rely for the broad-brush proposition that "wage and hour disputes . . . routinely proceed as class actions" (OB, p. 112, citation and internal quotations omitted) also involved challenges to corporate policies or practices common to the class. (E.g., *Ghazaryan v.*

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[43] Contrary to what Plaintiffs argue, the *Brinker* court did not "re-weigh" the evidence by "crediting Brinker's declarations" or "reject[ing] [P]laintiffs' declarations outright." (OB, p. 120.) It made *no* determination about the merits of Plaintiffs' claims – whether "Brinker employees missed rest [and meal] breaks as a result of a supervisor's coercion or the employee's uncoerced choice to . . . continue working" (Slip Op., p. 31) – observing only that *both* sides' evidence "indicate[s] that some employees took meal [and rest] breaks and others did not" (*id*., p. 49). While a court of course cannot decide as part of the certification analysis whether an "action is legally or factually meritorious" (*Linder*, *supra*, 23 Cal.4th at pp. 439-440), no authority supports Plaintiffs' position that a court is precluded from noting a conflict in the evidence. (OB, pp. 120-121.)

Diva Limousine, Ltd. (2008) 169 Cal.App.4th 1524, 1528-1529, 1534 [challenging defendant's policy of requiring drivers to take meal and rest breaks during on-call time between assignments, when they were required to stay near their vehicles and remain in uniform]; *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, 1197 [challenging defendant's policy that "a single employee working a shift or supervising a new employee when no one else is on duty is *not authorized* to do any of the following for 10 consecutive minutes every four hours: lock the store; tell customers they are off duty; ignore customer traffic or stop monitoring customer traffic and go off duty; or leave his or her teller station"], original emphasis; *Alba v. Papa John's USA, Inc.* (C.D.Cal., Feb. 7, 2007, No. CV 05-7487) 2007 WL 953849, *13-14 [challenging defendant's policy of providing a first meal period only to employees "who work eight or more hour*s* in a single shift"]; *Cornn, supra*, 2005 WL 588431 at *11 [challenging defendant's policy of deducting a standard lunch hour "without reference to contemporaneous time records kept by employees at the direction of their employer, and without any attempt to verify whether employees were taking the standard lunch period without reporting it"].) Here, by contrast, the only evidence common to the class is Brinker's entirely lawful meal period, rest period, and off-the-clock policies.

B. The Court Of Appeal Correctly Concluded That Plaintiffs' Theories Of Recovery Are Not Susceptible To Class-Wide Proof.

1. Although representative evidence might show that meal and rest periods were missed and off-the-clock work was performed, only individual inquiries will show *why*.

Because liability hinges on whether Brinker failed to "provide" meal periods or failed to "authorize and permit" rest periods, Plaintiffs cannot prevail on those claims without showing *why* a meal or rest period was

missed. Any given employee on any given day may have skipped a provided meal or an authorized rest break for any number of reasons, in which event Brinker would not be liable. As the Court of Appeal recognized, the highly individualized and often subtle explanations behind any missed or shortened meal or rest period can only be established on a case-by-case basis:

> The reason meal breaks were not taken can only be decided on a case-by-case basis. It would need to be determined as to each employee whether a missed or shortened meal period was the result of an employee's personal choice, a manager's coercion, or, as plaintiffs argue, because the restaurants were so inadequately staffed that employees could not actually take permitted meal breaks. As we discussed, *ante*, with regard to rest breaks, plaintiffs' computer and statistical evidence submitted in support of their class certification motion was not only based upon faulty legal assumptions, it also could only show the fact that meal breaks were not taken, or were shortened, not why. It will require an individual inquiry as to all Brinker employees to determine if this was because Brinker failed to make them available, or employees chose not to take them.

(Slip Op., pp. 47-48.)

Plaintiffs' off-the-clock claims, which are "limited to time worked when meal periods were interrupted" (OB, p. 132), are similarly not susceptible to class-wide proof. Because Brinker cannot be held liable for off-the-clock work unless it knew or had reason to know the work was being performed (*Morillion, supra*, 22 Cal.4th at p. 585), "resolution of these claims would require individual inquiries [into] whether any employee actually worked off the clock, whether managers had actual or constructive knowledge of such work and whether managers coerced or encouraged such work." (Slip Op., pp. 51-52.)

Plaintiffs nevertheless insist that liability *can* be established through common proof, including "employee declarations" and "deposition testimony and documents establishing Brinker's uniform meal period and rest break policies," as well as "survey and statistical evidence." (OB, p. 116.) Plaintiffs are wrong. Their evidence shows only the *absence* of a class-wide policy or practice of prohibiting breaks or requiring off-the-clock work, and the impossibility of determining liability on the basis of boilerplate declarations or surveys.

a) Declarations

The declarations that Plaintiffs submitted in support of class certification evidence only what particular employees experienced at particular restaurants during particular shifts. (1PE89-171.) Plaintiffs offered *no* evidence from Brinker managers or executives – no evidence with class-wide applicability – suggesting that Brinker ever violated its stated and lawful meal period, rest period, or off-the-clock policies.

