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

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I. INTRODUCTION

This Court has consistently held that retroactive application of its civil case decisions is the rule, not the exception. Only in a handful of cases has this Court made a civil ruling prospective. In each of those cases, the Court explained that it was reversing a well-settled rule of law, generally of procedure rather than substance, resting on an unbroken line of appellate authority that the parties and others had reasonably relied upon, under circumstances where retroactive application would cause considerable hardship and disruption.

Amicus California Employment Law Council ("CELC") asks this Court either to ignore or radically re-write these principles by making the Court's upcoming ruling prospective only. None of the factors that might support a prospective-only application of that ruling exists in this case.

Most importantly, a decision affirming the trial court's class certification order could not establish a "new rule of law" no matter what the basis for this Court's ruling. The trial court's class certification ruling rested on its construction of several related provisions of the California Labor Code and Industrial Welfare Commission ("IWC") Wage Orders. As this Court has repeatedly explained in its cases addressing retroactivity, decisions in civil cases do *not* establish a new rule of law if they simply give effect "to a statutory rule," even one "that the courts had [previously] misconstrued." *Woosley v. California*, 3 Cal.4th 758, 794 (1992) (citations and internal quotations omitted).

Here, the parties and their amici principally ask this Court to resolve two disputed issues of statutory construction: 1) whether Brinker's early lunching policy violates the meal period timing requirements of paragraph

11 of the Wage Orders[1] and Labor Code sections 226.7 and 512 (as the trial court held in its July 15, 2005 order, 1PE204, 208); and 2) whether those Wage Order and Labor Code provisions impose on California employers an affirmative obligation to relieve their employees of all workplace duties during the employees' 30-minute meal periods.

Regardless of how the Court resolves those disputes, its ruling will construe and declare existing substantive law, and will not establish a new rule of law for purposes of retroactivity analysis. "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim." *Woosley*, 3 Cal.4th at 794 (quoting *People v. Garcia*, 36 Cal.3d 539, 549 (1984)). Indeed, Brinker acknowledged at oral argument that the law governing meal and rest breaks in California was unsettled and that whatever the Court ruled "would certainly be clarifying the law," rather than making new law.[2]

Even if the Court were to announce a truly "new" rule of law in its forthcoming decision, moreover, none of the other factors bearing on prospective versus retroactive application would justify carving out an exception from the presumption of retroactivity.

First, the substantive legal issues before this Court have never been decided on their merits by this Court, and have not been decided in a consistent or uniform manner by the Courts of Appeal. Consequently, even if CELC were able to show that California employers (or even some

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[1] Unless otherwise specified, "Wage Orders" refers to Wage Order 5-2001, codified at 8 Cal. Code Regs. §11050.

[2] Oral Argument transcribed from video posted at California Courts YouTube Channel, http://www.youtube.com/watch?v=IJBnSaUt0_M (last visited December 30, 2011).

significant number of them) had relied upon an incorrect construction of the applicable Wage Orders and Labor Code provisions, that reliance could not possibly have been "reasonable" for purposes of retroactivity analysis, given the high threshold for reliance established by this Court. *See, e.g.*, *Brennan v. Tremco Inc.*, 25 Cal.4th 310, 318 (2001) ("[I]n this case, we ... have certainly not disapproved 'of a long-standing and widespread practice expressly approved by a near-unanimous body of lower court authorities.'") (quoting *Droeger v. Friedman, Sloan & Ross*, 54 Cal.3d 26, 45-46 (1991)).

Second, considerations of "public policy and fairness" require retroactive application of the Court's upcoming substantive rulings. Although CELC warns of cataclysmic consequences if the trial court's class certification order is affirmed, a more realistic assessment demonstrates that a prospective-only decision would cause far greater harm to the low-income restaurant worker plaintiffs in this case—and to the underlying health and welfare public policies that California's meal-and-rest-break laws protect—than a retroactive ruling would cause to Brinker or other employers. No employer has any vested right to deprive its workers of legally required meal periods and rest breaks. To immunize from liability all employers who violated their legally required meal-and-rest-break obligations would not only leave the serious harm to those workers and the public interest unremedied, but it would also bestow on those non-compliant employers an unfair advantage over their law-abiding competitors (because depriving workers of mandated meal-and-rest-breaks results in lower comparative labor costs and increased comparative worker productivity).

Plaintiffs in this case are restaurant workers who earn their paychecks by preparing and serving food, cleaning up after customers, bussing tables, sweeping floors, operating cash registers, and performing other routine service tasks, often for the minimum wage plus whatever tips Brinker lets them keep. Like the plaintiffs and putative class members in

most of the other grant-and-hold cases (all of which were pleaded as class actions, which is, as a practical matter, the only basis on which most workers can ever vindicate their meal-and-rest-break rights, *see Gentry v. Superior Court*, 42 Cal.4th 443, 461-62 (2007); *Franco v. Athens Disposal Co., Inc.*, 171 Cal.App.4th 1277, 1295-96 (2009)), these plaintiffs are in an extremely vulnerable economic position, particularly in the current economy.[3] To tell these workers that their employer violated their statutory rights, but that they are not entitled to any remedy because that employer would suffer economic hardship if required to pay an additional hour of wages for each proven violation ($8.00, for a minimum wage employee) as Labor Code section 226.7 requires, would subvert the public policies underlying the Wage Orders and Labor Code and compound the harms that Brinker has already caused those workers to suffer.

CELC's arguments for prospective-only application of the Court's forthcoming decision do not rest on reasoned analysis. Instead, CELC peppers its brief with speculative, hyperbolic, and entirely one-sided rhetorical arguments that are entirely unsupported by factual citation to this record or any other record. CELC threatens dire consequences—a "tsunami" of class action lawsuits—if the trial court's class certification decision is affirmed. But colorful threats are no substitute for careful

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[3] *See, e.g., Brinkley v. Public Storage*, No. S168806 (review granted 1/14/09) (on-site storage facility workers); *Bradley v. Networkers Int'l*, No. S171257 (review granted 5/13/10) (installers); *Faulkinbury v. Boyd & Assoc.*, No. S184995 (review granted 10/13/10) (security guards); *Brookler v. Radioshack*, No. S186357 (review granted 11/17/10) (retail workers); *Hernandez v. Chipotle Mexican Grill*, No. S188755 (review granted 1/26/11) (fast-food restaurant workers); *Tien v. Tenet Healthcare*, No. S191756 (review granted 5/18/11) (hospital workers); *Lamps Plus Overtime Cases*, No. S194064 (review granted 7/20/11) (stockroom and sales floor workers); *Santos v. VITAS Healthcare*, no. S195866 (review granted 9/28/11) (hospice care workers).

analysis, and CELC's implied assumptions and careless predictions are illogical and overblown, just as its back-door attempt to re-argue the merits ignores the most critical statutory and regulatory language, and the considerable evidence demonstrating that plaintiffs' statutory construction is fully consistent with the legislative and regulatory purposes.

