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

REAL PARTIES' OMNIBUS ANSWER TO AMICUS CURIAE BRIEFS FILED IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Regulations

State Regulations

I. THE DUTY TO PROVIDE MEAL PERIODS IS THE SAME UNDER BOTH THE INDUSTRIAL WELFARE COMMISSION WAGE ORDERS AND CALIFORNIA LABOR CODE § 512

Despite the plain language of California Labor Code § 226.7 (b)[1] expressing the contrary, the Amici contend the section 226.7 premium is triggered by meal periods not "provided," i.e., not made available, in accordance with § 512 (a). Without citing any authority, the Amici argue that § 512 (a)'s use of language that is different from the Wage Orders, namely, use of the word "provide," somehow indicates a Legislative intent to depart from or reject the Wage Orders' meal period requirements.[2]

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[1] California Labor Code Section 226.7 (b) reads: "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." All statutory references shall refer to the California Labor Code unless otherwise specified.

[2] See Amicus Curiae Brief of National Retail Federation, et al. pg. 15 ("The Legislature simply ***did not*** replicate the language of the Wage Orders when enacting § 512. Instead the Legislature inserted language that had never before appeared within the Wage Orders by explaining that an employer's obligation is to 'provide' meal periods.") (emphasis in original); see also, Amicus Curiae Brief of the California Employment Law Council, pg. 24 ("In adopting the 'provide' phrasing for the Labor Code sections, the Legislature presumably was aware of the language in Wage Order 5-1998 and chose to clarify or deviate from it."); Amicus Curiae Brief for the Chamber of Commerce of The United States of America, pg. 26 ("[E]ven if the Wage Orders somehow could be read to support Plaintiffs' interpretation, the Wage Orders nonetheless could not contravene the plain language of the statutes (sections 226.7 and 512), which only require employers to make meal periods available."); But see, Amicus Curiae Brief of the Associated General Contractors of California,

Putting aside the grave fallacy of this argument for a moment, as under the Wage Orders, employers do not discharge their duty to "provide" meal periods under § 512 (a) by merely making them "available." When read in its entirety, the plain language of § 512(a) is clear in stating employees are entitled to meal periods, which must be taken absent valid and timely waivers. In addition to violating public policy, divorcing an employer's obligation to provide meal periods from whether they are actually taken would require § 512 (a) to be re-written and render portions of the statute superfluous and without any practical, reasonable meaning.

Throughout, Plaintiffs have argued the § 226.7 premium pay is triggered by an employer's failure to comply with the Wage Orders. The following sections will show the duty to "provide" a meal period under § 512 (a) is no different than the requirements under the Wage Orders, which § 226.7 expressly incorporates. As under the Wage Orders, § 512 (a) requires employers to provide meal periods that employees must receive absent valid and timely waivers. Thus, meal periods not provided in accordance with the Wage Orders are also not provided within the meaning of § 512 (a), and § 226.7 premium vests.

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pg. 4-14 (arguing that § 512 and the Wage Orders "each used language which affords employees a significant degree of flexibility once the threshold minimum requirements are met.").

A. Under the Wage Orders, Employers Cannot Let Employees Work Over Five Hours Without a Meal Period.

The Industrial Welfare Commission Wage Orders explicitly state, absent valid and timely waivers, employees cannot work over five hours without receiving a meal period: "No employer shall employ any person for a work period of no more than five (5) hours without a meal period..."[3] When substituting "employ" for how it is defined in the Wage Orders, the Wage Orders' directive becomes clearer: "No employer shall [engage, suffer, or permit] any person [to work] for a work period of no more than five (5) hours without a meal period..."[4] The command is clear – employers cannot let employees work over five hours without meal periods.

Despite the Wage Orders' clear directive to employers, Amicus Curiae for the Civil Justice Association of California ("CJAC") attempted to inject some confusion into the analysis. Noting the absence of words between "without" and "a meal period" in the Wage Orders, the CJAC argues that the "Wage Orders are silent as to whether an employer must 'provide' a meal period or 'ensure' that employees take the 'meal period[.]'"[5]

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3 See 8 Cal. Code Regs. § 11050 (¶11(A)).

4 See 8 Cal. Code Regs. § 11050 (¶2 (E)).

5 See Amicus Brief of the Civil Justice Association, pg. 15.

The Wage Orders have an answer to this. If an employee works over five hours and did not receive, or waive, a meal period, the employer has not complied with the Wage Orders' directive to not so employ a worker without one.

The Wage Orders' text leaves little to no room for competing interpretations of the meaning behind their meal period directives. Therefore, it is not surprising the Amici devoted little attention to them. Instead, their focus has been placed on § 512, which tracks the language of the Wage Orders in all but one respect. Section 512 states "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..." (emphasis added).

By the simple use of the term "providing," the Amici, like Brinker, contend the Legislature intended to deviate from the clear directive in the Wage Orders. Instead of not allowing employers to work employees over five hours without a meal period, the Amici argue Section 512 only requires employers to make meal period opportunities "available" to employees. The following will show that nothing in the plain language or in the legislative history of § 512 supports this argument.

B. When Entirely Read, § 512(a) Expressly Entitles Employees to, and Obligates Employers to Provide, the Meal Period *Itself*, Not the Opportunity to Have a Meal Period Made Available; the Amici's Interpretation Requires the Statute to be Re-written and Taken Out of Context

The full text of § 512 closely parallels the Wage Orders. While the Orders say "No employer shall employ any person...without a meal period," section 512 says "An employer may not employ any person...without providing a meal period..." The operative word in both provisions is *"employ,"* which means "engage, suffer or permit to work."[6] Both provisions prohibit employers from permitting employees to work without stopping for specified 30 minute meal periods absent a valid and timely waiver.

Like Brinker, the Amici contend employee rights to and employer obligations to "provide" meal periods are determined exclusively through the dictionary definition of the word "provide."[7] Given this singular determinate, the Amici assert that § 512(a) does not confer a right on employees to take or receive meal periods, only the convoluted right to the

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[6] See 8 Cal. Code Regs. § 11050 (¶2 (E)).

[7] See Amicus Briefs from Chamber of Commerce of U.S.A., pg. 10; Civil Justice Association of California, pg. 12; California Employment Law Council, pg. 17; California Chapters and Employment and Labor Law Committee of Association of Corporate Counsel, pg. 5-6; National Retail Federation, et al., pg. 6, 7.

opportunity to have meal periods made available to them. Thus, concludes the Amici, employers have satisfied their duty to "provide" meal periods when they have provided employees with meal period *opportunities*, regardless of whether meal periods are actually received.

This approach violates long established canons of statutory construction, which dictate "[t]he meaning of a statute may not be determined from a single word." *Dyna-Med, inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1386-1387 (1987). Statutory words must be construed in context with the whole statute and are thereby granted meaning "by the company they keep." *Grafton Partners v. Superior Court*, 36 Cal.4th 944, 960 (2005), quoting *People v. Jones*, 112 Cal.App.4th 341, 354 (2003).

The "company" the word "providing" keeps in § 512 (a) is the meal period waiver language. Waiver indicates "the voluntary relinquishment of a known right," and § 512(a) identifies exactly what that right is that may be waived. *Platt Pacific, Inc. v. Andelson*, 6 Cal.4th 307, 315 (1993). Section 512(a) reads:

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

As plainly shown, the right § 512(a) allows an employee to waive is not the right to the opportunity to have a meal period made available. In stating "the meal period may be waived...," the plain language of § 512 evidences a clear intent to grant employees the right to the meal period *itself.*

Limiting the interpretation of meal period rights exclusively to the dictionary definition of the word "provide" would require § 512 to be re-written, which is not to be accomplished through judicial fiat. *Morillion v. Royal Packing Company*, 22 Cal.4th 575, 585 (2002) (Whatever may be thought of the wisdom, expediency, or policy of the act...we have no power to rewrite the statute to make it conform to a presumed intention that is not expressed.") Specifically, accepting the Amici's interpretation would require § 512 (a) to be rewritten to state, "...the opportunity to have a meal period made available may be waived." If the Legislature intended only to

create an employee right to the opportunity for a meal period, it could have expressly stated *that* right could be waived.[8]

By the same token, if the Legislature intended to permit all meal periods to be waived, as the Amici contend, the express waiver language would have been wholly unneeded.

Much has been briefed about how the insertion of "waiver" into both the Wage Orders and § 512 impacts or illuminates the rights to, and the responsibilities to "provide," meal periods. Few of the Amici, though, cite § 512's waiver provisions to justify their position that meal periods only have to be made available. The analysis of the Amici that do address waiver fails in two critical respects, which will be analyzed at length in the following sections.

