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.

APPLICATION OF CALIFORNIA LABOR FEDERATION, AFL-CIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST
and
BRIEF OF CALIFORNIA LABOR FEDERATION, AFL-CIO, AS AMICUS CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST

Donald C. Carroll (Cal. S.B. 34569)
Charles P. Scully, II (Cal. S.B. 87704)
Law Offices of Carroll & Scully, Inc.
300 Montgomery Street, Suite 735
San Francisco, CA 94104
Telephone: 415-362-0241
Facsimile: 415-362-3384
Email: Carr_Scu@pacbell.net
Attorneys for Amicus Curiae
California Labor Federation, AFL-CIO

APPLICATION OF CALIFORNIA LABOR FEDERATION, AFL-CIO , FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE:

The undersigned respectfully asks permission to file an amicus curiae brief under Rule 8.520(f) in support of the Real Parties in Interest on behalf of the California Labor Federation, AFL-CIO (the "Federation").

The Federation is the California state body chartered by the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). The Federation is a federation of affiliated labor organizations which represent in excess of two million workers in the State of California.

One of the principal issues in this case concerns Labor Code §512 which was added to our law by A.B. 60, the Eight Hour Day Restoration and Workplace Flexibility Act, in 1999. The issue is whether employers must affirmatively provide an off-duty meal period of at least 30 minutes or whether employers need only provide time off for a meal if an

employee asks to take a meal period, as the Court of Appeal held.

The Federation is interested in this issue because the Federation was the sponsor of A.B. 60. The Opinion of the Court of Appeal is contrary to what the Federation intended and what the Legislature intended.

The Federation's affiliates and their members also are interested in this issue and will be directly affected by the decision in this case. If employers need not ensure that duty free meal breaks are actually given to workers, then unions must affirmatively negotiate such meal periods. They may no longer assume that the actual giving of duty-free time is a fundamental minimum labor standard imposed by law for the welfare of all California workers. California workers will get off-duty meal periods only if and when they ask for them, provided employees are ready to brave the possible displeasure of supervisors and owners.

The Federation proposes to limit its amicus brief to the issue concerning the legal nature of meal periods. This is consistent with its role as the sponsor of A.B. 60 which added §512 to Labor Code. The Federation has been involved over all the years in the legislative and

Industrial Welfare Commission development of meal breaks and believes it can succinctly show what the historical understanding was regarding an employer's duty to provide a duty free meal period which was then quite naturally and seamlessly incorporated by the Legislature into §512.

The Federation also intends to critique the Opinion's reasoning in ways not yet obviously done. The Opinion's reasoning if adopted would give employees the personal "freedom" to ask for a meal period or not. We believe this individualism has the capacity to destroy the whole notion of fundamental minimum labor standards.

In response to Rule 8.520(f)(4), no party or counsel for a party has authored the proposed brief in whole or in part. No party or counsel for a party, and indeed no person, save the Federation itself, has made a monetary contribution to fund the preparation or submission of the following amicus brief.

The proposed brief follows. There is also a separately filed

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motion for judicial notice.

Executed at San Francisco, California, this 17th day of July, 2009.

LAW OFFICES OF
CARROLL & SCULLY, INC

By: _____
DONALD C. CARROLL

By: _____
CHARLES P. SCULLY, II
Attorneys for
California Labor Federation,
AFL-CIO

BRIEF AMICUS CURIAE OF THE CALIFORNIA LABOR FEDERATION, AFL-CIO, IN SUPPORT OF REAL PARTIES IN INTEREST

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
C.R.C. Rule 8.208

The following application and brief are made by the California Labor Federation, AFL-CIO, an unincorporated state affiliated body of the American Federation of Labor - Congress of Industrial Organizations. Various labor organizations in the State of California are affiliated with it. The Federation is not a party to this action. Nonetheless the Federation knows of no entity or person that must be listed under (d)(1) or (2) of rule 8.208.

Date: July 17, 2009

LAW OFFICES OF
CARROLL & SCULLY, INC.

DONALD C. CARROLL
Attorneys for California Labor Federation, AFL-CIO as Amicus Curiae in Support of Real Parties in Interest

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I. INTRODUCTION

Pursuant to Rule 8.520(f) of the California Rules of Court, and after leave granted under the Rule, the California Labor Federation, AFL-CIO (the "Federation") submits this amicus curiae brief in support of the plaintiffs below and real parties in interest in this Court.

The Federation is the California state body chartered by the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). The Federation is a federation of affiliated labor organizations which represent in excess of two million workers in the State of California.

