No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

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

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED FOR REVIEW

This case presents the following issues:

1. *Meal Period Compliance Issue*: Under the Labor Code (§§226.7 and 512) and Industrial Welfare Commission ("IWC") Wage Orders (¶11),[1] must an employer actually relieve workers of all duty so they can take their statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (01/18/06)? Or may employers comply simply by making meal periods "available," as held in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (Jul. 22, 2008)?

2. *Meal Period Timing Issue*: Do the Labor Code (§§226.7 and 512) and Wage Orders (¶11) impose a timing requirement for meal periods? Or can employers provide a meal period at *any* time during a shift of up to ten hours without becoming liable for an extra hour of pay under section 226.7(b), as held in *Brinker*?

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[1] Wage Order 5-2001, which governs this case, is codified at 8 Cal. Code Regs. §11050. All references to "Wage Orders" are to Wage Order 5 unless otherwise specified. All statutory references are to the Labor Code unless otherwise specified.

"Pet." refers to Brinker's writ petition filed below on September 1, 2006. "PE" refers to Brinker's exhibits in support of its writ petition. "RJN" refers to plaintiffs' request for judicial notice filed below on February 2, 2007. "Slip op." refers to the Court of Appeal's opinion filed on July 22, 2008. "MJN" refers to the motion for judicial notice filed on January 20, 2009, concurrently with this brief.

3. *Rest Break Compliance Issue*: Under the Labor Code (§226.7) and Wage Orders (¶12), which require ten minutes' rest time "per four (4) hours or major fraction thereof," must employers provide a ten-minute rest break to employees who work between two and six hours, a second ten-minute rest break to employees who work more than six hours and up to ten, a third ten-minute rest break to employees who work more than ten hours and up to fourteen (etc.), as stated in DLSE Op.Ltr. 1999.02.16? Or may an employer compel employees to work an eight-hour shift with only a single rest break, as held in *Brinker*?

4. *Rest Break Timing Issue*: Under the Labor Code (§226.7) and Wage Orders (¶12), may employers withhold the first rest break until after the first meal period, as held in *Brinker*?

5. *Survey and Statistical Evidence Issue*: May trial courts accept expert survey and statistical evidence as a method of proving meal period, rest break, and/or "off-the-clock" claims on a classwide basis?

6. *Standard of Appellate Review Issue*: When an appellate court reviews an order *granting* class certification, does the appellate court prejudicially err by: (a) deciding issues not enmeshed with the class certification requirements; (b) applying newly-announced legal standards to the facts, then reversing the class certification order with prejudice, instead of remanding for the certification proponent to attempt to meet the new standards, and for the trial court to apply the new standards to the facts in the first instance;

or (c) reweighing the evidence instead of reviewing the trial court's predominance finding under the substantial evidence standard of review?

Petition for Review filed Aug. 29, 2008 at 1-3.

II. INTRODUCTION

This case arises at the crossing point of two of this Court's key precedents—*Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), in which the Court construed the "premium wage" remedy enacted in 2000 for meal period and rest break violations—and *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), in which the Court announced principles for lower courts to employ in assessing whether common questions predominate in wage and hour cases for class certification purposes.

Plaintiffs Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Rader, and Santana Alvarado ("plaintiffs") are hourly non-exempt workers for Brinker Restaurant Corporation, operator of restaurant chains including Chili's and the Macaroni Grill ("Brinker"). In 2004, they sued Brinker for failure to comply with California law governing meal periods, rest breaks, and off-the-clock work. In 2006, after considering an extensive evidentiary record, the trial court granted class certification.

Brinker filed a petition seeking interlocutory appellate review, which the Court of Appeal (Fourth Appellate District, Division One) granted. The Court of Appeal reversed the class certification order, and in so doing, decided four critical questions of law in a manner that not only contravenes the plain language of the governing IWC Wage Orders and Labor Code provisions, but also upends vital protections that

California workers have enjoyed for decades. The Court of Appeal's holdings present a very real threat to the health and safety of not only the impacted workers, but also the public—in other words, everyone whom our meal period and rest break laws were intended to protect.

The first critical question is whether, under the Labor Code and Wage Orders, an employer must actually relieve workers of all duty so they can take their non-waivable, statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (2006), or whether employers may comply simply by making meal periods "available," as the Court of Appeal held in this case.

The answer can be found through a careful review of the plain language of the Wage Orders and their adoption history dating back to the 1930s. For decades, the Wage Orders have imposed a mandatory compliance standard ("no employer shall employ") for meal periods, and a permissive compliance standard ("authorize and permit") for rest breaks. When the Legislature enacted Labor Code sections 226.7, 512, and 516, it intended to codify, not relax, the mandatory meal period compliance standard, thus preserving the distinction between meal periods and rest breaks. *All* of the legislative and regulatory history points inexorably to this conclusion. Yet the Court of Appeal panel considered none of that history, focusing instead on a dictionary definition of a single word—"provide."

The second critical question is whether the Labor Code and Wage Orders impose a *timing* requirement for meal periods, or whether employers may impose an "early lunching" schedule that requires people to work up to ten hours straight without a meal. Here, too, the Court of Appeal chose the less protective option. Once again, however,

the fifty-year history of the Wage Orders' language demonstrates beyond any doubt that employers may not schedule work periods longer than five hours without a meal.

Instead of enforcing this longstanding rule, the Court of Appeal determined that Labor Code sections 512 and 516 annulled it in favor of a dramatically weaker one—even though the legislative history of both statutes confirms that the Legislature intended to *codify* the Wage Orders' existing protections, thereby shielding workers from then-recent regulatory efforts to impair those protections.

What's more, the Court of Appeal ignored this Court's settled precedent, *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980), which acknowledged and enforced the IWC's power to impose "more restrictive" compliance standards than the Labor Code. This power has been unquestioned for decades, and nothing in either section 512 or section 516 evinces any intent to eliminate it.

The two other questions relate to rest breaks.

May employers refuse to provide rest breaks until after employees have worked four full hours—even though the Wage Orders require "ten (10) minutes net rest time per four (4) hours *or major fraction thereof*"? The Court of Appeal said yes, contrary to Division of Labor Standards Enforcement ("DLSE") enforcement policy of 60 years' standing. This means that an employee working an eight-hour shift would accrue just one rest break, not two—a revolutionary reinterpretation of California's rest break protections. Once again, a careful look at the history of the Wage Orders' language—which has been unchanged for over sixty years—confirms unequivocally that the Court of Appeal's interpretation was wrong.

Finally, may employers require workers to postpone their rest breaks until after the first meal period—pushing the meal period to the beginning of the work period and the rest time to the end—even though the DLSE believes that "the first rest period should come sometime before the meal break"? The Court of Appeal's contrary holding topples this well-established and commonsense interpretation, reducing the rest break requirement to a charade.

After ruling on these legal questions, the Court of Appeal reversed the entire class certification order with prejudice. The core reason for the reversal was the Court's meal period compliance holding—that meal periods need only be "made available" to workers who may then choose to "decline" them. According to the Court, individualized questions surrounding the reason for each missed meal period would overwhelm any common ones.

But the Court of Appeal failed to perceive that any such individualized questions would be irrelevant to plaintiffs' *other* claims. Common questions predominated on plaintiffs' claims for meal period timing, rest break compliance, and rest break timing. Brinker's uniform policy did not even "make" compliant meal periods or rest breaks "available." Therefore, there was nothing for the workers to "decline," so no individualized issues. Brinker's common policy, coupled with its corporate records of workers' shift lengths (which the Wage Orders require every employer to keep), are all the proof needed to establish the violations. The class certification order should have been affirmed respecting these claims.

The Court of Appeal then disregarded plaintiffs' extensive evidentiary showing that, even applying a "make available" compliance

standard, common questions predominated on plaintiffs' remaining claims for meal period, rest break, and off-the-clock violations.

This evidentiary showing included declarations documenting Brinker's pervasive understaffing—the root cause of widespread meal period and rest break violations for waitstaff, bartenders, cooks, and kitchen personnel. Plaintiffs presented testimony of Brinker executives establishing Brinker's uniform meal period and rest break policies and its centralized computer system tracking each work period and shift. And, to shore this up, they proffered expert survey and statistical evidence as a way to manage any remaining individualized issues. Through this evidence, plaintiffs established a pervasive pattern and practice of common violations—companywide.

The trial court accepted this evidentiary showing, and granted class certification, but the Court of Appeal reversed—in an opinion that re-weighs the evidence and finds it insufficient, as a matter of law, to ever support class certification in a meal period, rest break, or off-the-clock case. In so holding, the Court of Appeal contravened the most basic principles enunciated in *Sav-on*.

Sav-on prohibits appellate courts from re-weighing the evidence of predominance—but that is precisely what the Court of Appeal did. *Sav-on* also expressly approves expert survey and statistical evidence as a method of common proof in wage and hour cases—yet the Court of Appeal summarily rejected that evidence. And *Sav-on* bars procedures that would shift the burden of proof at the class certification stage. Under *Sav-on*, plaintiffs are not required to *disprove* all of the defendant's affirmative defenses. Yet that is what the Court of Appeal, in effect, required in this case, and found lacking.

The Court of Appeal's judgment should be reversed and the class certification order reinstated. At stake is the public policy—recognized in *Sav-on* and *Gentry v. Superior Court*, 42 Cal.4th 44 (2007)—supporting the rights of workers to seek redress against their employers for chronic violations of California's minimum workplace regulatory standards and to jointly prosecute such claims through the class action vehicle. "[R]etaliation against employees for asserting statutory rights under the Labor Code is widespread." *Gentry*, 42 Cal.4th at 461. Workers are often "unaware that their legal rights have been violated." *Id.* The class action device is often the only way to deter employers who fail to maintain minimum workplace standards and to provide redress for injured workers.

The Court of Appeal misinterpreted every legal question presented to it—then misapplied basic rules governing appellate review of class certification orders. Plaintiffs respectfully ask this Court to reverse the judgment and reinstate the certification order.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Meal Period, Rest Break, and Off-The-Clock Claims

In 2000, the DLSE began investigating Brinker for meal and rest break violations involving its hourly restaurant employees. 1PE197:16-19; 17PE4789-4804; 22PE6138-6139. In 2002, after the DLSE filed suit, Brinker paid a monetary settlement (covering violations from October 1999 through December 2001) and agreed to a court-ordered injunction to ensure its compliance with California meal and rest break laws. Pet. ¶7; 1PE197:19-28; 2PE375:7-20; 17 PE 4789-4804; 18PE4840-4844.

In August 2004, this lawsuit was filed on behalf of current and former non-exempt Brinker employees whom the DLSE settlement did not cover. 1PE15-28, 1PE179-94.

Plaintiffs contend that Brinker violates sections 226.7 and 512 and Wage Order 5 at each of its restaurant "concepts," including but not limited to Chili's, Macaroni Grill, Maggiano's, and Corner Bakery Café, in the following six ways:

Meal Period Violations

(1) Brinker pervasively fails to relieve employees of all duty so that they can take the meal periods that sections 226.7, 512 and Wage Order 5 require. Pervasive understaffing is the root cause of these violations. *See*, *e.g.*, 1 PE 112: 17-20, 126:17-20, 134:16-18, 153:15-20, 158:11-13 [Chili's]; 130:11-14, 148:18-22, 166:16-20, 145:8-12, 145:10-12 [Maggiano's]; 140:24-26 [Corner Bakery Café].[2]

(2) Brinker pervasively imposes an "early lunching" policy that requires employees to take meal periods either before beginning work or within the first two hours after arriving. Then, Brinker requires these employees to continue working more than five hours, and sometimes up to nine hours straight, without authorizing any further meal

[2] *Accord*: 126:17-20 ["I was regularly denied a 30 minute uninterrupted off-duty meal break. No one was scheduled or available to cover my tables during meal breaks."], 134:16-18 ["I was regularly denied a 30 minute uninterrupted off-duty meal period. The restaurant was always busy and I do not recall being scheduled for a meal period during my shift."], 166:16-20 ["Often times, I would be required to clock out for a meal period but continue serving my tables because there were no other employees available to cover my job duties."], 145:10-12 ["I rarely, if ever, received an uninterrupted meal break."].

period. *See*, *e.g.*, 1PE:112:18-19, 130:14-15, 132:16-18, 158:15, 168:21-25 [Chili's]; 148:21-22 [Macaroni Grill]; 145:9 [Maggiano's]; 140:17-18 [Corner Bakery Café]; 2PE456:5-20 [policy]. Brinker neither limits shift lengths to five hours after the early meal periods nor pays employees an hour of pay for the timing violation. *See generally* 1PE89-171 (class member declarations); 1 PE 213 11-17 (Brinker has paid no premium wages to any employees).[3]

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[3] *Accord*: 1RJN7211:19-7212:5 [summarizing evidence]; 1PE112:18-19 ["When I do get a meal break, I have to take it when the manager tells me to, which is usually within one hour after I begin my shift."], 130:14-15 ["When I did receive a meal break, I usually took this meal break within the first hour after I began my shift or one hour before the end of my shift"], 132:16-18 ["I was typically required to take my 30-minute meal period during the first hour of my scheduled shift"], 140:17-18 ["when I received a meal break, I usually had to take this meal break within the first hour after I began my shift"], 145:9-10 ["The schedule said that we were to take our meal break one hour after arriving at work"], 148:21-22 ["If I do get a meal period, I am required to take my meal break within the first hour I am at work], 158:15 ["the meal break was typically given within your first hour of work"], 160:21-22 ["I received my meal breaks within the first hour of work"], 163:25-27 ["I typically receive a thirty minute meal period about one hour after I arrive at work"]; 168:21-25 ["(I)f I was permitted to take a meal period, it was typically during the first hour of my scheduled shift or at the very end of my scheduled shift], 171:8-9 ["I would be told to take my meal break one hour after arriving at work"]; 21PE5913:22-5914:11 ["If they're scheduled to work more than five hours, they [Brinker] can ask them to take their meal period" after the first hour worked]; 21 PE 5770 ["Violations found: 1. Meal periods were not provided for every five (5) hours worked. Some were either taken in the first hour or greater than 5.25 hours later. Some even was [sic] taken after 6.5 hours later. 2. Some of the meal periods were less than 30 minutes, like 17, 19, 20, 26 minutes; 3. No second meal periods for the total hours worked more than five (5) hours after the first meal period..."].

Rest Break Violations

(3) Brinker pervasively fails to "authorize and permit" workers to take the rest breaks required by section 226.7 and Wage Order 5—again due primarily to widespread understaffing, which prevents workers from taking any breaks. *See*, *e.g.*, 1 PE 122:13-16, 124:11-14, 126:10-16, 132:10-14, 132:21-22, 134:11-13, 153:15-20, 168:13-16 [Chili's]; 130:7-8, 145:7 [Maggiano's]; 148:12-15, 158:11-13, 166:11-13 [Macaroni Grill]; 140:8-12 [Corner Bakery Café]; 21PE5770 [DLSE Audit Via Survey].[4]

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[4] *Accord*: 1 PE 122:13-16 ["I was not authorized or permitted to take a rest break due to high customer volume and short-staffing. There is an insufficient number of employees to cover the tables and allow employees to take rest breaks."], 126:10-16 ["I was routinely denied a ten-minute uninterrupted off-duty rest break. In fact, I was typically required to work through my rest break because no one was available to cover my tables. Tables must be covered because customers could not be left without service. The restaurant was always very busy. As a result, I could not take a ten-minute rest period for every four hours worked."], 130:7-8 [" I never received an uninterrupted 10 minute rest break for every four hours worked. I was told that is was too busy to take a break."], 132:10-14, 21-22 ["There is an insufficient number of cooks to prepare the food and allow employees to take rest breaks."], 134:11-13 ["The restaurant was always very busy, and as a result, I could not take a 10 minute rest period for every four hours worked.], 145:7 ["I do not recall ever receiving a rest period."], 148:12-15 ["I am routinely unable to take a ten-minute rest break for every four hours worked because there are no available servers to cover my assigned tables."], 158:11-13 ["I was told that Chili's is a fast pace restaurant and you will work from the time you clock-in until the time you clock-out."], 168:13-16 ["I was not always permitted to take a rest break due to high customer volume and short staffing. There is an insufficient number of servers to cover my tables in order for me to take an uninterrupted rest break."], 21 PE 5770 ["Violations found: ... 2. No Rest Periods."].

(4) Brinker pervasively fails to "authorize and permit" a rest break until after four *full* hours of work, instead of every "four (4) hours *or major fraction* thereof." *See*, *e.g.*, 1PE122:13-16, 124:11-14 [Chili's]; 138:10-13 [Macaroni Grill]; 134:7 [Maggiano's]; 140:8-12 [Corner Bakery Café]; 21PE5913:1-8, 21PE5914:1-5915:11 [policy].

(5) For workers required to take meal periods either before beginning work or within the first two hours after arriving, Brinker fails to "authorize and permit" a rest break before the first meal period. 21PE5913:18-5915:11.

Off-the-Clock Violation

(6) Brinker pervasively requires "off-the-clock" work during meal periods because workers are pervasively interrupted while on break. *See, e.g.*, 1 PE 112:18-20, 126:18-20, 153:18-20, 168:21-24 [Chili's]; 130:17-18, 149:1-5, 166:16-19 [Mac. Grill], 136:21-23 [Corner Bakery Café].[5] The "off-the-clock" claim is limited to time worked while clocked out for meal periods. 20PE5665:22-25.

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[5] *Accord*: 1 PE 112:18-20 ["75% of the time, I have to remain on-call and on-duty to perform my job duties" while clocked out for my meal break], 130:17-18 ["I often performed job duties while clocked-out for meal breaks or for the day."], 149:1-5 ["I am regularly required to work off-the-clock after I clocked-out for lunch …. Specifically, I am so busy and there is not another employee available to cover my job duties, so I have to continue working, even during my meal period."], 153:18-20 ["I do recall being told by my Managers that they would clock me out and adjust my meal periods to my time records for me. I was never paid for working through my meal periods."], 166:16-19 ["I would be required to clock-out for a meal period but continue serving my tables because there were no other employees available to cover my job duties."], 168:21-24 ["I always had to remain on-call, even when clocked out for a meal period."].

B. The Trial Court's 2005 Ruling on Meal Period Timing

In 2005, by stipulation (1PE196-200), the trial court ruled on the meal period *timing* question—"whether [Brinker] was required to provide a meal period for each five-hour block of time worked by an hourly employee." 1PE198:9-10, 202-206, 208.

The trial court determined that an employee "must be given" a meal period for every five hours of work. 1PE204. The purpose of section 512, the court determined, was "to protect employees and *ensure* that they have a thirty-minute meal break every five hours of work." *Id.* (emphasis added). "Therefore," the court concluded, "*defendant appears to be in violation of §512* by not providing a 'meal period' per every five hours of work." *Id.* (emphasis added).

In November 2005, Brinker filed a writ petition challenging this ruling. *Brinker Restaurant Corp. v. Superior Court*, no. D047509 (2RJN7349-7357). In January 2006, the Court of Appeal summarily denied the petition, deeming the ruling "advisory." *Id.* (order 01/20/06 (2RJN7371)); *see also* Slip op. 10-12. No further appellate review was sought.

C. The Class Certification Motion

In March 2006, plaintiffs moved for certification of a class of all non-exempt California employees since August 2000. 2RJN7384-7387. The motion sought certification of meal period, rest break, and off-the-clock subclasses. *Id.*; 20PE5665:22-23.[6] The claims of each subclass could easily be established by common proof:

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[6] Plaintiffs' motion also sought certification of a waiting time subclass; an arbitration agreement subclass; and an injunctive relief subclass. 2RJN7385-7386. Brinker's petition did not mention, or

(1) Whether employees received compliant and timely meal periods would be proven using evidence of Brinker's common policies coupled with Brinker's corporate time records. 1PE40:23-41:3, 46:12-47:9; 21PE5695:8-14; *see* 8 Cal. Code Regs. §11050(¶7(A)(3)) (requiring accurate records reflecting every meal period). To the extent (if any) that corporate time records would not establish the violations, representative employee testimony and/or survey evidence would do so classwide. 1PE53:18-54:11; 26PE7057:10-7058:5; 7068:17-7070:24; 7076:7-7079:4.

(2) Whether employees received compliant and timely rest breaks would be proven in part through evidence of the same common policies and corporate time records (1PE293; 21PE5702:1-7; 21PE5913:18-24) and in part through representative employee testimony and/or survey evidence (1PE53:18-54:11; 21PE5695:14-15).

(3) Whether employees worked "off-the-clock" meal periods would be proven through representative employee testimony and/or survey evidence. 1PE53:18-54:11; 21PE5695:14-15.

Because liability could be established thorough this classwide proof, plaintiffs argued, common questions predominated and class certification was proper. 1PE32-57, *passim*.

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challenge, the order certifying these subclasses, Pet. 10-23, and the Court of Appeal opinion does not disturb it, Slip op. 53.

D. The Evidence that Common Questions Predominated

Although plaintiffs were not allowed pre-certification merits discovery (2RJN7394:22-7395:9), they nonetheless submitted thousands of pages of evidence to support the argument that classwide proof was possible and that common questions predominated. 1PE58-3PE635; 21PE5707-24PE6509; 24PE6581-6709; 25PE6782-6914, 6924-6938.

1. Evidence of Brinker's Uniform Meal and Rest Break Policies and Practices

Brinker executives testified that all California restaurants have the same, uniform meal and rest break policy for all hourly employees (1PE259:14-261:14, 265:23-266:18; 2PE329:3-10) and that the policy contains the following provisions:

- Brinker's uniform policy "authorizes"—but does not affirmatively relieve from duty—employees who work "a shift that is over five hours" to take a thirty-minute meal period. 19PE5172 (quoted at Slip op. 5).
- For employees whose meal periods are scheduled early in the day, and who then work more than five and fewer than ten hours thereafter, Brinker's uniform policy does *not* authorize a second meal period. 19PE5172 (quoted at Slip op. 5); 2PE440:7-18, 456:5-20 (testimony of Brinker executives explaining uniform policy's operation).
- Brinker's uniform policy does not "authorize and permit" a rest break until after four *full* hours of work, instead of for every "four hours *or major fraction* thereof." 19PE5172 (quoted at Slip op. 5); 21PE5913:1-9.

- Brinker's uniform policy is not to provide a rest break before the first meal period for workers whose meal period was scheduled for before work begins or within the first hour. 19PE5172 (quoted at Slip op. 5); 21PE5913:18-5915:11 (testimony of Brinker executive explaining uniform policy's operation).

2. Brinker's Centralized Computer System

Plaintiffs presented evidence that Brinker uses a single, centralized computer system that could generate reports that will show Brinker's classwide meal and rest break violations.

All of Brinker's restaurants use the same computerized timekeeping system. 1PE293:4-17, 296:4-18. All employee time records are downloaded every night to a centralized computer system maintained at Brinker's corporate headquarters.

Brinker can use this centralized computer system to run a variety of reports for all California non-exempt employees. For example:

- Brinker can run a "Meal Period Compliance Report" that shows all "employee shifts that lasted over five hours with breaks that were less than 30 minutes." 1PE226:3, 244:11-17; 2PE325:9-17. The report would reveal all of Brinker's meal period violations.
- Brinker can run a "Five-Hour Short Report" showing "employees that worked more than five hours in any day, but their time was changed to reflect less than five hours." 1PE239:23-240:8, 248:16-22. This report would identify any "time shaving" (itself a violation of law) done to conceal Brinker's meal period violations.

- Brinker can run a "Time Card Maintenance Report" that shows all changes made to the original records. 1PE226:3-5; 2PE308:4-313:17.

These reports "[can] be easily generated. …. [Y]ou would just push a button and there it is." 1PE252:11-21. A monthly report for all of Brinker's California restaurants can be run in a matter of hours. 1PE254:14-18.

3. Representative Testimony Establishing Brinker's Meal and Rest Break Violations

Plaintiffs presented twenty-six declarations of current and former hourly employees who testified that they were routinely precluded from taking meal periods and rest breaks, required to take meal periods before clocking in or within the first two hours of their shift if they did receive them, and required to work "off-the-clock" during their meal periods. *See* Part III.A, above.

These employees testified generally that they did not "waive" their breaks, but instead they were not relieved of work duties so that they could take them. 1PE122:13-16, 124:11-14, 126:11-13, 126:18-20, 130:22-23, 132:10-13, 138:10-13, 143:12-16, 148:13-14, 166:16-19, 168:13-16. Consistent with this, Brinker admitted in its written discovery responses that it "is not aware that any waivers [under Wage Order 5] exist." 21PE5941:5-9.

4. Statistical and Survey Evidence of Brinker's Meal and Rest Break Violations

In 2003, the DLSE conducted a survey of Brinker hourly workers at a Chili's in Santa Clara and analyzed Brinker's computerized records to determine whether Brinker was complying with its meal and rest break obligations at that location. 21PE5770-5910. Employing these

methodologies, the DLSE identified numerous meal period and rest break violations, including "early lunching" violations. 21PE5770.