In fact, several of Plaintiffs' cookie-cutter declarations crumbled when the declarants were deposed, demonstrating that the complex employer-employee dynamics behind any missed break or instance of off-the-clock work require more thorough examination than declarations and surveys can possibly provide. One former employee, for example, swore in her declaration that she "routinely did not receive an uninterrupted off-duty 30 minute meal break for every five hours [she] worked." (1PE100.) Upon examination at her deposition, however, the employee admitted: "*I was provided a meal break every single time I worked over five hours*." (19PE5206, emphasis added.) She further conceded that all meal periods were 30 minutes long and uninterrupted. (*Id.*, p. 5207.) Similarly, another employee swore in his declaration that he often was "not allowed to take a 30-minute uninterrupted meal break." (1PE110.) But when questioned at

his deposition, he testified that most of the time he *was* able to take uninterrupted 30-minute meal periods. (19PE5310.)

Moreover, a substantial number of Plaintiffs' declarants testified that they usually *did* receive meal breaks – albeit early in their shifts (1PE132, 140, 163, 171; 19PE5206, 5221-5222, 5270, 5282-5284, 5310, 5371-5372) – and nearly one-third of the declarants make no mention of meal periods at all (1PE92, 103, 108, 114, 122, 124, 128, 138, 143, 151), forcefully undermining Plaintiffs' theory that Brinker maintained a *class-wide practice* of denying its employees meal periods.

Plaintiffs' declarations are equally unsupportive of their claim that Brinker had a widespread policy of requiring off-the-clock work. More than half of Plaintiffs' declarants make no reference to off-the-clock work (1PE92, 103, 108, 110, 114, 122, 124, 128, 132, 134, 138, 143, 145, 151, 156, 158, 160, 171), and several of those who do fail to state "the reason *why* they worked off the clock" (Slip Op., p. 51, original emphasis). As the Court of Appeal noted, those declarants "did not indicate whether they were required to do so or did so by their own choice, nor whether their supervisors had knowledge of such activities." (*Ibid*.)

b) Statistical evidence

While Plaintiffs have always touted the usefulness of "statistical and survey" evidence, they have never explained how those methodologies could be used to effectively manage the host of individual issues raised by their claims. Assuming that both meal and rest periods need only be provided, not ensured, the trier of fact would have to determine with respect to every meal and rest period allegedly missed by every one of the approximately 60,000 class members whether a particular manager implicitly discouraged or explicitly prohibited a timely break or whether the employee simply chose not to take it.

The same holds true for Plaintiffs' off-the-clock claims. The trier of fact would have to assess the credibility of the employee claiming to have performed work off-the-clock – which is indisputably unrecorded – and decide whether the employee's supervisor knew or should have known that such work was performed. No statistical sample or survey could untangle the highly complex and often unspoken employer-employee dynamics involved and bypass the inherently individualized inquiries necessary to establish liability with respect to each class member.[44]

c) Computer-generated inferences

Plaintiffs finally suggest that an *inference* of class-wide meal period, rest period, and off-the-clock violations can be drawn from "Brinker's centralized computer system recording every work and meal period." (OB, p. 116.) Plaintiffs' argument fails on several grounds. First, there is no record of the rest periods employees took or the off-the-clock work they performed, and Plaintiffs do not claim otherwise. Second, a time record indicating a missed or shortened meal tells nothing about *why* the meal was

[44] Although Plaintiffs now claim that the "deposition testimony of their two survey and statistics experts" would have salvaged their case (OB, p. 126, fn. 58), that testimony was not offered in connection with their motion for class certification and the Court of Appeal properly excluded it. In any event, Plaintiffs' "post-certification" experts simply professed that a reliable survey was possible (Krosnick Dep., pp. 48-51, 135; Javitz Dep., pp. 38-40, 63-64 [attached as exhibits to Plaintiffs' Motion for Judicial Notice filed December 17, 2007]) – without ever explaining how it would be designed or how it would "effectively manage the issues in question." (*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, and plaintiff has failed to do so here."].)

missed or shortened – whether because a manager required it or because an employee chose to skip or take a shortened break.[45]

Third, even by Plaintiffs' own estimate, Brinker's records demonstrate that for most of the class period meals were missed less than 25 percent of the time. (1PE54.) Thus, rather than "creat[ing] an inference of a company-wide practice . . . . [t]he time records actually demonstrate the individual nature of the inquiry." (*Kenny*, *supra*, 252 F.R.D. at p. 646.) In *Kenny*, the time records before the court demonstrated that employees on average "did not clock out for a full 30-minute meal break approximately 40 percent of the time defendants were required to provide them with a meal break." (*Id*. at p. 643.) Even with that higher percentage of missed meals, the district court concluded:

> Some of these employees clocked out for their full 30-minute meal break nearly all the time, some none of the time, and some part of the time. This disparity suggests that 'the availability' of meal breaks varied employee to employee, or at least store to store or manager to manager. . . . Liability cannot be established without individual trials for each class member to determine why each class member did not clock out for a full 30-minute meal break on any particular day.

(*Id.* at p. 646.) Similarly, the evidence here shows that some employees generally took their full meal and rest breaks (1PE132, 140, 163, 171; 6PE1564-11PE3026 [meal breaks]; 11PE3032-13PE3598 [rest breaks]), some employees rarely, if ever, took meal and rest breaks (e.g., 1PE116, 126, 134, 145), and some employees took meal and rest breaks part of the time (e.g., 1PE100, 110, 140).