One of the principal issues in this case concerns Labor Code §512 which was added to our law by A.B. 60, the Eight Hour Day Restoration and Workplace Flexibility Act, in 1999. The issue is whether employers must affirmatively provide an off-duty meal period of at least 30 minutes or whether employers need only provide time off for a meal if an employee asks to take a meal period, as the Court of Appeal held.

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contrary to what the Federation intended and what the Legislature intended.

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The Federation proposes to limit its amicus brief to the issue concerning the legal nature of meal periods. This is consistent with its role as the sponsor of A.B. 60 which added §512 to Labor Code. The Federation has been involved over all the years in the legislative and Industrial Welfare Commission development of meal breaks and believes it can succinctly show what the historical understanding was regarding an employer's duty to provide a duty free meal period which

was then quite naturally and seamlessly incorporated by the Legislature into §512.

The Federation also intends to critique the Opinion's reasoning in ways not yet obviously done. The Opinion's reasoning if adopted would give employees the personal "freedom" to ask for a meal period or not. We believe this individualism has the capacity to destroy the whole notion of fundamental minimum labor standards.

II. ARGUMENT

1. Historically, the California IWC generally always required employers to provide a duty free meal period.

From the very beginning California's Industrial Welfare Commission (IWC) never allowed employers simply to make available to a worker a meal period only if and when the worker asked for it. To the contrary, from the time the IWC first had statutory authority to set the standard conditions of labor for women and children up through the years after its authority was extended to males as well, the IWC has required as a general rule that employers actually provide a duty free meal period in which an employee can eat, rest, or pursue personal ends,

even off the employer's premises.

(A) The period of women and children.

From 1913 and "[f]or the first 60 years of its existence, the IWC's mission was to regulate the wages, hours and conditions of employment of women and children employed in this state in furtherance of such employees' 'health and welfare'... [and] beginning in 1916 – promulgated a series of industry – and occupation – wide 'wage orders', prescribing various minimum requirements with respect to wages, hours and working conditions to protect the health and welfare of women and child laborers." Industrial Welfare Commission v. Superior Court (1980) 27 Cal. 3d 690, 700.

The first meal period provision for any Order appeared in the 1916 Wage Order 2 regulating the fruit and vegetable canning industry:

> "(20) TIME FOR MEALS. – Every woman and minor shall be entitled to at least one hour for noon day meal; provided, however, that no woman or minor shall be permitted to return to work in less than one-half hour."

Federation's RJN Tab1[1], (emphasis added).

In 1932 the IWC issued a "Sanitary Order" applicable to any "occupation, trade or industry" which said:

> "10. MEALS. Every woman and minor shall be entitled to at least one (1) hour for meals; provided, however, that no woman or minor shall be permitted to return to work in less than one-half (1/2) hour, and provided further, that no woman or minor shall be permitted to work an excessive number of hours without a meal period."
>
> Id. at Tab 2, (emphasis added).

Wage Order 5, which is in issue in this action, appeared in 1943 for the Public Housekeeping Industry.[2] It clearly required an employer

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1 RJN refers to the Federation's Request for Judicial Notice lodged/filed herewith.

2 Wage Order 5 had a predecessor, Wage Order 12, for Hotels and Restaurants, first issued in 1919. Wage Order 12 did not have a meal provision. Instead, for the first time the IWC prescribed the even more fundamental requirement of one day of rest in seven days of work. Previously, workers in hotels and restaurants did not even enjoy a day of rest. Id. at Tab 3. From 1932 on the Sanitary Order,

to relieve an employee of all duties:

> "3. Hours
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) No employer shall employ any woman or minor for a work period of more than five (5) hours without an allowance of not less than thirty (30) minutes for a meal. If during such meal period the employee cannot be relieved of all duties and permitted to leave the premises, such meal period shall not be deducted from hours worked. However, if the employee's work for the day will be completed within six (6) hours, such meal period need not be given."
>
> Id. at Tab 4, (emphasis added).

In 1945 Wage Order 5 was codified in Title 8 of the

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supra, required a meal period.

Administrative Code in section 11050. Then in 1947 it was amended slightly but still retained the general minimum labor standard requirement of an off duty meal period:

> "10. Meal Period.
>
> No employee shall be required to work more than five (5) consecutive hours after reporting for work, without a meal period of not less than thirty (30) minutes. An 'on duty' meal period will be permitted only when the nature of the work prevents an employee from being relieved of all duty, and such 'on duty' meal period shall be counted as hours worked without deduction from wages."
>
> Id. at Tab 5.