This evidence illustrated two points. First, as already mentioned, Brinker's time records could be used to establish Brinker's violations on a classwide basis. Second, surveys could be taken from a representative sample of Brinker's employee population (like the DLSE's questionnaires (23PE6242-6500)) and used to prove classwide violations.

Indeed, Brinker itself presented both time record reports and common survey evidence and argued that classwide inferences could be drawn. 3PE647:3-4, 650:6-7, 661:2-3; 4PE983-989. In particular, an expert statistician analyzed computerized records of 10.6 million California shifts. 4PE988:1. Applying the law as Brinker interpreted it, the statistician found *1.6 million meal period violations*. 4PE988:25-26 (non-compliance rate of 15.4% times 10.6 million shifts). Assuming an average hourly wage of $7.00, Brinker would be liable for over $12.3 million under section 226.7(b)—for meal period violations *alone*—based on Brinker's *own* computerized records and the testimony of its *own* statistician. [7]

Although Brinker's expert had already demonstrated how statistical evidence could be used to establish classwide liability, plaintiffs filed a counter expert declaration explaining again that

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[7] Plaintiffs do not concede that the methodology was appropriate or the survey results accurate. Plaintiffs' own survey expert explained why Brinker's statistician's ultimate conclusions were unreliable due to methodological flaws. 25PE6928 ¶10. The testimony *did* show, however, that survey evidence can be used to prove many different facts classwide.

statistical and survey evidence could be used to establish Brinker's classwide violations. 25PE6924-6938.[8]

In May 2006, both parties filed expert statisticians' declarations as part of their class certification briefing. 4PE983-1077; 25PE6924-6938. The class certification briefing also addressed whether statistical and survey evidence could be used to establish Brinker's violations classwide, and the subject was discussed at length during the class certification hearing in June 2006.[9]

E. The Order Granting Class Certification

On July 7, 2006, the trial court granted class certification, holding that "common issues predominate over individual issues" (1PE1-14)—even if meal periods need only be "made available":

> Here, common questions regarding the meal and rest period breaks are sufficiently pervasive to permit adjudication in this one class action.
>
> 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.***

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[8] The trial court sustained Brinker's evidentiary objection to this declaration, limiting its use to rebuttal only. 1PE6.

[9] Argument in briefing: 1PE39:22-40:3, 40:23-41:3, 41:5-12, 41:18-23, 46:12-47:1, 47:6-9, 47:20-22, 51:25-52:5, 53:18-19, 54:9-11, 54:18-23; 21PE5687:8-13, 5687:27-28 (fn.1), 5688:17-5689:4, 5690:19-20, 5690:23-25, 5693:7-17, 5694:23-26, 5695:7-18, 5697:3-17, 5698:1-7, 5698:21-27, 5699:24-5700:6, 5701:19-20, 5703:7-15, 5704:12-5705:20. Argument during hearing: 26PE7066:2-7071:2, 7076:7-13, 7077:26-7080:25, 7081:6-28.

1PE1-2 (emphasis added).

Brinker opposed class certification by arguing that whether a "waiver" affirmative defense applied to each missed meal—that is, whether a worker was offered a compliant meal or rest break and simply chose not to take it—raised dozens of individualized questions. The hearing transcript makes clear that the court considered—and rejected—this argument. Two of the court's three questions during the hearing related to "waiver" and "due process concerns." 26PE7066:2-4, 7076:7-9. Plaintiffs repeatedly explained that, consistent with *Sav-on*, they intended to use "representative testimony," "random sampling," and "statistical sampling" to prove Brinker's violations—and to refute any "waiver" affirmative defense—on a classwide, common basis. 26PE7066:2-7071:2, 7076:7-13, 7077:26-7080:25, 7081:6-28.

The import of the class certification order was that both liability and any "waiver" affirmative defense, including any individualized questions about the reasoning behind an employee's "waiver," could be adjudicated by common proof in the form of expert survey and statistical evidence. Regardless of how any underlying legal questions were resolved, the method of proof would be classwide and common.

Brinker made no request for a statement of decision or detailed factual findings.

F. The Trial Court's Interrupted Further Proceedings

After class certification was granted, the trial court ordered additional briefing and a hearing that would have given Brinker an extra opportunity to challenge the validity of plaintiffs' proposed statistical methods of common proof. 2RJN7522-7548. That procedure was

interrupted when the Court of Appeal stayed all trial-level proceedings. Order 12/07/06.

In August 2006, the trial court ordered the parties to simultaneously designate survey and statistical expert witnesses to testify on the appropriate methodology for presentation of evidence at trial. 2RJN7444:17-18. Initial expert designations were due in September 2006 and rebuttal designations in early October 2006. *Id.*

On October 13, 2006, the court ordered full briefing and a hearing on plaintiffs' "motion to determine the appropriate methodology for presentation of evidence at trial." Plaintiffs' moving papers were due in December 2006. Brinker's opposition was due in January 2007 and plaintiffs' reply in February 2007. The motion would have been heard in March 2007. 2RJN7546:1-19.

Brinker planned to take this opportunity to attack plaintiffs' proposed statistical methodology and renew its argument that neither liability nor "waiver" could be established by common proof. 2RJN7442:10-13, 7463:22-25, 7465:7-16. Nonetheless, and despite the fact that these proceedings were incomplete, on September 1, 2006, Brinker filed its writ petition challenging the class certification order and seeking a stay of all proceedings. The petition did not mention the ongoing proceedings.

On December 7, 2006, the Court of Appeal issued a stay order halting all trial-level activity. At that time, the expert depositions had been completed and the first of the briefs would have been filed eleven days later. 2RJN7544-7546. The Court of Appeal subsequently denied plaintiffs' motion to augment the record to include the expert deposition testimony they had been ordered to present and were preparing to present below. RJN12/17/07; Order 04/23/08.

G. The Writ Petition

Brinker's writ petition filed on September 1, 2006 raised only one legal question requiring interpretation of the Labor Code or Wage Orders—the meal period compliance question. Pet. 7(¶17), 13-21.[10] In their Return, plaintiffs briefed that question (Return 47-51), and also the question of whether class certification had properly been granted (*id.* at 23-46), because those were the only issues raised in the petition.

To demonstrate that the class certification order was proper, plaintiffs' Return identified the meal period timing, rest break compliance, and rest break timing questions as common questions of law that supported certification. *See* Return 16, 36, 37 & n.23 (mentioning common "early lunching," "rest break every 3½ hours," and "rest break before first meal" issues). Having been allowed no merits discovery (2RJN7394:22-7395:9), plaintiffs did not brief the merits of these questions. *See id.*

In its reply, Brinker seized on these common questions and asserted—for the first time—that the trial court *should have decided* them. Reply filed 04/03/07 at 21-25, 29-31. Then, during oral argument, Brinker invited the Court of Appeal to decide them. Plaintiffs' counsel objected that the issues had not been briefed and requested further briefing. None was ordered.

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[10] The petition also argued that rest breaks need only be made available, not "ensured." Pet. 13. However, as plaintiffs pointed out in their Return, that was not disputed below, so there was nothing more the trial court needed to do to "determine the elements" of the rest break claim (as Brinker contended it failed to do). Return 28-29.

H. The Court of Appeal's First Opinion

On October 12, 2007, in an unpublished opinion, the Court of Appeal reversed the order granting class certification of plaintiffs' meal period, rest break, and off-the-clock claims. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 2007 WL 2965604 (Cal.App. 10/12/07 nonpub.).

The Court of Appeal reached and decided the meal period timing, rest break compliance, and rest break timing issues—even though none of those issues had been briefed. *Id.* at *10-*16 (slip op. 21-23, 25, 27-34). Then, the panel made its decision immediately final under Rule of Court 8.264(b)(3)—even though the case presented no mootness or frustration of relief concerns. *Id.* at *21 (slip op. 43).

Ten days later, plaintiffs filed a petition for review, pointing out (among other things) that the panel violated Government Code section 68081 by deciding unbriefed issues and abused its discretion by making its decision immediately final. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S157479, Petition for Review at 2, 8, 31-33.

Four days after that, the Court of Appeal filed a letter with this Court stating that its immediate finality order was a "clerical error." Five days later, this Court granted review, ordered the opinion vacated, and transferred the case back for "reconsideration as [the Court of Appeal] sees fit." No. S157479, Order filed 10/31/07.

On November 11, 2007, the Court of Appeal ordered further briefing under Rule of Court 8.200(b), which the parties submitted. *See* Letter Brief 12/17/07.

I. The Court of Appeal's Second Opinion

On July 22, 2008, the Court of Appeal issued a published opinion once again reversing class certification of the meal period, rest break, and off-the-clock claims. *Brinker*, 165 Cal.App.4th 25.

Instead of addressing whether substantial evidence supported the class certification order, the panel issued a series of rulings that substantially weaken employees' workplace protections:

- Meal Period Compliance. The panel refused to follow *Cicairos*, holding that "employers need not ensure meal breaks are actually taken, but need only make them available." Slip op. 44.

- Meal Period Timing. The panel held that the Labor Code and Wage Orders impose *no* timing requirement for meal periods. Slip op. 36-37. While a meal period is required for employees who work a shift longer than five hours, that meal period need not be given at any particular time during the workday. *Id.* Hence, by moving the meal period to the beginning or the end of the shift, employers may force employees to work nearly ten hours straight without a meal.

- Rest Break Compliance. The panel held that employers may refuse to provide rest breaks until after employees have worked four full hours—even though the Wage Orders require "ten (10) minutes net rest time per four (4) hours *or major fraction thereof*." Slip op. 24-28. This holding is contrary to a 60-year-old DLSE enforcement

policy and means that an employee working an eight-hour shift would accrue just one rest break, not two.

- Rest Break Timing. The panel held that employers may require workers to postpone their rest breaks until after the first meal period—pushing the meal period to the beginning of the work period and the rest time to the end. Slip op. 28-29. This holding is contrary to commonsense interpretation of the Wage Orders and DLSE opinion that "the first rest period should come sometime before the meal break."

Then, the panel held that under no set of facts could any of these claims be certified for class treatment. Slip op. 30-33, 47-52. The panel summarily rejected plaintiffs' proffered statistical and survey evidence as a method of common proof. *Id.* at 32, 47-49, 51.

Finally, the panel reweighed the evidence and made a finding that "under the facts presented" "the claims in this case are not suitable for class treatment." *Id.* at 33; *see also id.* at 14-17, 32, 49, 51-52.

On October 22, 2008, this Court granted review.

IV. WORKPLACE AND REGULATORY FRAMEWORK

A. California's Workplace Laws

The meal period and rest break protections at the core of this case arise out of standards set by the IWC. In California, the IWC is "the state agency empowered to formulate [regulations known as] wage orders governing employment in California." *Murphy*, 40 Cal.4th at 1102 n.4 (citing *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 561 (1996)); *see also* Lab. Code §§1173, 1178.5, 1182.

The IWC's statutory mandate is to "investigate the health, safety, and welfare" of California employees and "ascertain the hours and conditions of [their] labor and employment." Lab. Code §1173. In performing this function and adopting its Wage Orders, the IWC "necessarily and properly … exercise[s] a considerable degree of policy-making judgment and discretion." *IWC v. Superior Court*, 27 Cal.3d at 702.

When the IWC adopts a Wage Order, it conducts public hearings and issues a "Statement as to the Basis" reflecting "the factual, legal and policy foundations for the action taken." Lab. Code §§1177(b), 1178.5; *California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 213 (1979). Although the IWC was defunded in 2004, "its wage orders remain in effect." *Murphy*, 40 Cal.4th at 1102 n.4.

The IWC's Wage Orders are quasi-legislative in nature and are no less binding on the courts than statutes. *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 799-800 (1999). What's more, as discussed in detail below, the IWC may adopt regulations that are more protective than the Labor Code. *IWC v. Superior Court*, 27 Cal.3d at 733-34. In other words, the Labor Code's minimum standards operate as a floor. *See id.*

The DLSE "is the state agency empowered to enforce California's labor laws, including IWC wage orders." *Tidewater*, 14 Cal.4th at 561-62 (citing Lab. Code §§21, 61, 95, 98-98.7, 1193.5). The Labor Commissioner is the head of the DLSE. *Id.* In addition to conducting administrative enforcement proceedings, the DLSE issues opinion letters that, while not binding, are generally entitled to "consideration and respect" because they "constitute a body of experience and informed judgment." *Yamaha v. State Board of*

Equalization, 19 Cal.4th 1, 14 (1998); *see Bell v. Farmer's Insurance*, 87 Cal.App.4th 805, 815 (2001).

The DLSE also authors an Enforcement Policies and Interpretations Manual ("DLSE Manual"),[11] which "summarizes the policies and interpretations which DLSE has followed in discharging its duty to administer and enforce the labor statutes and regulations of the State of California." DLSE Manual §1.1.6. While "not controlling," the Manual's interpretations are "instructive." *Isner v. Falkenberg/Gilliam & Associates, Inc.*, 160 Cal.App.4th 1393, 1399 (2008) (citing *Sumuel v. ADVO, Inc.*, 155 Cal.App.4th 1099, 1109 (2007)).[12]

B. Plaintiffs' Contentions and the Realities of the Workplace

As this Court explained in *Murphy*, "[m]eal and rest periods have long been viewed as part of the remedial worker protection framework." *Murphy*, 40 Cal.4th at 1105 (citing *IWC v. Superior Court*, 27 Cal.3d at 724)). The Wage Orders have included meal and rest break requirements since "1916 and 1932, respectively." *Id.* (citing *California Mfrs. Assn. v. Industrial Welfare Com.*, 109 Cal.App.3d 95, 114-15 (1980)).

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[11] The current version of the complete Manual is available at: http://www.dir.ca.gov/dlse/DLSEManual/ dlse_enfcmanual.pdf (viewed 01/20/09). Relevant provisions of the Manual (current and former versions) are attached as Exhibits 49-51 of plaintiffs' MJN.

[12] *Accord Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 23 (2007) (relying on Manual); *Lujan v. Southern California Gas Co.*, 96 Cal.App.4th 1200, 1212 (2002) (same). *Contra Church v. Jamison*, 143 Cal.App.4th 1568, 1579 (2006) (giving "no weight" to Manual).

Presently, language governing meal periods can be found in three locations: the Wage Orders (8 Cal. Code Regs. §11050(¶11)), section 226.7, and section 512. Language governing rest breaks can be found in two: the Wage Orders (8 Cal.Code Regs. §11050(¶12)) and section 226.7.

As will be discussed in detail, plaintiffs contend that California's meal period laws require employers to affirmatively relieve workers of duty for thirty minutes, as held in *Cicairos*, 133 Cal.App.4th at 962-63 (quoting DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41). The basis for this contention is the critical distinction between the Wage Orders' rest period requirement—"authorize and permit"—and their meal period requirement—"no employer shall employ any person for a work period of more than five hours without a meal period." 8 Cal. Code. Regs. §§11050 (¶¶11(A), 12(A)).

Contrary to the Court of Appeal's opinion, this mandatory compliance standard does not mean (nor do plaintiffs contend) that employers must "force employees to take their meal periods … against [their] will." Slip op. at 41 n.9. Nor does it mean that employers must "[f]orce a recalcitrant employee to stand in the corner until he capitulates and takes his unwanted break." Answer to Petition for Review, 08/18/08, at 1. Nor does it mean that employees who refuse to obey directions to break for meal periods have earned an hour of compensatory pay.

Relieving workers of duty does not "force" them to do anything. They may choose to eat a meal, run a personal errand, socialize with friends, or merely relax. The employer's duty is simply to ensure that work stops for the required thirty minutes and that the employee is free to engage in personal activities.

Employers can easily comply with the law, so interpreted, by taking a few simple steps:

(1) Inform employees that the law requires them to take a thirty-minute meal period by the fifth hour of their shift;

(2) Incorporate thirty-minute meal periods into the employees' work schedules;

(3) Provide coverage for the employees or allow them to close down their workstations during lunch;

(4) Pay a premium if lunch is missed (Lab. Code §226.7(b)) and correct whatever caused the problem.

One employer who adopted these measures achieved a 99.6% compliance rate.[13]

The Court of Appeal's holding that employers need only make meal periods "available" (slip op. 44) fails to distinguish that compliance standard from the "authorize and permit" standard for rest breaks—ignoring the Wage Orders' critically different language—and essentially means that employers need do nothing more than adopt a paper policy allowing meal periods, leaving it to workers to take it upon themselves to halt work.

This holding ignores the reality of the workplace and the many, often subtle, ways employers can discourage or impede workers from actually taking breaks that are "offered" to them:

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[13] *Savaglio v. Wal-Mart Stores, Inc.*, Nos. A116458, A116459, A116886 (Cal. App. First Dist., Div. Four), Appellants' Opening Brief (Aug. 24, 2007) at 13 (MJN Ex. 72); *id.*, Reporter's Transcript on Appeal, Vol. 27, pp. 4872-73 (MJN Ex. 73).

> Employers have countless ways to discourage workers from taking breaks ranging from outright prohibition, to more subtle measures such as adoption of piece rate compensation schemes that force workers to choose between rest breaks or a lower hourly rate of compensation. Some employers offer work only to those who complete their scheduled tasks early, assign tasks that cannot be completed within the allotted time if breaks are taken, or fail to provide temporary backup ("floaters" or "breakers") to provide complete relief from duties.

Worksafe, Inc., Amicus Letter Supporting Review (09/29/08) at 13. In many industries, to raise a concern about a missed meal is to risk termination. *See* California Rural Legal Assistance Foundation, Amicus Letter Supporting Review (09/26/08) at 3 ("In the real world of farm work, a harvester who decides after 3 hours into her shift that she will take a break without express permission likely will be fired.").

The Court of Appeal's holding leaves employers "free to pile substantial work on employees under time requirements and a demeanor that suggest no break should or can be taken," and magnifies the "many natural disincentives to take breaks" that exist in "a busy, time-constrained work environment":

> Managers and supervisors, even while recognizing break rights, often look askance at them and the employees who dutifully take them. Employers who work through their breaks, or take shorter breaks, may get more praise and credit than those who don't.

Knapp, "High Court Should Give Employees a Break by Reversing 'Brinker,'" *Daily Journal* (11/04/08). Employees who "decide" never to take breaks will gain a competitive advantage in the employment market over those who do not—or who cannot due to physical limitations or otherwise.

As will be seen, the IWC, in accordance with its statutory mandate, weighed the relative benefits and burdens and imposed a *mandatory* meal period compliance standard on employers, not a permissive one.

C. The Executive Branch's Reaction to *Brinker*

As this Court has observed, the law governing meal periods and rest breaks has become "highly politicized" in recent years. *Murphy*, 40 Cal.4th at 1105 n.7. For example, in December 2004, the DLSE withdrew four worker-friendly opinion letters relating to meal periods and rest breaks, ostensibly in reliance on a new appellate opinion that was later depublished. *Id.*; *see* DLSE Memorandum to Staff (Dec. 20, 2004) (MJN Ex. 53) (citing *Westside Concrete Co. v. Department of Indus. Relations*, 123 Cal.App.4th 1317 (2004), *depublished*, 2005 Cal. LEXIS 2843 (03/16/05, no. S130403)).[14]

Similarly, when the Court of Appeal issued its unpublished opinion in October 2007, the DLSE filed a publication request, urging that court to convert the opinion into a binding precedent that would, as the DLSE acknowledged, annul certain worker-friendly opinion letters

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[14] The letters' withdrawal coincided with an effort by DLSE to adopt revised regulations that would have reversed DLSE's longstanding meal period enforcement position. *See* DLSE Notice of Proposed Rulemaking (Dec. 20, 2004) (MJN Ex. 54); *Cornn v. United Parcel Service, Inc.*, 2005 WL 588431, *4 (N.D. Cal. 2005) , *reconsid. granted in part on other grounds*, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005) (quoting proposed regulations; "it appears that the DLSE's position has changed, and that the agency no longer interprets California law to require an employer to ensure that meal periods are actually taken")). The DLSE ultimately abandoned this effort after the Assembly issued a resolution stating that the DLSE lacked authority to promulgate these regulations. Assembly Concurrent Resolution No. 43 (July 18, 2005) (MJN Ex. 69).

that "contain[] statements in tension with the discussion and holdings in *Brinker*."[15]

Then, three days after the Court of Appeal published its new opinion in July 2008, the Labor Commissioner issued a new interpretive memo adopting the *Brinker* holdings as the law for all California workers—wholly ignoring three-year-old *Cicairos*, the opinion of another court of equal stature.[16] The Commissioner also amended the DLSE Manual to "conform to *Brinker*"[17] and withdrew an opinion letter cited in *Brinker*.[18] All of this directly contradicted DLSE's prior enforcement policy, which was consistent with *Cicairos* and was applied in countless Berman proceedings and employer audits.[19]

In October 2008, this Court granted review, rendering *Brinker* uncitable. The Labor Commissioner issued a new interpretive memo and withdrew its memo from July.[20] On the meal period compliance question, rather than following *Cicairos*—the only remaining published California opinion addressing that question—the memo directs DLSE staff to follow two federal trial court orders, *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008) and *White v. Starbucks Corp.*,

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15 DLSE Publication Request (Oct. 29, 2007) at 2 (MJN Ex. 55).

16 DLSE Memorandum to Staff (Jul. 25, 2008) (MJN Ex. 56).

17 DLSE Enforcement Manual Revisions (Jan. 2009) (MJN Ex. 52) at 3-4 (revisions dated 7/25/08).

18 DLSE List of Withdrawn Opinion Letters Revised 7/25/08 (MJN, Ex. 47) (Op.Ltr. 1999.02.16 "withdrawn 7/25/08" (cited in Slip op. 25-26)); DLSE Enforcement Manual Revisions, *supra*, at 4 ("deleted reference to Opinion Letter 1999.02.16").

19 *See*, *e.g.*, DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41); DLSE Manual §45.2.1 (June 2002) (MJN Ex. 49) ("It is the employer's burden to compel the worker to cease work during the meal period.").

20 DLSE Memorandum to Staff (Oct. 23, 2008) (MJN Ex. 57).

497 F.Supp.2d 1080 (N.D. Cal. 2007). In December 2008, the DLSE reinstated the opinion letter it had withdrawn in July and revised its enforcement manual to reflect the grant of review.[21]

When an agency like the DLSE adopts a new enforcement position that "flatly contradicts its original interpretation, it is *not* entitled to significant deference." *Murphy*, 40 Cal.4th at 1105 n.7 (quoting *Henning v. Industrial Welfare Com.*, 46 Cal.3d 1262, 1278 (1988) (internal quotation marks omitted; emphasis added).

Here, the enforcement position stated in the DLSE's most recent materials represents a 180-degree reversal of its longstanding enforcement position. *Cf. id.* (citing *Cornn*, 2005 WL 588431 at *4 (quoting DLSE's 2005 proposed meal period regulations and noting their divergence from DLSE's prior enforcement position)). The DLSE's post-*Brinker* activity is "not entitled to significant deference." *Id.* (citing *Henning*, 46 Cal.3d at 1278).

V. THE MEAL PERIOD COMPLIANCE ISSUE

For two reasons, the Court of Appeal's judgment reversing class certification of plaintiffs' meal period compliance claim should itself be reversed. First, regardless of how the underlying legal question is ultimately resolved, the Court of Appeal contravened *Sav-on* by peremptorily rejecting any form of statistical and survey evidence as a method of common proof. Second, the Court of Appeal incorrectly interpreted the governing Wage Orders and Labor Code provisions.

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[21] DLSE Manual §45.3.1 n.1 (Dec. 2008) (MJN Ex. 51); DLSE List of Withdrawn Opinion Letters Revised 12/18/08 (MJN, Ex. 48) (Op.Ltr. 1999.02.16 removed from list); (DLSE Enforcement Manual Revisions, *supra*, at 4 (revisions dated 12/18/08) ("Changes consistent with Supreme Ct. acceptance to review *Brinker* …; reinstates previously withdrawn Opinion Letter 1999.02.16").

A. The Trial Court Correctly Granted Class Certification Regardless of How the Meal Period Compliance Issue is Resolved

The trial court's class certification order could have been affirmed regardless of how the underlying meal period compliance question is answered. That is because, even if meal periods need only be "made available," common expert survey and statistical evidence can be employed to establish whether Brinker's meal period practices met that compliance standard classwide. As discussed at length below, such proof is commonplace in wage and hour litigation such as this and was expressly authorized in *Sav-on*. The trial court correctly so held.

The Court of Appeal flatly rejected plaintiffs' proffered statistical and survey evidence. Slip op. 32, 47-49, 51. In so doing, it erred. Substantial evidence supported the class certification order, which should have been affirmed.

The Court of Appeal's class certification errors are discussed in detail in Part VIII, below. They are mentioned here to place the substantive compliance question in the correct procedural context.