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[45] While Brinker's then-expert, Dr. Sharon Kelly, analyzed time card data for "compliant meal periods" (4 PE 988), her declaration did not address the fact that such data could not possibly account for meals that were provided but that employees chose to skip or shorten (4 PE 984-989).

In this vacuum – where there is no evidence of an institutionalized policy or practice of denying meal or rest periods or requiring off-the-clock work – Brinker's liability can only be decided on a case-by-case basis.

2. California's federal courts have consistently held – for the same reasons the *Brinker* court did – that meal and rest period claims cannot be decided by way of statistical, survey, or other representative evidence.

Half a dozen federal courts – all applying California law – have uniformly decided – for the same reasons as the *Brinker* court – that meal and rest period claims cannot be established by statistical, survey, or other representative evidence.

In *Kenny*, for example, plaintiff's putative class action alleged that Supercuts stores throughout California "were too busy to give employees a meaningful opportunity to take breaks." (*Kenny*, *supra*, 252 F.R.D. at p. 646.) The district court denied plaintiff's certification motion, explaining that plaintiff's theory of recovery "requires an individual inquiry into each store, each shift, each employee":

> Perhaps the employee wanted to work through her meal break in order to earn more in tips or because she did not want to keep a valued customer waiting. On the other hand, the evidence might also show that in a particular case the store manager instructed an employee to help a customer rather than take a lunch break. Such an instruction could be viewed as the employer not "providing" a meal break; however, it is an individual question that cannot be resolved class wide.

(*Ibid*.)

In *Kimoto*, too, plaintiff claimed – exactly like Plaintiffs here – that "McDonald's was too busy to give employees a meaningful opportunity to take a break." (*Kimoto*, *supra*, 2008 WL 4690536 at *6.) The court held

that because meal periods need only be provided, not ensured, it could only be determined on an individual basis whether on any particular day, any particular shift at any one of McDonald's 158 California restaurants was "too busy" to permit meal and rest breaks:

> Assessing whether a McDonald's employee was *authorized* by his or her manager to take a rest or meal period would require an individualized, highly fact-specific inquiry to determine whether a divergent method applied in a particular restaurant, by particular managers, to particular shifts, to particular crew members.

(*Ibid*., original emphasis; see also *Wren*, *supra*, 2009 WL 301819 at *29 [holding that because "employees must be offered, but need not be forced to take a meal break . . . many individualized inquiries will be necessary . . . to determine the reason meal breaks were missed," and defendant will "be entitled to present individualized evidence that these meal periods were, in fact, offered and not taken"]; *Gabriella*, *supra*, 2008 WL 3200190 at *3 ["In order to determine defendants' liability, the parties would be required to litigate each instance of an alleged [meal or rest period] violation."]; *Salazar*, *supra*, 251 F.R.D. at p. 534 [holding that its "interpretation of the statute" – that "plaintiffs must show defendants *forced* plaintiffs to forego missed meal periods" – "forecloses class-wide adjudication of claims in this case"], original emphasis; *Brown*, *supra*, 249 F.R.D. at p. 586 ["Because FedEx was required only to make meal breaks and rest breaks available to Plaintiffs," resolution of their claims "will require substantial individualized fact finding."].)

Just like the Court of Appeal, California federal courts agree that absent allegations that "class-wide policies or practices caused members to miss meal and rest periods" (*Gabriella*, *supra*, 2008 WL 3200190 at *3), meal and rest period claims are not susceptible to class treatment. (*Wren*, *supra*, 2009 WL 301819 at *29 ["In the absence of any explicit policy on

the part of [the employer] to which the missed meals can be attributed and in light of the individualized inquiries necessary to evaluate the practices of [the employer] as to employee meal breaks, the Court concludes that Plaintiffs' meal break claims do not meet the requirements of Rule 23(b)(3)."].)

3. The out-of-state cases on which Plaintiffs rely, unlike *Brinker*, involved allegations of company-wide policies and practices of prohibiting meal or rest periods or requiring off-the-clock work.

Without mentioning any of the federal cases applying California law, Plaintiffs cite several out-of-state cases against Wal-Mart. (OB, pp. 126-127, 133.) Those cases not only applied non-California law, but also involved allegations that meal and rest periods were missed and off-the-clock work was performed as a result of "company-wide practices and policies." (*Hale v. Wal-Mart Stores, Inc.* (Mo.Ct.App. 2007) 231 S.W.3d 215, 220 [contending that "staffing and overtime limits are enforced through Wal-Mart's corporate discipline policy and a bonus incentive plan for store managers that is based on strict payroll and staffing controls"]; *Iliadis v. Wal-Mart Stores, Inc.* (N.J. 2007) 922 A.2d 710, 715 [claiming that Wal-Mart "provides financial incentives to store managers to increase store profits by lowering store expenses," which makes off-the-clock work "essentially mandatory"]; *Salvas v. Wal-Mart Stores, Inc.* (Mass. 2008) 893 N.E.2d 1187, 1210, fn. 62 [alleging that Wal-Mart was aware of the "widespread existence of time shaving and off-the-clock work caused by payroll pressure," and that cost-cutting policies had an "adverse impact on the ability of associates to obtain meal and rest breaks"]; *Braun v. Wal-Mart Stores, Inc.* (D.Minn., Nov. 3, 2003, No. 19-C0-01-9790) 2003 WL 22990114, *9 [submitting "Wal-Mart documents reflecting a practice of altering employee time records to reduce the amount of time recorded on