For all of these reasons, this Court's rulings on each of the substantive legal questions in this case should apply retroactively in accordance with the usual rule.

II. DISCUSSION

A. Retroactive Application of the Forthcoming Decision is Required Because the Court Will Not be Announcing a "New Rule of Law"

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." *Newman v. Emerson Radio Corp.*, 48 Cal.3d 973, 978 (1989); *see also Brennan*, 25 Cal.4th at 318. This rule "rests on the theory that the new decision does not really pronounce 'new' law but rather states what the law always was." *Grobeson v. City of Los Angeles*, 190 Cal.App.4th 778, 796 (2010) (citing *Casas v. Thompson*, 42 Cal.3d 131, 140 n.3 (1986)). "Exceptions" to the rule are "rare," even when a new decision "represent[s] a clear change in the law" and even when the change "could not have [been] anticipated prior to [the new] decision." *Newman*, 48 Cal.3d at 978, 982. Only the most "compelling and unusual circumstances" justify "departure from the general rule." *Id.* at 983; *see also Laird v. Blacker*, 2 Cal.4th 606, 620 (1992).

No such circumstances exist here. First, as a threshold matter, the Court's decision cannot possibly result in the creation of a "new rule of law," as that term has been used in the Court's retroactivity decisions. The parties' principal disputes concern matters of substantive statutory construction: the scope of an employer's meal period and rest break

obligations under the Wage Orders and Labor Code sections 226.7 and 512. Judicial decisions that declare the meaning of a statutory directive do not create a new rule of law for retroactivity purposes, but merely declare, or clarify, what the previously-enacted law already stated.

The threshold inquiry when an issue of retroactive application of a judicial decision has been raised is: "[D]oes the decision establish a new rule of law? If it does, the new rule may or may not be retroactive[,] but if it does not, no question of retroactivity arises, because there is no material change in the law ...." *Woosley*, 3 Cal.4th at 794 (quoting *People v. Guerra*, 37 Cal.3d 385, 399 (1984)); *see Donaldson v. Superior Court*, 35 Cal.3d 24, 36 (1983) (no question of retroactivity arises where decision does not establish a new rule or standard, but only elucidates and enforces prior law). When a Supreme Court ruling resolves a dispute over substantive statutory rights, that ruling is always retroactive, because it merely elucidates what the law was when the disputed provision was enacted or adopted. As this Court explained in *Woosley*:

> An example of a decision which does not establish a new rule of law is one in which we give effect "to a statutory rule that the courts had theretofore misconstrued." .... "Whenever a decision undertakes to vindicate the original meaning of an enactment, putting into effect the policy intended from its inception, retroactive application is essential to accomplish that aim."

3 Cal.4th at 794 (citing and quoting *People v. Mutch*, 4 Cal.3d 389, 394, 399 n.13, (1971); *McManigal v. City of Seal Beach*, 166 Cal.App.3d 975, 981-82 (1985); *People v. Garcia*, 36 Cal.3d 59, 549 (1984)).

Plaintiffs cannot predict what this Court will ultimately rule in *Brinker* (any more than CELC can). However, it is a near certainty that the Court will rest its decision on its construction of the Wage Orders and Labor Code provisions governing meal periods and rest breaks. Each of the

first four Questions Presented in plaintiffs' Petition for Review, which were the principal focus of the parties' and most amici's merits briefing, addressed the proper construction of provisions; and one or more of those same statutory and regulatory construction issues were also the focus of each of the post-*Brinker* grant-and-hold case decisions. *See supra* at 4 n.3.

CELC argues, as the principal basis for seeking a prospective-only decision, that California employers reasonably relied on Labor Code section 512's plain language (as CELC construes it) when they established their current meal-and-rest-break policies. CELC Br. at 1-3. Even if CELC had some factual basis for that speculative assertion about what California employers did, or what motivated them to do so (and putting aside the critical flaws in CELC's supposed "plain language" analysis, *see infra* at 25-33), CELC's "reliance" argument completely undercuts its "new rule of law" argument, because it reinforces plaintiffs' point that this is a case about statutory construction, not the continued vitality of a judicially created, extra-statutory rule.

Whatever this Court might ultimately conclude the IWC and Legislature intended, the Court's decision will not set forth a "new rule of law." Consequently, no possible basis exists for applying that decision only prospectively.

B. Even if the Court Were to Announce a "New Rule of Law," None of the Factors that Might in Some Exceptional Circumstances Warrant Prospective Application Applies to this Case

If the Court unexpectedly issues a decision that is *not* based on its construction of the Wage Orders and Labor Code provisions, and instead creates a "new rule of law" resting on some other set of governing principles, then, but only then, must the Court undertake the next step in the retroactivity analysis—a balancing of the equities.

Concluding that a judicial decision has created a "new rule of law" is only the beginning of the multi-factor retroactivity inquiry, not the end. The strong presumption of retroactivity still governs, even when the Court has announced a truly new rule, unless the proponents of prospective application can demonstrate that retroactive application would impose "unique burdens" that present "compelling and unusual circumstances justifying departure from the general rule." *Newman*, 48 Cal.3d at 983. This inquiry requires an equitable balancing of fairness and hardship to the litigants and to the general public, and generally focuses on two factors: 1) whether the prior rule was clearly well-established through decisions of this Court or a uniform and longstanding line of appellate authority upon which there was substantial and reasonable public reliance; and 2) whether the interests of fairness or public policy require an exception to the usual principle of retroactive application. *See, e.g., Newman*, 48 Cal.3d at 985-986; *Peterson v. Superior Court*, 31 Cal.3d 147, 152 (1982); *Grobeson*, 190 Cal.App.4th at 796-97 (citing *People v. Hicks*, 147 Cal.App.3d 424, 427 (1983)).