B. Under California Law, Employers Have an Affirmative Obligation to Relieve Workers of All Duty for Thirty-Minute Meal Periods

1. The Plain Language of the Statutes and Regulations Supports This Interpretation

a. The Labor Code and Wage Orders' Plain Language Impose an Affirmative Duty on Employers

Courts "do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" *People v.*

Pieters, 52 Cal.3d 894, 899 (1991) (quoting *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal.3d 801, 814 (1974)). Accordingly, "[w]e begin with the language of the statute, affording the words their ordinary and usual meaning *and viewing them in their statutory context*." *Alcala v. Superior Court*, 43 Cal.4th 1205, 1216 (2008) (emphasis added).[22] The words of regulations and statutes governing "conditions of employment are to be liberally construed with an eye to protecting employees." *Murphy*, 40 Cal.4th at 1111 (citing *Sav-on*, 34 Cal.4th at 340; *Ramirez*, 20 Cal.4th at 794; *Lusardi Constr. Co. v. Aubry*, 1 Cal.4th 976, 985 (1992)). So considered, "[i]f the statutory language is clear and unambiguous our inquiry ends." *Id.* at 1103).

Both the Labor Code and the Wage Orders address employers' meal period obligations. To interpret them, therefore, it is necessary to review "the entire scheme of law of which [they are] part." *Pieters*, 52 Cal.3d at 899. In other words, they must be viewed "in their statutory context." *Alcala*, 43 Cal.4th at 1216; *see also Van Horn v. Watson*, 45 Cal.4th 322, 353 (2008) ("a statute's language must be construed in context") (citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1386-87 (1987)).

Labor Code section 226.7 is the Legislature's latest word on meal periods and rest breaks. Section 226.7(a) states:

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[22] *Accord City of Santa Monica v. Gonzalez*, 43 Cal.4th 905, 919 (2008) ("We first examine the words of the statute, 'giving them their ordinary and usual meaning *and viewing them in their statutory context* ….'" (emphasis added)); *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 567 (2007) ("the court first examines the statute's words, giving them their ordinary and usual meaning *and viewing them in their statutory context*" (emphasis added)).

> (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.

Lab. Code §226.7(a); *see also id.* §§226.7(b) (tying premium wage remedy to violations of "an applicable order of the [IWC]"), 1198 ("The employment of any employee … under conditions of labor prohibited by [an IWC Wage Order] is unlawful.").

Turning to the Wage Orders, as section 226.7(a) instructs, one finds that, for more than 55 years, employers' meal period obligation has been couched in prohibitive language:

> *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 ….

8 Cal. Code Regs. §11050(¶11(A)) (emphasis added); *see* Wage Order 5-52(¶11) (Aug. 1952) (MJN Ex. 14).[23]

For over 65 years, the word "employ" has meant "engage, suffer, or permit to work." 8 Cal. Code Regs. §11050(¶2(D)); Wage Order 5NS(¶2(c)) (Jun. 28, 1943) (MJN Ex. 12). Hence, the employee must be "relieved of all duty" for the required 30 minutes. 8 Cal. Code Regs. §11050(¶11(A)); Wage Order 5NS(¶3(d)); *see also* 8 Cal.Code Regs. §11050(¶2(K)) (defining "hours worked" as "time during which an

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[23] Identical language appears in the current version of every Wage Order except nos. 12 (motion picture industry) and 14 (agricultural occupations). *See* 8 Cal. Code Regs. §§11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11110, 11130, 11150, 11160 (paragraph 11(A) of each section), 11170(¶9(A)). Wage Order 12 uses the same language, but allows six-hour work periods instead of five. *Id.* §11120(¶11(A)). Wage Order 14 states: "Every employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes …." *Id.* §11140(¶11(A)).

employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so"); Wage Order 5NS(¶3(f)) (defining "hours employed" as "time during which (1) [a]n employee is required to be on the employer's premises ready to work, or to be on duty, or to be at a prescribed work place [and] (2) [a]n employee is suffered or permitted to work, whether or not required to do so.").

In contrast to the Wage Orders' directive language for meal periods, the language for rest breaks is permissive:

> *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. ….

8 Cal. Code Regs. §11050(¶12(A)) (emphasis added).[24] That language, too, has existed for over 55 years. *See* Wage Order 5-52(¶12).

For the same 55 years, employers have been required to record every meal period. 8 Cal.Code Regs. §11050(¶7(C)(3)); Wage Order 5-52(¶7(a)(3)). Records of rest breaks have never been required. *Id.*

From a statutory interpretation standpoint, the differing language has important ramifications. "'When the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning.'" *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 717 (2007) (quoting *People v. Trevino*, 26 Cal.4th 237, 242 (2001)); *see Singh v. Superior Court*, 140 Cal.App.4th 387, 399 (2006) (applying this rule to IWC Wage Orders).

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[24] Identical language appears in paragraph 12(A) of every Wage Order except no. 17. *See* 8 Cal. Code Regs. §§11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11110, 11120, 11130, 11140, 11150, 11160.

Through this differing language, the Wage Orders create two different employer compliance standards for meal periods and rest breaks. Employers are prohibited from allowing employees to work more than five hours without a 30-minute meal period. Employers need only "authorize and permit" rest breaks.

Wage Order 14 is instructive. Unlike any of the other Wage Orders, no. 14 uses the permissive "authorize and permit" language for both meal periods and rest breaks: "*Every employer shall authorize and permit* all employees after a work period of not more than five (5) hours to take a *meal period* of not less than 30 minutes …." 8 Cal. Code Regs. §11140(¶11(A)) (emphasis added). This demonstrates that the IWC knew it was creating two different compliance standards and knew how to use permissive language for meal periods when it deemed the laxer standard appropriate.

Other statutes stating "no employer shall employ" have been interpreted to impose a strict, affirmative duty on employers.

For example, the IWC has used "no employer shall employ" to impose mandatory minimum wage requirements. In 1920, Wage Order 5 said:

> *No person, firm or corporation shall employ* or suffer or permit any woman or female minor to be employed … at a rate of wages less than $16 a week.

Wage Order 12(¶1) (Hotels and Restaurants) (July 31, 1920) (MJN Ex. 9) (emphasis added); *see also* Wage Order 5NS(¶3(a) (Jun. 28, 1943) (same) (MJN Ex. 12).[25]

[25] *See also* Wage Order 18, preamble (Any Industry) (Feb. 26, 1932) (MJN Ex. 11) ("[n]o person, firm or corporation shall employ or

Similarly, the Fair Labor Standards Act ("FLSA") states today that "no employer shall employ" workers without paying overtime. 29 U.S.C. §207. This creates a "'duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.'" *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000) (quoting 29 C.F.R. §785.13). "'The mere promulgation of a rule against such work is not enough.'" *Reich v. Department of Conservation*, 28 F.3d 1076, 1082 (11th Cir. 1994) (quoting 29 C.F.R. §785.13). "[N]o employer shall employ" as used in overtime statutes has always been understood as mandatory.

Likewise, "no employer shall require" as used in Labor Code sections 6402-04 means that employers have "an *affirmative duty*" to comply. *Division of Labor Standards Enforcement v. Texaco, Inc.*, 152 Cal.App.3d Supp. 1, 17 (1983) (emphasis original), *cited in* DLSE Op.Ltr. 1993.01.19-2.

The Wage Orders also require employers to pay a "premium wage"[26] to compensate employees for meal period and rest break violations. For meal periods, the Wage Orders state:

> 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*.

Id. §11050(¶11(B)) (emphasis added).[27] The wording for rest breaks is identical:

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suffer or permit any woman or minor to work" under conditions that do not comply with the Wage Order).

[26] *Murphy*, 40 Cal.4th at 1114.

> 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*.

Id. §11050(¶12(B)) (emphasis added).[28]

In other words, the Wage Orders use the term "provide" as a shorthand way to refer either to the directive meal period requirement, or to the permissive rest break requirement, depending on the *context*.

The Labor Code echoes this language. Section 226.7(b) imposes the same premium wage as the Wage Orders, and uses the word "provide" to refer to *either* the Wage Orders' directive meal period requirement, or the permissive rest break requirement, depending on the *context*:

> If an employer fails to ***provide*** an employee *a meal* ***or*** *rest period* in accordance with an applicable order of the [IWC], 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(b) (emphasis added).

Labor Code section 512(a), which also addresses meal periods, uses the word "provide" in similar fashion:

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[27] *See also* 8 Cal. Code Regs. §§11010(¶11(D)), 11020(¶11(D)), 11030(¶11(D)), 11040(¶11(B)), 11060(¶11(D)), 11070(¶11(D)), 11080(¶11(D)), 11090(¶11(D)), 11100(¶11(D)), 11110(¶11(D)), 11120(¶11(C)), 11130(¶11(D)), 11150(¶11(D)), 11160(¶11(F)), 11170(¶9(C)).

[28] *See also* 8 Cal. Code Regs. §§11010(¶12(B)), 11020(¶12(B)), 11030(¶12(B)), 11040(¶12(B)), 11060(¶12(B)), 11070(¶12(B)), 11080(¶12(B)), 11090(¶12(B)), 11100(¶12(B)), 11110(¶12(B)), 11120(¶12(B)), 11130(¶12(B)), 11150(¶12(B)), 11160(¶12(D))

> *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 ….

Labor Code §512(a) (emphasis added).

Section 512(a), section 226.7, and the Wage Orders all address employers' meal period obligations, which makes them in pari materia.[29] Section 512 itself acknowledges that these meal period provisions must all be read together. *See* Lab. Code §512(d) (creating exception to "apply in lieu of the applicable provisions pertaining to meal periods of *subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage Orders* …" (emphasis added)).

Statutes in pari materia "must be harmonized with each other to the extent possible." *Pacific Southwest Realty Co. v. County of Los Angeles*, 1 Cal.4th 155, 169 (1991) (citing *Moore v. Panish*, 32 Cal.3d 535, 541 (1982); *People v. Comingore* (1977) 20 Cal.3d 142, 147 (1977)). More specifically, "when statutes are *in pari materia* similar phrases appearing in each should be given like meanings." *People v. Lamas*, 42 Cal.4th 516, 525 (2007) (citing *People v. Caudillo*, 21 Cal.3d 562, 585 (1978), *overruled on other grounds*, *People v. Martinez* (1999) 20 Cal.4th 225, 229, 237 n.6 (1999)).

To avoid disharmony among these provisions, the phrase "[a]n employer may not employ" in section 512(a) must be interpreted in the same way as the Wage Orders' similar phrase, "[n]o employer shall employ." *See Fair v. Bakhtiari*, 40 Cal.4th 189, 659 (2006) ("The

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[29] "'Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.'" *Walker v. Superior Court*, 47 Cal.3d 112, 124 n.4 (1988) (quoting 2A Sutherland, *Statutory Construction* § 51.03 at p. 467 (4th rev. ed. 1984)).

Legislature is not required to employ identical terminology in separate statutes serving similar policy objectives.") Likewise, the word "provide" in section 512(a) must be interpreted in the same way as it is used in section 226.7(b) and the Wage Orders—here, to the directive meal period obligation. *Id.* ("We construe related statutes so as to harmonize their requirements and avoid anomaly.").

In sum, a plain-language reading of these provisions demonstrates that employers may not permit employees to work more than five hours without a 30-minute meal period—a mandatory standard imposing an affirmative obligation on employers to ensure that workers are relieved of duty for the required 30 minutes (or pay the extra hour of pay). In contrast, employers need only "authorize and permit" rest periods—a laxer compliance standard.

In holding otherwise, the Court of Appeal failed to observe the basic statutory interpretation principles discussed above. The court considered *only* section 512(a), did not mention section 226.7 or the Wage Orders, and made no effort to harmonize them. Slip op. 42-47. Instead, the court focused in on a single word in section 512(a)—"provide"—then looked it up in a dictionary. *Id.* at 42. The panel held that "meal periods need only be made available, not ensured," because "[t]he term 'provide' is defined in Merriam-Webster's Collegiate Dictionary … as 'to supply or *make available*.'" *Id.* (original emphasis).

However, "[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results." *State v. Altus Finance, S.A.*, 36 Cal.4th 1284, 1295 (2005) (quoting *Hodges v. Superior Court*, 21 Cal.4th 109, 114 (1999)). This Court has never advocated blind adherence to dictionary definitions. *E.g.*, *City and*

County of San Francisco v. Farrell, 32 Cal.3d 47, 53-54 (1982) (declining to apply dictionary definitions of word that did not comport with context or statute's purpose).[30]

The definition of "provide" that the Court of Appeal pulled from a dictionary is inconsistent with how "provide" is used in sections 226.7(b) and the Wage Orders. If "provide" means "make available," then the term is meaningless as used with reference to meal periods in section 226.7(b) and paragraph 11(B) of the Wage Orders—both of which expressly refer to the mandatory standard of paragraph 11(A) of the Wage Orders. Using that definition would eliminate the directive meal period compliance standard by making it identical to the permissive rest break compliance standard. The word "provide" may not be so interpreted.

"The meaning of a statute may not be determined from a single word or sentence." *Lungren v. Deukmejian*, 45 Cal.3d 727, 736 (1988) (citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1386-87 (1987)); *see also Troppman v. Valverde*, 40 Cal.4th 1121, 1135 n.10 (2007) (same); *People v. Shabazz*, 38 Cal.4th 55, 67-68 (2006) (same). This is because "a word may have different legal meanings in different contexts." *Richmond v. Shasta Community Services Dist.*, 32 Cal.4th 409, 421 (2004) (citing *People v. Woodhead*, 43 Cal.3d 1002, 1008 (1987)). Words must be interpreted in context because that is the only way that "provisions relating to the same subject

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[30] *Accord Bernard v. Foley*, 39 Cal.4th 794, 808 (2006) (rejecting dictionary definition of word where "nothing in the statutory language [as a whole] suggest[ed] that the Legislature … understood itself to be using the word" in the sense stated in the dictionary); *Altus Finance*, 36 Cal.4th at 1295-96 (rejecting dictionary definition of verb "to issue").

matter [can be] *harmonized*." *Van Horn*, 45 Cal.4th at 353 (emphasis added).

Interpreting section 512(a) as the Court of Appeal did would create an irreconcilable conflict with section 226.7. Section 226.7 expressly incorporates the Wage Orders' differing compliance standards into the Labor Code, whereas section 512(a), as interpreted by the panel, would eradicate the distinction between meal periods and rest breaks. In case of an irreconcilable conflict, the later-enacted statute prevails. *Collection Bureau of San Jose v. Rumsey*, 24 Cal.4th 301, 310 (2000); *City of Petaluma v. Pacific Tel. & Tel. Co.*, 44 Cal.2d 284, 288 (1955). Section 226.7 was enacted after section 512. Therefore, section 226.7, along with the Wage Orders it incorporates by reference, would prevail over section 512 to the extent they are inconsistent—which the panel's interpretation makes them.

The Court should not adopt an interpretation that creates an irreconcilable conflict between the statutes. As discussed above, the statutes can easily be harmonized. "Whenever possible, … we must reconcile statutes and seek to avoid interpretations which would require us to ignore one statute or the other, and the rule giving precedence to the later statute is invoked only if the two cannot be harmonized." *Fuentes v. Workers' Comp. Appeals Bd.*, 16 Cal.3d 1, 7 (1977) (citations omitted).

The only interpretation the plain language supports, while also harmonizing all of the meal period provisions, is that employers' meal period obligation is *mandatory*, while the rest period obligation is *permissive*.

b. The Meal Period Laws Do Not Allow Employees to Waive Their Meal Period Rights Except in Specific, Limited Circumstances

Brinker urged the Court of Appeal to hold that employers need only offer the opportunity to take a meal period, which workers may then "choose not to" take, "opt out" from taking, or "waive." Pet. 14, 19. The Court of Appeal agreed, concluding that employers need only "make [meal periods] available," which the employee may then "voluntarily choose not to take."[31] Slip op. 44, 47.

The Court of Appeal's interpretation contradicts the plain language of the statutes and Wage Orders, which expressly allow meal periods to be waived only in limited circumstances. "Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th 1215, 1230 (1994); see *Rojas v. Superior Court*, 33 Cal.4th 407, 424 (2004) (same). Because the IWC and Legislature expressly allowed waiver only in certain limited circumstances, "other exceptions are not to be presumed unless a contrary legislative intent can be discerned." *Mountain Lion Foundation v. Fish & Game Com.*, 16 Cal.4th 105, 116 (1997).

The Labor Code and Wage Orders expressly authorize meal period waivers in five situations—and no others:

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[31] The essence of "waiver" is "intentional relinquishment of a known right after full knowledge of the facts." *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd.*, 30 Cal.App.4th 54, 60 (1994) (quoting *City of Ukiah v. Fones*, 64 Cal.2d 104, 107-08 (1966)).

First, the Wage Orders allow employees who work no more than six hours per day to waive the meal period they would otherwise be entitled to after working five hours:

> 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.*

8 Cal. Code Regs. §11050(¶11(A)) (emphasis added).[32] The Labor Code contains similar waiver language: "… 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." Lab. Code §512(a).

If *all* meal periods are waivable, as the Court of Appeal held, there would be no need to state that they may be waived for shifts not exceeding six hours. The quoted waiver language would be surplusage.

Second, the Labor Code permits employees who work shifts of between ten and twelve hours to waive the second meal period to which they would otherwise be entitled after the tenth hour of work:

> 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, *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 is not waived.*

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[32] Again, this waiver language appears in every Wage Order except no. 12. *See* 8 Cal. Code Regs. §§11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11110, 11130, 11140, 11150, 11160 (paragraph 11(A) of each section), 11170(¶9(A)).

Lab. Code §512(a) (emphasis added).[33] Again, if meal periods are generally waivable, there would be no need to expressly authorize waiver for the particular circumstance of shifts of between ten and twelve hours.

Third, Wage Orders allow employees, in particular, limited situations, to waive the right to an *off-duty* meal period by expressly agreeing to "on duty" meal period:

> Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. *An "on duty" meal period shall be permitted only* when the nature of the work prevents an employee from being relieved of all duty and *when by written agreement between the parties an on-the-job paid meal period is agreed to.* The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

8 Cal. Code Regs. §11050(¶11(A)) (emphasis added).[34] If the Wage Orders allowed employees to waive their meal periods generally, they would not need express authorization to agree to "on duty" meals.

Fourth, Wage Order 1 allows "employees covered by a valid collective bargaining agreement" to "agree to a meal period that commences after no more than *six (6)* hours of work" instead of five.

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[33] Identical language appears in every Wage Order except nos. 4, 5, 12 and 14. *See* 8 Cal. Code Regs. §§11010, 11020, 11030, 11060, 11070, 11080, 11090, 11100, 11110, 11130, 11150, 11160 (paragraph 11(B) of each section), 11170(¶9(B)).

[34] This language appears in every Wage Order except no. 17. *See* 8 Cal. Code Regs. §§11010(¶11(C)), 11020(¶11(C)), 11030(¶11(C)), 11040(¶11(A)), 11050(¶11(A)), 11060(¶11(C)), 11070(¶11(C)), 11080(¶11(C)), 11090(¶11(C)), 11100(¶11(C)), 11110(¶11(C)), 11120(¶11(B)), 11130(¶11(C)), 11140(¶11), 11150(¶11(C)), 11160(¶11(D)).

8 Cal. Code Regs. §11010(¶11(A)) (emphasis added). If the meal period could be waived entirely, it would be unnecessary to specify that it may, by agreement, be postponed to the sixth hour of work.

Fifth, Wage Orders 4 and 5 state that "employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employer and the employee. The employee may revoke the waiver at any time …." 8 Cal. Code Regs. §§11040(¶11(D)), 11050(¶11(D)). Again, if all meal periods are waivable anyway, this language would be surplusage.

The Court of Appeal's interpretation of the meal period obligation—that meal periods need only be "made available" and may be waived at any time—renders all of this waiver language meaningless. And, as discussed below, nothing in the legislative or regulatory history evinces an intent to allow workers to waive their meal periods except under the limited circumstances expressly stated. Therefore, under well-established principles of statutory interpretation, additional exceptions may not be implied.

The rest break provisions are again instructive. Instead of using express waiver language, the Wage Orders say that "for employees whose total daily work time is less than three and one-half (3½) hours," "a rest period *need not be authorized*" at all. *Id.* §11050(¶12(A)) (emphasis added). In other words, for employees who work less than 3½ hours, the employer is allowed to decide not to "authorize and permit" any rest break whatsoever. Instead of giving the employee the right to "waive" the rest break, this language relieves the employer of its

rest break obligations altogether. It does not give the employee a waiver right because, for rest breaks, that right already exists.

In fact, none of the Wage Orders contains *any* express "waiver" provision for rest breaks for any industry. *See*, *e.g.*, 8 Cal. Code Regs. §11050(¶12), *passim*. That is because rest breaks, under the Wage Orders' plain language ("authorize and permit"), may be generally waived already.

The rest break language stands in stark contrast to the express waiver language the Wage Orders use for meal periods. For employees who work "not more than six (6) hours," "*the meal period* may be *waived* by mutual consent of the employer and employee." *Id.* §11050(¶11(A)) (emphasis added). Unlike the rest break language ("a rest period need not be authorized"), the meal period language does not allow an employer to decide to continue to employ such a worker past the fifth hour without a meal period. Instead, the worker must receive "the meal period," and then may choose to "waive" it—but *only* under the specific, limited circumstances stated in the Wage Order.

This is wholly consistent with the differing language that governs rest breaks ("authorize and permit") and meal periods ("no employer shall employ"). It is also consistent with the requirement that employers record meal periods, but not rest breaks. 8 Cal. Code Regs. §11050(¶7(A)(3)). And it is consistent with the conclusion that rest periods are generally waivable, but meal periods are waivable only under limited, specified circumstances.

In addition to express waiver provisions, the Labor Code and Wage Orders also contain provisions that entirely except particular classes of workers from otherwise mandatory meal period requirements. Lab. Code §512(c) (creating exemption for certain wholesale baking

industry workers); §512(d) (same for motion picture and broadcasting industries); 8 Cal. Code Regs. §§11040(¶11(D)), 11050(¶11(D)) (same for certain health care industry workers); §11050(¶11(E)) (same for certain residential health care facility workers); §11120(¶11(A) (requiring meal period every six hours, instead of five, for motion picture industry workers). This shows that when the IWC or the Legislature wishes to create an exception to the meal period requirements, it knows how to do so and does it expressly. This also shows that the IWC and Legislature have considered creating exceptions to these requirements, but have found it appropriate only for certain workers in certain industries.

The Court of Appeal did not mention any of the express waiver or exception provisions, except to assert that "plaintiffs' interpretation of section 512(a) is inconsistent with the language allowing employees to waive their meal breaks for shifts of less than five [*sic*] hours." Slip op. 42. The opinion offers no further explanation of that assertion. To the contrary, plaintiffs' interpretation of the meal period obligation is the only one that harmonizes the waiver language with the mandatory compliance language ("no employer shall employ"). It is also the only interpretation that comports with this Court's mandate that "if exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary." *Sierra Club*, 7 Cal.4th at 1230.

For this additional reason, the plain language of the statutes and Wage Orders contradicts the Court of Appeal's holding.

2. The Administrative and Legislative History Supports This Interpretation

To the extent that the plain-language analysis reveals any ambiguity in the governing language, courts must "turn to extrinsic aids to assist in interpretation," such as administrative constructions and legislative history. *Murphy*, 40 Cal.4th at 1103. Although significant administrative and legislative materials were before the *Brinker* court, the Court of Appeal's opinion mentions *none*.[35] Slip op. 42-47. Had the Court considered these materials, it would have discovered that the legislative and regulatory history fully support the conclusion that California's meal period laws place an affirmative obligation on the employer to relieve workers of all duty for thirty-minute periods.

a. The Wage Orders' Differing Language Was Intended to Create Differing Compliance Standards for Meal Periods and Rest Breaks

As mentioned above, for at least the past 55 years, the Wage Orders have used different language to define employers' meal period and rest break obligations. *Compare* Wage Order 5-52(¶¶11(A), 12) *with* 8 Cal. Code Regs. §11050(¶¶(11)(A), 12(A)).

The distinction was discussed in detail in 1979, when the IWC voted to amend Wage Order 14, applicable to agricultural workers. *See* IWC Transcript of Proceedings (Aug. 27, 1979) (25) (hereafter "IWC Transcript"). Originally, Order 14 used the mandatory "no employer shall employ" language for meal periods and the permissive "authorize

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[35] The Court of Appeal granted judicial notice of *some* administrative and legislative materials (*see* Orders 04/16/07, 05/14/07), but denied requests for judicial notice of other materials as "unnecessary"—while also saying that the denials "should not be construed as meaning this court will not consider" them. *See* Orders 04/23/08, 07/17/08.

and permit" language for rest breaks, just like the other Wage Orders. Wage Order 14-76 (Oct. 18, 1976) (MJN Ex. 22). In 1979, however, IWC Commissioner Howard Wackman moved to amend Order 14 to change the meal period obligation to "authorize and permit." IWC Transcript at 134:7.

At a public hearing (*see* Lab. Code §1178.5(c)), a proponent urged the IWC to adopt this amendment so that growers would not "be in the position where we have to police and order an employee to quit working" for the required thirty minutes. IWC Transcript at 141:5-7. Commissioner Waxman observed that in proposing the "authorize and permit" language, "it was the intent that the employer should allow the person to take the time off if that person desired it but that the employer *was not mandatorily forcing that worker to take the time off*." *Id.* at 134:8-11 (emphasis added).