In 1952, Wage Order 5 was amended to return to the language "No employer shall employ ..." but otherwise not really changed. Id. at Tab 6. Wage Order 5 – 57 made no change to the Meal Period language.

In 1963 the Meal Period provision of Wage Order 5 was amended, and then perpetuated without change in 1968. This was the form of the

language in effect immediately before the IWC's jurisdiction was expanded to include men. This 1968 language was:

> "11. Meal Periods
>
> (a) No employer shall employ any woman or minor for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes; except 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 employer and employee. Unless the employee is relieved of all duty during a thirty (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.
>
> (b) In all places of employment where employees are required to eat on the premises, a

suitable place for that purpose shall be designated."

Id. at Tab 7.

(B) The Period of all Employees

In the early 1970s federal courts found California's protective regulations for women were keeping women out of jobs in violation of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, as this Court explained in Industrial Welfare Commission v. Superior Court, supra, 27 Cal. 3d at 700-701. The California Legislature responded, not by repealing these protective provisions, but by expanding the mandate of the IWC to "all" employees in the State. Id. at p. 701. As this Court also observed, beyond a simple extension of the IWC's authority to men, the Legislature in 1973 "restated the commission's responsibility in even broader terms, directing the commission continually to review and to update its 'rules, regulation and policies to the extent found by the commission to be necessary to provide adequate and reasonable wages, hours and working conditions appropriate for all employees in the modern society.' (Italics added.) (§1173, enacted Stats. 1973, ch 1007, §1.5, p. 2002.)" Id. at p. 702.

(Emphasis added.)

The IWC tried to rush its duty to comply with this new mandate by convening just one wage board instead of separate wage boards for each 1968 Wage Order. The1974 Wage Orders were struck down (except for the minimum wage order) on the petition of this amicus in Henning v. Industrial Welfare Commission (1975) 76 C.C.H. Labor Cases ¶53639 and ¶53640 (San Francisco Superior Court). Because these 1974 orders were found to be void this amicus does not further describe their substantive content with respect to meal periods.

The subsequent 1976 Wage Orders thus presented the next official opportunity for the IWC to decide whether the meal period provision for women and children should be fully extended to men as well, due regard being given to what was then "appropriate for all employees in the modern society." Labor Code §1173. The IWC decided that the full extension to men was indeed warranted:

> "The Commission sees no reason to change its earlier findings that a 'duty free' meal period is necessary for the welfare for employees, and that 30

minutes is the minimum time that will serve the purpose. The section is sufficiently flexible to allow for situations in which such an arrangement is not possible...."

Statement of Findings By the Industrial Welfare Commission of the State of California In Connection with the Revision in 1976 of Its Orders Regulating Wages, Hours & Working Conditions, August 13, 1976, Federation's RJN at Tab 8 at page 14 thereof (emphasis added).

Wage Order 5–76 itself, effective October 18, 1976, made only the following underscored changes from what had been the regulation for women and children:

"11. Meal Periods.

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than thirty (30) minutes; except that when a work period is not more than six

(6) hours will complete the day's work, the meal period may be waived by mutual consent of employer and employees. Unless the employee is relieved of all duty during a thirty (30) minutes 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.

(B) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated." Federation's RJN Tab 9, (emphasis added).

In August, 1979, this Court found Wage Order 5–76 deficient because of the absence of an adequate statement of basis. California Hotel & Motel Assn. v. IWC (1979) 25 Cal. 3d 200. The Answer Brief

on the Merits, however, is inexact where it states no order applied to men before 1980. (See p. 4). It does not note that because the Order had been in effect since 1976 this Court directed that Wage Order 5–76 "remain operative" pending corrective action by the IWC which was to be taken within 120 days. 25 Cal. 3d at 216. On September 17, 1979 the IWC issued its Statement as to Basis for IWC Wage Order 5-80 which said with respect to the Meal Periods:

> "11. MEAL PERIODS.
>
> With regard to Section 11, Meal Periods:
>
> A 'duty free' meal period is necessary for the welfare of employees. The section is sufficiently flexible to allow for situations where that is not possible.
>
> The Commission received no compelling evidence and concluded that there was no rationale to warrant any change in this section, the basic provisions of which date back more than 30 years. Administrative exemptions are available if

warranted under provisions of Section 17 of this order." Federation'S RJN, Tab 10.

And, the Wage Order itself had Meal Period language identical to that in the 1976 Order. Id. Tab 11. No change was made to this language all through the 1980s until the early 1990s.