Neither of those factors would support prospective-only application of the Court's forthcoming decision, even if it announced a new rule of law.

1. Neither Brinker in Particular Nor California Employers in General Had a Reasonable Basis for Expecting that Their Proposed Construction of the Applicable Wage Order and Labor Code Provisions Would be Adopted by this Court

The first factor this Court considers in evaluating whether a new rule of law should be applied prospectively is whether it constitutes such a sharp break with previously settled case authority that the litigants and members of the general public should be found to have reasonably relied upon the previous rule remaining in effect. *See, e.g., Claxton v. Waters*, 34 Cal.4th 367, 379 (2004) (asking whether the new "judicial decision changes a

settled rule on which the parties ... have relied."). For purposes of this inquiry, the prior rule of law is only said to have been "settled" when a court of last resort has issued an authoritative decision establishing that rule as the governing law, or when that rule rests on longstanding and uniform appellate precedent from the Courts of Appeal. *See, e.g., Planning and Conservation League v. Department of Water Res.*, 17 Cal.4th 264, 274 (1998) (finding "no justification here to depart from the general rule of full applicability [where losing party] cannot claim reliance on a prior decision of this court or ... a consistent line of decisions from the Courts of Appeal making our contrary holding 'unforeseeab[le].'); *Newman*, 48 Cal.3d at 981-82 and cases cited.

In *Droeger*, for example, this Court declined to limit the retroactive application of its decision concerning the requirement of spousal consent for community real property transfers, because that "decision does not announce a 'new' rule of law or a change in the law [but] [r]ather ... resolves a conflict which existed in the appellate courts." 54 Cal.3d at 45. Prospective-only operation was inappropriate because "'it is undisputed that [our decision] did not overrule a prior decision of this court,'" and the principal appellate decision relied on by the losing party was "neither a long-standing precedent nor has it enjoyed near unanimous support in the lower courts." *Id.* (quoting *Newman*, 48 Cal.3d at 986).

Similarly, in *Brennan*, this Court concluded that its decision limiting malicious prosecution actions arising out of contractual arbitration proceedings would not apply prospectively only, because in rendering its decision the Court was "merely deciding a legal question, not changing a previously settled rule." 25 Cal.4th at 318. As the Court explained, "We have not overruled *any* decision predating [the events giving rise to plaintiff's claim], much less a prior decision of this Court" and "we have certainly not disapproved of a long-standing and widespread practice

expressly approved by a near-unanimous body of lower court authorities." *Id.* (emphasis in original) (citing *Droeger*, 54 Cal.3d at 45-46).

As these authorities demonstrate, judicial decisions in civil cases are made prospective only where, at a minimum, the new rule contradicts prior uniform appellate interpretations. Each case cited by CELC, for example, reversed a consistent and longstanding line of prior appellate authority. In *Claxton*, 34 Cal.4th at 378-79, this Court held certain evidence inadmissible that all prior appellate decisions had held admissible. In *Woods v. Young*, 53 Cal.3d 315, 330 (1991), the Court resolved a procedural statute of limitations question in a manner directly contrary to the "unanimous conclusion" of all "seven published Court of Appeal decisions." In *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 121-22 (2006), the Court rejected longstanding appellate decisions of another state that litigants may have reasonably believed were applicable to their cases. In *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 688-69 (1992), the Court interpreted a procedural filing deadline in a manner contrary to "unanimous and unquestioned" prior appellate authority. And, in *Estate of Propst*, 50 Cal.3d 448, 463 (1990), the Court changed a rule that had been applied in an unbroken series of appellate decisions, including three from this Court, dating back to 1932.

The briefs in *Brinker* focus principally on two issues of statutory construction: one concerning the proper timing of meal periods, and the other concerning the scope of an employer's obligation to relieve its workers of all duty during such meal periods. No prior decision of this Court resolved either of those issues (although prior decisions of this Court contained language supporting plaintiffs' substantive construction, and

plaintiffs' analysis of the important health and safety considerations underlying these provisions).[4]

A review of the extensive briefing in this case shows that plaintiffs' challenge to Brinker's early lunching policy (which CELC refers to as the "rolling five-hour" rule) raised an issue of first impression that had not been addressed by any Court of Appeal prior to the decision in this case. The trial court was therefore ruling on a clean slate when it held, in July 2005, that Brinker's classwide policy of requiring plaintiffs to take their meal periods during the first hour of their shift, if at all, was unlawful, because it required workers on a typical eight-hour shift to remain on duty for extended periods far exceeding five hours at a stretch. 1PE208. Notably, CELC does not cite *any* court decisions to support its position that California law allows employers to require "early lunching" or otherwise require workers to remain on duty without a 30-minute meal period for more than five hours at a stretch (or, as CELC concedes, up to "nine or more hours ... before a statutory entitlement to a second meal," CELC Br. 4).[5]

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[4] *See California Hotel & Motel Assn. v. Industrial Welfare Commission*, 25 Cal.3d 200, 205 n.7 (1979) (1976 Orders require "[a] meal period of 30 minutes *per 5 hours of work*" (emphasis added); *Murphy v. Kenneth Cole Productions*, 40 Cal.4th at 1094, 1113 (20007) (explaining that "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" (which is why plaintiffs contend that strict enforcement of these requirements is critical to protecting workers' interests, even where—indeed, especially where—the employer might protest that workers prefer to have the freedom to decide for themselves whether to work through a paid rest break or to skip a 30-minute meal period, *see infra* at 17-20).

[5] In a recently-filed supplemental brief, Brinker cites a federal district court decision, *Nguyen v. Baxter Healthcare Corp.*, 2011 WL 6018284 (C.D. Cal. Nov. 28, 2011), to support its position on meal period timing. *See* Brinker Supp. Br. filed 12/20/11. As discussed *infra* (at 31-32 & n.24,

As for meal period compliance, the briefing reveals a deep split among the Courts of Appeal concerning the proper standard to be applied in determining whether an employer has unduly interfered with its employees' right to an timely, unpaid 30-minute meal period. *Compare, e.g., Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied, with Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (2008), *review granted.*

A party cannot claim that it relied on settled law and that any change to that law was unforeseeable, where, as here, lower courts have issued inconsistent decisions and this Court has not yet addressed the question. *See, e.g., Planning*, 17 Cal.4th at 274; *Newman*, 48 Cal.3d at 982-983. There can be no reasonable reliance where "authoritative decisions so providing simply did not exist." *Grobeson*, 190 Cal.App.4th at 797 (citing *Caldwell v. Montoya*, 10 Cal.4th 972, 978-79 n.3 (1995)); *see also Droeger*, 54 Cal.3d at 44-45; *Newman*, 48 Cal.3d at 986-87.