the clock by, among other things, clocking out employees for meal breaks regardless of whether they received such a break, deleting employee time entries without their knowledge, and clocking out employees one minute after they clocked in, effectively depriving them of compensation for a full shift"].)[46] Unlike the Wal-Mart cases cited by Plaintiffs, the only evidence common to the class here is Brinker's entirely lawful meal period, rest period, and off-the-clock policies.

Plaintiffs also neglect to mention that most courts have refused to certify meal period, rest period, and off-the-clock claims against Wal-Mart for the same reasons cited in *Brinker*. (See, e.g., *Robinson v. Wal-Mart Stores, Inc.* (S.D.Miss. 2008) 253 F.R.D. 396, 402 [denying certification of plaintiffs' off-the-clock claims because it could only be determined on an individual basis why any particular employee worked off-the-clock in any given circumstance]; *Alix v. Wal-Mart Stores, Inc.* (2007) 838 N.Y.S.2d 885, 893 [refusing to certify plaintiffs' meal period, rest period, and off-the-clock claims in part because "[t]he very nature of their claims bespeaks a need for individual treatment of the allegations of the class members"]; *Cutler v. Wal-Mart Stores, Inc.* (Md.Ct.App. 2007) 927 A.2d 1, 12 [affirming trial court's decision denying certification of plaintiffs' meal period, rest period, and off-the-clock claims in part because "[e]vidence of

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[46] The claims against Wal-Mart in the cases cited by Plaintiffs also were based largely on violations of Wal-Mart's own meal period, rest period, and off-the-clock policies. (E.g., *Hale*, *supra*, 231 S.W.3d at p. 221; *Iliadis*, *supra*, 922 A.2d at p. 714.) Because management described those policies as "NOT optional" (*Iliadis*, *supra*, 922 A.2d at p. 715) and "non-negotiable" (*Salvas*, *supra*, 893 N.E.2d at p. 1194; *Braun*, *supra*, 2003 WL 22990114 at *9), there was a common factual issue as to "whether it was permissible under the pertinent Wal-Mart policies for an employee to miss a break voluntarily" (*Salvas*, *supra*, 893 N.E.2d at p. 1204; *Braun*, *supra*, 2003 WL 22990114 at *9). Here, because the "provide v. ensure" question is indisputably a prerequisite to any predominance analysis, that issue does not support certification.

each class member's time records, as well as individual explanations for breaks missed and individual testimony regarding work performed off the clock, would be required in order for the employees to prove their claims of unjust enrichment and violation of Maryland labor laws"]; *Jackson v. Wal-Mart Stores, Inc.* (Mich.Ct.App., Nov. 29, 2005, No. 258498) 2005 WL 3191394, *5 [affirming trial court's denial of class certification because plaintiffs' meal and rest period claims would necessarily require inquiries into whether "potential class members were expressly required by their supervisors" to forego a break, or whether they "simply chose to do so for a number of personal reasons"]; *Harrison v. Wal-Mart Stores, Inc*. (N.C.Ct.App. 2005) 613 S.E.2d 322, 329 [affirming trial court's denial of class certification because plaintiffs' rest period and off-the-clock claims "would require individual determinations," for example, whether employees "missed breaks in order to leave work early"]; *Petty v. Wal-Mart Stores, Inc.* (Ohio Ct.App. 2002) 773 N.E.2d 576, 581-582, *review den.* (Ohio 2002) 772 N.E.2d 1203 [affirming trial court's decision to deny certification of plaintiffs' meal period, rest period, and off-the-clock claims due to the predominance of issues individual to each putative plaintiff]; *Wal-Mart Stores, Inc. v. Lopez* (Tex.Ct.App. 2002) 93 S.W.3d 548, 557-558 [reversing trial court's grant of class certification as to plaintiffs' rest period, meal period and off-the-clock claims on the ground that each class member's claim would have to be determined on an individual basis]; *Basco v. Wal-Mart Stores, Inc.* (E.D.La. 2002) 216 F. Supp.2d 592, 603 [holding that individual issues predominate with respect to plaintiffs' off-the-clock claims due to "the myriad of possibilities that could be offered to explain why any one of the plaintiffs worked off-the-clock"].)

In sum, the Court of Appeal correctly decided – consistent with every federal court in California to address the issue – that in the absence of any evidence of class-wide policies or practices prohibiting meal or rest

periods or requiring off-the-clock work, "whether employees were forced to forgo [] breaks or voluntarily chose not to take them," and whether employees worked off the clock with their managers' actual or constructive knowledge, are "highly individualized inquir[ies]" prohibiting class treatment. (Slip Op., p. 32, citing *Brown*, *supra*, 249 F.R.D. at p. 587.)

4. Nothing in *Sav-on* or in any other California case compels the use of statistical, survey, or other representative evidence in deciding class certification.