First, interpreting the waiver provisions under a "make available" standard would require this Court to assume the Legislature engaged in an idle or superfluous act in adding the specific and limiting meal period waiver language. Second, under the Amici's interpretation, the strict waiver

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[8] See, for example, *California Teachers Association v. Governing Board of Rialto Unified* School *District*, 14 Cal.4th 627, 633 (1997) ("Had the Legislature intended school districts merely to provide teachers with an opportunity to apply for a vacant coaching position, it could easily have written the [California Education Code § 44919(b)] to state: 'provided, teachers presently employed by the district shall be notified of such a job opening[,]'" which it did not).

requirements of § 512 would be meaningless or inoperative if an employee could, at any time he or she chooses, decide to not take a meal period.

C. If § 512 (a) Only Mandates Employers to Make Meal Periods Available, The *Limitations* on When Meal Periods Can Be Waived Would Have No Meaning And Require The Court to Assume the Legislature Engaged in an Idle or Superfluous Act in Limiting the Circumstances in When Meal Periods Can be Waived

Reconciling the Amici's argument that meal periods need only be "made available" with §512 (a)'s waiver provisions and, more particularly, the statute's strict limitations on when waivers can occur, is the Amici's most significant hurdle. Unsurprisingly, *only 3* of the 15 Amicus briefs filed in support of Brinker addressed § 512 (a)'s limited waiver provisions.[9]

Section 512 (a) carefully restricts when and how meal period waivers can occur. First, to be valid, a waiver must always involve "mutual consent of both the employer and the employee." Second, § 512 (a) also restricts when mutually consented to meal period waivers can and cannot occur. Section 512 (a) allows the first meal period to be waived by mutual consent only in shifts of 6 hours or less. Section 512 (a) allows the second meal period to be waived only in shifts that do not exceed 12 hours and only where the first meal period was not waived.

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[9] See Amicus Briefs for The National Retail Federation, et al. pg. 8-12; California Employment Law Council, pg. 25-28; Chamber of Commerce of U.S.A., pg. 27-30.

According to the Amici, "waiver" has nothing to do with waiving the *receipt* of meal periods, and, therefore, "[w]hether an employee actually takes a meal period provided to him or her is not governed by these provisions." (See Brief of Amici Curiae Chamber of Commerce of the U.S.A., pg. 27-28). Instead, the Amici argue, because employees only have a right to have meal periods "made available" to them, "the waiver provisions concern only waiver of the right to have a meal period made available." (See Brief of Amici Curiae Chamber of Commerce of the U.S.A., pg. 27; see also Brief of Amici Curiae The National Retail Federation, *et al.*, pg. 10-11).

Divorcing waiver from receipt of meal periods, as the Amici do, results in absurd consequences. Under this interpretation, employees working more than 6 hours "cannot waive the employer's duty to make the first meal period available[,]" but the employee is nevertheless free to not take the meal period. (See Brief of Amici Curiae The National retail Federation, *et al.*, pg.11) Similarly, an employee working over 12 hours is not free to waive his right to a meal period opportunity, but he is free to not take the meal period. *Id.*

The Amici's interpretation begs the question of what practical result the Legislature was trying to attain in limiting the circumstances in which waivers can occur. Is the Court to believe the Legislature carved out the

limitations on when waiver can occur pursuant to § 512 (a), a statute concerning "not only the health and welfare of the workers themselves, but also the public health and general welfare[,]" only to preserve an employee's right to a meal period *opportunity*? *Gentry v. Superior Court*, 42 Cal.4th 443, 456 (2007).

The answer is simple. There is no protection to the health and welfare of employees, or the general public for that matter, if § 512 (a)'s limitations on waiver preserve only *opportunities* and permit employers to employ workers for exhausting hours without meal periods. Under the Amici's interpretation, § 512's limitation on when waiver can and cannot occur would be no practical limitation at all and would render it a provision without substance.

Accepting the Amici's interpretation that meal periods need only be "made available," then, would require the Court to assume the "Legislature engaged in an idle act or enacted a superfluous statutory provision" when it expressly placed limitations on when meal periods can be waived. *California Teachers Association v. Governing Board of rialto Unified School District*, 14 Cal.4th 627, 635 (1997). As such, the Amici's interpretation that § 512 only requires meal periods to be "made available" must fail.

D. The Last Nine Words of § 512 (a) Do Not Mean the First Meal Period Can be Waived in Shifts Over 6 Hours

Section 512 makes clear that, in a shift over 6 hours, a meal period cannot be waived and must be taken.[10] Similarly, in a shift over 12 hours, the second meal period cannot be waived, but must be taken.[11] These strict limitations on when meal periods can be waived and, conversely, when they must be taken, reveal the meaning of the employer's duty to "provide" meal periods, not the dictionary definition of the word "provide." Read in its entirety, § 512 facially requires employers to provide meal periods, which must be taken absent a valid and timely waiver (e.g., one formed with mutual consent and only for the shift lengths § 512 specifies).

To wiggle out of this clear mandate, the Amici seize on "the last nine words" of § 512 (a) to argue that the statute's limitations on when meal periods can be waived really allow for meal period waivers *at any time*. (See Amicus Brief for California Employment Law Council, pg. 27; see also, National Retail Federation, et al. pg. 10-11).

The last nine words of § 512 (a) relate to the requirements for a valid second meal period waiver:

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[10] § 512 (a): "...**except that if the total** work **period per day of the employee is no more than six hours**, the meal period may be waived" (emphasis added).

[11] § 512 (a): "...**except that if the total hours worked is no more than 12 hours**, the second meal period may be waived"

> "...the second meal period may be waived by mutual consent of the employer and the employee **only if the first meal period was not waived.**" (emphasis added).

Disregarding the fact that the immediately preceding sentence of § 512 (a) strictly forbids meal period waivers in shifts over 6 hours, the Amici argue those last nine words show a legislative intent to allow meal period waivers at any time of the day and irrespective of the total hours worked. Thus, the Amici concludes, "[a]n interpretation requiring employers to ensure that employees actually take the provided breaks does not give meaning to these last nine words because it does not allow for employees who work more than six hours to elect not to take the provided first meal period." (Brief for Amicus Curiae California Employment Law Council, pg. 27-28; see also National Retail Federation, et al., pg. 10-11).

This argument, however, fails in three critical respects. First, it ignores the Wage Orders' "on-duty" meal period language and the limited right of health care workers to waive their first meal, which is what the last nine words of § 512(a) refer back to when they say "only if the first meal period is not waived." Second, it fails by its very premise that interpretations rendering portions of a statute surplusage must be avoided. Third, it conflicts with this Court's historical interpretation that wage and

hour laws are to be liberally construed in favor of protecting employees and that the receipt of meal periods prevents work-related accidents.

Since 1963, the Wage Orders have included language permitting "on-duty" meal periods in limited circumstances:

> 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.[12]

This provision allows certain employees, by written agreement, to waive the right to a duty-free meal period, and instead take an on duty meal.

The last nine words of § 512(a) refer to this on-duty meal. They mean that on a shift not exceeding 12 hours, "the second meal period may be waived" only if the first meal period was not waived through an "on-duty" waiver agreement. In fact, a compliant "on-duty" waiver is the *only*

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[12] Wage-Order 5-2001 (8 Cal. Code. Regs. § 11050 (¶12(c)); *see also* Wage Order 5-63 (Apr. 18, 1963, eff. Aug. 20, 1963) (MJN Ex. 16) (adding "on-duty" language for the first time); Amicus Curiae Brief of Miles Locker and Barry Broad at 17-18, 20-21 (discussing enactment history of "on-duty" language). This provision allows certain employees, by written agreement, to waive the right to a duty-free meal period, and instead take an on duty meal.

situation in which non-health-care workers may waive their first meal period on shifts exceeding 6 hours.

The IWC itself has recognized this. Specifically referencing the last nine words of § 512(a), the IWC explained that "there's only one way you can still waive that first meal period, and that would be, then, through an on-duty meal period."[13]

The last nine words of § 512 (a) also preserve the rights of health care industry workers on shifts exceeding 8 hours, who may waive the first meal period in limited circumstances: "(D) Notwithstanding any other provision of this order, 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 employee and the employer." Wage Order 5-2001 (¶11(D)) (emphasis added). Under § 512(a), however, once a health care worker's shift exceeds 12 hours, that worker may waive the second meal period "only if the first meal period was not waived." *See also* Amicus

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[13] Transcript of Public Hearing of the IWC, at 712418218:20-22 (Nov. 8, 1999) (MJN Ex. 347); *see also* Amicus Curiae Brief of Locker and Broad at 30-31, 35 (discussing the limited circumstances in which first meal periods may be waived).