Once this Court granted plaintiffs' Petition for Review in October 2008, and vacated the Court of Appeal's opinion, no reasonable employer could have relied on that vacated appellate decision as a definitive or reliable statement of California law. *See Newman*, 48 Cal.3d at 987 n.7 (grant of review in *Foley*, two years before decision issued, "put litigants on clear notice of the possibility" that Court might rule as it later did). Three years *before* that, moreover, Brinker itself was on actual notice that its early lunching policy might be declared unlawful, as the trial court ruled *in plaintiffs' favor* on the meal period timing question in July 2005—6½ years

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40-41 & n.30), that case ignores the most critical Wage Order and statutory language, and, more importantly for present purposes, cites no decisional law of this Court or any other court on the timing issue—other than the Court of Appeal's opinion in this case and another vacated "grant and hold" case.

ago. 1PE196-200, at 198:8-10 (stipulation submitting issue for decision); 1RJN7085-7338 (briefing); 1PE202-206, 208; *see also* 2RJN7339-7370 (No. D047509); 2RJN7371 (Brinker's unsuccessful writ petition).[6]

CELC's warnings about employers facing a "tsunami" of lawsuits are therefore completely unfounded. Because the three-year statute of limitations for Labor Code violations has already expired for claims that arose before this Court granted review in October 2008 (while the four-year statute of limitations under Business and Professions Code section 17200 will only have about six months left to run once the Court issues its opinion), the only employers will face future liability are those who stubbornly insisted on implementing meal-and-rest-break policies that they knew, or should have known, might be declared unlawful in this case.

2. Considerations of Fairness and Public Policy Require Retroactive Application of the Court's Forthcoming Decision

Even if Brinker and its amici could overcome these overwhelming hurdles, the Court's decision would still have to be applied retroactively as a matter of fairness and public policy.

As this Court explained in *Newman*, only in an exceptional case involving "unique burdens" that "present[] compelling and unusual circumstances" will an exception be made to the general rule of retroactivity. 48 Cal.3d at 983. Judicial decisions always result in an allocation of benefits and burdens to litigants and the general public. Indeed, "every time this court overrules authority developed in the lower courts, but not yet definitively determined, it affects expectations of litigants who stood to gain or lose under the approach taken below." *Id.*

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[6] "RJN" refers to plaintiffs' request for judicial notice filed in the Court of Appeal on February 2, 2007.

In the labor and employment field as in countless other areas, this Court has frequently issued groundbreaking decisions with enormous practical and economic consequences for plaintiffs and defendants alike, yet CELC has not identified any such ruling of substantive labor law that applied only prospectively.[7] That is because, as this Court recognized in *Newman*, "the hardship on parties who would be saddled with an unjust precedent if the overruling were not made retroactive, ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation." 48 Cal.3d at 981 (quoting Roger Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 Hastings L.J. 533, 545-56 (1977)).

a. Any Balancing of the Equities Concerning Retroactive Application of this Court's Rulings Strongly Favors Plaintiff Low-Wage Restaurant Workers

CELC presents an extremely one-sided argument about fairness, misstating critical facts in order to suggest that if the Court agrees with plaintiffs as to meal period timing, the victim in this case would be Brinker, which the Court will have held deprived its workers of timely meal-and-rest

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[7] *See, e.g., Pineda v. Bank of America, N.A.*, 50 Cal.4th 1389 (2010); *Martinez v. Combs*, 49 Cal.4th 35 (2010); *Gentry*, 42 Cal.4th 443; *Murphy*, 40 Cal.4th 1094; *Armendariz v. Foundation Health Psychcare Svcs.*, 24 Cal.4th 83 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163 (2000); *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000); *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 799-800 (1999); *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988). *See also Newman*, 48 Cal.3d at 979 (citing cases) ("As we shall explain, virtually all of this court's previous ground-breaking tort decisions have been applied retroactively, even when such decisions represented a clear change in the law. Exceptions have been rare and we will find no reason to add to that short list in this case.").

breaks as mandated by almost 90 years of regulatory law, rather than the vulnerable, easily exploited low-wage workers who come to this Court seeking relief for the statutory violations they suffered—and that Brinker did not remedy even after the DLSE's investigation, settlement and court-approved injunction in 2002, *see infra* at 16, the subsequent DLSE audit in 2003, *see id.*, and the ongoing complaints by Brinker's own employees, *see, e.g.*, 1PE100, 130 (complaints to managers about not being able to take meal or rest breaks). *See also* 1PE213 (Brinker did not pay additional hour's wage under section 226.7 to any workers).

CELC callously argues that meal-and-rest-break violations are "victimless" offenses (CELC Br. at 10)—a tone-deaf argument in a case affecting thousands of low-wage restaurant workers whom Brinker forces to work on their feet, many in hot kitchens or dishwashing stations, without a break for extended hours at a time. CELC then contrasts the claimed technical nature of Brinker's classwide violations with its forcefully stated, but factually insupportable, assertions about the supposedly dire consequences that "most California employers" must inevitably face if the Court's decision applies retroactively (CELC Br. at 1, 3, 4).

We start with *this* case, and the facts in *this* record. As plaintiffs have repeatedly shown (and as the trial court could reasonably have found in granting class certification in this case involving both unlawful classwide policies and "widespread de facto violations" as in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 328, 338 (2004)), defendant Brinker knew that the DLSE, and later the trial court, had declared aspects of its meal-and-rest-break policies to be unlawful. Yet not only did Brinker fail to remedy those violations, but it refused even to conduct any internal audit or investigation to determine the scope of the violations it was accused of committing—thus sending a clear signal to its managers that they would suffer no adverse consequences by continuing to cut labor costs by denying

workers their legal rights to timely meal periods and rest breaks. *See Savon*, 34 Cal.4th at 332 (evidence that defendant lacked meaningful compliance program and did not treat any class member as non-exempt supports trial court's discretionary finding of classwide violations more efficiently adjudicated in single proceeding).