In 1993 the IWC amended Wage Order 5 to add a new subsection C to section 11, Meal Periods. This language allowed employees in the health care industry and working in excess of 8 hours to waive their second meal period, provided that such waiver was voluntarily done in a written agreement and capable of being revoked by an employee on one day's written notice. Federation's RJN Tab 12. The practical effect for employers in health care was that an employer did not have to seek an exemption from the IWC for such a purpose.

In April, 1997, a much different IWC eliminated the 8 hour day on petition of the Governor after the Governor could not convince the Legislature to do so. The IWC did so in five wage orders including Wage Order 5–98. In California Labor Federation v. Superior Court (1998) 63 Cal. App. 4th 982, 986–989, the Court of Appeal upheld the

IWC primarily on the basis that the IWC's action fell within the broad discretion given it by statute; and this Court denied review. California workers were left with the less protective rule of federal law which provided for overtime only after 40 hours in a week. Ibid. The IWC majority (and the Governor) said they were providing for more "flexibility" in work schedules. Labor was of the view that the law already provided the means for flexibility by petition to the IWC and thus the elimination of the 8 hour day was not required to gain flexibility.

As part of this same weakening of minimum labor standards in the declared interest of flexibility, the IWC also decided to invoke flexibility to allow all workers subject to Wage Order 5–98 (not just health care workers) to waive their second meal period:

> "In an effort to extend the same flexibility to other employees, as part of the general overtime review the IWC proposed to allow all employees covered by this order who work shifts in excess of eight total hours in a workday to voluntarily waive their right

to a meal period as long as certain protective conditions were met."

IWC Statement As To Basis, Wage Order 5–98, Federation's RJN Tabs 13 and 14.

Thus, the 1993 amendment allowing workers in the health care industry to waive their second meal period was now extended by the IWC to all covered workers including some of the lowest paid and most marginalized in our society on the claimed basis that the IWC was providing these employees "the freedom" to choose between leaving work one-half hour early or taking a second meal on a long shift. Ibid. Labor contended that employers ought to follow the formal IWC exemption request procedure to achieve such a result because it better protected workers; but employers claimed such exemption procedures were "too cumbersome", and the employers prevailed. Ibid.

It should be noted that the foregoing provision for waiver of a second meal period did nothing to change the historical requirement that an employer provide a duty free first meal period (and a second if not waived). The duty was not triggered only when an employee asked for

a meal period. But this 1997 amendment was also a warning to this amicus that the meal period provision was a potential target for further erosion in the name of flexibility and that this amicus could not depend on the IWC to protect workers as fully as this amicus believed proper.

2. The Eight Hour Day Restoration and Workplace Flexibility Act – A.B. 60

This amicus was the sponsor of A.B. 60, the Eight Hour Day Restoration and Workplace Flexibility Act. Stats. 1999, ch. 134. This was an attempt to have the Legislature itself deal with some of the flexibility issues.

The Act was passed by the Legislature and signed by the Governor. It effectively restored the 8 hour day and made clear the Legislature's disagreement with the Court of Appeal and the 1998 actions of the IWC. See uncodified section 1 of Stats 1999, ch. 134. The Legislature was interested in providing employers and employees flexibility in scheduling work without leaving the matter solely to the IWC. Thus, the Legislature also added Labor Code §511 to provide workers and employers a methodology for selecting "alternative work weeks".

When it came to meal periods, however, the Legislature wrote into the law through new Labor Code §512 a codification of the then historical duty of employers to provide a duty free meal and also added a requirement for a second meal period:

> "SEC. 6. Section 512 is added to the Labor Code, to read:
>
> 512. An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An 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."

Stats 2000, ch. 134, sec. 6.[3]

It will be noted that the language of the first sentence is essentially the same as before the IWC made changes in the law in 1998. Indeed, the Legislative Counsel correctly so noted in the official Legislative Counsel's Digest for the Act:

"Existing wage orders of the commission prohibit an employer from employing an employee for a work period of more than 5 hours per day without providing the employee with a meal period of not less than 30 minutes, with the exception that if the total work period per day of the employee is no more than 6 hours, the meal period may be waived by mutual consent of both the employer and employee.

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The Legislature declared IWC Wage Order 5–98, RJN Tab 13, and four others null and void. Uncodified section 21, Stats 2000, ch. 134.

> This bill would codify that prohibition and also would further prohibit an employer from employing an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, with a specified exception." (Emphasis added).