Contrary to what Plaintiffs suggest (OB, pp. 123-124), *Sav-on* in no way requires lower courts considering certification to rely upon the statistical, survey, or other representative evidence proffered by plaintiffs. The *Sav-on* Court held only that there is no "per se bar . . . to certification based partly on pattern or practice evidence or similar evidence of a defendant's class-wide behavior," and instructed courts to examine whether "the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-on*, *supra*, 34 Cal.4th at pp. 333, 327.)

The *Brinker* court followed *Sav-on*'s instruction to a tee. After analyzing Plaintiffs' theories of recovery and deciding – as the trial court failed to do – that meal and rest periods must only be provided, not ensured, the Court of Appeal concluded that Plaintiffs' claims cannot be proven by statistical evidence or other class-wide proof. Nothing in *Sav-on* compels or even authorizes the use of statistical or other similar evidence in a case such as this where Plaintiffs, to establish Brinker's liability, must show for each missed break and instance of off-the-clock work whether "Brinker failed to make [the meal or rest period] available, or [the] employee[] chose not to take [it]" (Slip. Op., p. 48), and whether Brinker "kn[ew] or should have known the employee was working off the clock" (*id.*, p. 51, citing

Morillion, *supra*, 22 Cal.4th at p. 585). *Sav-on* stands only for the proposition that statistical evidence is admissible in *appropriate* cases, no more and no less. (*Sav-on*, *supra*, 34 Cal.4th at p. 333, fn. 6.)

Thus, in all the other appellate decisions cited by Plaintiffs (OB, pp. 124-125), the courts examined plaintiffs' theories of recovery and determined that class-wide evidence was appropriate under the specific circumstances presented. (E.g., *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1107 [where defendants had "conceded that common issues [we]re present" and that their acts were "the same with regard to each plaintiff," "well sampling and other hydrological data" could prove "how and when defendants disposed of toxic chemicals and whether [their] conduct was negligent"]; *Capitol People First v. Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 693 [holding that the trial court erroneously rejected statistical evidence "despite the suitability of this approach where only declaratory and injunctive relief is sought" and where "appellants' theory of recovery . . . focuses on the common practices, policies, acts and omissions of the state actors and regional centers"]; *Reyes v. Board of Supervisors* (1987) 196 Cal.App.3d 1263, 1279 [holding that sampling evidence was appropriate in case challenging county's common practice of depriving general relief recipients of benefits for failing to comply with work project rules without distinguishing between willful and nonwillful violators].)[47]

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[47] Plaintiffs' reliance on *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, is also misplaced. In *Bell*, the plaintiffs had already "prevailed on *liability* issues" (*id.* at p. 721, emphasis added), and the court decided only that statistical and other representative evidence could be used to decide the amount of *damages* to which class members were entitled (*id.* at p. 754). Similarly, in *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 474 F.3d 1214, the Ninth Circuit held that "a statistical formula could be used to determine the total amount of backpay and punitive damages owed to Plaintiffs in the event that Wal-Mart is found liable for discriminating

None of the decisions cited by Plaintiffs even hints that statistical, survey, or other representative evidence is always appropriate in the class action context, and none – significantly – addresses the specific types of claims before this Court. As discussed above, federal cases addressing the certification of meal and rest period claims brought under California law uniformly hold that they are not susceptible to class-wide proof. Instead, "very particularized individual liability determinations would be necessary," and "findings as to one [employee] could not reasonably be extrapolated to others." (*Dunbar*, *supra*, 141 Cal.App.4th at pp. 1431-1432.) The Court of Appeal's decision that survey, statistical, and other representative evidence has no place here should be affirmed.

C. Contrary To What Plaintiffs Maintain, There Are No "Common Legal Questions" Justifying Certification.

Plaintiffs' argument that their meal period timing claim, as well as their "particularized rest break claims (for failure to 'authorize and permit' a rest break after two hours' work or before the first meal period)" present common legal questions justifying certification (OB, pp. 113-114; *id.* at pp. 78-80, 103-105, 110) stretches the bounds of reason.[48] Plaintiffs, after all, are asking this Court to answer those exact legal questions, not remand

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against Plaintiffs." (*Id.* at p. 1239.) Neither *Bell* nor *Dukes* held that statistical, survey, or other representative evidence could be used to establish liability – much less that it is *always* appropriate for that purpose, as Plaintiffs imply. In any event, after Plaintiffs filed their opening brief, the Ninth Circuit ordered an en banc hearing in *Dukes*, stating that "the three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit." (*Dukes v. Wal-Mart, Inc.* (9th Cir. 2009) 556 F.3d 919.)

[48] Notably, Plaintiffs are *not* claiming that the "provide v. ensure" issue is a common legal question justifying certification. Rather, they implicitly acknowledge – as they must – that the issue must be resolved in order to ascertain whether individual or common questions predominate. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 926.)

them to the trial court. (*Id*., pp. 1-2.) The notion that this Court should order a class certified after resolving all the "common legal issues" that purportedly warrant certification makes no sense.[49]

1. The meal period timing issue

Specifically with respect to the meal period timing issue, Plaintiffs contend that whether employers must provide a meal period for every five consecutive hours of work, as Plaintiffs insist, is a "common legal question supporting class certification." (OB, p. 79.)