Brinker has been on notice since at least 2002—almost ten years ago—that the DLSE considered its meal and rest period policies to be unlawful, when Brinker agreed to pay a $10 million settlement to its workers after reviewing hundreds of pages of DLSE documents itemizing its extensive violations of California meal and rest break law. 2PE348-68, 18PE4840-44 (stipulated injunction). As to "early lunching" in particular, Brinker has known since at least the DLSE's 2003 follow-up audit in Santa Clara that the DLSE considered that policy unlawful. 21PE5770-71 ("Violations found: . . . 1. Meal periods were not provided for every five (5) hours worked. Some were either taken in the first hour or greater than 5.25 hours late. Some even was taken after 6.5 hours later."). And, of course, the trial court in July 2005 had concluded that Brinker's "early lunching" policy was unlawful (thus triggering Brinker's first, unsuccessful writ petition). *See* 1PE204, 208.

Even after these developments, Brinker did not change—or even re-evaluate—its unlawful policies. To the contrary, Brinker's own PMK witnesses, Director of Human Resources and Compliance Ginger Hukill and Legal Compliance Manager Barbara Youngman, both testified that Brinker's early lunching policy continued unabated even after the DLSE's enforcement activity and even after that trial court found that policy to be unlawful. 1PE266, 2PE329, 440, 456-57. Joseph Taylor, Brinker's Vice President and Head of Corporate Compliance, similarly testified that as of the date of his deposition, Brinker had still made "no effort to make sure it was in compliance with California law or the DLSE injunction" (which

remained in effect through 2006, 18PE4840-44). *See* 2PE451, 21PE5936. This is as far from "reasonable reliance" as could possibly be imagined. Surely the trial court had a rational basis for concluding that Brinker had a classwide policy of deliberate head-in-the-sand non-compliance, which could only be effectively remedied on a classwide basis.

CELC's arguments are no more persuasive when applied to California employers as a whole. In making its threats of looming catastrophe, CELC relies on two critical, but unstated and unsupportable assumptions. First, it assumes that "most" California employers, like Brinker, impose early lunching policies on their workers in violation of California law. Second, it assumes that those employers "altered" their formerly lawful meal period timing policies in 2000, in "reasonabl[e] reli[ance]" upon the "literal words" of the Labor Code (CELC Br. at 4), and did not revisit the legality of those policies despite the Legislature's express incorporation of the Wage Order language in Labor Code section 226.7, or the IWC's reiteration of that same Wage Order language—both of which happened later in the same year, yet both of which CELC's brief completely ignores. *See* CELC Br. at 1, 2, 3, 7.

Neither of these implied assumptions is supported by record cites or any other evidence. Nor do they make any sense.

First, as to CELC's assertion that the meal period violations alleged by plaintiffs here are "victimless" (CELC Br. at 10), the administrative and judicial authorities cited by plaintiffs show precisely the opposite. The IWC long ago concluded, based on decades of scientific study and research,[8] that the availability of periodic meal and rest breaks is critical to

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[8] *See* Amicus Curiae Brief of Bet Tzedek et al., at 4-16 (summarizing early 19th-century studies on health benefits of regular breaks from work);

worker health and safety, and to the safety and well-being of their customers as well. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1005 (2007); *id.* 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." (citing Tucker et al., *Rest Breaks and Accident Risk*, The Lancet, p. 680 (Feb. 22, 2003); Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 44 pt. 2 Ergonomics, pp. 164-174 (2001); Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 Colum. J. Eur. L. 53, 55 (2004/2005))); *see also Gentry*, 42 Cal.4th at 456; *cf. Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1201 (2011) (California wage and hour laws further the "public interest" in "protecting health and safety" and "guarding against the evils of overwork") (citing *Gentry*).[9]

That is also why the Legislature concluded, in an effort to boost meal period compliance, that when an employer violates the minimum meal-and-rest break requirements imposed by law, the aggrieved workers are entitled to an additional hour's wage as compensation. That requirement is designed to discourage employers from violating the law (*Murphy*, 40 Cal.4th at 1110-11); and to ensure that if violations do occur,

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Amicus Curiae Brief of Worksafe et al., at 9-17 (health and safety concerns that led to adoption of meal period laws have not diminished).

[9] *See, e.g.*, IWC Transcript of Public Hearing (Feb. 11, 1916) at 41 (MJN Ex. 283) (30-minute minimum meal period originally adopted to avoid "giv[ing workers] dyspepsia"); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 ("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.").

the workers will be compensated for harm they suffered as a result of their employer's unlawful, worker-health-impairing conduct.[10]

Several questions were raised at oral argument about whether the most "worker friendly" construction of the meal period standard would be to let each worker decide whether to take advantage of the right to a 30-minute unpaid meal period. The proper focus, however, is how *the IWC* intended meal period protections to function in the workplace. Transcripts of proceedings in connection with amendments to Wage Order 14 show the IWC intended, for all workers other than those in the agricultural industries, that employers take affirmative steps to ensure meals are taken for the health and welfare of the employees and the public. IWC Transcript of Proceedings (August 27, 1979) at 140:5-141:10 (MJN, Ex. 25) ("1979 Transcript"). The practical reality is that if meal periods are made freely waivable (despite the clear language in the Labor Code and Wage Orders stating that meal periods may only be waived in specifically designated

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[10] CELC argues that "it is unfortunate that the 'Rolling 5' issue comes before this court in *Brinker*, a case involving waiters and waitresses working dinner shifts." CELC Br. at 4. That is only part of the restaurant workforce. "Early lunching" also affects Brinker's bus persons, prep-cooks, cooks, dishwashers, and many other vulnerable low-wage workers, who are equally affected by Brinker's unlawful policies and who are especially susceptible to the company's pressure to work long-unbroken hours. *See, e.g.*, 1PE110, 122, 126, 132, 138, 140, 148, 166, 168 (evidence of pressures resulting from inadequate staffing); 3PE721, 780, 823; 20PE5487 (evidence of pressures resulting from forcing workers on break to sacrifice earned tips, which Brinker acknowledges in its Opp. to Pet. for Review at 4, 15-16). *See generally* Worksafe Law Center Amicus Brief, filed August 19, 2009, *and* Bet Tzedek Legal Services Amicus Brief, filed August 20, 2009 (explaining the consequences to economically powerless blue collar and service worker employees if employers' legal duties could be discharged simply by announcing that meal periods were available, without having to take affirmative steps to relieve the workers of all workplace duties and to monitor compliance).

circumstances), unscrupulous employers could too easily pressure their economically vulnerable employees into skipping meals, or not taking the full 30-minutes that the IWC and Legislature decided was essential to maintain worker health and welfare. *Worker-protection regulation always eliminates some "freedom of choice"—but it does so deliberately, to ensure that the overwhelmingly one-sided balance of power in the workplace does not result in workers being pressured, directly or indirectly, to sacrifice the minimum workplace rights the Legislature and IWC has deemed fundamental to their long-term protection and the public interest.*

Second, CELC's arguments concerning the supposed harm to employers if called to task for their unlawful conduct lack any factual foundation. There is no indication in the record, nor is it logical to assume, that *any* significant number of employers, let alone "most California employers," impose an early lunching policy similar to Brinker's.