The amendment was approved. *See* IWC Transcript of Proceedings (Sept. 7, 1979) at 165:3-24 (MJN Ex. 26); Wage Order 14-80 (Sept. 7, 1979) (MJN Ex. 23). In its Statement as to the Basis for Wage Order 14-80, the IWC explained that it "amended" the meal period section "*to make it a little more flexible* in response to evidence about the nature of agricultural work." IWC Statement as to the Basis for Wage Order 14-80 (Sept. 7, 1979) at ¶11 (Meal Periods) (MJN Ex. 28) (emphasis added).

Now, Order 14 is the only Wage Order that uses "authorize and permit" for *both* meal periods and rest breaks. 8 Cal. Code Regs. §11140(¶¶11(A), 12(A)).

As the transcript and Statement as to the Basis demonstrate, when the IWC says "authorize and permit," it intends to create a less stringent, more "flexible" employer compliance standard, and that when

it says "no employer shall employ," employers must "mandatorily" require workers to stop working for thirty minutes.

In 1997, the IWC again acknowledged the mandatory nature of the meal period requirement. Adding subparagraph (C) to Wage Order 5-89, allowing "employees in the health care industry who work shifts in excess of eight (8) total hours in a workday [to] voluntarily waive their right to a meal period,"[36] the IWC explained that "the waiver of one meal period allows an employee *the freedom to choose between leaving work one-half hour earlier* or taking a second meal period on a long shift." Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9) (Apr. 11, 1997) at 8 (MJN Ex. 30) (emphasis added). If workers already enjoyed the "freedom to choose" to decline any of their meal periods, the express waiver language the IWC adopted would have been meaningless and unneeded.

Similarly, when the IWC adopted the 2000 version of the Wage Orders, its Statement as to the Basis confirmed the mandatory, non-waivable nature of the employer's meal period obligation:

> 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.

IWC Statement as to the Basis for 2000 Amendments (Jan. 1, 2001) (MJN Ex. 32) at 20 (emphasis added); *see id.* at 19 (Wage Orders "continue the preexisting *requirement* of a meal period for an employee working for a period of more than five (5) hours, and provide for a

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[36] *See* Wage Order 5-98(¶11(C)) (Jan. 1, 2009) (MJN Ex. 20); Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9) (Apr. 11, 1997) at 7-8 (MJN Ex. 30).

second meal period in accordance with Labor Code §512(a)" (emphasis added)).

Likewise, the IWC's official summary of the Interim Wage Order adopted in March 2000 states: "An employee *must receive* a thirty-minute meal period for every 5 hours of work," which the employee "may waive" only under specified circumstances and "[p]ursuant to mutual consent by the employer and the employee." IWC Summary of Interim Wage Order—2000 (eff. March 1, 2000) at 4 (emphasis added); *see also* IWC Summary of Amendments to Wage Orders 1-13, 15 and 17 (Jan. 1, 2001) at 4 (MJN Ex. 33) (same language).

Faithful to these indicia of the IWC's intent, the DLSE has consistently recognized that the Wage Orders' differing language creates a "distinction between meal periods and rest periods." DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41) (cited in *Cicairos*, 133 Cal.App.4th at 962-63); *see also* DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40) (employer compliance obligation for rest periods is "[u]nlike meal periods"); DLSE Op.Ltr. 2000.11.03 (MJN Ex. 38) at 4 ("it is important to distinguish between rest periods and meal periods").

In a 2001 opinion letter interpreting Wage Order 16, the DLSE confirmed that the different language imposes different duties on employers, including, for meal periods, an affirmative obligation to relieve workers of all duty:

> Unlike meal periods, during which ***the employer has an affirmative obligation to ensure that workers are actually relieved of all duty, not performing any work, and free to leave the worksite***, the employer is merely required to "authorize and permit all employees to take rest periods."

DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40) (emphasis added) (cited in *Cicairos*, 133 Cal.App.4th at 962-63).

In January 2002, the DLSE made clear that this interpretation applies to *all* of the Wage Orders, not just Wage Order 16, because they all have the same language:

> [F]ocusing on the language that is common to all wage orders, you ask whether we would agree that an employer must only "authorize and permit" employees to take rest periods. In this regard *rest periods differ from meal periods, during which an employer has an affirmative obligation to ensure that workers* *are actually relieved of all duty, not performing any work, and* (with the exception of health care workers under Orders 4 and 5) *free to leave the employer's premises*.
>
> This distinction between meal periods and rest periods is present in all of the wage orders, not just Order 16.

DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41) (emphasis added).

In September 2002, the DLSE adopted this same interpretation specifically respecting Wage Order 5:

> [T]he *required* meal period must be an off-duty meal period, during which time the employee: 1) is not required to work, 2) is not suffered or permitted to work, 3) is not subject to the control of the employer so as to be free to leave the employer's premises and attend to his/her own personal affairs, 4) for a minimum of thirty minutes.

DLSE Op.Ltr. 2002.09.04 (MJN Ex. 43) (emphasis added); *see also* DLSE Op.Ltr. 1988.01.05 (MJN Ex. 34) ("The Division has historically taken the position that unless employees are relieved of all duties and free to leave the premises, the meal period is considered 'hours worked.'").

The only false note in this chorus of voices is a 1991 opinion letter that said, "So 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 period free of any duty, the employer has satisfied his or her obligation." DLSE Op.Ltr. 1991.06.03 (MJN Ex. 35). That opinion letter overlooked the Wage Orders' differing compliance language for meal periods and rest breaks. *Id.* All of the letters that consider that language uniformly confirm employers' affirmative obligation to relieve workers of all duty for meal periods. DLSE Op.Ltr 2003.11.03 (MJN Ex. 46) [withdrawn 12/20/04]; DLSE Op.Ltr. 2002.09.04 (MJN Ex. 43); DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41); DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40); DLSE Op.Ltr. 2001.04.02 [withdrawn 12/20/04] (MJN Ex. 39).

The DLSE Manual also confirms the longstanding interpretation that the employer must relieve workers of all duty, and ensure that they are not working, for the required thirty minutes:

> **Regulation Clearly Places Burden on Employer To Insure Meal Period.** …. The clear intent of the IWC is that *the burden of insuring that the employees take a meal period within the specified time is on the employer*; it is the employer's duty not to "employ any person for a work period of more than …" *It is the employer's burden to compel the worker to cease work during the meal period.*

DLSE Manual, §45.2.1 (June 2002), at 45-4 (MJN Ex. 49) (bold original; italics added). The DLSE compared the meal period obligation to the mandatory minimum wage obligation:

> The burden is similar to that imposed upon the employer [to pay minimum wage]. The employer must pay the employee the minimum wage and may not defend his or her failure to do so on the fact that the employee chose to accept less than the minimum wage. As with the

> minimum wage obligation, *the employer is not entitled to excuse the fact that he or she employed an employee for a period of more than five hours without a meal period on the failure of the employee to take the meal period.*

Id. (emphasis added); *see also* DLSE Op.Ltr. 2002.12.09-1 (MJN Ex. 44) ("The requirement that employees in the State of California receive a meal period is what is commonly known as a minimum state standard. Another example of a minimum state standard is the California minimum wage ….").[37]

(Three days after the Court of Appeal's published opinion in this case, the DLSE reversed this longstanding enforcement position and revised the Manual accordingly.[38] *See* DLSE Enforcement Manual Revisions (Jan. 2009) (MJN Ex. 52) at 3 (summarizing 07/25/08 and 12/18/08 revisions to §45.2.1). The day after this Court granted review, making *Brinker* uncitable, the Labor Commissioner issued a memo to staff readopting the *Brinker* holding. DLSE Memorandum to Staff (Oct. 23, 2008) (MJN Ex. 57). Such actions, because they "flatly contradict"

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[37] "That meal periods were mandatory was the longstanding enforcement position of the [DLSE] and the IWC itself." Barry Broad (former IWC Commissioner, 1999-2001), Amicus Letter in Support of Review, 09/11/08, at 3 ("Broad Letter"); "The DLSE's historic enforcement policy reflected the greater burden placed on employers under the IWC's meal period requirements than under its rest period requirements, which task employers with a less strict affirmative duty to 'authorize and permit all employees to take rest periods.'" Miles E. Locker (former DLSE Chief Counsel, 1998-2001), Amicus Letter in Support of Review, 09/12/08, at 6 ("Locker Letter").

[38] "At all times prior to the issuance of the *Brinker* opinion, DLSE interpreted [the Wage Orders] to mean that an employer does not satisfy its obligation to provide a meal period by merely allowing the employee to take one. The employer violates the wage order by suffering or permitting the employee to work during a required meal period." Locker Letter at 4-5.

the agency's original enforcement position, are not entitled to any consideration. *Murphy*, 40 Cal.4th at 1105 n.7.)

The Court of Appeal's analysis of the meal period compliance issue does not mention a single DLSE opinion letter—let alone the IWC transcript illuminating the IWC's intent and understanding of the differing compliance language. Slip op. 42-47.

Elsewhere in its opinion, the Court of Appeal flatly refused to consider Op.Ltr. 2001.09.17 because it "concerned the timing of rest periods, not meal breaks." Slip op. 40. While the letter's "re" line does say "Rest Period Provisions," the letter's body plainly discusses meal periods as well. The panel also rejected Op.Ltr. 2001.09.17 as "inapplicable to this case" because it discussed Wage Order 16, not Wage Order 5. Slip op. 29. But the two orders' relevant language is *identical*. Four months after issuing Op.Ltr. 2001.09.17, the DLSE issued another letter recognizing that for language "present in all of the wage orders, not just Order 16," the interpretations of Op.Ltr. 2001.09.17 apply to all. DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41). The *Brinker* panel overlooked this; its opinion wholly fails to mention DLSE Op.Ltr. 2002.01.28—the very letter on which *Cicairos* relied.

All of this material contradicts the Court of Appeal's interpretation of California employers' meal period obligations. As will be seen, the legislative history of section 226.7 and 512(a)—which the panel also ignored—contradicts it as well.

b. The Legislature Intended to Codify the Wage Orders' Mandatory Meal Period Compliance Standard

Nothing in the legislative history surrounding the enactment of sections 226.7 or 512(a) suggests that the Legislature intended to alter

the Wage Orders' two differing compliance standards, which had existed for half a century, or that the Legislature meant to replace the Wage Orders' meal period compliance standard with a new and materially different one.

On the contrary, the Legislature's intent in enacting section 226.7 was to *codify* the Wage Orders' two differing compliance standards. According to the Senate Floor Bill Analysis, section 226.7

> [***p***]***laces 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.

AB 2509, Third Reading, Senate Floor Bill Analysis, at 4 (Aug. 28, 2000) (emphasis added) (MJN Ex. 61).

Notably, the Senate Analysis itself uses the word "provide" to refer to the two *different* "existing provisions" of the Wage Orders. ***Id.*** That is exactly how "provide" was used in the Wage Orders (8 Cal. Code Regs. §11050(¶¶11(B), 12(B))) and, later, in the text of section 226.7(b), which expressly adopted the Wage Orders' compliance standards.

As this Court has already determined, "the legislative history of [AB] 2509 establishes that the Legislature was fully aware of the IWC's wage orders in enacting section 226.7." *Murphy*, 40 Cal.4th at 1110. Therefore, the word "provide," like the word "penalty," "should be informed by the way in which the IWC was using the word." *See id.* As discussed in detail above, the IWC used the word "provide" to refer alternatively to the directive meal period obligation, or the permissive rest break obligation, depending on the context. *See* 8 Cal. Code Regs. §11050(¶¶11(B), 12(B)).

Like section 226.7, section 512(a) was also expressly enacted to "codify" the "*existing wage orders*." AB 60, Legislative Counsel Digest, at 2 (July 21, 1999) (MJN Ex. 58) (emphasis added). Section 512(a)'s drafters, like the drafters of section 226.7, used the word "provide" to refer to the Wage Orders' directive "no employer shall employ" language for meal periods: "*Existing wage orders* of the commission prohibit an employer from employing an employee … without ***providing*** the employee with a meal period …." AB 60, Legislative Counsel Digest, *supra*, at 2 (emphasis added). That, in turn, is precisely how the word "provide" is used in the statute's text.

In other words, according to section 512(a)'s drafters, for meal periods, "provide" means "no employer shall employ"—which is also what "provide" means in Wage Order ¶11(B). In the rest break context, section 226.7(b) and Wage Order ¶12(B) make clear that "provide" means "authorize and permit." The very fact that the Legislature chose to expressly reference the Wage Orders, rather than section 512(a), in section 226.7—enacted a year after section 512(a)—demonstrates that it did not understand section 512(a) to have a different substantive meaning from the Wage Orders.

In 2005, the Assembly confirmed its understanding that the word "provide" in section 512(a) was not intended to alter the Wage Orders' existing compliance standard for meal periods.

In late 2004, the DLSE attempted to promulgate regulations stating that an employer who "[m]akes the meal period available to the employee and affords the opportunity to take it" is "deemed" to have complied with section 512(a). *See Cornn*, 2005 WL 588431, *4 (quoting regulations); DLSE Notice of Proposed Rulemaking (Dec. 20, 2004) (MJN Ex. 54). The Assembly vehemently disagreed with that

interpretation of section 512(a), declaring instead that "the proposed regulation is *inconsistent with existing law*" and "*would significantly diminish* long-standing protections in California wage and hour law concerning the provision of meal and rest periods to employees." Assembly Concurrent Resolution No. 43 (July 18, 2005) at 2, 3 (MJN Ex. 69) (emphasis added). The Assembly further declared that the IWC, not the DLSE, has authority to adopt Wage Orders. *Id.* at 1-2. Finally, the Assembly declared that the proposed regulation was one that:

> *weakens the substantive protections* and remedies afforded to California employees *under Sections 226.7 and 512 of the Labor Code and the 17 Wage Orders*.

Id. at 2 (emphasis added).[39] In other words, the Assembly understood that section 512(a), like the Wage Orders, requires employers to do something more than just make a meal period "available."

There is no reason to suppose that, by using the word "provide" in section 512(a), the Legislature intended to relax employers' obligations or diminish workers' rights respecting meal periods. If that had been the intent, something in the legislative history would have reflected it. Nothing does.

What the legislative history shows, instead, is that AB 60 (including section 512(a)) was enacted to reverse a regulatory attempt, and forestall future attempts, to *diminish* workers' rights. AB 60, Legislative Counsel Digest, *supra*, at 2; *Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429, 434 (2006) (AB 60 passed "in response to the IWC's elimination of daily overtime rules in certain industries"). AB 60 was "a response to the IWC's amendment of five wage orders [in] 1997, which, among other things, eliminated the state's daily overtime

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[39] The DLSE later abandoned the rulemaking effort.

rule in favor of the less restrictive [federal] weekly overtime rule." *Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 176 (2003).

AB 60 restored daily overtime (Lab. Code §510) and "mandated that the IWC conduct public hearings and adopt consistent wage orders (§517, subd. (a)), including orders pertaining to meal and rest periods (§516)." *Bearden*, 138 Cal.App.4th at 434. By "codify[ing]," in section 512(a), the mandatory meal period compliance standard of the "existing wage orders" (AB 60, Legislative Counsel Digest, *supra*, at 2), the Legislature intended to proactively prevent the IWC from *weakening* that standard in the future—as the IWC had tried to do for overtime.

The Court of Appeal acknowledged none of this. Its analysis of the meal period compliance issue ignored all the legislative history material discussed above. Slip op. 42-47.

The administrative and legislative history uniformly reinforces the conclusion that the plain language already leads to—that California's meal period laws require employers to take affirmative steps to ensure that workers are relieved of duty for thirty minutes.

c. Labor Code Section 516 Does Not Support the Court of Appeal's Reading of Section 512(a)

The Court of Appeal's fundamental error was to read section 512(a) in isolation, and then to further isolate a single word, "provide," as though that word were the sole and only source of California employers' meal period obligations. As discussed in detail above, that is simply wrong. Any reading of section 512(a) that ignores the interrelated provisions of later-enacted section 226.7, and the Wage Orders that section 226.7 expressly incorporates, contravenes this Court's longstanding statutory interpretation precedents.

In another part of its opinion, the Court of Appeal asserted that Labor Code section 516 "forbids wage orders inconsistent with section 512."[40] Slip op. 39. Although the Court's analysis of the meal period compliance issue (slip op. 42-47) does not mention section 516, perhaps its misunderstanding of that provision explains why it considered one word from section 512(a)—and nothing else. The Court simply misread section 516, just as it misread section 512(a).

Section 516 was originally enacted as part of AB 60, along with section 512 and several other provisions. As enacted, it read:

> Notwithstanding any other provision of law, 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.

Stats. 1999, ch. 134, §10 (AB 60).

AB 60 passed in July 1999 (*id.*) and went into effect on January 1, 2000. AB 60, Complete Bill History (July 21, 1999) (MJN Ex. 59). Later that year, on June 30, 2000, the IWC adopted the 2001 iteration of the Wage Orders, which included the same meal and rest period language as they did since 1952. 8 Cal. Code Regs. §11050(¶11(B)).[41]

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[40] As an initial matter, the Court's apparent conclusion that the Wage Orders' meal period requirements are "inconsistent with section 512" is wrong. The Wage Orders' requirements—which stand unchanged since the 1940s—cannot be inconsistent with section 512(a) for the simple reason that section 512(a) "codified" them. Also, as discussed in detail above, the Wage Orders and section 512(a) are wholly uniform from a plain text standpoint.

[41] At that time, the IWC added the extra hour of pay remedy, codified in paragraph 11(B) of most of the Wage Orders. Statement as to the Basis for 2000 Amendments (June 30, 2000, eff. Jan. 1, 2001) (MJN Ex. 32); *see supra* fn. 27.

About two months after that, the Legislature passed SB 88, amending section 516 to substitute the phrase "[e]xcept as provided in Section 512" in place of "[n]otwithstanding any other provision of law." Stats. 2000, ch. 492, §4 (SB88) (MJN Ex. 63), *cited in* Slip op. at 39. Then, about a week after that, the same Legislature passed AB 2509, and section 226.7 was adopted—expressly incorporating the Wage Orders. Stats. 2000, ch. 876, §6 (AB 2509) (MJN Ex. 60).

The sequence of the two bills' passage through the Legislature leaves no doubt that the amendment of section 516 could not have been intended to eliminate the Wage Orders as a source of California meal period obligations (as the *Brinker* panel effectively held). SB 88 passed the Assembly on August 21, 2000, and the Senate on August 25, 2000. SB 88, Complete Bill History (Sept. 19, 2000) (MJN Ex. 66). AB 2509 passed the Senate four days after that, on August 29, and the Assembly on August 30, 2000. AB 2509, Complete Bill History (Sept. 29, 2000) (MJN Ex. 62). If either body had thought that section 516, as amended, meant that section 512 wholly superseded the Wage Orders, they would not have expressly referred to the Wage Orders in section 226.7, adopted days later.

In 2005, the Legislature confirmed its understanding that meal period obligations derive from all three sources—section 512(a), section 226.7, and the Wage Orders—when it added subdivision (d) to section 512. Subdivision (d) specifically cites all three provisions as the collective source of California's meal period requirements:

> If an employee in the motion picture industry, as those industries are defined in Industrial Welfare Commission Wage Orders 11 and 12, is covered by a valid collective bargaining agreement that [includes certain meal period provisions], then the terms, conditions and remedies of the agreement pertaining to meal periods *apply in lieu of the*

> *applicable provisions pertaining to meal periods of subdivision (a) of this section, Section 226.7, and Industrial Welfare Commission Wage Orders 11 and 12.*

Lab. Code §512(d) (emphasis added). When section 512(d) was enacted, the Assembly Bill Analysis observed that "[e]xisting state law sets forth the requirements for meal periods, *both* in the Labor Code *and* in the Industrial Welfare Commission Wage Orders." AB 1734, Assembly Floor Bill Analysis (Sept. 7, 2005) (MJN Ex. 68) (emphasis added).

Also in 2005, in response to DLSE's effort to adopt new and inconsistent meal period regulations, the Assembly confirmed that California's meal period laws derive from all three sources:

> The DLSE does not have the authority to promulgate a regulation that *weakens* the substantive protections and remedies afforded to California employees under *Sections 226.7 and 512 of the Labor Code and the 17 Wage Orders.*

Assembly Concurrent Resolution No. 43 (July 18, 2005) (MJN Ex. 69) at 2.

As discussed above, the whole purpose of AB 60, which originally added section 516, was to prevent the IWC from *diminishing* workers' then-existing meal period rights. To do this, the Legislature "codified" those existing rights in section 512(a), then enacted section 516, preventing the IWC from "amend[ing]" its existing standards. The IWC has not done so. The Wage Orders' meal period language has been unchanged for decades.

In sum, the Wage Orders, section 226.7, and section 512(a) all require employers to take affirmative steps to relieve workers of all

duty—and nothing in section 516 alters this conclusion. *See also* Part VI.B.4 (pp. 95-101), below (further discussing section 516).

3. The Case Law Supports This Interpretation

This conclusion finds further support in *Cicairos*, the only published California opinion to interpret the meal period obligations of our state, and *Murphy*, in which this Court also considered those obligations.

a. *Cicairos v. Summit Logistics, Inc.*

In *Cicairos*, the Court of Appeal (Third Appellate District) held that an employer's "obligation to provide … an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty'" for their meal periods. 133 Cal.App.4th at 962-63 (quoting DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41)).

This holding is consistent with the plain language of the Labor Code and Wage Orders and the administrative and legislative history discussed above. This Court should adopt the *Cicairos* holding.

Cicairos involved truck drivers who "delivered groceries and perishable goods to Safeway stores in California." *Id.* at 955. The employer had adopted a policy stating that the truck drivers were "entitled to take a 30-minute meal break … after working for five hours," but "the decision … to take the meal break(s) … [was] left to [the driver's] discretion." *Id.* at 962.

The Court of Appeal determined that merely adopting and distributing a policy allowing meal periods was not sufficient to comply with the law. *Id.* Instead, more "affirmative" steps were required to

ensure that the drivers stopped working (*i.e.*, were relieved of all work duties) for the required thirty minutes. *Id.* at 962-63.

The first thing the court pointed out was the Wage Orders' requirement that employers keep accurate daily records of all meal periods and hours worked. *Id.* at 962 (citing 8 Cal. Code Regs. §11090)).[42] The court then observed that the employer was capable of tracking (and did track) the drivers' actual working hours, yet the employer did not also track their actual meal periods; did not schedule meal periods into the drivers' shifts (as their collective bargaining agreement required); and did not "monitor compliance" with the meal period laws, as the Wage Orders require. *Id.*

By failing to take these affirmative steps—recording, scheduling, and monitoring compliance by ensuring that workers were actually relieved of duty—the employer failed to satisfy its meal period obligations. *Id.* at 962-63.

To emphasize the severity of this particular employer's violations, *Cicairos* also observed: "Furthermore, the defendant's management pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch." *Id.* at 962. This conduct magnifies the violation, but it is not one of the "affirmative" steps *Cicairos* cited. Rather, it is something every employer must *refrain* from doing, over and above the affirmative measures that employers must take to comply. Merely refraining from discouraging breaks is not sufficient because that alone does not fulfill the Wage Ordres' recording and monitoring requirement.

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[42] *See also* 8 Cal. Code Regs. §11050(¶7(A)(3)); *Murphy*, 40 Cal.4th at 1114 ("employers are required to keep … records of meal periods" (citing 8 Cal. Code Regs. §11070(¶¶7(A)(3), (C))).

For these reasons, the *Cicairos* court flatly rejected the employer's argument that "meal periods and rest breaks were the sole responsibility of the drivers because the company could not regulate the drivers' activities on the road." *Id*. The Wage Orders required the employer to monitor and record the drivers' working hours and their meal periods—on the road or not. An employer who failed to do so failed to satisfy its meal period obligations.

Several courts, including the Court of Appeal (slip op. 45-47), have construed *Cicairos* as consistent with a "make available" compliance standard instead of the "affirmative duty" standard the decision expressly adopted. Those courts seized on *Cicairos*' passing reference to management pressures to support a reading contrary to the opinion's core logic.

In *Brown*, for example, the court asserted that in *Cicairos*, "an employer simply assumed breaks were taken, despite its institution of policies that prevented employees from taking meal breaks." *Brown*, 249 F.R.D. at 856. *Brown*'s reference to "policies that prevented employees from taking meal breaks" is a red herring. The focus of *Cicairos* was on the affirmative steps that the employer *failed* to take—it *failed* to track whether meal periods were actually taken, even though it tracked actual working hours; *failed* to schedule meals into workers' shifts; and *failed* to "monitor compliance." *Cicairos*, 133 Cal.App.4th at 962. *Cicairos* mentions that drivers felt pressured to skip meals, but *Cicairos* says nothing to suggest that plaintiffs must prove positive employer interference. Instead, under *Cicairos*, the employer violated California's meal period requirements by *not* taking *affirmative* steps to comply beyond adopting a paper policy. *Id.* at 962-63.