Plaintiffs point to several cases in which the action involved questions of law common to all class members. (OB, p. 79, citing *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713-717, *Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 100, and *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 933.) But in none of those cases was the appellate court asked to decide the very issues that ostensibly supported class certification. To the contrary, the courts reasoned that "[c]onsolidation in a class action . . . creates substantial benefits for both the parties and the courts in that class action disposition averts the unnecessary risk of numerous and repetitive administrative and judicial proceedings with the attendant possibility of inconsistent adjudication." (*Rose*, *supra*, 126 Cal.App.4d at p. 933; see also *Daar*, *supra*, 67 Cal.2d at pp. 714-715 ["If a class suit is not permitted here, a multiplicity of legal actions dealing with identical basic issues will be required in order to

[49] Because these are pure legal issues that both sides want decided, and given the importance of these issues to employers and employees throughout California, there is no reason for this Court to defer their decision. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 115, fn. 5 ["[A] reviewing court has discretion to decide . . . an issue if it presents a pure question of law arising on undisputed facts, particularly when the issue is a matter of important public policy."], citation omitted; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [reviewing court has discretion to decide "a pure question of law which is presented by undisputed facts"].)

permit recovery by each of several thousand taxicab users. The result would be multiple burdens upon the plaintiffs, the defendant and the court."].)[50] Here, of course, there will be no "risk of numerous and repetitive administrative and judicial proceedings" or any "possibility of inconsistent adjudication" after this Court resolves the meal period timing issue once and for all.

If this Court affirms the Court of Appeal's decision that employers must offer a first meal period only to employees working more than five hours per day and a second meal period only to employees working more than 10 hours per day (Slip Op., pp. 36-37), even Plaintiffs do not contend that any common legal questions are left. Brinker's meal period policy is indisputably consistent with the Court of Appeal's interpretation of the statutory language.

If this Court reverses the Court of Appeal's decision, meal period timing violations still could not be proven on a class-wide basis. Contrary to what Plaintiffs insist, Brinker's records would not "show each initial meal period and each succeeding work period of over five hours." (OB, p. 79.) If an employee skipped the initial meal period – for any of the personal, financial, or work-related reasons discussed above – Brinker's time records would not disclose when the first meal was offered or whether there was a "succeeding work period of over five hours." A trier of fact could only identify violations on an individual basis, after hearing live

[50] Similarly, in *Sav-on*, certification was based in part on a "predominant" legal issue that could "easily be resolved on a class-wide basis": "how the various tasks in which AM's and OM's actually engaged should be classified – as exempt or nonexempt." (*Sav-on*, *supra*, 34 Cal.4th at pp. 330-331.) This Court, however, was not being asked to decide that very issue.

testimony from the employee, his or her supervisor, and co-workers about whether and when the initial meal period was actually provided.

2. The rest period timing issues

The same is true with regard to the rest period timing issues. As discussed with respect to the meal period timing issue, the idea that this Court should affirm the trial court's certification order based on "common question[s] of law" (OB, p. 103) that it will have already decided makes no sense.

If this Court affirms the Court of Appeal's decision that the Wage Order only requires authorizing rest periods every four hours and does not require that the first rest period occur before the first meal, even Plaintiffs do not contend that there are any common legal issues remaining. Plaintiffs also do not dispute that Brinker's policy is consistent with the Court of Appeal's interpretation of the Wage Order.[51]

Plaintiffs claim that if this Court reverses and holds that rest periods are "triggered at the second and sixth hours of a typical eight-hour shift" (OB, p. 104), a rest period subclass should be certified. Again, Plaintiffs ignore the individual issues that would persist even in the event of that ruling. Because there is no statutory requirement that rest periods be recorded, a factfinder could only determine on an employee-by-employee basis whether there actually was a violation of Plaintiffs' proposed rule that employees receive rest periods at the two-hour and six-hour marks.

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[51] Plaintiffs mistakenly accuse both the Court of Appeal and Brinker of only authorizing a rest period "after" four hours of work. (OB, pp. 103, 106.) As explained in section III.A.2, above, the Court of Appeal held that employers must permit a rest period every four hours, and in the middle of the four-hour work period insofar as practicable. (Slip Op., pp. 24-25, 28-29.) Likewise, Brinker's policy is that a rest period must be authorized within – not after – every four-hour work period. (21PE5913-5915.)

Similarly, individual issues would still predominate even if this Court holds that employers are required to authorize a first rest break before the first meal. Although Brinker does not require that employees take their first rest break before the first meal (21PE5915), it could only be determined on a case-by-case basis whether any particular employee on any particular day received a pre-meal rest period. Class treatment is thus inappropriate.

D. Plaintiffs' "Affirmative Defense" Arguments Are Groundless.

1. Individual issues arise not from any "affirmative defense" but from Plaintiffs' substantive causes of action.

Plaintiffs contend that "any non-common questions created by Brinker's 'waiver' defense cannot defeat class certification when common questions otherwise predominate." (OB, p. 127.) Plaintiffs' "affirmative defense" argument is built on a mistaken premise.