Brief of Locker and Broad at 34-35(explaining health care workers' limited waiver right).

This right was first added via the 1993 amendments to the 1989 series of Orders. *See* Wage Orders 4-89, 5-89 (Amendments to Sections 2, 3, & 11), ¶11(C) (Aug. 21, 1993) (MJN Exs. 152, 158). Notably, the Legislature specifically reinstated those amended Orders when it enacted AB 60. *See* AB 60 §21, at p. 14 (MJN Ex. 58); *see also* Amicus Brief of Locker and Broad at 28-29. The last nine words of § 512 (a), also enacted as part of AB 60, served to preserve that expressly reinstated waiver right – *and* the limited "on-duty" waiver right, which the reinstated Orders also contained.

Amici's argument wholly ignores these two situations in which the first meal period may be waived. *Those* are the situations to which the last nine words of § 512(a) refer.

Amici's argument also fails because interpretations rendering portions of a statute "surplusage" must be avoided. See, *Woods v. Young*, 53 Cal.3d 315, 323 (1991). (See Amicus Briefs for National Retail Federation, pg. 10; California Employment Law Council, pg. 28). To interpret the last nine words as meaning meal periods can be waived at any time would render as surplusage the language forbidding the first meal period to be waived after six hours. Specifically, § 512 (a)'s language

stating, "...**except that if the total work period per day of the employee is no more than six hours**, the meal period may be waived...[,]" would be rendered inoperative and surplusage if meal periods *could* be waived after 6 hours.

Finally, interpreting the last nine words to allow for runaway waivers whereby employees could work ten or more hours straight without a meal period would fly in the face of this Court's historical stance of construing wage and hour laws broadly and with an eye to the protection of employees. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1111 (2007); *see also*, *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 702 (1980) ("[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.").

Interpreting the last nine words of § 512 (a) as urged by the Amici would also conflict with this Court's position that employees working long hours without taking meal periods face greater risk of work-related accidents. See *Murphy*, *supra,* 40 Cal.4th at 1113 ("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.").

The last nine words of § 512 (a) should be read in a manner that harmonizes and does not nullify all other provisions. *Parris v. Zolin*, 12 Cal.4th 839, 845 (1996). As the above analysis shows, the Amici's interpretation does not do this.

By the plain terms of § 512(a) and the Wage Orders, the first meal period may be waived only by (a) employees on shifts not exceeding six hours; (b) employees who agree (in writing) to an on-duty meal period; and (c) health care workers on lengthy shifts, who may waive (in writing) one of their two meal periods. The last nine words of § 512(a) refer to, and preserve, the waiver rights for employees (b) and (c), and prohibit those employees from also waiving their second meal. Amici's argument to the contrary should be rejected.

E. The Word "Provide" and the Duty it Imposes on Employers in Other Sections of the Labor Code Has Not Been Interpreted as to "Make Available," But as Not "Permitting or Requiring" the Employee to Work Without the Thing to be Provided.

To show "provide" as used in § 512 means make available, Amici for The U.S. Chamber of Commerce and the National Retail Federation cite to cases outside the meal-period context to "support a plain-meaning interpretation of 'provide' as 'make available.'" (Brief of Amici Curiae

Chamber of Commerce of the United States of America, pg. 13). None of the cases cited reflect California law and, in many critical aspects, the cases directly conflict with how this Court has interpreted provide in similar employment contexts.

Amicus The National Retail Federation et al. relies on this Court's decision in *Brett v. S.H. Frank & Co.*, 153 Cal.267, 272 (1908), to argue that "[t]he law, in justly requiring that an employer shall furnish reasonably safe appliances and a reasonably safe place for the performance of his work, does not make him an insurer of his employees against all accidents." (See Amicus for National Retail Federation, et al., pg. 7). For nearly one hundred years, though, this principle adduced from *Brett* has not governed an employer's duty to furnish a safe place to work.

This Court decided *Brett* five years before the Legislature enacted The Workmans Compensation, Insurance and Safety Act of 1913[14], which was popularly referred to as the *Boynton Act*. See *Mathews v. Workers' Compensation Appeals Board*, 6 Cal.3d 719, 731 (1972). The work related injuries the *Brett* Court was not going to hold employers liable for were those in which the employee was contributorily negligent. *Brett*, *supra*, 153 Cal. at 272-274. For the near century since the *Boynton Act*, liability to

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14 Stats. 1913, ch. 176 section 1, p. 279

employees for work-related injuries has been imposed without regard to negligence of the employer or employee.[15] Thus, for nearly a century and contrary to *Brett*, which has been statutorily overruled, the employer's affirmative duty to furnish a safe place to work *has* made him "an insurer of his employees against all accidents."

Relying on federal and state cases from other jurisdictions, The National Retail Federation also argues, "[f]or the health and welfare of employees," many courts have concluded the duty to "provide" safety devices for employees is a duty to make the devices available, not ensure employees actually use them. (Amicus Brief of National Retail Federation, et al., pg. 7). This is not the law in California.

As this Court stated in *Alber v. Owens*, 66 Cal.2d 790 (1967), regardless of the statutory use of the words "furnish" and "provide," the law in California does not merely require an employer to make a safe work environment and safety devices *available* to employees. In *Alber*, this Court ruled that the duties imposed in Labor Code §§ 6400-6403, which require an employer to furnish a safe place to work and provide employees safety

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15 See Cal. Lab. Code § 3600: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person...shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of employment.

devices and safe guards, is a duty forbidding the employer from permitting or requiring employees "to be in any unsafe place of employment." *Alber*, *supra*, 66 Cal.2d at 794.

This is exactly the same duty Plaintiffs have argued § 512 (a) and the Wage Orders impose on employers with respect to meal periods. Namely, employers may not "suffer, engage, or permit" employees to work without mandatory meal periods.[16]

II. THE LEGISLATIVE HISTORY OF § 512 DOES NOT SUPPORT AN INTENT TO WEAKEN THE WAGE ORDERS' MEAL PERIOD REQUIREMENTS

A. Assembly Bill 60, to Which § 512 Was Added, was Primarily Enacted in Response to the Amendment of Five Wage Orders, Which Eliminated the State's Daily Overtime Rules.

Amici are correct to point out that § 512 was added to the Labor Code as part of AB 60, which was passed into law as the Eight-Hour Day and Workplace Restoration Act of 1999. The Amici are wrong, however, in arguing the exclusive "purpose of the Act...was to provide flexibility to all workers." (See Amicus Brief of National Retail federation, et al., pg. 17).

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16 Quoting from the definition of "employ" in Section 2(E) of Industrial Welfare Commission Wage Order No. 5-2001, which is applicable to Plaintiffs' claims here. "Employ" is defined the same in all 17 Wage Orders.

AB 60 was drafted in "response to the IWC's amendment of five wage orders [in] 1997, which, among other things, eliminated the state's daily overtime rule in favor of the less restrictive [federal] weekly overtime rule." *Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 176 (2003); *see also, Bearden v. U.S. Borax, Inc.*, 138 Cal.App.4th 429, 434 (2006) ("In 1999, in response to the IWC's elimination of daily overtime rules in certain industries, the Legislature passed and the Governor signed Assembly Bill No. 60..., the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.").

Thus, as explained in Plaintiffs' Opening Brief on the Merits, Assembly Bill 60, of which § 512 (a) was a part, "was enacted to reverse a regulatory attempt and forestall future attempts, to *diminish* workers' rights." (Plaintiffs' Opening Brief on the Merits, pg. 61). Motivated by this purpose, Assembly Bill 60, through the enactment of Labor Code § 510, restored the daily overtime requirements that some of the Wage Orders eliminated 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, supra,* 138 Cal.App.4th at 434.

Certain provisions were added to AB 60 to achieve flexibility. For instance, Labor Code § 511 was enacted to provide workers and employers

a framework within which to establish alternative workweeks. To be certain, though, nothing in the statutory history of § 512 indicates it, too, was added for a similar purpose of accommodating scheduling flexibility. On the contrary, § 512 was enacted to "codify" the existing Wage Orders' meal period compliance standards and to prevent the IWC from weakening them.