Similarly, in *White* (and *Brinker*, which simply quotes *White*), the court observed that the *Cicairos* defendant "*knew* that employees were driving while eating and did not take steps to address the situation. This, in combination with management policies, effectively deprived the drivers of their breaks." *White*, 497 F.Supp.2d at 1089 (emphasis added). Every employer who "monitors" meal periods, as the Wage Orders all require, will "know" whether or not their workers are taking off-duty meals. *White* pointed out that Wage Order 9 required the *Cicairos* defendant to record meal periods, but failed to also observe that *every* Wage Order has the same requirement.

Under *Cicairos* and the Wage Orders, affirmative steps are required—recording actual meal periods; scheduling them; and monitoring them to ensure they are taken. It is not enough to refrain from interfering with them. Employers have an affirmative obligation to relieve workers of duty and record the resulting compliant meal period.

The Court of Appeal erred by misreading *Cicairos* and following *White* instead.

b. *Murphy v. Kenneth Cole Productions*

The Court of Appeal further erred by failing to follow this Court's opinion in *Murphy*—which is wholly consistent with *Cicairos*.

In *Murphy*, this Court closely examined section 226.7 and the remedy it created for meal period violations. *Murphy* held that "the Legislature intended section 226.7 first and foremost to compensate employees for their *injuries*." *Murphy*, 40 Cal.4th at 1111 (emphasis added). Employees denied their meal periods "face greater risk of work-related accidents and increased stress, especially low-wage

workers who often perform manual labor." *Id.* at 1113. In *Murphy*, this Court repeatedly emphasized that meal periods are "required," "mandated," and "mandatory." *Id.* at 1106, 1111, 1113.

This language is consistent with *Cicairos*' holding that an employer must take "affirmative" steps to provide meal periods *beyond* merely adopting a policy that allows them. Standing alone, such a policy is nothing more than lip service, and does nothing to prevent the "work-related accidents or increased stress" decried in *Murphy*. To comply with the Labor Code, an employer must also employ adequate staff and take whatever affirmative steps are necessary to ensure that breaks are not just made available, but that workers are actually relieved of duty—or pay the premium wage to compensate them for the resulting "injuries."

The facts of *Murphy* illustrate the point. In *Murphy*, a retail clothing store manager had to work while eating lunch and sometimes could not even take a restroom break because the employer did not sufficiently staff the store, which meant that no other employees were available to relieve him. *Id.* at 1100. In other words, *the employer* did not ensure that the manager was relieved of his work duties so that he could take his legally-mandated meal periods. *See id.* Consequently, for each missed meal period, the employer had to pay an extra hour of pay under section 226.7 to compensate the manager for the "noneconomic injuries [he] suffer[ed] from *being forced to work through* rest and meal periods." *Id.* at 1113 (emphasis added).

In *Brown*, the court seized upon the word "forced" in *Murphy*, asserting that *Murphy* "repeatedly described [the meal period requirement] as an obligation not to force employees to work through breaks." 249 F.R.D. at 587. However, *Murphy* cannot be understood in

a vacuum that does not consider its facts. *Murphy* makes clear that when an employer hires inadequate staff and workers miss their breaks, the employer is liable for the premium wage of section 226.7(b). *That* is what "forced" means in *Murphy*.

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. *See* Part III.A, above. Brinker, like the *Murphy* employer, thereby also "forced" its workers to "work through [their] meal periods." *See Murphy*, 40 Cal.4th at 1113.

Murphy also recognized the importance of the meal period *recording* obligation. Citing *Cicairos*, this Court explained:

> Because employers are required to keep all time records, including records of meal periods, for a minimum of three years (Cal.Code Regs., tit. 8, § 11070, subd. 7(A)(3) & (C)), employers should have *the evidence necessary to defend against plaintiffs' claims*.

Murphy, 40 Cal.4th at 1114 (citing *Cicairos*, 133 Cal.App.4th at 961) (emphasis added). In other words, a recorded break shows compliance, while a missing one proves a violation.

Ultimately, *Murphy*'s reasoning was grounded in the long-established principle that Labor Code provisions are to be broadly interpreted in favor of the *employee*, whom they were enacted to protect. In *Murphy*'s words, "statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees." *Id.* at 1111 (citing *Sav-on*, 34 Cal.4th at 340; *Ramirez*, 20 Cal.4th at 794; *Lusardi Constr. Co. v. Aubry*, 1 Cal.4th 976, 985 (1992)).

The Court of Appeal failed to construe the Labor Code in accordance with this principle. It also ignored the statutes' and Wage Orders' plain language (except the isolated word "provide") and all of

the administrative and legislative history. And, instead of relying on California appellate precedents (*Cicairos* or *Murphy*), the Court relied on federal trial court ones (*Brown* and *White*) to announce California law. *Brinker*'s flawed analysis should be relegated to the archive of misguided opinions.

4. Public Policy Supports This Interpretation

a. Health and Safety—Both for Workers and the Public—Will Be Compromised if Thirty-Minute Meal Periods Become Optional

In *Murphy*, this Court explained that mandatory meal and rest periods are essential to employee health and safety:

> Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, *especially low-wage workers who often perform manual labor*. [Citations.] Indeed, health and safety considerations (rather than purely economic injuries) are what motivated the IWC to adopt *mandatory* meal and rest periods in the first place.

40 Cal.4th at 1113 (citing *California Mfrs.*, 109 Cal.App.3d at 114-15) (emphasis added). They protect not only workers, but the public at large: "California courts have long recognized [that] wage and hours laws 'concern not only the health and welfare of the workers themselves, but also the public health and general welfare.'" *Gentry*, 42 Cal.4th at 456 (citation omitted).

These health- and safety-related goals would be wholly defeated if employees could "voluntarily choose" not to take breaks at the expense of their on-the-job safety, as *Brinker* holds.

To adopt the *Brinker* holding would be to empower employees to engage in activity (skipping their breaks) that would increase the "risk

of work-related accidents" not only for themselves, but for all of their co-workers and their customers as well. The "mandatory" meal period provisions construed in *Murphy* were intended to prevent precisely that. *See* CRLA Letter at 2 ("In three of six agricultural heat fatalities confirmed in 2005, investigation reports show that the victims succumbed to the heat while working under conditions where all required meal and rest periods were not 'taken.'").

Subject to a few narrow and carefully-crafted exceptions (discussed above), the Legislature and IWC chose to create *one*, *uniform* meal period standard to govern all types of laborers in *all* industries. That standard must be interpreted to protect not only employees who enjoy the "civilized working conditions [that] prevail in the offices in which most judges, attorneys, corporate executives, and their support staff are customarily employed," but also workers who "must show up on time for rigidly-scheduled working hours or shifts, and who have no freedom of movement or 'flexibility' to structure their activities during working hours." Worksafe Letter 4.

The uniform standard must protect the most vulnerable of California workers, including factory workers, garment workers, construction workers, drillers and miners, machinery operators, farm processing workers, and those who "dare not speak up to demand a break …, for fear of losing their jobs." *Id.* at 4-5.

The Court of Appeal's holding eliminates critical workplace protections for the very "low-wage workers" whom the uniform meal period laws were equally intended to protect. *Murphy*, 40 Cal.4th at 1113.

b. Employers, Not Workers, Have the Power to Control the Workplace

While refusing to consider legislative history, *Brinker* had no compunction invoking "public policy" to justify weakening worker protections. According to *Brinker*, if employers were affirmatively obligated to relieve workers of all duty for meal periods, then

> employers would be forced to police their employees and force them to take meal breaks. With thousands of employees working multiple shifts, this would be an impossible task. If they were unable to do so, employers would have to pay an extra hour of pay any time an employee voluntarily chose not to take a meal period, or to take a shortened one.

Slip op. 47 (citing *White*).

Nonsense.

The very essence of an employer-employee relationship is the employer's "'right to *control* the manner and means of accomplishing the result desired.'" *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350 (1989) (quoting *Tieberg v. Unemployment Ins. App. Bd.*, 2 Cal.3d 943, 946 (1970)) (emphasis added). "[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed." *Morillion*, 22 Cal.4th at 585.

Every day, employers set their employees' daily work hours, thereby controlling when the employees start and stop working. They do this for "thousands of employees working multiple shifts." Employers who do not exercise this control, and tolerate additional work, become liable for additional pay. For example, employers "have to pay" overtime if workers "voluntarily choose" to work overtime hours—so employers exercise their control and prevent it. Similarly,

employers can avoid meal period premium payments by requiring employees to stop working for the required thirty minutes—just as they do to avoid overtime costs.

Also, the Wage Orders already require employers to control the workforce sufficiently as to keep track of every hour worked so that every hour is paid. 8 Cal. Code Regs. §11050(¶7(A)). Likewise, employers must make themselves aware of and record every meal period. *Id.* §11050(¶7(A)(3)); *see Murphy*, 40 Cal.4th at 1114 (citing 8 Cal. Code Regs. §11070(¶7)); *Cicairos*, 133 Cal.App.4th at 961). The mandatory meal period compliance standard adds nothing to the burden employers already bear.

Contrary to the Court of Appeal's conclusion, a mandatory compliance standard would not expose employers to worker "manipulation." Slip op. 46. The mandatory standard prohibits employers from "employing" workers without a meal period, which means "suffer or permit" to work. 8 Cal. Code Regs. §11050(¶2(D)). An employer would be liable for missed meal periods if the employer knew or reasonably should have known the employee was working—the same objective standard as for overtime. *See Morillion*, 22 Cal.4th at 585. Because employers are required to track each meal period, they will "always have that knowledge." DLSE Op.Ltr. 2001.04.02 [withdrawn 12/20/04] at 5 (MJN Ex. 39). In the unlikely event that an employee tried to surreptitiously work while clocked out for a meal, or deliberately disobeyed instructions to stop working, the employer would not be liable—just like with overtime.[43] The trier of fact can easily be

[43] *Compare Forrester v. Roth*, 646 F.2d 413 (9th Cir. 1981) ("suffer or permit" standard for overtime did not create liability when employee deliberately concealed overtime work) with *Burry v. National Trailer*,

so instructed, as in one recent meal period class action. *See Savaglio v. Wal-Mart Stores, Inc.*, No. C-835687 (Cal. Super., Alameda Co.), Judgment (Oct. 11, 2006) (MJN Ex. 73) (reducing damages to account for employees who "fail[ed] to substantially comply with directions by [the employer] about meal periods").

The reality is that the employer, not the employee, controls whether and when employees perform work. In the DLSE's words, "[e]xperience has taught that it is the employer who assigns the meal period and the employee who accepts the assignment." DLSE Op.Ltr. 2002.06.14 (MJN Ex. 42) [withdrawn 12/20/04].[44] *Cicairos* perceived no "public policy" problem with placing responsibility for meal period compliance squarely on the employer's shoulders, where it belongs.

c. As a Matter of Law, Regulations Established to Protect the Public Interest—Including the Meal Period Laws—May Not Be Waived

When a statute was enacted to protect the public interest, the rights afforded by that statute may not be waived. Specifically, Civil Code section 3513 provides that "a law established for a public reason

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338 F.2d 442 (6th Cir. 1964) (employees worked unrecorded overtime with employer's knowledge; overtime owed).

[44] The Brinker panel refused to consider Op.Ltr. 2002.06.14 because it had been "withdrawn." Slip op. 40. However, the letter remains available on the DLSE website at this link: http://www.dir.ca.gov/dlse/opinions/2002-06-14.pdf. Moreover, as discussed above, the withdrawal coincided with a series of unsuccessful DLSE attempts to weaken the meal period regulations after those regulations "became highly politicized." *Murphy*, 40 Cal.4th at 1105 n.7. The withdrawal should not be accorded any "substantial weight." *Id.* The purportedly "withdrawn" letter should be accorded a degree of persuasive worth that depends on the thoroughness of the subject's treatment, the soundness of its reasoning, and its overall persuasive value. *Yamaha*, 19 Cal.4th at 7-8, 11-15.

cannot be contravened by a private agreement." Civ. Code §3513. A law has been established for a public reason "if its tendency is to promote the welfare of the general public rather than a small percentage of citizens." *Benane v. Int'l Harvester Co.*, 142 Cal.App.2d Supp. 874, 878 (1956). Thus, under these principles, a statutory right cannot be waived "where it would 'seriously compromise any public purpose that [the statute was] intended to serve.'" *Azteca Const., Inc. v. ADR Consulting, Inc.*, 121 Cal.App.4th 1156, 1166 (2004) (quoting *DeBerard Properties, Ltd. v. Lim*, 20 Cal.4th 659, 668-669 (1999)).

As this Court has recognized, employees who do not receive meal periods "face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor." *Murphy*, 40 Cal.4th at 1113. California's meal period requirements were enacted to reduce these risks and protect California employees' health and welfare. *See id.* at 1105; *see also Gentry*, 42 Cal.4th at 456.

If employees are allowed to voluntarily "waive" meal periods, they will face an increased "risk of work related accidents and increased stress" and be subjected to the health and safety risks that the laws were intended to prevent. *Murphy*, 40 Cal.4th at 1105, 1113. Accordingly, because waiver of meal periods would seriously, if not completely, compromise the public purpose of the meal period statutes, such waiver should be prohibited by Civil Code section 3513. *See, e.g., Henry v. Amrol*, Inc., 222 Cal.App.3d Supp. 1, 6 (1990) (employees may not waive provisions of Labor Code addressing payment of vacation time wages because such provisions were established to protect workers and have a public purpose); *Grier v. Alameda-Contra Costa Transit Distr.*, 55 Cal.App.3d 325, 334-335 (1976) (employee cannot waive protections of Labor Code regulating wage reductions for tardiness).

For this final reason, the *Brinker* panel erred by holding that meal periods need only be "made available," and by reversing the order granting class certification of the meal period claim.

VI. THE MEAL PERIOD TIMING ISSUE

The next substantive question is whether California law imposes any *timing* requirement for meal periods. The Court of Appeal reached the merits of this question, and said no. Slip op. 34-41. This part of the Court of Appeal's judgment should be reversed for two reasons. First, as a procedural matter, class certification was correctly granted respecting this claim because common questions predominate as to it. Second, as a substantive matter, the Court of Appeal reached the wrong conclusion by again misinterpreting the Labor Code and Wage Orders.

A. Common Questions Predominate on the Meal Period Timing Issue, So the Class Certification Order Should Be Affirmed

This part of the case is a subset of the broader meal period claim. *See* Part III.A., above. The Court of Appeal's judgment reversing class certification of the *entire* meal period claim left by the wayside all workers subjected to Brinker's mandatory "early lunching" policy. Separately considered, this part of the meal period claim was properly certified for class treatment regardless of the outcome of the meal period compliance issue discussed above.

Brinker's uniform meal and rest break policy authorizes "a 30-minute meal period" for employees who work "a shift that is over five hours." Slip op. 5 (quoting 19PE5172). During their depositions, Brinker executives testified that for employees whose meal period is scheduled near the beginning of the shift, Brinker's uniform policy does not authorize another meal period if they work more than five hours

after the initial meal period. 2 PE 440:7-18, 456:5-20. That means that Brinker routinely employs workers for a work period of more than five hours without offering them a meal period—failing to meet even the lesser "make available" standard (much less affirmatively relieving them of duty). *See* Part III.A, above.

Plaintiffs contend this violates California law (including the Wage Orders, section 226.7, and section 512(a)), as discussed in more detail below.

Whether Brinker's uniform policy violates California law is a classic example of a common legal question supporting class certification. Every class member's meal period claim (to the extent based on this alleged violation) stands or falls with the resolution of that issue; and if each class member sued individually, the same legal question would have to be resolved in each case. *See generally Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 713-17 (1967); *Medrazo v. Honda of North Hollywood*, 166 Cal.App.4th 89, 100 (2008) (whether defendant's uniform conduct violated statute presents predominating common legal question); *Rose v. City of Hayward*, 126 Cal.App.3d 926, 933 (1981) (class certification proper when interpretation of a statute presents "single, decisive issue for all class members").

The trial court correctly determined that common questions predominated and granted class certification of this aspect of plaintiffs' meal period claim. Because the law requires Brinker to record each work period and each meal period (*Murphy*, 40 Cal.4th at 1114 (citing 8 Cal. Code Regs. §11070(¶7(A)(3)); *see id.* §11050(¶7(A)(3)), Brinker's records will show each initial meal period and each succeeding work period of over five hours. Because Brinker's policy was not to authorize a meal period during that succeeding work period (much less

affirmatively relieve workers of duty), there will be no question of whether such a meal was "waived," leaving no individualized issues.

Because the trial court certified the *entire* meal period claim for class treatment, it had no occasion to consider possible meal period subclasses. What the Court of Appeal should have done, after finding the broader meal period claim uncertifiable, was separately consider certification of a meal period timing subclass (or order the trial court to separately consider such a subclass on remand).

Courts are duty-bound to consider and certify subclasses when that will "facilitate class treatment" of one or more parts of the case. *Aguiar v. Cintas Corp. No. 2*, 144 Cal.App.4th 121, 134 (2006) (citing *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 470-471 (1981); *Vasquez v. Superior Court*, 4 Cal.3d 800, 821 (1971)); *see also Sav-on*, 34 Cal.4th at 339-340 & fns. 11, 13; *Lee v. Dynamex, Inc.*, 166 Cal.App.4th 1325, 1335 (2008) (same). Even if certification of a broader class is properly denied, "the court *should determine* if it would be feasible to divide the class into subclasses to … allow the class action to be maintained." *Medrazo*, 166 Cal.App.4th at 99 (citing *Richmond*, 29 Cal.3d at 470-71) (emphasis added).

This is part of the court's "obligation" to "fashion methods" that will permit class treatment. *Sav-on*, 34 Cal.4th 339-340 & fns. 11, 13. It exists regardless of whether the class proponent expressly moved for subclasses. *Richmond*, 29 Cal.3d at 467-68, 470-71, 478; *Medrazo*, 166 Cal.App.4th at 94, 99; *Aguiar*, 144 Cal.App.4th at 130, 134.

The Court of Appeal erred by reversing the class certification order wholesale. Instead, at a minimum, it should have directed the trial court to certify a meal period timing subclass on remand.

B. California Law Requires Employers to Time Workers' Meal Periods So That Workers Are Not Employed for More Than Five Hours Without a Meal Period

1. Plaintiffs' Contentions and the "Rolling Five" Misnomer

As an initial matter, the Court of Appeal incorrectly referred to this part of plaintiffs' meal period claim as the "rolling five" claim. Slip op. 9, 15, 33-35. That is a misnomer that reveals a misunderstanding of plaintiffs' contentions. Contrary to the opinion, plaintiffs do not contend that employees must necessarily receive "a second meal period five hours after they return to work from the first meal period." *Id.* at 37.

Plaintiffs contend that Brinker authorizes a single meal period at or near the beginning of the shift (aka "early lunching"), then continues to employ its workers for more than five hours thereafter. 19PE5172; 2PE440:7-18; 2PE456:5-20 (Brinker's uniform policy). Some workers end up working more than nine hours straight without being offered a meal period (much less being affirmatively relieved of duty). *E.g.*, 1PE97:8-10 (employee's shifts begin at 7:00 a.m., with a 9:00 a.m. "lunch," followed by uninterrupted work until 4:00 or 5:00 p.m. (over seven hours)); 2PE456:19-20 ("they do not receive a second one until they hit ten hours"); *see also* 1PE110:17-18, 112:18-19, 130:14-15, 132:16-18, 134:18-20.

California law prohibits this (as discussed in detail below). However, the law does not compel the employer to schedule a second meal period. Rather, the law imposes a *timing* requirement. Lab. Code §512(a); 8 Cal. Code Regs. §11050(¶11(A)).

By appropriately *timing* the first meal period, the employer can avoid a pre- or post-meal work period that exceeds five hours. This is

true for all shifts up to and including ten hours. 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. For shifts of more than ten hours, a second meal period is triggered because the first meal period *cannot* be timed to avoid two work periods exceeding five hours. And, regardless of shift length, the *latest* the first meal period may be scheduled to start is during the fifth hour.

Accordingly, to escape liability, Brinker would not necessarily have to relieve workers of duty for a second meal period (although that would be one way to comply). Instead, Brinker could simply move the first meal period closer to the mid-point of the day's shift, eliminating all work periods that exceed five hours. Or, Brinker could end the worker's shift no later than five hours after the first meal period. Or, Brinker could pay the meal period premium. Lab. Code §226.7(b); 8 Cal. Code Regs. §11050(¶11(B)).

Brinker's uniform policy is to do none of the above. That is what this action seeks to rectify on behalf of all Brinker workers.

2. The Wage Orders' Plain Language and Regulatory History Require Employers to Correctly Time Workers' Meal Periods

The Wage Orders prohibit employers from employing workers "for a work period of more than five (5) hours without a meal period of not less than 30 minutes." 8 Cal. Code Regs. §11050(¶11(A)).[45] This language has been unchanged since 1952. *See* Wage Orders 5-52(¶11) (Aug. 1952), 5-57 (Nov. 15, 1957), 5-63 (Aug. 20, 1963), 5-68 (Feb. 1,

[45] Identical language appears in every Wage Order except No. 14. No. 12 has the same language, but allows work periods of six hours instead of five. *See* fn. 23, above.

1968), 5-76 (Oct. 18, 1976), 5-80 (Jan. 1, 1980), 5-98 (Jan. 1, 1998), Interim Wage Order—2000 (Mar. 1, 2000), 5-2001 (Oct. 1, 2000) (MJN Exs. 5, 14-21).

A review of the history of this language illuminates its meaning.

In 1932, the IWC first adopted a meal period requirement for the public housekeeping industry: "[N]o woman or minor shall be permitted to work an excessive number of hours without a meal period." Wage Order 18(¶10) (Feb. 26, 1932) (MJN Ex. 11) (applicable to all industries). In 1943, the IWC determined that five hours was the longest work period that could be permitted without a meal period, and adopted a requirement that is essentially identical to today's:

> No employer shall employ any woman or minor for a work period of more than five (5) hours without an allowance of not less than thirty (30) minutes for a meal.

Wage Order 5NS(¶3(d)) (Jun. 28, 1943) (MJN Ex. 12).

In 1947, the IWC amended this language to specify that the five-hour period that triggered the meal period is the one that began to run when the employee reported to work:

> No employee shall be required to work more than five (5) *consecutive hours after reporting to work*, without a meal period of not less than thirty (30) minutes.

Wage Order 5R(¶10) (Jun. 1, 1947) (emphasis added) (MJN Ex. 13). This language, in contrast to the 1943 language, triggered a meal period only for the five-hour work period that began "after reporting to work."

Tellingly, the IWC *removed* this language in 1952 and restored the 1943 compliance standard. Wage Order 5-52 contains the language that remains in the Wage Orders today, prohibiting employers from employing workers "for a work period of more than five (5) hours

without a meal period of not less than 30 minutes." Wage Order 5-52(¶11) (Aug. 1952) (MJN Ex. 14).

This amendment history demonstrates that the Wage Orders' current language requires a meal period for *any* work period exceeding five hours, regardless of when that work period began.

This language has been consistently interpreted to require a meal period for *each* five-hour work period. As a practical matter, this requirement obligates employers to *time* meal periods and shift lengths so as to avoid work periods exceeding five hours—or pay the premium wage—and to prohibit the "early lunching" Brinker imposes on its workers.

In 1979, this Court "summar[ized]" Wage Order 5-76—whose language is identical to the current Wage Orders—as follows: "A meal period of 30 minutes *per 5 hours of work* is generally required." *California Hotel*, 25 Cal.3d at 205 n.7 (citing Wage Order 5-76) (emphasis added).

The IWC also interprets the Wage Orders to require a *second* meal period if a work period exceeding five hours follows the first one. The 1993 and 1998 amendments to Wage Order 5 bear this out.

In 1993, the IWC added subparagraph (C) to Wage Order 5-89 allowing "employees in the health care industry who work shifts in excess of eight (8) total hours in a workday [to] voluntarily waive their right to a meal period." *See* Wage Order 5-98(¶11(C)) (Jan. 1, 2009) (MJN Ex. 20); Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9) (April 11, 1997) at 7-8 (MJN Ex. 30). In 1998, the IWC expanded this waiver right to all workers covered by Wage Order 5. *Id.*

Convening a Wage Board to consider this amendment, the IWC said it may be needed "because the language in [Section 11, Meal Periods] does not permit employees to waive their *second meal periods on a shift*." IWC Charge to the 1996 Wage Boards, IWC Orders 1, 4, 5, 7, and 9 (June 28, 1996) (MJN Ex. 29) (emphasis added). Once adopted, the amendment "allow[ed] an employee freedom to choose between leaving work one half-hour earlier or taking *a second meal period on a long shift*." Statement as to the Basis, Overtime and Related Issues (Orders 1, 4, 5, 7, and 9), *supra*, at 8.