The issue before this Court is not, as Plaintiffs would have it, whether Brinker employees "waived" their rights to meal and rest periods. Rather, the issue is whether Brinker "provided" meal periods within the meaning of Labor Code section 512, and "authorized and permitted" rest periods within the meaning of the Wage Order.

The Court of Appeal correctly held that individual issues predominate because an employer's affirmative duty to "provide" meal periods and "authorize and permit" rest periods does not entail ensuring that breaks are taken. (Slip Op., pp. 31, 47-48.) It explained that "[i]t will require an individual inquiry as to all Brinker employees to determine if [breaks were missed] because Brinker failed to make them available, or employees chose not to take them." (*Id*., p. 48.) Individual questions thus surround the issue of whether Brinker "failed to make [breaks] available."

That element is Plaintiffs' burden to prove at trial. (E.g., *Brown*, *supra*, 249 F.R.D. at p. 584 ["Plaintiffs can prevail on their rest period claim if they demonstrate that FedEx did not 'provide' or 'authorize and permit' rest breaks."].)

2. Even if the issue of whether Brinker provided meal and rest breaks is deemed an "affirmative defense," it still defeats class certification.

Even if the issue of whether particular breaks were provided, skipped, discouraged, or prohibited is, as Plaintiffs insist, an "affirmative defense" (OB, pp. 127-128), the individual issues arising from that defense still are sufficient to defeat certification.

A predominance analysis considers whether the issues before the court "may be jointly tried" or "requir[e] separate adjudication" – not whether those issues originated with an affirmative defense or a substantive claim. (E.g., *Gerhard v. Stevens* (1968) 68 Cal.2d 864, 913 [holding class certification inappropriate, in part, because "defendants would undoubtedly raise the defense of abandonment of the mineral interests as to each alleged member of the class, which . . . creates a factual issue as to the individual owner's intent"]); *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544 [holding that affirmative defenses that entail fact-intensive inquiries specific to each claimant "weigh[] heavily against certification"]; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811 [holding that affirmative defenses "will require individual litigation of claims," precluding certification].)

Indeed, Plaintiffs cite no case – and Brinker is unaware of any – supporting their newly-minted theory that "non-common issues surrounding affirmative defenses are relevant to a predominance analysis only if they exist *alongside* non-common questions on *liability*." (OB, p. 130, original emphasis.) Contrary to what Plaintiffs argue, *Walsh v. IKON*

Office Solutions, Inc. (2007) 148 Cal.App.4th 1440 (cited in Slip Op., p. 50), holding that courts conducting a predominance analysis must consider whether an affirmative defense "raise[s] issues specific to each potential class member" (*id.* at p. 1450, citing *Gerhard, supra*, 68 Cal.2d at p. 913 and *Kennedy, supra*, 43 Cal.App.4th at p. 811) is in no way "inconsistent with *Sav-on*" (OB, p. 129). In *Sav-on*, the exemption defense raised "considerations . . . likely to prove susceptible of common proof" (*Sav-on*, *supra*, 34 Cal.4th at p. 337); it did not present individual issues that "predominate over common issues" (*Walsh*, *supra*, 148 Cal.App.4th at p. 1450), as the affirmative defense in *Walsh* and the so-called affirmative defense of waiver here do.

Plaintiffs argue that if courts are permitted to consider whether an affirmative defense "would raise issues specific to each potential class member" (*Walsh*, *supra*, 148 Cal.App.4th at p. 1450), "that would require the plaintiff to disprove the affirmative defense on a classwide basis – merely to obtain class certification." (OB, p. 129.) Not so. The *Walsh* court specifically noted that "the question before [it] . . . is not whether IKON *proved* its defense, but whether it presented evidence from which the trial court could reasonably conclude that the adjudication of the defense would turn more on individualized questions than on common questions." (*Walsh*, *supra*, 148 Cal.App.4th at p. 1453, fn. 8, emphasis added.) While *Sav-on* rejected defendant's argument that plaintiffs should be compelled to demonstrate "as a prerequisite to certification" that its policies were "right as to all members of the class or wrong as to all members of the class" (*Sav-on*, *supra*, 34 Cal.4th at p. 338), here neither Brinker nor the lower court opinion suggests imposing any such requirement on Plaintiffs. The *Brinker* court held only – entirely consistent with *Sav-on* – that in the absence of class-wide policies or practices prohibiting meal or rest breaks, the question of whether Brinker "provided" meal periods and "authorized"

rest breaks "requir[es] separate adjudication" (*Sav-on*, *supra*, 34 Cal.4th at p. 326, internal quotations and citation omitted).

Plaintiffs' reliance on *Lockheed* (OB, pp. 129-130), is also misplaced. *Lockheed* stands only for the narrow "noncontroversial" point "that a limitations defense does not categorically preclude class certification." (*Lockheed, supra*, 29 Cal.4th at p. 1105, fn. 4.) Although a straightforward statute of limitations defense may be amenable to class treatment because it involves a legal question, Brinker's "waiver defense" – if characterized as such – necessarily involves highly individualized inquiries concerning very complex and often subtle employer-employee dynamics. (*Block*, *supra*, 65 Cal.App.4th at p. 544 ["[W]hile some issues, such as statute of limitations for a cause of action . . . might be common for all members of the class, others – such as the affirmative defenses of consent, waiver, or estoppel – clearly were not."].)