CELC does not even try to support its self-serving assertions about what "most California employers" have done or what those employers "previously thought to be settled law." CELC App. at 3; CELC Br. at 1, 2. In fact, those assertions are easily rebutted. If CELC had bothered to look at the most popular treatises on California Employment Law, it would have realized that the authors of those treatises—including attorneys from the very law firms who represent amici Employers Group (Shepard Mullin) and CELC (Paul Hastings) in this case—have for years been warning California employers that they should "provide meal periods at a time during the work day that avoids any actual work periods in excess of five hours." *See* Simmons, *California's Meal and Rest Period Rules: Proactive Strategies for Compliance* §2.3(b) (2d ed. 2007) (emphasis added); Wilcox, *California Employment Law* §3.23 at 3-168 ("A nonexempt employee working more than five hours must be provided with a meal period of at least 30 minutes."). As the Simmons treatise explains:

> [T]he timing of meal periods is important. .... [A] second meal period may be necessary, even for an eight-hour shift, if an employee takes a meal period too early in the shift. For example, if more than five hours remain in the balance of the shift, after the employee returns from a meal period, a second meal period is arguably owed.

Id. §2.3(a). The Simmons treatise also includes a chart illustrating the meal period timing window for eight-hour shifts starting at different times. *See id.* §2.3(e). CELC's assertion that "most" employers "reasonably relied" on a construction that would allow them to require employees to work up to "nine or more hours" without a meal period (CELC Br. at 4) rests on nothing more than CELC's say-so.

Next, CELC argues that the Court's forthcoming decision on meal period timing should be made prospective only because otherwise unsuspecting California employers would face a "tsunami" of litigation that would subject them to "massive damages." CELC Br. at 5-7. This argument is completely overblown as well.

In the first place, the Court's ruling could only affect those employers, like Brinker, who have a workplace-wide policy and practice of requiring early lunching followed by a long unbroken stretch of work that exceeds five hours or more—*i.e.*, employers who violate the law. In a typical workplace, with an eight-hour shift and a half-hour unpaid meal period, no potential for liability exists as long as the employer schedules its workers to take their meal period between the third and fifth hours (and relieves them of all duty during that time). The meal period timing claim only exists in this case because of Brinker's requirement that meal periods must be taken at the very start of most workers' shifts, because only then could more than five hours (or, more commonly, six or seven) elapse between the end of the meal period and the end of the shift.

CELC nonetheless warns about the hypothetical employer who regularly requires its workers to perform some overtime work after an eight-hour shift, but then risks millions of dollars in back wages and penalties by unwittingly failing to provide a second meal period before that overtime work began. CELC Br. at 4, 10-11. While CELC flatly asserts that "most California employers" will find themselves in that dilemma if the Court's ruling is deemed retroactive, the numbers just don't add up. No second meal period would be required for overtime worked performed at the end of an eight-hour shift unless and until more than five hours has passed since the end of the last meal period. In a 9-5 workday, for example, if lunch is taken from 1:00-1:30, a second meal period would not be required unless overtime continued past 6:30 p.m.—*i.e.,* not an extra "minute" of work, but an additional hour and a half of extra job duties.

Moreover, there is no evidence in the record, nor is there any logical reason to believe, that "early lunching" requirements like Brinker's are common in California. If they were, those other workers who had been forced to work long stretches of time without a meal period would likely have filed similar lawsuits challenging their own employer's "early lunching" policies, particularly after review was granted in October 2008. Yet of the eight grant-and-hold cases following *Brinker*, not one of them raises this issue.[11] Nor do any of the federal district court cases cited by Brinker and its amici raise this issue.[12] The supposed crisis of pent-up litigation yearning to overwhelm the courts is entirely fanciful.

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[11] *Brinkley v. Public Storage*, No. S168806, raises the timing issue, but did not involve an "early lunching" policy of the kind imposed by Brinker.

[12] Only two federal cases raise any timing issue at all, but nothing in either decision suggests that the employer had an "early lunching" policy like Brinker's. *Nguyen*, cited in Brinker's latest supplemental brief, is discussed in more detail *infra* (at 31-32 & n.24, 40-41 & n.30). In *Kimoto*

CELC also grossly exaggerates the economic impacts of a retroactive ruling on any employer that chooses to impose an unlawful early lunching policy.

For pure hyperbolic effect, and without any basis in fact, CELC asserts that "most" California employers: 1) require unlawful early lunching, which itself is highly doubtful; 2) pay their workers an average wage of $25 per hour—more than three times the minimum wage and a far higher wage than most non-exempt private sector workers are paid in this State; 3) pay those wages on a weekly rather than bi-weekly basis (thus doubling the potential pay-period penalties); and 4) have such a high turnover rate that most potential claimants are former employees entitled to Labor Code section 203 waiting time penalties (assuming a willful violation). CELC Br. at 5-8. CELC also assumes that most California employers have huge workforces (and thus correspondingly huge liability (*id.* at 8)), even though census data shows that only 0.8% of California private sector employers employ more than 500 workers.[13] Thus, while CELC's numbers are dramatic, they are factually baseless. CELC has presented an entirely fabricated scenario about damages and penalties that exists only in CELC's imagination.

Whatever this Court eventually rules, California employers will not be liable for meal period timing violations (just as they will not be liable for

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v. McDonald's Corps., 2008 WL 4690536 (C.D. Cal. Aug. 19, 2008), the plaintiff raised a "late breaks" argument, but the court did not address its substantive merits. *Id.* at *6. As for meal period compliance, the case quoted the Wage Orders' *rest* period language ("authorize and permit"), then decided the *meal* period question based on *that* language (and the subsequently-vacated *Brinker* opinion), while completely ignoring the Wage Orders' *meal* period language. *Id.* at *4-*5.