B. The Legislative History of § 512 Shows the Legislature Intended to Codify and Strengthen The Wage Orders' Long Standing Meal Period Requirements, Not Reject or Modify Them.

Aside from referring to the fact that the Act in which § 512 was enacted had "workplace flexibility" in its title, the Amici analysis on why the legislative history supports their argument that § 512 created an employer obligation to make meal periods available is scant. Most Amici addressing the issue merely assert the Legislature's ultimate use of language that was different from the Wage Orders' meal period language is indicia of an intent to deviate from the Wage Orders.[17] Other Amici relied

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[17] See Amicus Curiae Brief of National Retail Federation, et al. pg. 15 ("The Legislature simply ***did not*** replicate the language of the Wage Orders when enacting § 512. Instead the Legislature inserted language that had never before appeared within the Wage Orders by explaining that an employer's obligation is to 'provide' meal periods.") (emphasis in original); See also, Amicus Curiae Brief of the California Employment Law Council, pg. 24 ("In adopting the 'provide' phrasing for the Labor Code sections, the Legislature presumably was aware of the language in Wage Order 5-1998 and chose to clarify or deviate from it."); Amicus Curiae

on summaries from the legislative digest that used the phrase "without providing the employee with a meal period" to conclude that making meal periods "available" is what the Legislature thought the Wage Orders required and what § 512 would also require.

Nothing in the legislative history of § 512 suggests the Legislature intended to deviate from the Wage Orders' long standing, mandatory meal period requirements. The opposite is true. The history plainly reveals that the Legislature intended to "codify" the meal period standards of the "*existing wage orders.*" AB 60, Legislative Council Digest, at 2 (July 21, 1999) (MJN Ex. 58) (emphasis added).[18]

AB 60 also offers proof that the Legislature knew what to do with Wage Orders it wished to reject. In restoring the daily overtime provisions in § 510, the Legislature *rescinded* the five Wage Orders that had eliminated daily overtime.[19] The Legislature acted in the opposite fashion

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Brief for the Chamber of Commerce of The United States of America, pg. 26 ("[E]ven if the Wage Orders somehow could be read to support Plaintiffs' interpretation, the Wage Orders nonetheless could not contravene the plain language of the statutes (sections 226.7 and 512), which only require employers to make meal periods available.").

18 See Brief of CJAC at 13-14 (citing the same Legislative Council Digest); *see also* SB 88, Senate Third Reading (Aug. 16, 2000) at 5 (MJN Ex. 64) (§ 512 enacted to "codify" existing Orders).

19 Assembly Bill 60, § 21, at 14 (MJN Ex. 58) (declaring Order 5-98, which is the subject of MJN Ex. 20, and four others "null and void").

with respect to its codification of the Wage Orders' meal period requirements in § 512. It reinstated Order 5-89 (amended 1993) (MJN Ex. 158) and four others – none of which had language identical to § 512.[20] Thus, as with the offending overtime Wage Orders, if the Legislature believed those Wage Orders' meal period requirements differed from § 512 and wished to change them, it would not have reinstated Wage Orders containing those requirements.

If the Legislature had intended, by using the word "providing" in § 512, to *change* the Wage Orders' longstanding meal period requirements, something, somewhere in the Legislative history would expressly say so. The Amici cite nothing that does.

C. The IWC Adoption and Interpretative History Relating to the Wage Orders' Meal Period Requirements is Instructive of What the Legislature Was Codifying in § 512, Not Legislative Language Used in Committee Reports to Summarize Those Requirements.

Amicus CJAC relies on language from the legislative digest report which uses the same "without providing" language ultimately used in

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20 AB 60, §21, at 14 (MJN Ex. 58) ("reinstat[ing]" Order 5-89 (amended 1993) (MJN Ex. 158) and four others).

§ 512.[21] It cites to this report to show that the Legislature thought the Wage Orders only required meal periods to be made available and that, in codifying that requirement, that is what § 512 would do. (See CJAC at 14). In other words, according to CJAC, the Legislature's summary of what *it* thought the Wage Orders' meal period requirements were, is conclusive evidence of what the Wage Orders' mean, regardless of what the Wage Orders themselves say or what their adoption history shows.

This Court rejected this same argument in *Murphy*, which focused on whether the § 226.7 premium was a wage or a penalty.

In *Murphy*, a floor analysis stated that section 226.7 "codif[ied] the lower penalty amounts adopted by the [IWC]." *Murphy*, *supra*, 40 Cal.4th at 1110 (quoting Assembly bill 2509, Assembly Floor Analysis (Aug. 25, 2000)). This Court held that "[t]he manner in which the IWC used the word 'penalty' undermines the Court of Appeal's reliance on the use of the word in the legislative history." *Id.* In codifying the Wage Orders, the Court reasoned the Legislature was "fully aware of the IWC's wage orders in enacting section 226.7." *Id.* Thus, the Court ruled the Legislature's use of

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[21] See Assembly Bill 60, Legislative counsel Digest (July 21, 1999), pg. 2 (MJN Ex. 58); See also Brief of Civil Justice Association of California citing to this Digest entry, pg. 13-14.

the word "penalty" "should be informed by the way the IWC was using that word." *Id.*

Based on *Murphy*, then, to determine what the "codified" Wage Orders meant, attention must be paid not to the language in a legislative summary, but to the Wage Orders' adoption and interpretative history.[22]

D. The Wage Orders' Adoption History Shows that Employers Do Not Satisfy Their Meal Period Obligations by Making Them Available, But Must Ensure that Workers Are Relieved of Duty for Meal Periods.

The administrative history behind the adoption of the Wage Orders makes clear that employers do not satisfy their meal period obligations by merely making them available. From the beginning – 1916 – the IWC

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[22] See also, *Yamaha Corp. of America v. State Bd. Of Equalization*, 19 Cal.4th 1, 22 (1998) ("Lawmakers are presumed to be aware of long-standing administrative practice and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication [that] the administrative practice was consistent with underlying legislative intent"). Admittedly, this principle applies to the interpretation of an amended or reenacted statute. An analogous situation exists with § 512 codification the Wage Orders' meal period requirements, which have a rich adoption and interpretive history dating back to 1916. Thus, codifying the Wage Orders' meal period requirements, "which has a meaning well established by administrative construction is persuasive that the intent was to continue the same construction previously recognized and applied." *Robert F. Kennedy v. Medical Center v. Belshe*, 13 Cal.4th 748, 760 (1996).

always required that the employer is to see to it that employees are actually relieved of duty for 30-minute meal periods.[23]

The earliest Wage Order expressly prohibited employers from "permit[ing] [employees] to return to work in less than one-half hour." Wage Order 2 ¶ 1(20) (Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex 76). An early 1933 Order makes plain that employers could not simply offer an employee a 30 minute meal period, but was "responsible for seeing that the time is taken." Order 9 Amended, ¶9(a) (Jun. 21, 1933, eff. Aug. 28, 1933) (MJN Ex. 141).

In 1943, the IWC Continued this requirement using the same basic language used in the Wage Orders *and § 512* today: "No employer shall employ any woman or minor for a work period for more than five (5) hours without an allowance of not less than thirty (30) minutes for a meal." Order 5NS(¶3(d)) (Apr. 14, 1943, eff. Jun. 28, 1943) (MJN Ex. 12). The IWC also adopted the definition of "employ" still in place today: "engage, suffer or permit to work." *Id.* ¶2(c)).

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23 The Amicus Brief filed by Miles E. Locker and Barry Broad in support of Real Parties in Interest exhaustively covered the IWC's rich adoption history of the Wage Orders. Given its length, the points in that brief will not be re-written here. For brevity, this history will be summarized in much the same way as written in Plaintiffs' Reply Brief on the Merits at pg. 5 and 6.

Based on the IWC Wage Boards' findings for the above Wage Order, it is clear that its language indicates meal periods must be taken, not just made available: ***"The Commission finds it is necessary to insure a meal period after not more than 5 hours of work in order to protect the health of women and minors."*** Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 (MJN Ex. 302) (emphasis added).[24]

As discussed above and more thoroughly in the Amicus Brief of Miles E. Locker and Barry Broad, it is clear that the IWC possesses a long and entrenched history of protecting employees from working long hours without actually receiving meal periods during which they are relieved of all duty. Nothing in the adoption history shows the IWC's vigilance was directed at protecting employees' rights to meal period opportunities.