The Legislative Counsel is of course legal counsel for the Legislature (and for the Governor under certain conditions) and is charged with assisting the Legislature to understand in digest form what a particular bill purports to do. See generally Government Code §10207 and §10230 et seq. Presumably the Legislature relies on its lawyer when its lawyer tells it that the language chosen for a bill codifies prior law.

There is not a whiff of support, either in the text of the Act or in its legislative history, for the proposition that employers now, suddenly, had a new found flexibility to make meal periods voluntary, providing them only upon request of an employee. Specifically, the argument that the use of the word "provides" in fact masks such a radical departure

from the past is totally without support in either the text or in the legislative history of the Act. (We discuss the Court of Appeal's treatment of "provide" next.)

There is no evidence either that the use by the Legislature of the word "provide" caused an immediate shift in the IWC's understanding of what the law required of employers with respect to meal periods.

To the contrary, the IWC's understanding post-Act was expressly consistent with its pre-Act understanding. The Act directed the IWC to review its Wage Orders for compliance, and the IWC did so. In doing so the IWC also had to take into account S.B. 88, Stats. 2000, ch. 492, then recently enacted in September of 2000. Pertinent to the subject at hand, S.B. 88 added a subsection (b) to Labor Code §512 to give the IWC permission to adopt a meal period that would commence after six hours of work. Id. Sec. 1. S.B. 88 also amended Labor Code §516 to allow the IWC to amend working condition orders with respect to meal and break periods "except as provided in Section 512." Id. Sec. 4. The IWC took these S.B. 88 changes into account when in response to the directive given it by the Legislature in A.B. 60, it said with respect to

meal periods:

(1) "Wage Orders 1, 2, 3, 6, 7, 8, 9, 10, 11, 13 and 15 continue the preexisting requirement of a meal period for an employee working for a period of more than five (5) hours ..." (emphasis added);

(2) "and provide for a second meal period in accordance with Labor Code §512(a).";

(3) changed the first meal period from after 5 hours to after 6 hours for Wage Order 12;

(4) for employees who work shifts in excess of 8 hours those workers may voluntarily waive in writing one of their two meal periods (under certain conditions including a right of the worker to revoke on one day's notice); and

(5) because of testimony received regarding a lack of employer compliance with the meal and rest break requirements, an employer must pay an additional hour of pay for each work day that a meal period is not provided.

Statement of Basis, Federation's RJN Tab 15.

Wage Order 5-2001, effective January 1, 2001 as amended

reflected these changes. Federation's RJN Tab 16.

In subsequent years Wage Order 5-2001 was amended in 2002 and updated in 2005 to allow on-duty meal periods for employees responsible for 24 hour residential care for (i) unemancipated foster children and (ii) elderly, blind and developmentally disabled persons. Federation's RJN Tab 17.

In 2004, the current administration's DLSE attempted in the absence of a functioning IWC to adopt a regulation which would relieve employers, for the first time, from having to ensure that a meal period is provided. That effort by DLSE has been abandoned. See Opening Brief on Merits, p. 31 n. 14 and p. 60.

To summarize, from the very beginning the law generally required employers affirmatively to relieve women and children workers from all duty for a meal period. The law certainly could have changed when the IWC's jurisdiction was extended to males because the Legislature directed that the IWC take a fresh look at what was best for all employees in the modern society. No fundamental change, however, was made for meal periods. The IWC was also required to conduct a

"full review" at least once every two years to investigate the health, safety and welfare of California employees. In doing so the IWC has never deviated from generally requiring that employers provide a duty free meal period. When the meal period law was codified in 1999, the Legislative Digest says the Legislature only intended to codify prior law, i.e. a prohibition on doing anything else but affirmatively giving an employee a duty free meal period. Finally, the actions of the IWC after passage of the codified provision were only consistent with prior law.

In all of this there is not a hint that the Legislature intended the word "provide" to signal such a radical departure from the past as to allow employers to avoid the affirmative duty of providing a duty free meal period only until some employee first verbally asked for time to have a meal period.