In other words, as the IWC understood it, "a work period of more than five (5) hours without a meal period" means employees must receive a "*second meal period*" whenever five hours' work follows the first one. For example, if a meal period is scheduled at the end of the third hour—which is, under plaintiffs' construction, the earliest it may be scheduled for an eight-hour shift—then a second meal period would accrue five hours later, at the end of the eighth hour. The IWC determined that workers whose shifts continue beyond that eighth hour should be allowed to waive that "*second meal period*."

Under the Court of Appeal's interpretation, the IWC's reason for the 1993 and 1998 amendments would not exist, because no worker would ever be entitled to a "second meal period" at the end of eight hours' work— even if the first meal period were pushed up to the first hour. There would never be a "second meal period" to waive.

The exception was temporarily removed when the Interim Wage Order was adopted in March 2000. Interim Wage Order—2000 (eff. Mar. 1, 2000) (MJN Ex. 21). At that time, the IWC confirmed its understanding that under paragraph 11(A), "[a]n employee must receive a thirty-minute meal period for *every 5 hours* of work." IWC Summary

of Interim Wage Order—2000, *supra*, at 4 (emphasis added) (MJN Ex. 31); IWC Summary of the 2000 Amendments to Wage Orders 1-13, 15 and 17, *supra*, at 4 (MJN Ex. 33) (same language).

Then, in June 2000, the IWC readopted the exception, limited to healthcare workers, and slightly reworded it. 8 Cal. Code Regs. §11050(¶11(D)). Now, the exception allows healthcare workers who work shifts exceeding eight hours to "voluntarily waive … one of *their two meal periods*." (Emphasis added.) Again, this reflects the IWC's understanding that an employee who works more than eight hours, and who received a first meal period at the earliest compliant time (the end of the third hour), accrues *two* meal periods under the "every 5 hours" rule of paragraph 11(A).

Meanwhile, in July 1999, the Legislature enacted express waiver language for shifts exceeding *twelve* hours. Lab. Code §512(a). In so doing, the Legislature made express the implicit right to "a second meal period." *See* Part VI.B, below. Both waiver provisions operate under the same assumption—that a meal period accrues "every 5 hours." By prohibiting work periods exceeding ten hours without "a second meal period," section 512(a) acknowledges that the first meal period, to be compliant, occurs no later than the end of the fifth hour, followed by a second compliant meal period at the end of the tenth hour. Section 512(a) then allows that second meal period to be waived.

Likewise, according to the DLSE, the Wage Orders' language is "unambiguous" and "makes clear beyond any question that each five-hour 'work period' stands alone." DLSE Op.Ltr. 2002.06.14 at 2-3.[46]

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[46] Again, this Opinion Letter was "withdrawn" in a "highly politicized" move. *See Murphy*, 40 Cal.4th at 1105 n.7; DLSE Memorandum to Staff (Dec. 20, 2004) (MJN Ex. 53).

To avoid violating the Orders, the employer must either *time* the meal period appropriately or end the work day early:

> [I]f an employee is assigned a meal period in the first two and one-half hours of [an] eight-hour workday, the employer would be prohibited from employing that employee past seven hour and thirty-first minute of the workday.

Id. at 3. The Orders also "prohibit an employer employing a worker eight hours a day in a restaurant from requiring the employee to take a meal period within the first hour of the work day *so as to accommodate the employer's work schedule*." *Id.* at 3 (emphasis added); *cf.* DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40), at 4, 5 ("The purpose of the rest period is to refresh workers during the workday"; "a 'ten minute break' followed by quitting time is not a rest break at all, and having the employer pay for that fictitious break seems like a subterfuge").

This "is the long-standing enforcement policy of DLSE." *Id.* at 4. Accordingly, the DLSE Manual confirms that the Wage Orders impose a *timing* requirement: "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, §45.2.1 (June 2002) (MJN Ex. 49) (emphasis added).[47]

Contrary to all of these indicia of meaning, the Court of Appeal held that the Wage Orders impose no "restriction on the timing of meal periods." Slip op. 40; *id.* at 34-41.

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[47] *See* Locker Letter at 8 ("For decades, DLSE read the wage orders to impose a timing requirement as to when meal periods must be provided during the workday. …. DLSE interpreted [the Wage Orders] to mean that the meal period must occur at or near the mid-point of the workday, so that the employee does not work more than five hours before starting the meal period or more than five hours after completing the meal period.").

Under the Court of Appeal's interpretation, an employee working a ten-hour shift would be entitled to a meal period (because he was employed "for a work period of more than five hours")—but his employer could require him to take the meal period at the beginning or end of the day and work for 9½ uninterrupted hours. An employee working a double shift (two consecutive eight-hour shirts totaling sixteen hours) would be entitled to two meal periods (because she was employed "for a work period of more than ten hours")—but her employer could require her to take first meal period at the beginning of the day, and the second at the end of the day, with *fifteen* uninterrupted hours in between.

Because all but one of the Wage Orders has the same language, this holding would mean that not only restaurant workers, but also workers in many other industries, including assembly-line factory workers, could all be required to work over fifteen hours straight without a meal period. A more dramatic curtailment of workers' meal period rights is hard to envision.

The Court of Appeal dismissed *California Hotel* ("A meal period of 30 minutes *per 5 hours of work* is generally required") as "distinguishable" because it supposedly "involved an IWC wage order (No. 5-76) that is not involved in the present case." Slip op. 38. But Wage Order 5-76's wording is identical to the current Wage Order and has been unchanged since. *Compare* Wage Order 5-76(¶11(A)) (MJN Ex. 18) *with* 8 Cal. Code Regs. §11050(¶11(A)). Also, by mistaking this Court's "summary" of Wage Order 5-76 for its actual text, the panel found a "distinction between the provisions" that does not exist. Slip op. 39. In *California Hotel*, this Court correctly summarized the Wage

Orders' requirements and the panel was bound to follow its interpretation.

The Court of Appeal also dismissed DLSE Op.Ltr. 2002.06.14 ("each five-hour 'work period' stands alone") because it was "withdrawn and therefore cannot be relied upon to support plaintiffs' claims." Slip op. 40. As discussed above, however, that opinion letter's "withdrawal" was a "highly politicized" move that coincided with other DLSE efforts to weaken the meal period laws. *Murphy*, 40 Cal.4th at 1105 n.7. The letter's reasoning should be accorded weight commensurate with the thoroughness of its treatment of the subject, the soundness of its reasoning, and its overall persuasive value. *Yamaha*, 19 Cal.4th at 7-8, 11-15.

The panel also rejected DLSE Op.Ltr. 2001.09.17 (slip op. 40), which plaintiffs cited *by analogy* in support of the general principle that a rest break relegated to the beginning or end of the day is worthless because it gives workers no real rest or refreshment. The same is indisputably true of meal periods.[48] The panel did not even mention the DLSE Manual or any IWC material.

The panel erred by rejecting thirty years of consistent and commonsense judicial and administrative interpretation of California's Wage Orders. As will be seen, the panel likewise erred by failing to consider any legislative history surrounding section 512(a)'s enactment.

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[48] *See* Locker Letter at 9 ("[Under *Brinker*, t]he employer's duty to provide a meal period is reduced to a meaningless charade, with 'meal periods' at the very beginning or very end of a shift providing no benefit to employees whatsoever.").

3. The Labor Code and Its Legislative History Fully Support This Conclusion

More than 50 years after the IWC adopted this meal period requirement, the Legislature enacted Labor Code section 512(a), which uses slightly different wording than the Wage Orders:

> 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 ….

Lab. Code §512(a) (emphasis added).

The Court of Appeal made much of the words "per day," which appear in section 512(a) but not the Wage Orders. Slip op. 35-37. The panel understood these words to create a material difference in meaning, but a close reading of section 512(a) shows that its language is easily harmonized with the Wage Orders.

By their plain language, the words "[a]n employer may not" in section 512(a) function to prohibit employers from "employ[ing] an employee for a work period of more than five hours per day without providing a meal period…." However, nothing in section 512(a) prohibits employers from "providing" *more* meal periods than the minimum number stated. Section 512(a) does not say, for example, that employers may *not* "provide" *more than one* meal period "for a work period of more than five hours per day." Nor does it prohibit an employer from "providing" a meal period to workers employed *fewer* than five hours "per day." By using prohibitive language, section 512(a) creates a compliance floor.

Accordingly, an employer could choose to "provide" a meal period to all of its employees every three hours, and that employer would be in full compliance with section 512(a).

Similarly, to the extent that the Wage Orders require more meal periods (whether more frequent or more precisely timed) than the minimum stated in section 512(a), they are entirely consistent with the statute. An employer who "provides" a meal period for every five-hour work period, or who times meal periods to minimize five-hour work periods, has complied with the Wage Orders *and* section 512(a). In other words, if section 512(a) contains *no* timing requirement, as the panel held, then the Wage Orders create one to fill that gap in coverage.[49]

The legislative history fully supports this plain-language interpretation.

By adding the words "per day," the Legislature did not intend to effect any substantive change in California meal period laws. The Legislative Counsel Digest for AB 60 states: "This bill would *codify*" the meal period provisions of the "[*e*]*xisting* wage orders." AB 60, Legislative Counsel Digest, at 2 (emphasis added). The Digest would not contain such language if the words "per day" had been intended to alter workers' meal period rights, or to override the Wage Orders, as the Court of Appeal held.

In 2000, the Legislature reiterated its understanding of California law when it enacted section 226.7, which "[p]laces into the statute the *existing provisions* of the [Wage Orders] requiring employers to provide

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[49] The same is true respecting the meal period compliance standard discussed in detail in Part V, above. Even if, as the Court of Appeal concluded, section 512(a) requires employers merely to make meal periods "available," the Wage Orders are not inconsistent with that because "no employer shall employ" is a more stringent compliance standard. An employer who complies with the Wage Orders has also met the more lenient standard that the panel assigned to section 512(a).

… a 30-minute meal period *every five hours*." AB 2509, Third Reading, Senate Floor Analysis (Aug. 28, 2008) at 4 (MJN Ex. 61). Notably, the Legislature chose to incorporate the Wage Orders, not section 512, as the liability standard for the new remedy it adopted in section 226.7(b), which require violating employers to pay money. *Id.*

Also in 2000, the Legislature enacted section 512(b), which authorizes the IWC to relax section 512(a)'s minimum meal period requirement by "adopt[ing] a working condition order permitting a meal period to *commence after six hours* of work," instead of five. Lab. Code §512(b) (emphasis added); Stats. 2000, ch. 492, §2 (SB 88) (Sept. 19, 2000) (MJN Ex. 63). This language confirms the Legislature's understanding that, at a minimum, sections 512(a) and (b) and the Wage Orders *do* impose a timing requirement. The first meal period of the day must "commence" no later than the fifth hour worked (or the sixth hour if a Wage Order authorizes it). If the first meal period commences *earlier* than the fifth hour, sections 226.7, 512(a) and the Wage Orders they "codified"[50] trigger "a second" meal period five hours after that—as discussed above. Again, employers can avoid that second meal period simply by *timing* the first meal period and the shift length appropriately.

In sum, a plain-language reading of the Wage Orders, sections 512(a) and (b), section 226.7, and their administrative and legislative history fully supports the conclusion that a meal period is triggered for

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[50] AB 60, Legislative Counsel Digest (July 21, 1999) at 2 (MJN Ex. 58) (enacted to "codify" "existing wage orders"); AB 2509, Senate Third Reading (Aug. 28, 2000) at 4 (MJN Ex. 61) ("[p]laces into statute the existing provisions" of the Wage Orders); SB 88, Senate Third Reading (Aug. 16, 2000) at 5 (MJN Ex. 64) (section 512 "codifies" existing duties).

each "work period of more than five (5) hours," and that employers must schedule meal periods and shifts to limit the number of work periods exceeding that length—or pay premium wages.

The Court of Appeal did not consider any of the legislative history surrounding sections 512(a) or 226.7. Slip op. 34-41. Therefore, it did not perceive that both statutes were intended to "codify" the fifty-year-old Wage Orders. As a result, the panel adopted an interpretation of "per day" that does not "codify" "existing" law, but radically amends it—indeed, that "invalid[ates]" it. *Id.* at 40.

To reach its dramatic revision of the meal period laws, the Court of Appeal made several statutory interpretation errors.

First, the panel "presume[d] the Legislature intended the provisions of [the Wage Orders] and section 512(a) to be given a consistent interpretation." Slip op. 36. That statement is correct so far as it goes. However, because the panel failed to consider any legislative history—or even the fact that the Wage Orders were enacted fifty years before section 512(a)—the panel erroneously assumed the Wage Orders were meant to codify section 512(a), instead of vice versa. *Id.* at 35-37. Also, the panel made no effort to harmonize the provisions. The panel should have interpreted section 512(a) in light of the Wage Orders' settled administrative interpretation, discussed above, as well as the Legislature's stated intent to "codify" "existing" law. The panel's failure to do so led it to "interpret" out of existence California's longstanding meal period timing requirement.

Second, the panel again interpreted selected words ("per day") in isolation instead of in context, contrary to this Court's clear statutory interpretation precedents. As just one consequence, the panel's interpretation of section 512(a) (that "per day" means something other

than what the Wage Orders mean) would create an irreconcilable conflict with section 226.7—which expressly adopts the Wage Orders' compliance standards. The panel should have attempted to harmonize the provisions in the manner discussed above.

Third, the panel stated that plaintiffs' interpretation would render superfluous section 512(a)'s language triggering a second meal period for workers "employed for a work period of more than 10 hours per day." Slip op. at 37-38. This again reveals the panel's misunderstanding of plaintiffs' claim. Plaintiffs do not contend that employees must receive "a second meal period five hours after they return to work from the first meal period." *Id.* at 37. Rather, as explained above, the Wage Orders and Labor Code create a *timing* requirement for meal periods—and require employers who do not meet that requirement to pay premium wages.

For shifts over ten hours, if the first meal period is correctly timed, it makes perfect sense that a second meal would be triggered *after* the tenth hour. That is because, for shifts over ten hours, the only way to avoid a work period exceeding five hours is to schedule the initial meal period at the midpoint of the first ten hours. The statute then triggers a second meal period five hours later, after the tenth hour. The entire scheme thus avoids any work periods over five hours.

Contrast this with the panel's interpretation. According to the panel, for a shift over ten hours, the first meal period could be scheduled during the first hour of work, followed by 9½ hours of uninterrupted work before the ten-hour rule triggered a second meal period. This interpretation nullifies the salutary effects of the first meal period, making *that* meal period wholly meaningless.

In sum, plaintiffs' reading is the only one that *harmonizes* the whole statutory scheme and protects workers by ensuring that they never work more than the IWC's longstanding maximum—five hours—without a meal period.

4. Notwithstanding Section 516, the IWC May Adopt More Restrictive Meal Period Protections Than Appear in the Labor Code

As its final reason for narrowly interpreting the Wage Orders and Labor Code, the Court of Appeal held that the 2000 amendment to section 516 effectively invalidated the Wage Orders' meal period language, leaving section 512 as the sole source of any meal period requirement in California. Slip op. 36, 39-40 (citing *Bearden*, 138 Cal.App.4th at 438). This, too, was error.

As an initial matter, this argument assumes the provisions are inconsistent and cannot be harmonized, and that the words "per day" create a requirement that differs from the Wage Orders. As discussed above, that is not correct, but even if it were, the IWC has always been empowered to adopt "more restrictive provisions than are provided by [the Labor Code]." *IWC v. Superior Court*, 27 Cal.3d at 733 (citing *California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 290-94 (1943); *Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 599-601 (1968); 2 Ops.Cal.Atty.Gen. 456, 457 (1943)).

In *IWC v. Superior Court*, a group of employers challenged paragraph 3(A) of Wage Orders 8-80 and 13-80, which entitled agricultural workers to one day's rest in seven. 27 Cal.3d at 733. Labor Code section 554, by contrast, was more lenient, expressly exempting agricultural workers from this requirement. *Id.* The employers argued

that the stricter Wage Orders were "invalid" because "inconsistent" with section 554. *Id.*

This Court disagreed, explaining that the employers' position reflected "a fundamental misconception of the relationship between" the Labor Code and Wage Orders:

> [T]he authorities have uniformly held that "the [Wage] Orders may provide *more restrictive provisions* than are provided by (the general) statutes adopted by the Legislature on this subject (in sections 510-556)…."

Id. (quoting 2 Ops.Cal.Atty.Gen. at 457; citing *California Drive-In*, 22 Cal.2d at 290-94; *Rivera*, 265 Cal.App.2d at 599-600) (emphasis added).

The Court also emphasized the fact that "the [challenged] sections … have been part of the wage orders of the industries in question since 1943." *Id.* at 734. Hence, "the long-continued and consistent administrative interpretation has received at least silent acquiescence from the Legislature." *Id.* (quoting *Rivera*, 265 Cal.App.2d at 601). The Court refused to overturn it. *See id.*

Here, the Wage Order's fifty-year-old meal period requirement (as the Court of Appeal interprets it) is "more restrictive," providing greater protections, than Labor Code section 512(a). Accordingly, under *IWC*, the Wage Orders are not "invalid." *IWC v. Superior Court*, 27 Cal.3d at 744. So long as the Wage Orders provide greater protections, they are valid. *See* DLSE Op.Ltr 2001.04.02 [withdrawn 12/20/04] (MJN Ex. 39) at 2 (notwithstanding section 512(a), "the IWC retained the authority to maintain or establish higher standards than those set by the statute").

Without mentioning *IWC*, the Court of Appeal held that section 516 "forbids wage orders inconsistent with section 512." Slip op. 36 (citing *Bearden*, 138 Cal.App.4th at 438.) According to the panel, section 516 prohibits courts from interpreting *existing* Wage Orders to provide *greater* protections than section 512—effectively invalidating the Wage Orders' more restrictive provisions. Slip op. 39-40.

To understand why the Court's reliance on section 516 is misplaced, it is necessary to review the enactment history of both section 516 and section 512.

AB 60 added both section 512 and section 516 to the Labor Code. As originally enacted, section 512 consisted of a single paragraph. Stats. 1999, ch. 134, §6 (AB 60). That paragraph is now codified as section 512(a), and its language has not changed since its original enactment.

Section 516's enactment and amendment history is discussed in detail above. Part V.B.2.c (pp. 62-66). As originally enacted, section 516 allowed the IWC to "adopt or amend" Wage Orders respecting "rest periods, meal periods, and days of rest"—"[n]otwithstanding any other provision of law." *See id.*

In 2000, the Legislature enacted SB 88, which amended *both* sections 512 and section 516. Stats. 2000, Ch. 492 (SB 88). The bill added new subsection (b) to section 512 and renumbered section 512's original text as subsection (a). *Id.* §1. Subsection (b) (which has not since been amended) authorizes the IWC to *weaken* existing meal period requirements if certain conditions are met:

> (b) Notwithstanding subdivision (a), the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence *after six*

> *hours of work* if the commission determines that the order is consistent with the health and welfare of the affected employees.

Lab. Code §512(b) (emphasis added). This language permits the IWC to allow meal periods after six hours of work instead of five, *if* the IWC finds this "consistent with the health and welfare of the affected employees." Then, SB 88 amended section 516 to substitute the phrase "[e]xcept as provided in Section 512" in place of "[n]otwithstanding any other provision of law." Stats. 2000, ch. 492, §4.

Accordingly, section 516, as amended, allows the IWC to weaken the Wage Orders' meal period requirement, but only to the extent permitted by section 512(b)—that is, to allow six-hour, instead of five-hour, work periods without a meal period. This amendment was necessary because "[n]otwithstanding any other provision of law," read literally, might have permitted the IWC to adopt a Wage Order allowing seven- or eight-hour work periods, far beyond the six-hour minimum of section 512(b), let alone the five-hour minimum of section 512(a). To enforce new subsection (b), this language had to be changed to "[e]xcept as provided in section 512."

The legislative history surrounding SB 88 bears this out.

First of all, the Senate third reading analysis expressly reconfirms that section 512(a) was meant to *codify* preexisting law (*i.e.*, the Wage Orders): "Section 512 <u>*codifies*</u> the duty of an employer to provide employees with meal periods." SB 88, Senate Third Reading (Aug. 16, 2000) (MJN Ex. 64) at 5; Senate Third Reading (July 7, 2000) (MJN Ex. 65) at 5 (same) (cited in Slip op. at 39). The analysis then explains that SB 88 "<u>*clarifies*</u> two provisions of the Labor Code enacted in [AB 60]." *Id*. Finally, SB 88 "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." *Id.* (emphasis added).

As discussed above, the whole purpose of AB 60, which enacted sections 512 and 516 in the first place, was to prohibit the IWC from *weakening* the Wage Orders' protections—which the IWC had tried to do by eliminating the eight-hour workday in 1997. AB 60, Legislative Counsel Digest, *supra*, at 2; *see Collins*, 105 Cal.App.4th at 176. SB 88 reaffirms the original purpose of AB 60—to "codify" the existing Wage Orders and prevent the IWC from trying to *weaken* them by adopting Wage Orders not "consistent" with section 512(a).

What's more, nothing in the text of sections 512 or 516 or their enactment history suggests that the Legislature intended to abrogate *IWC v. Superior Court* or its holding that the Wage Orders may impose "more restrictive" requirements than the Labor Code. Neither the case nor its holding is mentioned anywhere in the history of AB 60 or SB 88. Rather, the Legislature simply intended to reconfirm that the IWC's regulations must be "consistent with" the Labor Code, which, in this case, the more restrictive provisions are.

Finally, by its plain terms, section 516 would only limit the IWC's power to "adopt or amend" a Wage Order, which did not happen here. The Wage Orders' relevant language has been unchanged for decades.

The Court of Appeal relied heavily on *Bearden*, but that case does not support its reading of section 516. Slip op. 36, 40 (citing *Bearden*, 138 Cal.App.4th at 438). Rather, *Bearden* demonstrates that the rule of *IWC v. Superior Court* survived section 516's amendment.

In *Bearden*, the Court of Appeal held that the IWC could not create an *exception* to section 512(a) that would have *weakened* its minimum requirement of a second meal period for workers employed "for a work period of more than ten hours per day."

In 2000, the IWC adopted new Wage Order 16 for the on-site construction, drilling, mining, and logging industries. 8 Cal. Code Regs. §11160. Paragraphs 10(A) and (D) contain language identical to paragraph 11(A) of Wage Order 5. *Id.* §11160(¶10(A), (D)). Paragraph 11(B) tracks verbatim the second sentence of Labor Code section 512(a), which requires "a second meal period" for "a work period of more than ten hours per day." *Id.* §11160(¶10(B)); *see* Lab. Code §512(a). Paragraph (E) created an exception to paragraphs (A), (B), and (D) for "any employee covered by a valid collective bargaining agreement" containing certain provisions. *Id.* §11106(¶10(E)).

Pursuant to paragraph (E), a mine operator required its unionized employees "to work 12.5 consecutive hours for each shift, but [gave them] only one 30-minute meal break per shift." 138 Cal.App.4th at 423. Six miners sued for violations of section 512(a), 226.7, and Wage Order 16, arguing that a second meal period was required because they worked more than 10 hours. *Id.* at 433-34. The employer argued that paragraph (E) exempted them from this requirement. *Id.* at 433.

As an initial matter, the Court of Appeal determined that the miners had "satisfied their burden by establishing that Wage Order section 10(E) conflicts with section 512 by creating a new exception not authorized by the Legislature." *Id.* at 437. While section 512(a) requires a second meal period for *all* California workers, paragraph 10(E) purported to create an exception to that requirement for a subset of miners. *See id.*; 8 Cal. Code Regs. §11160(¶¶10(B), (E)). Section

512 contains express exceptions for certain motion picture, broadcasting, and wholesale baking industry workers, but not for mine workers. Lab. Code §§512(c)(d). Hence, the employer in *Bearden* could comply with paragraph 10(E) by withholding a second meal period from unionized miners who work 12½-hour shifts, but doing so would violate section 512(a). The provisions are not consistent.

The *Bearden* court quoted SB 88, Senate Third Reading and its statement that "IWC's authority to adopt or amend orders under Section 516 must be *consistent with* the specific provisions of Labor Code Section 512." 138 Cal.App.4th at 438 (quoting SB 88, Senate Third Reading, *supra* (MJN Ex. 64)). The court concluded that "section 516, as amended in 2000, does not authorize the IWC to *enact* wage orders inconsistent with the language of section 512." *Id.* (emphasis added). Accordingly, paragraph 10(E)'s weaker, inconsistent provisions were invalid. *Id.*

Bearden takes nothing away from *IWC v. Superior Court*, and neither does section 516 as amended. In this case, the Wage Orders' "more restrictive" meal period requirement is not inconsistent with section 512(a) because employers can simultaneously comply with both. Also, the IWC did not "adopt or amend" a Wage Order to add the "more restrictive" provision; rather, the relevant language of Wage Order 5 was adopted decades before section 516. In *Bearden*, by contrast, Wage Order 16 went into effect *after* section 516 was amended.