Labor Section § 512 unequivocally codified the Wage Orders. As this Court reasoned in *Murphy*, the IWC interpretation of the meal period

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[24] *See also* Transcript of Proceedings of Wage Board in Public Housekeeping Industry (Oct. 7, 8 and Nov. 16, 1942) ("Oct. 1942 Transcript"), at 703428119 (MJN Ex. 294) (same); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 6, 1943), at 703438107 (MJN Ex. 301) (same). This Wage Board adopted two earlier versions of Order 5NS, one on Feb. 5, 1943 (MJN Ex. 294) and another on April 6, 1943 (MJN Ex. 301), but each of these was rescinded before it went into effect (*see id.* At 703438102); *see also* MJN Ex. 302 at 703439101-102; MJN. Ex. 304). Each time, the Wage Board made identical findings.

requirements through their adoption and interpretative history is instructive regarding what was being codified. *Murphy*, *supra*, 40 Cal.4th at 1110. Legislative comments in a digest are not. *Id.*

In sum, the Legislature codified meal period requirements that obligated employers to do much more than merely make meal periods "available". To find otherwise would mean the Legislature intended to reject, or deviate from, the Wage Orders' long-standing requirements that employees receive, and are affirmatively relieved of duty during, meal periods, which the legislative history behind § 512 simply will not support.[25]

E. The Amicus Brief Filed by The DLSE and Labor Commissioner Angela Bradstreet Ignores the Adoptive and Interpretative History Behind the Wage Orders' Meal Period Requirements and Overstretches the Reach and Scope of the Opinion Letters and Cases to Which it Cites.

The Brief filed by the Division of Labor Standards Enforcement (hereinafter "DLSE") filed in support of Brinker ignores the near century old adoptive and interpretive history behind the Wage Orders' meal period requirements. Instead, relying on certain opinion letters, the DLSE states that its historical position has been meal periods have been "provided," and

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[25] Please refer to sections II (A) and II (B), above.

employees are not owed compensation under§ 226.7 (b), so long as the employer permits them to be taken and does nothing to restrict employee freedom for the entire 30 minutes. This conclusion overstretches the letters and cases on which the DLSE relies.

First of all, opinion and advice letters from the DLSE only represent the DLSE's interpretation, and this Court has held them to be entitled to no judicial deference. *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 563 (2007). Furthermore, the relied on letters and cases only address the employer's obligation under the Wage Orders to relieve employees of duty and not interfere with employee freedom during meal periods. They do not speak to the employer's duty to make sure the employee takes the meal period in the first place.

The letters and cases to which the DLSE cites highlight employer compliance relating to meal periods in terms of whether the employer restricted employee freedom during meal periods. In all the factual scenarios discussed in the relied on opinion letters and cases, the *only* thing that went wrong was the employer imposed restrictions on employee freedom during meal periods.

Other letters, discussed in Plaintiffs' Opening Brief, but not mentioned by the DLSE, address employers' obligation to ensure that

workers are relieved of all duty for their meal periods, as distinct from the more lenient, "authorize and permit" rest period requirement.[26]

The DLSE's cited letters address a different point. In the 1/28/92 letter, the DLSE stated the employer has not infringed on employee freedom "during the meal period" by requiring the employee to wear pager. (See DLSE RJN, Ex. 2) The cited letter from 7/12/96 clarified this further and stated that, "if the employee responds, as required, to a pager call *during the meal period*, the whole of the meal period must be compensated." (See DLSE RJN, Ex. 6) (emphasis added). *Bono Enterprises v. Labor Commissioner*, 32 Cal.App.4th 968 (1995), to which the DLSE cites, also deals with the issue of how much employer control is too much to render it time for which the employee must be compensated. *Bono* held that, where an employee is not free to leave the premises *"during his or her lunch hour*...[,] that employee remains subject to the employer's control." *Id.* at 975 (emphasis added).

If anything, then, these opinion letters and cases are only relevant insofar as they shed light and offer guidance on "close-call" scenarios, wherein an employer's subtle degrees of control rendered the meal period

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[26] Opening Brief on the Merits at 54-56 (citing DLSE Op.Ltr 2003. 11.03 (MJN Ex. 46); 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 (MJN Ex.39)).

time for which the employee had to be compensated. Given their limited address, the cited letters and cases cannot be relied on as reciting the whole of an employer's obligation to "not employ any person...without a meal period" as articulated in the Wage Orders.

The series of opinion letters and changes to the DLSE's Enforcement and Policies and Interpretations Manual that ensued after the enactment of Labor Code §§ 512 and 226.7 do not reflect a policy departure from the letters cited above. Rather, they shed further light on an employer's meal period obligations. Specifically, these letters and Manual changes show it is the employer's obligation to insure employees actually take meal periods, that employers cannot simply have a paper policy making meal periods available and then leave it to the employees' discretion to take them.[27]

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[27] See 4/2/01 letter from DLSE Chief Counsel, Miles Locker (DLSE RJN, Ex. 8), wherein it is stated "An employer is liable for the meal period penalty not only if the employer prohibits the employee from taking the required meal break, but also, if the employee (though authorized and permitted to take a meal break) works, with the employer's sufferance or permission, during the period that the employee had been authorized to take his or her meal period." See DLSE Enforcement Policies and Interpretations Manual (DLSE RJN Ex. 15) (emphasis added): "Regulation Clearly Places on Employer to Insure Meal Period. The language of Section 11 (A) (patterned on Labor Code § 512) provides that "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes..." 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..."; see also DLSE Enforcement

Thus, what ensued after the enactment of § 226.7 does not show, as the DLSE here argues, a shift in DLSE policy, but different sides to the same coin. The pre-226.7 letters instruct on what constitutes compliant employer conduct *during the meal period.* Restrictions of employee freedom, such as not allowing employees to leave the premises or requiring phones and pagers to be answered, result in a non compliant meal period. The post-226.7 letters and manual changes instruct on the employer's obligation to see to it that the meal period is taken in the first place. Given this, then, the only real DLSE policy shift occurred in 2008, when, after *Brinker*, the DLSE stated the employer has satisfied his or her meal period obligations by simply making meal periods available, regardless of whether employees actually received them.[28] *See Murphy, supra,* 40 Cal.4th at 1105 n.7 (DLSE actions that "flatly contradict" earlier positions in the "highly politicized" meal period arena are unreliable); *Jones v. Tracy School Dist.*,

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Policies and Interpretations manual (DLSE RJN Ex. 15): "...[I]t is not the obligation of the employee to take the meal period if offered or turn it down if he or she so desires. The burden is similar to that imposed upon the employer that he or she 'shall pay to each employee wages not less than [minimum wage] per hour'...As with the minimum wage obligation, the employer is not entitled to excuse the fact that it 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."

[28] See Revised DLSE Enforcement and Policies and Interpretations Manual, which is the subject of Plaintiffs' MJN, Ex. 51. ("Labor Code § 512(a) and Section 11 of Wage Order 5-2001...mean that employers must provide meal periods by making them available, but need not ensure that they are actually taken.").

27 Cal.3d 99, 107 (1979) (declining to defer to DIR memorandum created "after [agency] had become an amicus curiae in this case[;] "[t]his chronology...substantially dilutes the authoritative force of the memorandum").

III. PUBLIC POLICY SUPPORTS AN INTERPRETATION THAT PROTECTS THE EMPLOYEE'S RIGHT TO TAKE MEAL PERIODS

A. Statutes Governing Conditions of Employment Are to be Liberally Construed in Favor of Protecting Employees.

As this Court recognized in *Murphy*, statutes governing conditions of employment are to be construed broadly in favor of protecting employees. *Murphy, supra,* 40 Cal. 4th at 1111. As sections 512 and 226.7 regulate employee wages and working conditions, "[t]hey are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished..." *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 702 (1980).

B. The Fundamental Public Policy of Protecting the Health and Safety of Workers.

Meal and rest periods have long been viewed as part of the remedial worker protection framework. *Industrial Welfare Commission, supra*, 27 Cal.3d at 724.

This Court explained in *Murphy*, mandatory meal periods serve important health and safety concerns:

> 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. 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.

Murphy, supra, 40 Cal.4th at 1113.

In 2000, Assembly Member Darrell Steinberg introduced Assembly Bill No. 2509 as a means of enforcing the existing IWC Wage Order prohibitions against employees working during meal periods and rest periods. (*Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2509* (1999-2000 Reg. Sess.) Feb. 24, 2000, pp. 3, 5.) Supporters of the bill commented about the "large and growing" problem of employers who are chronic violators of wage and hour laws, including employers that worked their employees for long hours without breaks. *Id.* at p. 9.