[13] http://www.census.gov/epcd/susb/2008/ca/CA--.HTM (last visited December 30, 2011).

failing to relieve workers of all duty obligations during a timely meal period) unless they knew or should have known that the employee was actually working. The standard is "suffer or permit." That is the same standard that governs employer liability for all work performed, whether pre- or post-shift, and whether the overtime rules apply or not.[14] If an employer suffers or permits its employees to work when they should be on break, or when they are entitled to statutory overtime, or before or after their designated shifts, the employer should be liable.[15] There is nothing inequitable about that rule, and certainly nothing that would require application of that rule to be prospective only.

b. The Public Policies Underlying the Meal-and-Rest Break Provisions Strongly Favor Retroactive Application of the Court's Forthcoming Decision

CELC's proposed brief is really little more than an effort to re-argue the merits of the meal period timing issue. That is not proper, of course, but it leaves no alternative but to respond.

Not only are CELC's arguments contrary to applicable statutory and regulatory language and the manifest intent of the Legislature and IWC, but they are also directly contrary to the important public policies supporting

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[14] *See, e.g., Martinez*, 49 Cal.4th at 70 ("the basis of liability is the [employer's] knowledge of and failure to prevent the work from occurring"); *Morillion*, 22 Cal.4th at 585. *Compare Forrester v. Roth*, 646 F.2d 413 (9th Cir. 1981) ("suffer or permit" standard did not create liability when employee deliberately concealed overtime work) *with Burry v. National Trailer*, 338 F.2d 422 (6th Cir. 1964) (employees worked unreported overtime with employer's knowledge; overtime owed).

[15] *Martinez*, 49 Cal.4th at 71 (employers "set [workers'] hours, telling them when and where to report to work and when to take breaks"); *Morillion*, 22 Cal.4th at 585 ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.").

the Wage Order and Labor Code provisions at issue. "Fairness and public policy" is a critical factor the Court must consider in deciding whether to carve out an exception from the presumption of retroactivity for a new rule of law. For the Court to rule in favor of plaintiff workers, but then excuse all past violations, would neither be fair nor consistent with these public policies.

C. The Court's Forthcoming Rulings on Each Substantive Legal Question Presented in this Case Should Operate Retroactively, in Accordance with the Usual Rule

For the Court to adopt CELC's arguments, and apply its forthcoming rulings in this action prospectively only, would undermine every purpose of the Legislature and the IWC in adopting worker-protective meal period laws in the first place. This Court's retroactivity precedents preclude such a result.

1. California Has Required Proper Meal Period Timing, for the Protection of California Workers, Since the Earliest Wage Orders

The Legislature explicitly incorporated the meal period provisions of the IWC's Wage Orders into Labor Code section 226.7, ***which is the latest-enacted of all the statutes under consideration in this case.*** Section 226.7 is a critical statutory provision that, tellingly, CELC's brief does not even mention. The Wage Orders incorporated into section 226.7 have always required meal periods for each five-hour work period.

The Wage Orders prohibit employers from employing workers "for a work period of more than five (5) hours without a meal period of not less than 30 minutes." 8 Cal. Code Regs. §11050(¶11)(A). This language has been unchanged since 1952. *See* Wage Orders 5-52 (¶11) (Aug. 1952), 5-57 (Nov. 15, 1957), 5-63 (Aug. 20, 1936), 5-68 (Feb. 1, 1968), 5-76 (Oct.

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

A "work period" is a term of art meaning "a continuing period of hours worked."[16] The term is repeatedly used this way throughout the Wage Orders, including in the recordkeeping provision (employers must keep "time records showing when the employee begins and ends each ***work period***" (8 Cal. Code Regs. §11050, ¶7(A)(3))) and in the rest break provision (requiring rest breaks "in the middle of each ***work period***" (8 Cal. Code Regs. §11050, ¶12(A))). A typical shift consists of a "work period," followed by a "meal period," followed by another "work period." *Id.*, ¶11(A).[17] On an eight-hour shift, this allows the employer to designate any time within a two-hour window for the meal period—*i.e.*, any time between the third and fifth hours of work.

To avoid "a work period of more than five (5) hours," as the Wage Orders require, meal periods must be timed to occur "at such *intervals* as will result in no employee working longer than five consecutive hours without an eating period."[18] In other words, the Orders require "a 30-minute meal period within *each* five-hour time frame." DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) (emphasis added).[19]

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[16] Memorandum of IWC Executive Officer, "MEAL PERIODS" (03/05/82) (MJN Ex. 376#24; 800410152).

[17] The Wage Orders define a "shift" as "designated hours of work by an employee, with a designated beginning time and quitting time." 8 Cal. Code Regs. §11050, ¶2(Q). In the trial court's words, "[w]ithin a shift there are 'work periods' and 'meal periods.'" 1PE203.

[18] Letter from IWC Executive Officer (07/13/82), at 800410113 (MJN Ex. 376#20) (emphasis added).

[19] *Accord* DLSE Op. Ltr. 2002.06.14 (MJN Ex. 42) ("each five-hour 'work period' stands alone"). The DLSE's amicus brief, filed on August

Employers may comply with this requirement in many ways, depending on the needs of the particular workplace. First, employers may schedule meal periods within the appropriate window, depending on the length of the worker's shift, to avoid "work periods" exceeding five hours either before or after the meal. *See* Simmons, *supra*, §2.3(e) (chart of compliance windows for different shift lengths).[20] Second, employers may end the worker's shift no later than five hours after the meal period. Third, employers may schedule a second meal period no later than five hours after the first one. Fourth, the employer may pay the extra hour of pay mandated by section 226.7(b) and the Wage Orders.

The earliest Wage Orders confirm the IWC's intent to protect worker health and safety by limiting the number of hours they may work without a meal. *See generally* Locker-Broad Amicus Brief at 3-15.

26, 2009, does not address meal period timing or argue that the Wage Orders do not impose a timing requirement.