3. The Court of Appeal opinion is clearly erroneous on the duty to provide a meal period.

The Court of Appeal erroneously ignores the foregoing legislative history. While Real Parties in Interest assure that significant parts of that history was made available to the Court of Appeal (Op. Brief on

Merits, p. 51), the Court's Opinion refuses to consider it. Slip Op. pp. 42-47. The Court of Appeal refuses to consider it because the Court of Appeal seizes upon the one word "providing" in Labor Code §512(a); finds "providing" to have a dictionary meaning of "to supply or make available"; and thereupon concludes, "[t]hus, from the plain language of section 512(a) meal periods need only be made available, not ensured, as plaintiffs claim." Slip Op. p. 42.[4]

This method of analysis is contrary to what this Court has said about alleged "plain meaning":

> "But the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word

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[4] The Court of Appeal also says, "Moreover, plaintiffs' interpretation of section 512(a) is inconsistent with the language allowing employees to waive their meal breaks for shifts of less than five hours." Ibid. The Court of Appeal does not explain this conclusion. Slip Op. pp.42-47.

or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. (*People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485]; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281].) An interpretation that renders related provisions nugatory must be avoided (*People v. Craft* (1986) 41 Cal.3d 554, 561 [224 Cal.Rptr. 626, 715 P.2d 585]); each sentence must be read not in isolation but in the

> light of the statutory scheme (In re Catalano (1981) 29 Cal.3d 1, 10-11 [171 Cal.Rptr. 667, 623 P.2d 228]); and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed (*Metropolitan Water Dist. v. Adams* (1948) 32 Cal.2d 620, 630-631 [197 P.2d 543])...."
>
> Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.

This amicus suggests, first, that the literal meaning (if such it really be which we do not believe is so) must give way to the Legislature's intent and to the spirit of §512(a) as developed in the first part of this amicus brief. Historically, women and children did not get a meal period only if they first asked for it nor did male workers after the IWC's jurisdiction was extended to all workers.

Second, the Court of Appeal's interpretation "renders related provisions nugatory". Specifically, all of the various provisions for "waivers", written or otherwise, in the statute and in the Wage Orders, become simply unnecessary if all an employer must do is make available

a meal period to a worker who asks for a meal break. This totally non-sensical result is well developed in detail by the Real Parties in Interest. See Opening Brief on the Merits, pp. 45-48. Further, if the Court of Appeal is correct there would be no difference between a meal period break and a rest break ("authorize and permit") where the text and history show only separate meanings.

The key word(s) in Labor Code §512(a) is not "providing", but rather an employer "may not employ" an employee, as Real Parties so well show. The word "providing" is simply the neutral term that covers both duties of an employer with respect to both types of breaks as Labor Code §226.7(b) makes so abundantly clear:

> "If an employer fails to provide an employee 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."
>
> (Emphasis added).

Third, the Court of Appeal has wrongfully chosen a result which better comports with its conception of preferable public policy. This amicus believes that such is the real basis for understanding the Opinion on this point. The Court of Appeal prefers the policy analysis of two federal district court decisions where the decisions were affected in great measure by those courts' concern for the practical effect of meal periods on large California employers. Thus, from White v. Starbucks Corp. (N.D. Cal. 2007) 497 F.Supp. 2d 1080, the Court of Appeal chooses to quote in part the following: "'The interpretation that White advances – making employers ensurers of meal breaks – would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts ...." Slip Op. p. 43. Similarly, the Court of Appeal also chose to rely on the following from Brown v. Federal Express Corp. (C.D. Cal. 2008) 2008 WL 906517 at *5-6: "[r]equiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous .... It would also create perverse incentives, encouraging employees to violate company meal

break policy in order to receive extra compensation under California wage and hour laws.'" Slip Op. p. 44.

Certainly, concern for the practical impact of scheduling meal periods, especially on large employers, is a legitimate policy-type consideration. Such has always been a policy-type consideration, first when the IWC was concerned with women and children and, up until now, when the IWC was concerned for all workers. Policy considerations, however, are for the Legislature (or the IWC under Labor Code §1173). Here the Legislature has already made the policy choice by codifying the historical requirement that an employer affirmatively schedule an employee for a duty free meal period, absent an applicable exception. It simply was not open to the Court of Appeal to justify its construction of the statute by its own evaluation of advisable or effective public policy. See generally California Federal S. & L. Assn. v. City of Los Angeles (1991) 54 Cal.3d 1, 23 [Concern for whether a statute is advisable/effective or prudent public policy is misplaced.] By requiring California workers to ask for a meal break before an employer has to "provide" one, the Court of Appeal favored

the scheduling difficulties of particularly large employers over the policy resolution reached by the Legislature in Labor Code §512.

The Court of Appeals additional concern with "perverse incentives" is nothing more than a collateral attack on this Court's opinion in Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal. 4th 1094. Certainly, this amicus does not defend a worker who might claim not to have had a meal break just in order to sue for the extra one hour compensation which was at issue in Murphy. To suggest, however, that Murphy created such "perverse incentives", without any factual support, and to conclude that therefore only workers who ask for a meal period and do not get it should have an action under Murphy goes beyond anything Murphy authorized. It substitutes a court's notion of policy for the policy choice historically made by the Legislature and the IWC. In the view of this amicus the Court of Appeal seems to have accepted some allegation that employees will game the system and to have concluded that, therefore, the historical protection of a meal period must be sacrificed by making employees first ask for a meal.