Upon the legislative finding that "[n]umerous studies have linked long hours to increased rates of accident and injury, the Legislature enacted § 512 as part of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999.[29] Thus, as a measure aimed at reducing workplace accidents and injury, § 512's purpose cannot be fulfilled if, under the Amici's

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[29] Stats. 1999 ch.134.

argument, employees have the ultimate discretion to continue working long hours without taking a meal period.

Thus, one of the express purposes of §§ 512 and 226.7 is to decrease the rates of accidents and injury due to long work hours. This Court recognized in *Murphy* "that the Legislature was fully aware of the IWC's wage orders in enacting section 226.7." *Murphy, supra*, 40 Cal.4th at 1110.

When § 226.7 (a) and (b) are viewed in light of the express legislative intent to decrease long work hours in order to reduce accidents and injuries, along with the rule that wage and hour laws are to be construed broadly in favor of protecting employees, the logical conclusion is that the legislature fully realized that, in enacting § 226.7 (b) they were requiring employers to relieve the employee of all duty for not less than 30 minutes.

Because the express purpose of these laws is to decrease the rates of accidents and injury due to long work hours it is logical to assume that the Legislature intended the meal period provisions to be mandatory. Section 226.7 deters employers from not providing meal periods during which the employee is relieved of all duty.

C. Public Policy: Protecting the Health and Safety of Society.

The public safety aspect presented by Labor Code Sections 512 and 226.7 has been largely ignored by the Amici. Ignoring public safety, however, does not alter the very important public safety goals of Labor Code §§ 512 and 226.7. Employees denied their rest and meal periods face greater risks of work related accidents. *Murphy, surpa,* 40 Cal.4th at 1113. As we all realize, many times work related accidents also injure and kill non-employees.

Labor Code Section 512 is intended to prevent injuries and deaths. Well rested and well nourished workers are less likely to cause serious injuries and deaths to themselves and the public at large. In the restaurant setting such as with the Brinker restaurants, Labor Code Section 512 helps to prevent the tired and malnourished restaurant worker from cutting lettuce with the same knife just used for cutting raw chicken. It helps prevent the kitchen worker from cooking with food and ingredients that are passed their expiration dates. It helps prevent *E. coli* breakouts that sicken dozens of customers and families.

If the Court accepts the Amici's interpretation of § 512 as not requiring meal periods, then tired and mal-nourished employees will have accidents, injuries and deaths that were entirely preventable. Thus, if the Court accepts the Amici's interpretation, the stated public policy goal of

reducing accidents with regards to the employee and the public at large is frustrated.

D. Labor Code § 226.7 - A Dual Purpose Remedy: Compensating Employees and Shaping Employer Conduct.

This Court has recognized that § 226.7 has dual purposes, which are similar to other dual-purpose wage remedies:

> "...[S]ection 226.7 **seeks to shape employer behavior** in addition to compensating the employee... Overtime pay is only one such example of a dual-purpose remedy that is **primarily intended to compensate employees, but also has a corollary purpose of shaping employer conduct.** Reporting-time and split-shift pay serve a similar dual function." (emphasis added) *Murphy, supra,* 40 Cal.4th at 1111.

Sections 512 and 226.7 "shape[s] employer conduct" by providing an incentive for employers to comply with the meal and rest period requirements embodied in the Wage Orders and § 512. *Murphy, supra,* 40 Cal.4th at 1110. Like overtime pay provisions, payment for missed meal and rest periods function as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards. *Id.*

E. The Entire Purpose Behind the 2000 Changes Was to Encourage Compliance.

The Wage Orders have always required meal and rest periods after specified hours of work. Until 2000, however, "[t]he only remedy available to employees [for missed meal and rest periods] was injunctive relief aimed at preventing future abuse." *Murphy, supra,* 40 Cal.4th at 1105. In the year 2000, "due to a lack of employer compliance, the IWC added a pay remedy to the wage orders, providing that employers who failed to provide a meal or rest period 'shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day' that the period is not provided." *Id.* at 1105-1106, quoting Cal. Code Regs., tit. 8, § 11070, subds. 11(D), 12(B).

The same arguments advanced by Amici today, were also made in 2000. These arguments were rejected by the California Legislature and the IWC, both of which decided to put teeth into the meal period provisions by imposing the premium wage for non-compliance.

The § 226.7 premium wage was targeted at shaping employer conduct to comply with the Wage Orders' and § 512 (a)'s clear mandates. *Murphy, supra,* 40 Cal.4th at 1111. If there is no compliance enforcement, then employer conduct is not shaped. Without the shaping of employer conduct, the public policy goals are again not met.

If § 512 is interpreted as Amici wish, there will be no shaping of employer behavior. If meal periods are allowed to be discretionary, then there is no incentive for employers to make sure that employees actually receive them. The workplace will revert back to its pre-§512 and pre-§226.7 days, where employer conduct with respect to meal and rest periods was not incentivized to comply.

F. "Noneconomic Injuries" Suffered by Employees Who Work Through Rest and Meal Periods.

The Legislature intended Section 226.7 to compensate employees. *Murphy, supra*, 40 Cal.4th at 1110. This conclusion is consistent with this Court's prior holdings that "statutes regulating conditions of employment are to be liberally construed with an eye to protecting employees." *Id. at* 1111, citing *Sav-On v. Superior Court*, 34 Cal. 4th, 319, 340 (2004); *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 794 (1999); *Lusardi Construction v. Aubry*, 1 Cal.4th 976, 985 (1992).

This Court acknowledged there are "noneconomic injuries" suffered by employees who work through rest and meal periods:

> 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. 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. Additionally, being forced to forgo rest and meal periods denies employees time free from employer control that is often needed to be able to

accomplish important personal tasks. *Murphy, supra,* 40 Cal.4th at 1113.

Further, this Court has acknowledged that low-wage workers are the likeliest to suffer violations of Section 226.7 and, arguably, are at the greatest risk of injury and death. *Murphy, supra,* 40 Cal.4th at 1113-1114.

G. Labor Code Sections 512 and 226.7 When Read in Conjunction, Confer a Benefit to Employees, Which the Amici's Interpretation Completely Eliminates.

When the employee works through a meal period or is not authorized and permitted to take a rest period, the employee has suffered the loss of a benefit these breaks confer. As this Court held in *Murphy*, § 226.7 restores that loss by compensating the employee. *Murphy, supra,* Cal.4th at 1104. Under the Amici's interpretation, these losses would not be compensated, which would flatly contradict *Murphy*.

H. The Issue is Not About force - the Issue is Requiring Employers to Comply With Legal Requirements Designed to Promote the Health and Welfare of Employees and the Public at Large.

Amici, the distort the realities of Plaintiffs' interpretation of Labor Code Sections 512 and 226.7. To the Amici, like Brinker, Plaintiffs' argument is framed as one "forcing" employees to take unwanted meal periods. Amici are wrong. No one is "forcing" anyone to do anything. It is

about shaping employer behavior in order to achieve the stated public policies embodied in sections 512 and 226.7.

As explained, § 226.7 is the Labor Code's method for "ensuring" employers are incentivized to comply with meal and rest period requirements. It offers employees compensation for suffering the detriment of working long hours without meal periods or the allowance of rest periods. *Murphy, supra,* 40 Cal.4th at 1113. Amici are urging an interpretation whereby employees suffer the detriments without compensation.

The issue is requiring employers to comply with the legal requirements of the Wage Orders' and the Labor Code that are designed to promote the health and welfare of employees and the general public. The Amici, like Brinker, ask this Court to ignore these objectives and interpret these provisions for the benefit and protection of employers at the expense of workers.

I. Sometimes the Law is Simply Inconvenient.

The heart and soul of Amici's argument is that Plaintiffs are trying to "force" employees to take meal periods when it is more convenient for them to work through meal periods. Hence, employers only have to make them "available" rather than require the employers to ensure compliance

with an affirmative obligation to relieve workers for a 30 minute, duty-free meal period.

Amici argue that enforcement of these wage laws restricts the rights of workers and employers. But that is what the law does. It restricts people's rights and liberties. These wage laws are no different. They may not be convenient for employers or for some employees. The purpose behind the Wage Orders and Labor Code Sections 512 and 226.7, however, was not convenience These provisions are designed to protect employees and the public at large and compensate employees.