Under *IWC v. Superior Court* and basic statutory interpretation principles, the Wage Orders' requirement is valid and enforceable. Under California law, employers must appropriately time their workers' meal periods to avoid work periods exceeding five hours; *or* they must end all shifts within five hours after the meal period; *or* they must pay

the premium wage; *or* they may comply by scheduling a meal period for every five-hour work period. The Court of Appeal erred by holding otherwise, and had no basis to overturn the order granting class certification of the meal period timing claim. Its judgment should be reversed.

VII. THE REST BREAK ISSUES

As explained above (Part III.A), plaintiffs' rest break claim encompasses three theories. In the broadest sense, Brinker pervasively fails to "authorize and permit" rest breaks generally, as a result of understaffing. In two more particularized violations, Brinker maintains a uniform policy that: (1) fails to "authorize and permit" a rest break until after four *full* hours of work, instead of every four hours "or major fraction thereof"; and (2) fails to "authorize and permit" a rest break before the first meal period.

Because the trial court deemed class certification appropriate for the rest break class as a whole, that court did not distinguish among the three theories. The Court of Appeal, by contrast, reached and decided two legal questions raised by plaintiffs' two more particularized claims. As for plaintiffs' broader claim for generalized rest break violations, this case raised no disputed legal questions because the compliance standard for rest breaks was conceded below. *See*, *e.g.*, 1RJN7148:1-6 ("rest periods can be waived by the employee provided the employer authorizes and permits them to be taken"); 2RJN7541:24-25 ("with rests, we all concede they can be waived").

The Court of Appeal erred by reversing class certification of the rest break claim—both the broader rest break claim and also the two more particularized claims. The broader rest break claim is discussed in Part VIII.B, below. The two more particularized claims will be

addressed now. The Court of Appeal incorrectly resolved the legal questions raised by both those claims—and erroneously reversed the class certification order respecting them.

A. The Rest Break Compliance Issue

The first particularized claim relates to rest break compliance. As with the meal period timing question, class certification was correctly granted as to this question. As a substantive matter, the Court of Appeal once again misinterpreted the Wage Orders. Its judgment should be reversed for either reason.

1. The Rest Break Compliance Claim Was Correctly Certified For Class Treatment

Like the meal period timing question, the rest break compliance question is a common question of law that supports *affirmance* of the class certification order. The Court of Appeal should have affirmed the trial court's finding that common questions predominated.

Brinker's uniform rest break policy states: "If I work over 3.5 hours during my shift, … I am eligible for one ten[-]minute rest break for each 4 hours that I work." 19PE5172, *cited in* Slip op. at 5. The record contained substantial evidence that Brinker's uniform *application* of this policy did not "authorize or permit" workers to take a rest break until "*after* their fourth hour" of work was complete. 21PE5913:1-9 (emphasis added).

Plaintiffs contend that paragraph 12(A) of Wage Order 5 requires employers to "authorize and permit" a rest break for every "four (4) hours *or major fraction thereof*." 8 Cal. Code Regs. §11050(¶12) (emphasis added). Brinker's uniform policy does not "authorize and permit" a rest period for any worker until after the fourth *full* hour

instead of a "major fraction thereof." Hence, plaintiffs contend that Brinker violates paragraph 12(A) classwide.

Common questions predominate on this aspect of plaintiffs' rest break claim. The meaning of "four (4) hours or major fraction thereof" is a common legal question. Whether Brinker's uniform policy complies is another common question. These questions predominate regardless of how the underlying legal question is ultimately resolved. Because the uniform policy is not to "authorize and permit" appropriate rest breaks *at all*, there would be no questions about whether employees chose to "voluntarily decline" them. Such questions are irrelevant to the claimed violation. The class certification order therefore could, and should, have simply been affirmed respecting this violation. Alternatively, the trial court should have been instructed to certify a rest break compliance subclass on remand.

The Court of Appeal honed in on paragraph 12(A)'s requirement that rest breaks "insofar as practicable shall be in the middle of each work period." Slip op. 30. According to the panel, "the propriety of permitting a rest break near the end of a typical four-hour work period depends on whether the scheduling of such a rest break was practicable in a given instance, and thus cannot be litigated on a class basis." *Id.*

The panel fundamentally misunderstood this part of plaintiffs' rest break claim. As discussed in detail below, under plaintiffs' reading of "major fraction," a rest break would be triggered at the second and sixth hours of a typical eight-hour shift. Under the panel's interpretation, a rest break would be triggered at the fourth hour, and that's it. The difference is 50% fewer rest breaks for workers.

This claim has nothing to do with the *scheduling* of those triggered rest breaks *within* the work period or whether it was

"practicable" to schedule the break "in the middle of each work period." This claim is about the *number* of rest breaks that employers must "authorize and permit" during the workday.

The class certification order should have been affirmed as to this part of plaintiffs' rest break claim.

2. The Wage Orders' Plain Language Triggers a Rest Break At The Two-Hour Mark, Not Four

Paragraph 12(A) requires employers to "authorize and permit" rest breaks, and then explains how to determine the *number* of breaks: "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.*" 8 Cal. Code Regs. §11050(¶12(A)) (emphasis added). As for *timing*, rest breaks "insofar as practicable shall be in the middle of each work period." *Id.* The only *exception* to these requirements is "for employees whose total daily work time is less than three and one-half (3½) hours." *Id.*

The DLSE has consistently interpreted "four hours or major fraction thereof" to mean that "an employer must provide its employees with a 10-minute rest period when the employees work *any time over the midpoint of any four-hour block of time*." DLSE Op.Ltr. 1999.02.16 (original underscoring; italics added) (MJN Ex. 37).

The DLSE Manual has long echoed this interpretation: "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)." DLSE Manual §45.3.1 (June 2002) (MJN Ex. 49)).[51]

In 1999, quoting the 1948 procedure manual, the DLSE explained:

> Rest Periods – in the Orders shall be construed to mean that for each four hours (or majority fraction thereof) worked in a day the employee has earned the right to 10 minutes' rest time. That is, if the (employee) works *more than 2* and up to 6 hours in a day, (the employee) is entitled to 10 minutes; if (the employee) works more than 6 and up to 10 hours in a day (the employee) is entitled to 20 minutes; if (the employee) works more than 10 and up to 14 hours in the day, (the employee is entitled to 30 minutes, etc.

DLSE Op.Ltr. 1999.02.16 (MJN Ex. 37) (quoting Chief's Decisions, Section 1101: Rest Periods, *General Interpretation and Enforcement Procedure of the Orders and the Labor Code Sections*, Manual of Procedure, Division of Industrial Welfare, Department of Industrial Relations (1948)) (emphasis added). The DLSE also observed that "[t]he 'any time more than two hours' interpretation provides a bright line that makes employer compliance easier." *Id.*

The Court of Appeal flatly rejected this interpretation of sixty years' standing. Slip op. 22-28. Instead, it held that a rest break is not triggered until "after" an employee "has worked a full four hours." *Id.* at 24. Hence, an employee working an eight-hour shift would be entitled to a first rest break after the fourth hour, but no second one, because the second one would not be triggered until "after" the eighth

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[51] After the published opinion in this case, the DLSE removed that language from the Manual and "withdrew" Op.Ltr. 1999.02.16. DLSE Manual §45.3.1 (July 2008) (MJN Ex. 50). After this Court granted review, the language was restored and the opinion letter reinstated. DLSE Manual §45.3.1 n.1 (Dec. 2008) (MJN Ex. 51).

hour—when the employee has already gone home. By contrast, the DLSE's longstanding interpretation triggers a rest break at the second hour plus another at the sixth hour—two per day for an eight-hour shift.

In other words, the *Brinker* opinion cuts in half the number of rest breaks employers must provide.

A review of the history of the rest break language shows why the Court of Appeal's interpretation is wrong and the DLSE's is correct.

In 1943, the IWC first adopted a rest break requirement for the public housekeeping industry: "No employee whose work requires that she remain standing shall be required to work more than two and one-half (2½) hours consecutively without a rest period of ten (10) minutes." Wage Order 5NS(¶3(d)) (Jun. 28, 1943) (MJN Ex. 12).

In 1947, the IWC amended this language: "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. Rest periods shall be computed on the basis of ten minutes for four hours working time, *or majority fraction thereof*." Wage Order 5R(¶11) (Jun. 1, 1947) (emphasis added) (MJN Ex. 13).

Notably, the IWC's new triggering language—four hours "or majority fraction thereof"—is about the same as the 2½-hour limit from 1943. The primary distinction between the two versions is that the 1943 language was directive, prohibiting employers from employing workers beyond the 2½-hour limit, while the 1947 language ("authorize and permit") is permissive.

In 1952, the first sentence was left unchanged, but the second sentence was revised: "The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes per four

(4) hours *or major fraction thereof*." Wage Order 5-52(¶12) (Aug. 1952) (MJN Ex. 14) (emphasis added). Also, an exception was created: "However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3½) hours." *Id.*

The 1952 language has not been changed since. In 2000, the IWC *added* paragraph (B), imposing a premium wage on violators to remedy "the lack of employer compliance with the meal and rest period requirements." 8 Cal. Code Regs. §11050(¶12(B)); Statement as to the Basis for the 2000 Amendments to Wage Orders, *supra*, at 21 (MJN Ex. 32).

The Court of Appeal refused to defer to the DLSE's interpretation because of the 1952 amendment, which changed "majority fraction" to "major fraction." Slip op. 26-27. Using a dictionary once again, the panel looked up the word "majority"—but not the word "major." *Id.* at 27. If the panel had looked up both words, it would have discovered that "major" is the adjective form of the noun "majority." "Major" means "constituting the *majority*: said of a part, etc." *Webster's New World Dictionary* (3d College Ed. 1991) (sense 3) (MJN Ex. 74) (emphasis added). "Major," not "majority," is the grammatically correct modifier of the noun "fraction."

Accordingly, substituting "major" for "majority" was a grammatical correction and changed nothing. Yet the Court of Appeal converted it into a sweeping, substantive amendment of the rest break laws.

The Court of Appeal inferred that the word "majority" must have been changed to "major" in order to avoid a conflict with the 3½-hour exception also added in 1952. Slip op. 27. It said that, because of the exception, "the term 'major fraction thereof' can only be interpreted as

meaning the time period between three and one-half hours and four hours." *Id.* at 24.[52]

That makes no sense. There would have been no need to add an exception for 3½-hour workdays if no rest period were triggered at all until after four hours (or until after 3½ hours). The exception reflects the IWC's understanding that "major" and "majority" both mean that a rest period is triggered at two hours, even for employees who work fewer than 3½ hours a day. For such employees, that rest period, "insofar as practicable," would have to be "in the middle of" the 3½-hour period—at 1¾ hours. The exception relieves employers of the obligation to "authorize and permit" that rest period.

The IWC could (and did) reasonably conclude that employees who work longer shifts should receive breaks at the midpoint of each four-hour time block, while employees who work less than 3½ hours need not receive the break to which they would otherwise be entitled under the Wage Orders' plain language. The Court of Appeal cited *no* authority for its contrary conclusion.

Plaintiffs' construction of the Wage Orders is supported by plain language going back to 1947 and an unwavering, sixty-year-old DLSE interpretation. Plaintiffs' construction also provides workers with meaningful rest breaks, rather than reducing the rest break requirement to a charade. The Court of Appeal erred by failing to adopt it.

B. The Rest Break Timing Issue

The rest break timing issue was also (1) improperly decertified and (2) incorrectly decided by the Court of Appeal.

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[52] If that is so, Brinker's uniform policy is non-compliant on its face because it authorizes a rest break only after four hours, not 3½. 21PE5913:1-9.

1. The Rest Break Timing Claim Was Correctly Certified for Class Treatment

Substantial evidence showed that Brinker's uniform rest break policy (19PE5172, *cited in* Slip op. at 5) does not "authorize and permit" a rest break before the first meal period if the meal period is scheduled within two hours after the shift begins. 21PE5913:1-8; 21PE5914:1-5915:11.

Plaintiffs contend (and the DLSE has declared) that under the Wage Orders, a rest break must be "authorized and permitted" before the first meal period. This is a common question of law not "enmeshed" with any class certification issues. *Linder*, 23 Cal.4th at 439-41. Because the uniform policy fails to "authorize or permit" any pre-meal rest break at all, *none* of these of these rest breaks will have been "waived" or "declined." What's more, because Brinker must record each shift and meal period (8 Cal. Code Regs. §11050(¶7(A)(3)), its records will reflect every early meal before which no rest break was "authorized or permitted"—classwide. Hence, no individualized issues exist.

The class certification order should have been affirmed respecting this claim. At a minimum, the trial court should have been directed to certify a rest break timing subclass on remand. *Sav-on*, 34 Cal.4th 339-40 & fns. 11, 13; *Richmond*, 29 Cal.3d at 467-68, 470-71, 478; *Lee*, 166 Cal.App.4th at 1335; *Medrazo*, 166 Cal.App.4th at 94, 99; *Aguiar*, 144 Cal.App.4th at 130, 134.

2. Under California Law, the First Rest Break Must Be "Authorized and Permitted" Before the First Meal Period

The Court of Appeal held that an employer need not provide a rest break before the first meal period—even though the DLSE believes

"the first rest period should come sometime before the meal break." Slip op. 28-29; *see* DLSE Op.Ltr. 2001.09.17 (MJN Ex. 40).

The Court of Appeal rejected the DLSE's opinion letter (Op.Ltr. 2001.09.17) as "inapplicable to this case" because it discussed a different Wage Order. Slip op. 29. However, the relevant language of both Wage Orders is identical. *Compare* 8 Cal. Code Regs. §11160(¶¶10(A), 11(A)) *with* 8 Cal. Code Regs. §11050(¶¶11(A), 12(A)). The DLSE has recognized that for language "present in all of the wage orders," the interpretations in Op.Ltr. 2001.09.17 apply to all. DLSE Op.Ltr. 2002.01.28 (MJN Ex. 41).

The Court of Appeal also said that the DLSE's interpretation applies only if an employer "regularly requires employees to work five hours *prior to* their 30[-]minute lunch break"—then said that plaintiffs do not contend Brinker does this. Slip op. 29 (emphasis added). This overlooks what plaintiffs *do* contend—that Brinker regularly requires employees to work more than five hours *after* their meal break. The rationale behind the DLSE's opinion is identical whether the overlength work period comes before or after the meal. The 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.

The DLSE's reading of paragraph 12(A) is a commonsense one consistent with its plain language and worker protection purpose. It should be adopted.

VIII. THE TRIAL COURT CORRECTLY GRANTED CLASS CERTIFICATION OF PLAINTIFFS' MEAL PERIOD, REST BREAK AND OFF-THE-CLOCK CLAIMS

As *Sav-on* illustrates, actions to enforce California's wage and hour laws are eminently suitable for classwide resolution. Indeed, "wage and hour disputes (and others in the same general class) routinely proceed as class actions." *Prince v. CLS Transportation, Inc.*, 118 Cal.App.4th 1320, 1328 (2004) (citing *Rose*, 126 Cal.App.3d at 933).

Reported cases in which wage and hour claims were certified for class treatment include not only *Sav-on*, *Prince*, and *Rose*, but also *Madera Police Officers Assn. v. City of Madera*, 36 Cal.3d 403 (1984); *Morillion*, 22 Cal.4th 575; *Ghazaryan v. Diva Limousine, Ltd.*, ___ Cal.App.4th ___, 2008 WL 5279762, *7 (Dec. 22, 2008); *Bufil v. Dollar Financial Group, Inc.*, 162 Cal.App.4th 1193 (2008); *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1 (2007); *Aguiar*, 144 Cal.App.4th at 121; *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715 (2004); *Earley v. Superior Court*, 79 Cal.App.4th 1420 (2000); *Stephens v. Montgomery Ward & Co.*, 193 Cal.App.3d 411 (1987) (employment discrimination); and *Los Angeles Fire & Police Protective League v. City of Los Angeles*, 23 Cal.App.3d 67 (1972).[53]

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[53] Federal courts handling California wage and hour cases also routinely certify them for class treatment. *See*, *e.g.*, *Smith v. Cardinal Logistics Management Corp.*, 2008 WL 4156364 (N.D. Cal. Sept. 5, 2008); *Cervantez v. Celestica Corp.*, 253 F.R.D. 562 (C.D. Cal. 2008); *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439 (N.D. Cal. 2008); *Wiegele v. Fedex Ground Package Sys., Inc.*, 2008 WL 410691 (S.D. Cal. Feb. 12, 2008); *Kurihara v. Best Buy Co.*, 2007 WL 2501698 (N.D. Cal. Aug. 30, 2007); *Krzesniak v. Cendant Corp.*, 2007 WL 1795703 (N.D. Cal. June 20, 2007); *Alba v. Papa John's USA, Inc.*, 2007 WL 953849 (C.D. Cal. Feb. 7, 2007); *Chun-Hoon v. McKee Foods Corp.*, 2006 WL 3093764 (N.D. Cal. Oct. 31, 2006); *Whiteway v. FedEx*

As this Court recently confirmed, "[b]y preventing 'a failure of justice in our judicial system,' the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights." *Gentry*, 42 Cal.4th at 462 (quoting *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 434 (2000); *Bell*, 115 Cal.App.4th at 741). In wage and hour cases in particular, individual hearings "are neither effective nor practical substitutes for class action[s]." *Id.* at 465. And, "absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime" or complying with other wage and hour laws. *Id.* at 462; *see also* DLSE Op.Ltr. 2003.10.17 at 6 (MJN Ex. 45) (DLSE "will never have the resources" to investigate and rectify every wage and hour violation across state).

In other words, class actions are essential to effective enforcement of California's wage and hour laws—which not only benefit workers, but also protect the health and safety of the public. *Gentry*, 42 Cal.4th at 456; *Murphy*, 40 Cal.4th at 1113. The Court of Appeal had no legally sound reason to contravene these principles by reversing class certification in this case.

For reasons already discussed, common questions predominated on plaintiffs' meal period timing claim, as well as plaintiffs' two particularized rest break claims (for failure to "authorize and permit" a

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Kinko's Office and Print Services, Inc., 2006 WL 2642528 (N.D. Cal. Sept. 14, 2006); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 489-90 (E.D. Cal. 2006); *Tierno v. Rite-Aid Corp.*, 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006); *Rees v. Souza's Milk Transp. Co.*, 2006 WL 1096917 (E.D. Cal. Apr. 24, 2006); *Cornn*, 2005 WL 588431; *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602 (C.D. Cal. 2005); *Breeden v. Benchmark Lending Group, Inc.*, 229 F.R.D. 623 (N.D. Cal. 2005).

rest break after two hours' work or before the first meal period). *See* Parts VI.A, VII.A.1, VII.B.1, above. Therefore, the Court of Appeal erred by reversing class certification wholesale.

Plaintiffs' remaining claims—for meal period compliance, for generalized rest break violations, and for "off-the-clock" work—are also suitable for class treatment, as the trial court correctly determined. Because substantial evidence supported the trial court's predominance finding, the order granting class certification was not an abuse of discretion.

Instead of being reversed, the entire class certification order should have been affirmed.

A. The Meal Period Claim Was Correctly Certified for Class Treatment—Under an "Affirmative Duty" Compliance Standard

As explained above, under the Labor Code and Wage Orders, employers have an affirmative obligation to relieve workers of all duty for thirty-minute meal periods. Lab. Code §§226.7(a), 512; 8 Cal.Code Regs. §11050(¶11(A)). Under that compliance standard, common questions plainly predominate, and the Court of Appeal erred by reversing the class certification order.

As repeatedly mentioned before, the Wage Orders require employers to be aware of, and then record, the start and end time of each shift and each meal period. *Murphy*, 40 Cal.4th at 1114 (citing 8 Cal. Code Regs. §11070(¶7(A)(3)); *Cicairos*, 133 Cal.App.4th at 961); *see* 8 Cal. Code Regs. §11050(¶7(A)(3)).

Brinker keeps its employee time records in a centralized computer system. 1PE232:4-24; 1PE293:4-17, 296:4-18. Using this system, Brinker can run various reports showing shifts of specified

lengths and whether meal periods were taken or shorted. 1PE226:3, 244:11-17; 2PE325:9-17; *see* Part III.D.2 (pp. 16-17), above.

Employers like Brinker use these records for important purposes such as calculating their federal payroll taxes. Moreover, in its 2003 audit of a Brinker restaurant, the DLSE relied on Brinker's time records to assess meal period compliance. 21PE5770-5910. The records are presumed complete and correct. [54]

The reports generated from these records would reveal all of Brinker's meal period violations. They are all "the evidence needed to defend against"—or prove—"plaintiffs' claims." *Murphy*, 40 Cal.4th at 1114; DLSE Op.Ltr 2001.04.02 [withdrawn 12/20/04] at 5 (MJN Ex. 39) (Wage Orders require employers to "always" have knowledge of meal periods). This evidence is common to the class and predominates.

For this simple reason, if employers must meet a mandatory compliance standard for meal periods, then all of Brinker's violations can be established through common proof in the form of Brinker's computerized records. The class certification order should be affirmed.

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[54] *See*, *e.g.*, *Lee*, 166 Cal.App.4th at 1335 n.5 ("a defendant may not avoid class certification by making a business decision to … fail to document particular job assignments or tasks" (citing *Aguiar*, 144 Cal.App.4th at 134)); *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1188-89 (2008) (employer bears burden of proof because employer is in best position to know which class members worked which jobs at which times); *Cicairos*, 133 Cal.App.4th at 961 ("[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee." (quoting *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 727 (1988)).

B. The Meal Period and Rest Break Claims Were Correctly Certified for Class Treatment—Under an "Authorize and Permit" Compliance Standard

The class certification order should also be affirmed as to both meal periods and rest breaks—even if the Court of Appeal's less strict, "authorize and permit" or "make available" compliance standard applies to both.

Even if both meal periods and rest breaks, once made available, can be "waived," Brinker's violations can nonetheless be established through the common proof described in Part III.D (pp. 15-19, above). This proof includes employee declarations about Brinker's pervasive understaffing and the missed breaks that resulted; deposition testimony and documents establishing Brinker's uniform meal period and rest break policies; and evidence of Brinker's centralized computer system recording every work and meal period. Plaintiffs bolstered this proof through proffered expert survey and statistical evidence, presented as a way of managing any remaining individualized questions.

The trial court properly accepted this proof and found that common questions predominated. The Court of Appeal rejected it—in contravention of three principles well-established by this Court's precedents, primarily *Sav-on*.

First, instead of reviewing the trial court's predominance finding under the "substantial evidence" standard of review, as *Sav-on* requires, the Court of Appeal reweighed the evidence. Rather than accepting plaintiffs' employee declarations and considering whether they were "substantial," the Court of Appeal credited Brinker's manager declarations instead.

Second, the Court of Appeal peremptorily rejected plaintiffs' proffered survey and statistical evidence—despite *Sav-on*'s holding that such evidence is an appropriate way to establish a classwide pattern of violations.

Finally, the Court of Appeal shifted the burden of proof of Brinker's "waiver" affirmative defense by requiring plaintiffs to prove, in effect, that no class member had "waived" their breaks. That approach contravened *Sav-on* as well as basic principles of fairness.

For all of these reasons, the Court of Appeal's judgment should be reversed, and the class certification order reinstated.

1. The Court of Appeal Contravened the Applicable Standard of Review by Re-Weighing the Evidence that Common Questions Predominated

Class certification orders are reviewed for abuse of discretion. *Sav-on*, 34 Cal.4th at 326. The trial court is "ideally situated to evaluate the efficiencies and practicalities of permitting group action" and thus is "afforded *great discretion in granting or denying* certification." *Id.* (emphasis added).

Whether common questions predominate is a *factual* finding. *Id.* at 329. Predominance is proven through "documents, depositions, declarations,…interrogatory responses" and other " 'testimony [and] writings...offered to prove,' and having a 'tendency in reason to prove,' that fact." *Id.* (quoting Evid. Code §§140, 210) (alteration in original).

Accordingly, a predominance finding must be affirmed if supported by "substantial evidence." *Id.* at 329. "[A] reviewing court is not authorized to overturn a certification order merely because it finds the record evidence of predominance less than determinative or

conclusive. The relevant question on review is whether such evidence is *substantial*." *Id.* at 338 (emphasis in original).

In this case, as its opinion makes clear, the Court of Appeal rejected plaintiffs' predominance evidence because it considered that evidence "less than determinative or conclusive"—repeating the error of the intermediate appellate court in *Sav-on*.

As the Court of Appeal observed, plaintiffs filed 33 employee declarations while Brinker filed over 600. Slip op. 14-17. Plaintiffs' declarations stated that employees "were not provided rest or meal breaks" and that "they did not 'waive' their breaks, but instead *were not relieved of work duties* so they could take their breaks." *Id.* at 14 (emphasis added); *see* 1PE91-171; Part III.A (pp. 8-12, above) (summarizing testimony). Brinker's declarations stated that employees "were allowed rest breaks" and "were regularly provided 30-minute meal periods." Slip op. 16.