Thus, the Opinion misuses the plain meaning rule and substitutes

the policy values of certain courts for the policy choice made by the Legislature.

4. Respondent Brinker's plea of "Employee Freedom" is as misplaced as a policy choice as is the policy choice of the Court of Appeal favoring the scheduling burdens of larger employers.

Brinker contends that California employees should have the personal freedom to take a meal period or not: "The actual issue is whether an employee can choose, for whatever personal reason the employee may have, not to take the meal period that the employer makes available...." Answer Brief on the Merits, p. 2, emphasis in original.

This plea for "employee freedom" was not a ground adopted by the Court of Appeal. Nor should this Court adopt it now.

First, this appeal to employee freedom is nothing more than a disagreement with the Legislature and the IWC over how and in what manner flexibility in hours and conditions should be achieved with due regard for the welfare of all employees. The Legislature was aware of the need for flexibility in A.B. 60, provided it in the area of alternative work weeks, but then codified the prior law with respect to meal periods. This amicus as the bill's sponsor did not want a flexibility like

that now sought by Brinker. See supra p.17. Brinker cannot point to a single thing either in the text of A.B. 60 nor in the IWC Wage Orders to show that "employee freedom" to take time off, or not, suddenly became talismatic in interpreting what the Legislature intended. Plainly an employee retains the freedom to do what s/he wants during the off duty meal period, even to the extent of being able to leave an employer's premises. Despite some hyperbole to the contrary, the law has not and does not contemplate forced feeding. The law also does not contemplate that employees need to line up like Oliver Twist to request a meal. The employer has no such freedom to make off-duty meal periods elective.

Second, this appeal to employee freedom is a collateral attack on the very notion of minimum labor standards which provide protective legislation for the public welfare. It smacks of the modern heresy of individualism which Robert Bellah has described at length. Bellah et al., Habits of the Heart, University of California Press, 1986. It puts individual desires ahead of what is good for the larger group of California workers. Almost 30 years ago Justice Tobriner writing for this Court eloquently upheld the right of this state to legislate

fundamental minimum regulation of wages, hours and working conditions to protect the welfare of employees against claims by the employer community of preemption by federal law. Industrial Welfare Commission v. Superior Court (1980) 27 Cal. 3d 690. If the appeal to employee freedom is credited, however, then the meal period provision in our law is no longer a "minimum" labor standard assertable by the state under its police power because it becomes elective at the choice of an individual. "A 'minimum' by definition cannot be undercut." Bechtel Construction Inc. v. United Bro. of Carpenters Etc., 812 F.2d 1220, 1226 (9th Cir. 1987). [A state regulation allowing the California Division of Apprenticeship Standards to approve lower wage rates than those fixed by California's apprenticeship standards means the latter are no longer minimums and can be preempted by federal law]. This amicus asks this Court not to sanction a weakening of the meal period minimum by recourse to a self-serving claim of employee freedom.

It no doubt is true that many employees for varying reasons, and from time to time, do not want to take time off, as Brinker correctly asserts. But our law does not accommodate that when the public welfare

is at issue:

> "Any one [sic] may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."
>
> California Civil Code §3513

In Viceroy Gold Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996) a district court struck down Labor Code §§750 and 750.5 which provided for only 8 hour shifts for employees working in mines. The district court did so on the basis that the limitation was "highly onerous" to employees as well as employers, based on the remoteness of the mine and the need for travel, as was well demonstrated by the facts in the case. The Ninth Circuit correctly reversed because the hours limitation arose from a California fundamental minimum labor standard, the wisdom of which was up to the Legislature, not the district court.

Over the years employers have approached employees asking them to use their "freedom" to enter into agreements, oral or written, to vary one or more provisions of the Labor Code enacted for the welfare

of employees. A sample catalog is in the Division of Labor Standards Enforcement Policies and Interpretations Manual, §§23.1, 31.3 and 31.4 (www.dir.ca gov/dlse/DLSEManual/dlse-enfcmanual.pdf.) This appeal to employee freedom by Brinker is but an extension of this proclivity to use such claims of freedom to undermine protective legislation, this time the meal period provision.