Finally, Plaintiffs turn to the New Jersey Supreme Court's decision in *Iliadis*, but that case too offers no support for their theory that affirmative defenses cannot "defeat class certification *standing alone*." (OB, p. 131, original emphasis.) In *Iliadis*, as in *Sav-on*, it was determined that common issues predominated because of evidence that Wal-Mart on an institutionalized basis "promoted uncompensated work and created a work environment where uniformly applicable policies were ignored as part of a corporate-wide effort to reduce labor expenses." (*Iliadis*, *supra*, 922 A.2d at p. 723; see also *id.* at p. 715 ["Wal-Mart, it is claimed, provides financial incentives to store managers to increase store profits by lowering store expenses . . . [making] off-the-clock work 'essentially mandatory,' as evidenced by corporate e-mail encouraging store managers to 'get volunteers' to 'cut hours.'"].) The *Iliadis* court held, as *Sav-on* did, that although "[i]ndividual questions may yet remain, such as [] whether particular employees voluntarily missed rest and meal breaks," those

questions were outweighed by questions concerning class-wide policies and practices. (*Id.* at p. 723.) Contrary to what Plaintiffs suggest, *Iliadis* did not hold that individual issues surrounding the affirmative defense of waiver are insufficient to overcome class certification where, as here, there is no evidence of institutionalized policies or practices of prohibiting meal or rest periods or requiring off-the-clock work.

Courts conducting a predominance analysis, in sum, are required to weigh all the issues – whether generated by substantive causes of action or affirmative defenses – and there is no support for Plaintiffs' theory that individual issues resulting from the "affirmative defense" of waiver cannot independently defeat class certification.

E. The Court Of Appeal's Sound Decision That Remand Is Unnecessary Did Not Contravene *Washington Mutual*.

Relying exclusively on *Washington Mutual, supra*, 24 Cal.4th 906, Plaintiffs contend that if this Court affirms, it should remand "to the trial court for [P]laintiffs to attempt to meet the new legal standards in a renewed class certification motion." (OB, p. 134.) The Court of Appeal correctly decided that remand is entirely unnecessary, and that *Washington Mutual* in no way suggests otherwise.

Contrary to what Plaintiffs insist (OB, pp. 133-134), *Washington Mutual* did not lay down a blanket rule requiring remand whenever a certification order is vacated based on "erroneous legal assumptions." Instead, the Court decided under the particular circumstances of that case that remand was appropriate because highly fact-specific questions remained to be resolved, including "the scope or enforceability of the choice-of-law provisions at issue" in the parties' contracts. (*Washington Mutual*, *supra*, 24 Cal.4th at p. 928.)

Here, there are no fact-specific questions for the trial court to settle before certification can be decided. No "evidentiary showing" (OB, p. 134)

could eliminate the individual inquiries needed to prove whether each alleged instance of a missed or shortened break was the product of an employee's decision or a manager's coercion. No "additional survey and statistical evidence" (*ibid*.) could preclude the "individual inquiries" required to resolve "whether any employee actually worked off the clock, whether managers had actual or constructive knowledge of such work and whether managers coerced or encouraged such work." (Slip Op., pp. 51-52.) Nothing in a "renewed class certification motion," in short, 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 correctly ordered class certification denied with prejudice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884-885 ["We need not remand the matter to the trial court . . . for we are . . . in as good a position as that court to resolve the determinative legal question."]; *Faulder v. Mendocino Cty. Bd. of Supervisors* (2006) 144 Cal.App.4th 1362, 1368 [holding that when there are no "relevant disputed factual issues that need to be resolved," "nothing would be gained" by remand, which would only create "uncertainty and delay"]; *Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1608 [holding that "there is no need to remand" a pure "question of law"]; *Klein v. Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 75 ["We need not remand the matter to the trial court because we may resolve the determinative legal question . . . ."].)

The Court of Appeal, in sum, correctly resolved all class certification issues. Its judgment should be affirmed.

CONCLUSION

As we have shown, neither the Labor Code nor the Wage Order supports Plaintiffs' claims that employers must not only provide meal periods but also must ensure that they are taken, that meal periods must be

provided for every five consecutive hours worked, or that employers must authorize rest periods at the second, sixth, and tenth hours of their employees' shifts – and always before the first meal period. As we have also shown, federal courts applying California law have denied class certification for virtually identical meal and rest period claims, recognizing that absent evidence of institutionalized policies or practices of prohibiting breaks, individualized liability determinations must be made in each case. The *Brinker* Court of Appeal reached the same result. These courts all got it right.

For all these reasons, Brinker submits that the judgment of the Court of Appeal should be affirmed in its entirety.

Respectfully submitted,

Dated: April 29, 2009

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CERTIFICATE OF COMPLIANCE

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

This brief consists of 39,905 words as counted by the Microsoft Word version 2002 word processing program used to generate the brief.

Dated: April 29, 2009

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. On April 29, 2009, I served the foregoing document described as: **ANSWER BRIEF ON THE MERITS** on the interested parties below, using the following means:

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Executed on April 29, 2009, at Los Angeles, California.

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