The testimony of Brinker managers also conflicted. In the deposition excerpts that plaintiffs filed, the managers testified that Brinker had a single, uniform meal period and rest break policy that applied across the company. 1PE259:14-261:14, 265:23-266:18; 2PE329:3-10. In the declarations Brinker filed, the managers testified "that there was no uniform practice for meal breaks." Slip. op. 16. Those managers also "stated they permitted their employees to take rest and meal breaks" and "explained in detail their compliance with rest and meal break laws." *Id.* at 15.

Notwithstanding the conflicting evidence, the trial court granted class certification, impliedly crediting plaintiffs' declarations over Brinker's.[55]

Under *Sav-on*, if the trial court has granted class certification, then the reviewing court facing such conflicting evidence must *accept as true* all of the evidence that *supports* the order. *Sav-on*, 34 Cal.4th at 329. In fact, the reviewing court must "presum[e] in favor of the certification order … *the existence of every fact the trial court could reasonably deduce* from the record." *Id*. (emphasis added). Then, the reviewing court must consider whether, in light of that favorable evidence, the trial court's conclusion that common questions predominated was "irrational." *Id.*

Sav-on illustrates the point. *Sav-on* was a misclassification case in which plaintiff drug store managers claimed that they regularly performed non-managerial tasks, and were therefore misclassified as exempt from the overtime laws. *Id.* at 325. As in this case, each side filed competing declarations about how the managers spent their time. The trial court granted class certification, and on appeal, this Court held that the plaintiffs' declarations constituted "substantial, *if disputed*, evidence that deliberate misclassification was defendant's policy and practice." *Id.* at 329. The Court rejected the defendant's argument that its competing declarations showed instead that individualized questions predominated:

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[55] The record contains substantial evidence that Brinker's employee declarations were gathered by adverse attorneys who acted as Brinker's "lawyer advocate at all times." 22PE5962:22-5963:15; *see Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 197 (N.D. Cal. 2004) (striking report based on employee surveys gathered by counsel with adverse interests).

> [D]efendant … point[s] out, as the Court of Appeal observed, that its responses to plaintiffs' interrogatories state that the actual tasks performed by class members and the amount of time spent on those tasks vary significantly from manager to manager and cannot be adjudicated on a class-wide basis. *But the trial court was within its discretion to credit plaintiffs' evidence on these points over defendant's, and we have no authority to substitute our own judgment for the trial court's respecting this or any other conflict in the evidence.*

Id. at 331 (emphasis added). The Court concluded that "a reasonable court *crediting plaintiffs' evidence* could conclude" that common questions predominated. *Id.* at 330 (emphasis added).

Under *Sav-on*, the Court of Appeal was required to presume that the trial court had accepted plaintiffs' factual showing as true, and therefore to disregard any conflicting evidence, such as Brinker's competing declarations. As in *Sav-on*, plaintiffs' declarations create "substantial issues" as to whether Brinker pervasively denied meal periods and rest breaks through the expedient of understaffing.

Instead of following *Sav-on*, the Court of Appeal either rejected plaintiffs' declarations outright, or gave Brinker's contrary declarations equal weight. For example, the panel reversed certification of the rest break claim by crediting Brinker's declarations—which the trial court had implicitly rejected in favor of plaintiffs'—and by concluding that the very fact that Brinker could muster conflicting declarations meant common questions predominated:

> Plaintiffs claim they were forced to forgo rest breaks, while *Brinker submitted evidence from management and employees that rest breaks were made available but on occasion waived by the employees*. The question of whether employees were forced to forgo rest breaks or voluntarily chose not to take them is a highly individualized inquiry that would result in thousands of

> mini-trials to determine as to each employee if a particular manager prohibited a full, timely break or if the employee waived it or voluntarily cut it short.

Slip op. 32 (emphasis added). Under *Sav-on*, the Court of Appeal should have accepted as *true* plaintiffs' evidence that they were pervasively "forced to forego" their breaks. The trial court implicitly *accepted* that evidence and *rejected* Brinker's, and the Court of Appeal "had no authority to substitute its judgment for the trial court's respecting this or any other conflict in the evidence." 34 Cal.4th at 331. The Court of Appeal also erred by concluding that the very presence of conflicting declarations itself creates non-common questions. Faced with exactly the same type of competing evidence, *Sav-on* reached no such conclusion. *See id.*, *passim*.

The Court of Appeal repeated its error when reversing class certification of the meal period claim. The panel relied on "Brinkers' [sic] manager declarations," which stated that "individual restaurants … implement[ed] individualized practices to ensure compliance with meal break policies." Slip op. 49. But in *Sav-on*, when the defendant pointed out its competing declarations, this Court held that the trial court "was within its discretion credit plaintiffs' evidence on these points over defendant's." 34 Cal.4th at 331. Here, as in *Sav-on*, the record contains evidence that notwithstanding any "individualized practices to ensure compliance with meal break policies," workers still missed their breaks because they were not relieved. The trial court accepted that evidence as true, and appellate court had "no authority to substitute [its] own judgment" on this point. *Sav-on*, 34 Cal.4th at 331.

The panel also said that "even plaintiffs' employee declarations show no class-wide practice regarding meal breaks. Some employees only claimed to have been refused rest breaks and *said nothing* about

being denied meal breaks or that they were forced to take meal breaks at a certain time." Slip op. at 49 (emphasis added). The panel does not explain how a declarant's silence constitutes substantial evidence of *any* fact. The trial court reasonably credited the testimony of the many declarants who affirmatively said they were denied their meals because they were not relieved.

Finally, according to the panel, "the evidence indicated … that some employees took meal breaks and others did not" and "for those that did not, the reasons *they declined to take* a meal period requires individualized adjudication." Slip op. 49 (emphasis added). First of all, the panel improperly credited Brinker's declarations that employees "declined to take" their breaks over plaintiffs' declarations that they were not relieved—which the trial court had accepted. Moreover, even if some of Brinker's declarations described compliant breaks, plaintiffs' declarations did not, and if a single employee declaration describes working conditions "in a manner that … permit[s] certification," that is sufficient to affirm the class certification order. 34 Cal.4th at 334. Plaintiffs are not required to "marshal[] more such declarations." *Id.* "Evidence of *even one credible witness* is sufficient proof of any fact" relevant to class certification. *Id.* at 334 (emphasis added).

The trial court acted well within its discretion by accepting plaintiffs' testimonial evidence of Brinker's pervasive understaffing. This evidence—coupled with evidence of Brinker's uniform policies and centralized computer system—was more than substantial and fully supports the trial court's finding that common questions predominated. And if that were not enough, plaintiffs also proffered expert survey and statistical evidence as a way of managing any remaining individualized questions. The class certification order should have been affirmed.

2. The Trial Court Did Not Abuse Its Discretion by Accepting Expert Survey and Statistical Evidence As a Method of Common Proof

The Court of Appeal rejected not only plaintiffs' declarations, but also their proffered expert survey and statistical evidence. According to the court, such evidence could *never* be sufficient to establish plaintiffs' meal period or rest break claims classwide. *See*, *e.g.*, Slip op. 48 (survey and statistical evidence "could *only* show the fact that meal breaks were not taken, or were shortened, not *why*" (emphasis added)); *see also id.* at 32, 49, 51-52.

This holding once again contravened *Sav-on*.

In *Sav-on*, the Supreme Court unequivocally held that common proof in the form of representative testimony and statistical evidence is entirely appropriate and fully justifies a predominance finding.

In *Sav-on*, as here, the defendant sought interlocutory appellate review after class certification was granted below. 34 Cal.4th at 326. No manageability proceedings had yet been conducted. *Id.*, *passim*. The Supreme Court affirmed the order granting class certification of the plaintiffs' misclassification claims, holding that there was no "per se bar … to certification based partly on pattern and practice evidence or similar evidence of a defendant's class-wide behavior." 34 Cal.4th at 333.

Sav-on expressly endorsed the use of statistical and representative evidence to establish common practices:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards

> similarly situated plaintiffs makes class certification appropriate.

Id. at 333; *see also Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676, 691 (2007) ("under California law, courts can take an aggregate approach to plaintiffs' claims").

As *Sav-on* observed, such methods of proof are commonplace and courts routinely approve their use. 34 Cal.4th at 333 n.6 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340 (1977) (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096, 1106-08 (2003) ("well sampling and other hydrological data" about "the pattern and degree of contamination" could support liability); *Reyes v. Board of Supervisors*, 196 Cal.App.3d 1263, 1279 (1987) (classwide liability "can be proved by reviewing … a sampling of representative cases"); *Stephens*, 193 Cal.App.3d at 421 (certification proponent used "statistical data" and analysis of the defendant's corporate structure to show centralized control over employment decisions)).[56] For purposes of the trial court's initial class certification determination, an actual expert report explaining the precise statistical and survey methodologies to be employed is not required. *See id.* at 326-33, *passim*.

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[56] "[P]resenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential witnesses. In some cases, courts have described surveys as the most direct form of evidence that can be offered." Federal Judicial Center, *Reference Manual on Scientific Evidence* 236 (West 2000).

Recent decisions illustrate the operation of this kind of proof in various contexts. *See*, *e.g.*, *Alch v. Superior Court*, 165 Cal.App.4th 1412, 1428 (2008) ("[Plaintiffs] cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis."); *Capitol People*, 155 Cal.App.4th at 692-96 (reversing denial of class certification because "use of sampling or statistical proof" had been improperly "restricted"; "the trial court turned its back on methods of proof commonly allowed in the class action context"); *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 13-14 (2007) (affirming class certification based on representative testimony); *Bell*, 115 Cal.App.4th at 751 (trial court has discretion "to weigh the advantage of statistical inference … with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts"); *see also Parra v. Bashas', Inc.*, 536 F.3d 975, 979 (9th Cir. 2008) (commonality established through "statistical and anecdotal evidence of discrimination"); *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1180 (2007) ("It is well established that commonality may be established by raising an inference of class-wide discrimination through the use of statistical analysis.").[57]

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[57] Representative evidence has long been used in FLSA actions to establish liability. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (court determined on classwide basis that reporters were misclassified based on testimony of 22 of 70 employees); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988) (court determined on classwide basis that eight employees misclassified without the testimony of all eight employees); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982) (court determined classwide liability for 246 assistant managers in 44 different restaurants based on testimony regarding overtime exemption from witnesses at six stores); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (not all employees need testify in order to prove FLSA violations provided sufficient evidence provided for jury to make reasonable

Here, the trial court exercised its discretion to accept plaintiffs' proffered expert survey and statistical evidence as an appropriate method of classwide proof. Instead of affirming that discretionary decision, the Court of Appeal *reversed*—in an opinion that reweighs the evidence then finds it inadequate as a matter of law to support certification of plaintiffs' claims. Slip op. 48 (survey and statistical evidence "could *only* show the fact that meal breaks were not taken, or were shortened, not *why*" (emphasis added)); *id.* at 32, 47, 49, 51.

The Court of Appeal not only improperly substituted its own judgment for the trial court's, but also came to an incorrect conclusion. In fact, expert survey and statistical evidence *can* show *why* a meal period or rest break was missed, or *why* off-the-clock work was done.[58] In *Sav-on*, this Court easily agreed that such evidence could prove the nature of the class members' day-to-day work. 34 Cal.4th at 333; *see also Alch*, 165 Cal.App.4th at 1427-31. The Supreme Courts of Massachusetts and New Jersey agree, and have both approved class certification of meal period and rest break claims through such expert testimony. *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1205 (Mass. 2008) (approving expert statistical evidence to establish "class-wide practice of … denying or discouraging rest breaks or meal breaks"); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 717, 723-25

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inference as to non-testifying employees); *Jankowski v. Castaldi*, 2006 WL 118973, *7 (E.D.N.Y. 2006) (plaintiffs need only present testimony of representative sample of employees as part of proof of prima facie case under FLSA).

[58] *See* 25PE6924-6938, *passim*. The Court of Appeal denied plaintiffs' motion to augment the record to include the post-certification deposition testimony of their two survey and statistics experts. RJN12/17/07; Order 04/23/08.

(2007) (expert testimony and "statistical extrapolation"); *see also Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo.App. 2007) (same).

Brinker itself has acknowledged that representative and statistical evidence can be used to establish classwide factual inferences. 3PE647:3-4, 650:6-7, 661:2-3; 4PE983-989. Brinker may introduce its own representative and statistical evidence to establish any aspect of its defense (such as "waiver"). And the trial court had every intention of conducting manageability hearings, which will give Brinker ample opportunity to test plaintiffs' experts' proposed statistical methodologies before trial. *See* Part III.F (pp. 20-21, above).

In this case, the order granting class certification was supported by not only the proffered expert survey and statistical evidence, but also an extensive record of Brinker's classwide meal and rest break policies; Brinker's centralized computer system recording every work and meal period; and representative testimony concerning Brinker's common practices (including pervasive understaffing). The Court of Appeal's task was limited to confirming whether this evidence was "substantial" under *Sav-on*. It was.

3. Affirmative Defenses, Including "Waiver," Cannot Defeat Class Certification

Finally, as a matter of law, any non-common questions created by Brinker's "waiver" defense cannot defeat class certification when common questions otherwise predominate.

Brinker's "waiver" argument is an affirmative defense. *Williams v. Marshall*, 37 Cal.2d 445, 456 (1951).[59] As such, Brinker will bear

[59] *Accord*: *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 33 (1995); *City of Ukiah*, 64 Cal.2d at 107-08; Cal. Civil Jury Instructions (CACI) no. 336 (2006) ("Affirmative Defense—Waiver")

the burden of proving it at trial. *DRG/Beverly Hills*, 30 Cal.App.4th at 60 (citing *City of Ukiah*, 64 Cal.2d at 107-08); *Aguiar*, 144 Cal.App.4th at 135 ("burden of proof in [a] wage-and-hour case [falls on the] defendant to prove [it] provided proper employee rest breaks") (citing *Cicairos*, 133 Cal.App.4th at 961-64)).

This Court's precedents make clear that affirmative defenses like "waiver" cannot cancel out a plaintiff's showing that common questions predominate. *Sav-on*, 34 Cal.4th at 337, 338; *Lockheed*, 29 Cal.4th at 1105 & n.4.

In a single paragraph, the Court of Appeal held that an affirmative defense, such as waiver, can be sufficient, by itself, to defeat class certification. Slip op. 50. The panel ignored *Sav-on* and *Lockheed*, instead citing *Walsh v. IKON Office Solutions, Inc.*, 148 Cal.App.4th 1440 (2007), as its only authority.

In *Walsh*, the court stated that in assessing whether common questions predominate:

> [t]he affirmative defenses of the defendant must also be considered, because a defendant may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member and that the issues presented by that defense predominate over common issues.

Walsh, 148 Cal.App.4th at 1450 (citing *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 913; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 811).

That statement does not accurately reflect this Court's precedents concerning affirmative defenses and class certification.

In *Sav-on*, this Court refused to allow defendants' evidence of an affirmative defense (there, the exemption defense to the overtime claim)

to defeat class certification. 34 Cal.4th at 337-38. In so holding, the Court rejected the premise behind the *Walsh* statement: that trial courts are somehow required first to "assess a defendant's affirmative defenses against every class member before certification can be ordered." *Id.* at 337. The Court held that to "require" the plaintiff to "prove [that] the entire class" was *not* subject to the affirmative defense "as a prerequisite to certification" would "reverse th[e] burden" of proof on the affirmative defenses. *Id.* at 338. The Court found "no authority" for making such proof "a prerequisite to certification," "nor does the logic of predominance require it." *Id.*

Walsh is wholly inconsistent with *Sav-on*. If, after the plaintiff proves that common questions predominate on liability, a defendant "may defeat class certification by showing that an affirmative defense would raise issues specific to each potential class member," that would require the plaintiff to *disprove* the affirmative defense on a classwide basis—merely to obtain class certification—even if the plaintiff has already *proven* that common questions predominate on liability. Under *Sav-on*, such a requirement would impermissibly reverse the burden of proof governing affirmative defenses and undermine the logic of a predominance analysis. *See Krzesniak v. Cendant Corp.*, 2007 WL 1795703, *15-*17 (N.D. Cal. June 20, 2007) (distinguishing *Walsh* and following *Sav-on*'s holding on affirmative defenses).

Similarly, in *Lockheed*, this Court rejected the defendant's contention that "each of the elements of the claims asserted on behalf of proposed class members, ***and*** *all applicable defenses*" must be "capable of common proof" for a class to be certified. 29 Cal.4th at 1105 (emphasis added). The Court said it was "not so." *Id.* The Court specifically debunked the argument that class certification is *per se*

inappropriate because an affirmative defense of untimeliness had been pleaded. *Id.* at 1105 n.4 ("No California court has declined to certify a class action specifically because of a statute of limitations defense. [Such a defense] does not categorically preclude class certification.").

The Court of Appeal erred by relying on *Walsh* instead of *Sav-on* and *Lockheed*.

Walsh cited two cases—*Gerhard* and *Kennedy*—in support of its affirmative defenses language, but neither of those cases supports it.

In *Gerhard*, the Court of Appeal affirmed the trial court's order denying class certification because it was based on substantial evidence that non-common questions predominated as to each class member's "individual right to recover," *as well as* to the affirmative defense of "abandonment." *Gerhard*, 68 Cal.2d at 913. In *Kennedy*, the Court of Appeal affirmed the trial court's order denying class certification because substantial evidence showed that "[i]ndividual questions clearly predominate in determining liability, causation, damages" and "privity," *in addition to* "defenses." *Kennedy*, 43 Cal.App.4th at 810-811.

In other words, under *Gerhard* and *Kennedy* (as well as *Sav-on* and *Lockheed*), non-common issues surrounding affirmative defenses are relevant to a predominance analysis only if they exist *alongside* non-common questions on *liability*. Neither *Gerhard* nor *Kennedy* supports the contrary idea that affirmative defenses are sufficient, *by themselves*, to nullify a plaintiff's predominance showing on liability. Notably, neither *Sav-on* nor *Lockheed* considered either *Gerhard* or *Kennedy* to be worth citing for *any* proposition relating to affirmative defenses.

What's more, even the *Walsh* court itself did not go as far as the Court of Appeal's reliance on it suggests. The *Walsh* court affirmed the

trial court's decertification order because the order was based on substantial evidence that "commonality was lacking" as to "liability" *and* as to "damages." 148 Cal.App.4th at 1456. It relegated to a footnote its discussion of evidence "that the adjudication of the [affirmative] defense would turn more on individualized questions than on common questions." *Id.* at 1453 n.8. In other words, non-common questions as to affirmative defenses were not sufficient to defeat class certification even in *Walsh* itself. The Court of Appeal overlooked this aspect of *Walsh*.

The *Walsh* court did take pains to observe the well-established rule that "differences in damages between class members do not preclude class certification." *Id.* at 1162 n.14 (citing *Sav-on*, 34 Cal.4th at 334-35). The decertification order could be affirmed, the court held, only if non-common questions predominated as to "*both liability and damages*." *Id.* (original italics; underlining added). Affirmative defenses resemble damages in this respect. Under California law, neither can defeat class certification *standing alone*. The Court of Appeal erred by following *Walsh* and holding otherwise.

This Court is not alone in its view of affirmative defenses at the class certification stage. In another case for meal period violations, the New Jersey Supreme Court refused to allow affirmative defenses, including an identical "waiver" defense, to defeat certification:

> Although different factual situations may arise with respect to the *defenses* as to different plaintiffs[, such] does not derogate from the fact that the affirmative cause of action itself has the community of interests and of questions of law or fact which justify the class action concept.

Iliadis, 922 A.2d at 724 (alteration and emphasis original) (citations omitted). Individualized issues surrounding the "waiver" affirmative defense were "not a bar to maintainability of the action as a class action." *Id.*

In sum, contrary to what the Court of Appeal concluded, no California opinion holds that an affirmative defense, standing alone, can defeat a plaintiff's commonality showing. *Walsh* does not. The cases *Walsh* cites—*Gerhard* and *Kennedy*—do not. And in *Sav-on* and *Lockheed*, this Court made clear that this is simply not the law in California.

The Court of Appeal erred by reversing class certification of the meal period and rest break claims. Even if those claims are governed by a permissive compliance standard, instead of a mandatory one, common questions predominate.

C. The Off-the-Clock Claim Was Correctly Certified For Class Treatment

Finally, the trial court correctly granted class certification of plaintiffs' off-the-clock claim. This claim is limited to time worked when meal periods were interrupted. 20PE5665:22-25. Just as expert survey and statistical evidence may establish a classwide pattern and practice of missed meal periods, it may also establish a classwide pattern and practice of interrupted meal periods. The trial court did not abuse its discretion in accepting such evidence as common proof of this claim as well.

The Court of Appeal cited three non-California cases in reversing certification order. Slip op. 52-53 (citing *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tex. App. 2002); *Basco v. Wal-Mart*

Stores, Inc., 216 F.Supp.2d 592, 602 (E.D. La. 2002); *Petty v. Wal-Mart Stores, Inc.*, 773 N.E. 2d 576 (Ohio App. 2002)).

However, other courts routinely certify off-the-clock claims for class treatment. *See*, *e.g.*, *Salvas*, 893 N.E.2d 1187; *Iliadis*, 922 A.2d 710; *Hale*, 231 S.W.3d 215; *Godfrey v. Chelan County PUD*, 2007 WL 2327582 (E.D. Wash. Aug. 10, 2007); *Barnett v. Wal-Mart Stores, Inc.*, 2006 WL 1846531 (Wash. App. Jul. 3, 2006); *Braun v. Wal-Mart Stores, Inc.*, 2005 WL 3623389 (Pa. Com. Pl. Dec. 27, 2005); *Braun v. Wal-Mart Stores, Inc.*, 2003 WL 22990114 (Minn. Dist. Nov. 3, 2003).

For example, the New Jersey Supreme Court reversed an order denying class certification of off-the-clock claims, explaining that "[a] trier of fact may appropriately consider whether Wal-Mart 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*, 922 A.2d at 723. One of the key common questions was "whether Wal-Mart understaffed its stores in expectation of off-the-clock work." *Id.* In this case, plaintiffs will present not only expert testimony, but also representative testimony about the off-the-clock work resulting from Brinker's understaffing.

In sum, the trial court did not abuse its discretion in granting class certification of the off-the-clock claim, and its order should not have been reversed.

D. The Court of Appeal Contravened This Court's Directives In *Washington Mutual*

The Court of Appeal's final error was to order class certification denied "with prejudice." Slip op. 53.

Under *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906 (2001), when an appellate court vacates a class

certification order based on erroneous legal assumptions, it must then remand for the trial court to apply the correct legal assumptions and "consider afresh" whether class certification should be granted. *Id.* at 928. Yet the Court of Appeal refused to permit plaintiffs to attempt to meet the new legal standards it adopted, or to allow the trial court to evaluate the evidence in light of those standards in the first instance.

Denying class certification with prejudice was not only contrary to *Washington Mutual*, but also manifestly unfair. Plaintiffs prepared to meet the evidentiary showing required by *Cicairos* and the DLSE opinion letters—not whatever showing the opinion's newly-announced legal standards might require. What's more, merits discovery had not been allowed (2RJN7394-95), so plaintiffs' evidentiary showing was necessarily preliminary. The trial court had ordered expert witness exchanges and depositions and had set a briefing and hearing schedule on survey and statistical evidence. 2RJN7442-44, 7522-48. The Court of Appeal interrupted that process when it stayed all proceedings—then *denied* plaintiffs' motion to augment the record with the additional survey and statistical evidence they were preparing to present below (RJN12/17/07; Order 04/23/08)—then ruled for itself that as a matter of law no such evidence could possibly meet its newly-announced legal standards, ever. Plaintiffs should have been afforded an opportunity to complete the pending trial-level proceedings and attempt to meet the new legal standards on remand.

If this Court affirms the panel's holdings on any of the substantive legal questions discussed above, or announces any new interpretations of the Labor Code or Wage Orders, then the case should be remanded back to the trial court for plaintiffs to attempt to meet the new legal standards in a renewed class certification motion.

IX. CONCLUSION

For the reasons discussed above, the Court of Appeal's judgment should be reversed and the class certification order reinstated. At a minimum, the case should be remanded to the trial court for class certification to be considered anew.

Dated: January 20, 2009

Respectfully submitted,

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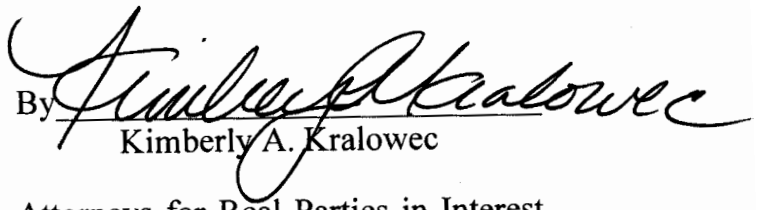
By 
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CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 36,600 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: January 20, 2009

Kimberly A. Kralowec

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My business address is Schubert Jonckheer Kolbe & Kralowec LLP, 3 Embarcadero Center, Suite 1650, San Francisco, CA 94111.

On January 20, 2009, I served the foregoing document(s) described as

OPENING BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed January 20, 2009 at San Francisco, California.

Pamela ~~Lee~~