The case of *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524, 1536 (Cal.App.2d Dist. 2008) is illustrative. In *Gharzaryan*, the employer submitted declarations by workers that they were in favor of the alleged work practice of not getting paid for wait time/gap time when they had to be ready at a moment's notice to drive limousines. In opposing class certification, Brinker submitted similar declarations that stated, in effect, employees were inconvenienced by having to take 30 minute meal periods. The *Ghazaryan* court rejected the argument that a defense to unlawful work practices was that it was "inconvenient" to employees:

> Although individual testimony may be relevant to determine whether these policies unduly restrict the ability of drivers as a whole to utilize their on-call time for personal purposes, the legal question to be resolved is not an individual one. To the

> contrary, the common legal question remains the overall impact of Diva's policies on its drivers, not whether any one driver, through the incidental convenience of having a home or gym nearby to spend his or her gap time, successfully finds a way to utilize that time for his or her own purposes.

Ghazaryan v. Diva Limousine, Ltd., 169 Cal.App.4th 1524, 1536 (2008).

The *Ghazaryan* Court correctly held that just because some workers were not in inconvenienced by the illegal work practice did not mean these workers' rights trumped the public policy considerations and the workers that are aggrieved by the illegal work practice.

The wage orders were written to protect workers. Like all laws/ regulations - they are enacted to protect the public. There are no provisions in any law/regulation that excuse non-compliance because of the inconvenience involved with complying.

It is immaterial here that some workers at Brinker, or some workers that work for any of the Amici groups, don't want to follow the applicable Wage Orders or the law. As the Court said in *Gharzaryan,* "the common legal question remains the overall impact of Diva's policies on its [workers]", not whether any individual workers are inconvenienced by the wage orders as Brinker suggests.

The Labor Code and the Wage Orders trump individual desires. There is no provision for "waiving" compliance with the Wage Orders because they inconvenience the worker or the employer.

There may be many statutes which we may not personally like or believe are not in our personal best interests. This is irrelevant as to the whether we are obligated to follow the statute. Imagine the state of society if persons did not have to follow laws that we personally do not like? And it is improper to place such personal interests of a purported few employees over the health and safety interests of all California employees and Californians overall who interact and rely on these employees. Indeed, as this Court stated in *IWC v. Superior Court, supra*, 27 Cal.3d at 734, "[t]he likely chagrin of the regulated should not obscure the underlying social need that prompts the regulation." *IWC v. Superior Court*, 27 Cal.3d at 734.

J. Policing the Work Place *is* the "Shaping Employer Conduct" Goal That This Court Approved of in *Murphy*.

Amici argue that Plaintiffs' interpretation of § 512 would be an unworkable standard requiring employers to "police" the workplace. This argument is ridiculous. Employers have to "police" their workplace daily. Employers have to comply with OSHA regulations, comply with EPA regulations, prevent racial discrimination, prevent sexual harassment,

ensure tax withholding and compliance, and ensure that employees use necessary safety devices.

In the restaurant industry, employers are required to make their employees wear hair nets, follow sanitation regulations, comply with California's Alcohol Beverage Control regulations, comply with California's smoke-free bar & restaurant laws, use proper holding temperatures for potentially hazardous foods, use adequate cooking temperatures for potentially hazardous foods, conduct proper personal hygiene before any food handling, and properly wash fruits and vegetables.

Employers are responsible for the acts, omissions, torts, intentional torts and even the criminal acts of their employees.

Of course, the concept is called Respondeat Superior:

> The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts."

Lisa M. v. Henry Mayo Newhall Memorial Hospital, 12 Cal.4th 291, 296-297 (1995).

The California Labor Code and the Wage Orders require the employer to similarly "police" the workplace. Examples include § 510, which requires employers pay employees for all overtime worked and § 226, which requires employers to keep accurate time records.

These wage laws are soundly based upon the concept that the employer controls the workplace. "In all such cases it is the duty of the management to exercise its control and see that work is not performed if it does not want it to be performed." *Morillion v. Royal Packing* (2000) *Co.*, 22 Cal.4th 575, 584-585, quoting 29 C.F.R. § 785.13. The principles enunciated in *Morillion* control an employer's obligation to relieve employees of all duty during a required meal period. The principles apply when calculating overtime and the total number of hours worked in a day or week. *Morrilion*, *supra*, 22 Cal.4th at 584-585. They also apply when calculating the number of meal periods and rest periods that do not comply with Labor Code Section 512 and the wage orders.

Remember, one of the stated goals of Labor Code Section 512 is shaping employer conduct. Policing the workplace is exactly how the employer's conduct shaping takes place. That is, by employers policing the workplace and making sure that their workers actually are relieved of all duties for 30 minutes. Amici in support of Brinker now complain about

having to shape their conduct. However, this is the very conduct which the Legislature intended to be shaped. And it is the very employer shaping conduct that this Court approved of in *Murphy*.

Amici's complaint about employers having to "police the workplace" misses the mark. Employers policing the workplace to ensure workers are actually relieved of all duties for 30 minutes is the very conduct which the Legislature intended to shape by passing Labor Code Section 512 and 226.7.

The Amici advance a "woe is us" argument. They lament how employers are powerless to comply with these arduous meal and rest period requirements. It is ridiculous to suggest that employers are helpless to monitor whether employees work through meal periods.

If employers do not want to pay the premium wages for employees who work through meal periods or work overtime hours, then the employer is free to establish compliance procedures, monitor employees, keep accurate records, and discipline employees who work excessive overtime or do not take required meal periods. Employers routinely monitor and enforce compliance with overtime laws just as they do with tax laws and citizenship laws, etc.

IV. EVEN UNDER AMICI'S INTERPRETATION THAT MEAL AND REST PERIODS NEED ONLY BE MADE AVAILABLE, THIS MATTER IS APPROPRIATE FOR CLASS TREATMENT

A. Having to Prove Employer Coercion for Each Missed Meal and Rest Period Violation under the Amici's Theory of the Case Does not Mean Individual Issues Will Predominate.

The Amici wrongly contend class treatment of meal and rest period claims would degenerate into individualized mini trials to determine whether missed meal and rest periods were owing to employer coercion or employee choice. The Amicus California Employment Law Council argues that, "[w]hether and why a particular employee takes, shorts, or misses a meal period will vary dramatically from employee to employee – and even over time for the same employee – depending on any number of variables (e.g., supervisor, work location, work schedule, nature of job, etc.).[30]

This Court rejected this exact same argument in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), as discussed in Plaintiffs' Opening and Reply Briefs on the Merits.

In *Sav-on*, the defendant had classified plaintiffs as salaried managers who were purportedly exempt from overtime wages. *Sav-on, supra*, 34 Cal.4th at 324. In seeking certification, plaintiffs argued that the members had been misclassified based on their job title and job

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30 Amicus Brief for California Employment Law Council, pg. 32.

descriptions, without reference to their actual work. *Id.* at 325. Plaintiffs further argued that, despite their job titles and descriptions, the managers actually spent most of their time performing non-exempt tasks, which therefore entitled them to overtime. *Id.*

Defendants in *Sav-on* made the same arguments being made here. Namely, the defendant in *Sav-on* argued that "determining its liability, if any, for unpaid overtime compensation necessarily requires making individual computations of how much time each class member actually spent working on specific tasks." *Sav-on, supra,* 34 Cal.4th at 328. The *Sav-on* defendant further argued that "the actual activities performed by its [managers], and the amount of time spent by each [manager] on exempt activities...varied significantly from store to store and individual to individual, based on multiple factors, including store location and size, physical layout, sales volume, hours of operation, management structure and style, experience level of managers, and number of hourly employees requiring supervision." *Id. at* 325.

This Court rejected defendant's arguments and affirmed the trial court's grant of certification in *Sav-on*. The Court reasoned:

> We long ago recognized 'that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action.' Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility and

damages does not mean individual fact questions predominate.[31]

The trial court here considered the individual issues that may arise under Brinker's and the Amici's legal theory. The trial court rejected, however, that the individual inquiries were such that they would predominate over those common to the class. Specifically, the trial court recognized that, if accepted, Defendants' theory "may require some individualized discovery," but that "the common alleged issues of meal and rest violations predominate." (Minute Order, Superior Court of California, County of San Diego, No. GIC834348, 1PE2 (July 6, 2006).

Accordingly, for the same reasons in *Sav-on*, the Court should reject the Amici's argument and uphold the certification order, regardless of how the Court comes down on the substantive legal issues.

B. Plaintiffs' Proposed Random Sampling, Survey, and Statistical Evidence Would not be Incurably Biased or Deprive Defendants of the Right to Cross Examination.