A certain skepticism of this appeal to employee freedom is also in order because the U.S. Supreme Court has counseled such skepticism under analogous circumstances. Employers will often claim to be championing the statutory right of workers not to select a union to represent them. In Auciello Iron Works v. NLRB, 517 U.S. 781, 791 (1996) the Supreme Court said in part:

> "The Board is accordingly entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union, which is subject to decertification petition from the workers if they want to file one. There is nothing unreasonable in giving a short leash to the employer

as vindicator of its employees' organizational freedom." (Emphasis added).

The same skepticism is in order here too where the petitioners tell this Court that "the actual issue" in this case has to do with "employee freedom" of choice.

III. CONCLUSION

The Court is asked to reverse.

Dated: July 17, 2009

LAW OFFICES OF
CARROLL & SCULLY, INC.

By: _____
DONALD C. CARROLL

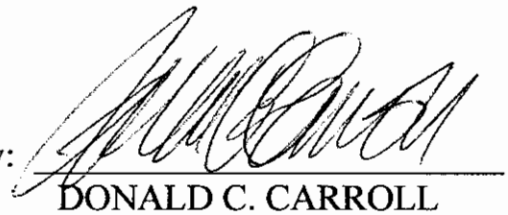
By: _____
CHARLES P. SCULLY, II
Attorneys for Amicus Curiae
California Labor Federation,
AFL-CIO

CRC RULE 14(c)(1) Certification

I, Donald C. Carroll, certify that the foregoing Brief of California Labor Federation, AFL-CIO, as Amicus Curiae in Support of Real Parties in Interest was prepared using WordPerfect and that the word count for the text and footnotes is 6,667 words, as reported by an appropriate word count command to the WordPerfect program.

DATE: July 17, 2009

LAW OFFICES OF
CARROLL & SCULLY, INC

By: 

DONALD C. CARROLL
Attorneys for Amicus Curiae
California Labor Federation AFL-CIO

CERTIFICATE OF SERVICE
(C.C.P. Section 1013A and 2015.5)

I, Kathryn Mullins, declare that I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is 300 Montgomery Street, Suite 735, San Francisco, California 94104.

Upon this day, I served the following document(s):

Application of California Labor Federation, AFL-CIO for Leave to File Brief Amicus Curiae in Support of Real Parties in Interest

and

Brief of California Labor Federation, AFL-CIO, as Amicus Curiae in Support of Real Parties in Interest

on the following party(s) by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I am readily familiar with the practice of the Law Offices of Carroll & Scully, Inc. for the collection and processing of correspondence for mailing with the United States Postal Service. I deposited each such envelope, with first class postage thereon fully prepared, in a recognized place of deposit of the U.S. Mail in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Personal Service: I personally delivered the above document(s) to the office of the addressee on the date shown herein.

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whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.

(D) By Overnight/Mail Courier: By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

(E) By Facsimile: I served such document(s) via facsimile electronic equipment transmission (fax) on the parties in this action, pursuant to oral and/or written agreement between such parties regarding service by facsimile by transmitting a true copy to the following facsimile numbers:

TYPE OF SERVICE	ADDRESSEE	PARTY
(A)	Rex S. Heinke Johanna R. Shargel Akin Gump Srauss Hauer & Feld 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Petitioners Brinker Restaurant
(A)	Karen Joyce Kubin Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105	Petitioners Brinker Restaurant

(A) Laura M. Franze — Petitioners
M. Brett Burns — Brinker Restaurant
Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071-2627

(A) Timothy D. Cohelan — Real Parties in Interest
Isam C. Khoury, Esq.
Michael D. Singer, Esq.
Cohelan Khoury & Singer
605 C Street, Suite 200
San Diego, CA 92101-5305

(A) Robert C. Schubert — Real Parties in Interest
Kimberly Ann Kralowec
Schubert Jonckheer Kolbe
& Kralowec LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111

(A) L. Tracee Lorens — Real Parties in Interest
Lorens & Associates
1202 Kettner Blvd., Suite 4100
San Diego, CA 92101

(A) William Turley — Real Parties in Interest
Robert D. Wilson III, Esq.
David T. Mara, Esq.
The Turley Law Firm, APLC
555 West Beech St., Suite 460
San Diego, CA 92101

(A) Clerk
California Court of Appeal
4th Appellate District, Division One
750 "B" Street, Suite 300
San Diego, CA 92101

(A) Honorable David B. Oberhotzer
San Diego County Superior Court
Hall of Justice, Dept. 67
330 W. Broadway
San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 20, 2009 at San Francisco, California.

Kathryn Mullins