To begin, the Amici's criticism of Plaintiffs' proposed survey and statistical evidence is premature and unfair. As in *Sav-on,* the trial court granted certification before it was apprised of exactly how such evidence was going to aid in managing the case. Following the class certification

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[31] See, *Sav-on, supra*, 34 Cal.4th at 334, quoting from *Collins v. Rocha,* 7 Cal.3d 232, 238 (1972); *Reyes v. Board of Supervisors*, 196 Cal.App. 3d 1263, 1278 (1987).

order, the trial court ordered the parties to exchange expert reports on survey and statistical evidence and return to the court for discussions on how the case would be managed.[32] Before the trial court was scheduled to hear how the case would be managed via surveys and statistical evidence, the Court of Appeal granted the writ and stayed all further proceedings. Thus, the Amici, like Brinker, attack the propriety of the class certification order on a post-certification hearing the trial court was never given the chance to conduct.

This notwithstanding, the Amici's criticism that the use of survey and statistical evidence in meal and rest period class actions could not eliminate bias and would deprive the defense of its right to cross examination is misguided.[33]

1. Bias Could be Accounted for and Eliminated From Survey Responses.

The National Retail Federation, et al. attacks the use of survey evidence for meal and rest period cases on the grounds that such surveys could never eliminate bias.[34] Besides identifying and giving examples of what bias is, The National Retail Federation simply assumes and concludes that any survey results in this case would be incurably biased and thus not reliable sources of why meal and rest periods were missed.

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32 2RJN7522-7548.

33 See Amicus Brief for National Retail Federation, et al., pg. 37-54.

34 See Amicus Brief for National Retail Federation, et al., pg. 37.

Again, the final decision of how survey and statistical evidence were to be used in this case never occurred, because the Court of Appeal stayed all further trial proceedings before the manageability hearing took place. Prior to that, though, Defendants were given the opportunity to take the deposition of Plaintiffs' survey and statistician expert, Dr. Jon A. Krosnick. In his deposition, Dr. Krosnick laid out three general concerns for maintaining the integrity of a survey, one of which was factoring in and eliminating "strategic answering," or bias. (See Real Parties in Interest's RJN, 12/17/07, Ex. 1, 125:22.). Dr. Krosnic testified that there are well-established statistical procedures used for identifying bias and correcting the data so as to eliminate its effect on the survey results. (See Real Parties in Interest's RJN, 12/17/07, Ex. 1, 125:22 thru 127:5).

In summary fashion, Dr. Krosnick identified two general ways of eliminating the effect of bias from the survey results. One is to ask the respondents whether they are aware of the pending lawsuit and then compare the survey results of those who were aware of the suit with those who were not. (See Real Parties in Interest's RJN, 12/17/07, Ex. 1, 125:21 thru 126:15). If those who knew of the lawsuit provided substantially different answers from those that did not, Dr. Krosnick testified that well-established statistical procedures could correct the data without sacrificing the survey's integrity. *Id.* at 126:9-15. Dr. Krosnick also explained how

administering a "mini version of an oath promising to tell the truth in the survey" was a scientifically effective way of increasing the accuracy of the reports provided in the survey. *Id.* at 126:16 thru 127:10.

2. Defendants Would Be Given an Opportunity to Cross Examine a Representative Sample of Those Surveyed.

The National Retail Federation, et al. also argues that the use of survey evidence will deprive Defendants the right to cross examine those who participated in the survey.[35] This is simply untrue. As in *Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715, 751 (2004), Defendants will be given the opportunity to depose a representative sample of those surveyed.

The use of random sampling followed by representative testimony is an acceptable and superior method of adjudicating the nearly 100,000 claims in this case on the isolated issue of *why* a class member missed a break. The right to cross-examine the representative sample of the survey respondents fully satisfies Defendants' due process rights to cross examination. In deposing a representative sample, one that is agreed on by the parties and/or ordered by the Court, Defendants will be afforded ample opportunity to cross examine the class members "and test the credibility" of

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35 See Amicus Brief for The National Retail Federation, et al., pg. 40.

the survey respondents.[36] Thus, while sampling and individualized adjudication offer equivalent due process outcomes in terms of accuracy, sampling will spare class members and the courts the inconvenience, burdens, and delays attendant to case-by-case adjudication of over 100,000 claims.[37]

Class members will benefit by receiving their individual damage awards sooner. Both parties will benefit from the substantial reduction of transactional costs, the expense of which will impose a particular burden on Defendants by virtue of their obligation to pay not only their own attorneys' fees and costs, but also those of the individual Plaintiffs, if they prevail. A quicker resolution offers Defendants an additional advantage: the sooner the case is over, the less Defendants will be liable for in terms of pre-judgment interest.[38]

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[36] See Amicus Brief for National Retail Federation, et al. pg. 40.

37 Contrary to the arguments made by Amicus Curiae The U.S. Chamber of Commerce, pg. 50-57, Plaintiffs' proposed use of survey and statistical evidence would also not deprive Defendants the right to present their defense of waiver. Waiver is a defense, which Defendants have the burden of proving, and which cannot be asserted as a basis to deny class certification. *See, Sav-on, supra*, 34 Cal.4th at 337; *Lockheed Martin Corp. v. Superior Court,* 29 Cal.4th 1096, 1105, n. 4 & n.4 (2003). See also detailed discussion on this in Plaintiffs' Opening Brief on the Merits, pg. 127-132.

[38] All of these benefits, taken together, satisfy the public policy of "encourag[ing] the use of the class action device." *Sav-on, supra*, 34 Cal.4th at 340, quoting from *Richmond v. Dart Industries, Inc.*, 29 Cal.3d

C. Other Than the Class Action Vehicle, No Other Adequate Enforcement Mechanism Exists to Vindicate Employee Rights to Meal and Rest Periods and Shape Employer Behavior.

Some of the Amici suggest that, under a "make available" standard, outside of the class action context an aggrieved employee could still file an individual lawsuit or an administrative wage claim for violations. This Court, in *Gentry*, rejected this same argument and reconfirmed the public policy reasons behind allowing wage claims to proceed on a class basis.

In *Gentry*, this Court reasoned that "the existence of an anti-retaliation statute...and an administrative complaint process undermines [the point] that fear of retaliation will often deter employees from individually suing their employees. *Gentry*, *supra*, 42 Cal.4th at 461. This Court explained that employees' very real fear of retaliation, coupled with the time and expense involved with filing an individual claim, would, in many instances, deter employees from doing anything and induce them "quietly to accept substandard conditions." *Id.* at 460, citing to *Mitchell v. DeMario Jewelry*, 361 U.S. 288. 292 (1960).

Expounding further on this, the Court in *Gentry* opined:

462, 473 (1981) ("'By establishing a technique where by the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress from claims which would otherwise be too small to warrant individual litigation.'").

> [E]mployees will seldom have detailed personal records of hours worked. Their case ordinarily rests on the credibility of vague recollections and requires them to litigate complex overtime formulas and exemption standards. For current employees, a lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security and prospects for promotion. If the employee files after termination of employment, the costs of litigation may still involve travel expenses and time off from work to pursue the case, and the value of ultimate recovery may be reduced by legal expenses.

Gentry, *supra*, 42 Cal.4th at 458.

Similar to overtime claims, not allowing meal and rest period claims to proceed as class actions would undermine the enforcement of these claims. This undermining of enforcement goes directly to the heart of the shaping employer conduct goal this Court announced in *Murphy*. Without enforcement, there is no ancillary result of shaping employer conduct. Thus, the only way to effectuate the stated goals is to allow meal and rest period claims to proceed as class actions.

V. CONCLUSION

The Court of Appeal's judgment should be reversed and the class certification order reinstated. Alternatively, the case should be remanded for the trial court to consider class certification anew.

Dated: October 8, 2009

Respectfully submitted,

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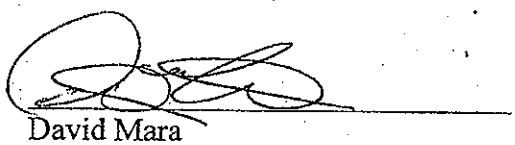
CERTIFICATE OF COMPLIANCE WITH WORD COUNT REQUIREMENT

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 13,699 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: October 8, 2009



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On October 8, 2009, I served the foregoing document(s) described as

REAL PARTIES' OMNIBUS ANSWER TO AMICUS CURIAE BRIEFS IN SUPPORT OF PETITIONERS

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Executed October 8, 2009 at San Francisco, California.

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