[20] "Scheduling" itself is a flexible concept that employers may accomplish in a variety of ways. They can schedule meal periods at a particular time for each worker, staggering the meal periods if necessary to provide full coverage on the floor. They can also use "window scheduling" whereby a worker on a shift from 9:00 to 5:30, for example, is instructed to take lunch no earlier than 12:00 and no later than 2:00. Employers can stagger the start times of workers' shifts so the meal periods come up at varying times and the floor is always covered. A restaurant manager needing to cover the dinner rush, for example, can start the servers' shifts shortly before the rush begins, thereby getting through the busy period before any server has completed five hours' work. An employer might also have a manager send workers on break using a tap-on-the shoulder policy (*i.e.*, a policy that gives supervisors discretion to decide when meal periods and rest breaks may be taken within the appropriate window period, by providing that no breaks may be taken until a supervisor tells the particular employee to clock out for break). There are many such options for an employer who wishes to comply with the law.

For instance, the IWC's 1931 sanitary order governing all industries stated: "[N]o women or minor shall be permitted to work ***an excessive number of hours*** without a meal period." Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Exs. 11, 80) (emphasis added). The word "excessive" came to be generally "interpreted to mean after four and a half or five hours of work." Minutes of a Meeting of the IWC (Jan. 6, 1933) at 701443122 (MJN Ex. 288); *see also* Wage Order 16A (1931) (MJN Ex. 245) (meal period required no later than 5½ hours after reporting to work); Minutes of a Meeting of the IWC (Aug. 19, 1939), at 701450133 (General Card No. 14) (MJN Ex. 291) (4½ hours for an eight-hour shift or, in professional offices, five hours).

This requirement was made even more explicit in 1943 when the IWC adopted the "NS" series of Wage Orders. These Orders introduced the term of art "work period," and limited the maximum length of the "work periods" to five hours. Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶3(d) (MJN Ex. 12) ("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." (emphasis added)); Minutes of a Meeting of the IWC and Wage Order 5NS (Apr. 14, 1943), at 703439106 (MJN Ex. 302) ("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." (emphasis added)).

In 1947, the term of art "work period" was removed and replaced with "five (5) consecutive hours after reporting to work." Wage Order 5R, ¶10 (Jun. 1, 1947) (MJN Ex. 13). In 1952, however, "work period" was *restored* and the language adopted that remains in place today. Wage Order 5-52, ¶11 (MJN. Ex 14). As the IWC explained in its 1952 summary of findings, the intent of this amendment was to *eliminate* the 1947 standard

("five consecutive hours after reporting to work"), and to *restore* the 1943 standard (prohibiting "work period[s] of more than five hours"):

> The meal period provision was amended to permit a 6-hour work period without a meal when such a work shift would complete the day's work, and the additional provision that ***a meal period shall be every 5 hours rather than providing only one meal period within the first 5 hours.***

Minutes of a Meeting of the IWC (May 16, 1952), at 703456236 (emphasis added).

Contrary to CELC's and Brinker's positions, therefore, the Wage Orders have, since 1952, required meal periods "every 5 hours" and not merely "one meal period within the first five hours." *Id.*[21]

The same language has continued, unchanged, through the current Wage Orders. 8 Cal. Code Regs. §11050, ¶11(A). Those Wage Orders prohibit the "early lunching" practices that Brinker unlawfully imposes on its workers—as the historical record from 1952 to 2000 confirms. *See* Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (1943 Orders prohibit work schedules "leaving a stretch of 6 hours to be worked after lunch"); Report and Recommendations of the Wage Board for IWC Wage Order 12–Motion Picture Industry (Oct. 21, 1966), at 6 (MJN Ex. 328) (1963 Orders require "meal periods *at intervals* of no more than five and one-half hours" (emphasis added)); *California Hotel*, 25

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[21] *See also* Letter from IWC Executive Officer M. Miller to K. Wehrenberg (Jul. 13, 1982) (MJN Ex. 376#20), at 800410113 ("Another kind of problem that has arisen where employers have scheduled 11- or 12-hour shifts has been *the failure to provide for a second meal period after the second five hours of work.* .... One major employer recently argued that the IWC meal periods regulation does not require the two meal periods, but the meaning of that section is [that] meal periods must be provided 'at such *intervals as will result in no employee working longer than five consecutive hours without an eating period.*'").

Cal.3d at 205 n.7 (1976 Orders require "[a] meal period of 30 minutes *per 5 hours of work*" (emphasis added)); IWC Summary of Interim Wage Order—2000 (eff. Mar. 1, 2000) (MJN Ex. 31) ("An employee must receive a thirty-minute meal period for *every 5 hours of work.*" (emphasis added)); IWC Summary of Amendments to Wage Orders 1-13, 15 and 17 (Jan. 1, 2001) at 4 (MJN Ex. 33) (same language).

In 2000, the Legislature enacted Labor Code section 226.7 for the expressly stated purpose of "codify[ing]" the Wage Orders, including their timing requirement. AB 2509, Third Reading, Senate Floor Bill Analysis, at 4 (Aug. 28, 2000) (MJN Ex. 61). As the Senate Floor Analysis explains, section 226.7 "[p]laces into statute the existing provisions of the [Wage Orders] requiring ... a 30-minute meal period ***every five hours***." *Id.* (emphasis added). The intent was to address the problem of "chronic violators" who "work their employees long hours without rest periods." *Id.*; *see Murphy*, 40 Cal.4th at 1105 (section 226.7 enacted "due to a lack of employer compliance" with Wage Orders).

CELC wholly ignores section 226.7, even though it is the most recently enacted statute on the subject of meal periods. Section 226.7 explicitly incorporates the *Wage Orders—not* section 512—and does not contain *any* language that Brinker or its amici have argued is inconsistent with the Wage Orders' longstanding timing requirement. Even if there were some inconsistency, moreover, this Court has already expressly held that the Wage Orders may be more protective of workers' rights than the minimum floor set by the Labor Code. *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980).[22]

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[22] CELC's reliance on Labor Code section 516 is misplaced. When the IWC adopted the current Orders, it was explicitly empowered to "adopt or amend" the Orders in any manner it deemed consistent with worker health

In its most recent supplemental brief, Brinker cites a federal district court decision in support of its argument that California law has no timing requirement for meal periods. Brinker Supp. Br. filed 12/20/11 (citing *Nguyen*, 2011 WL 6018284). This case devoted one paragraph to the issue (*id.* at *7), and did not consider any of the materials discussed above. The only support for its holding was language in section 512(a) "requiring a second meal break 'for a work period of more than ten (10) hours per day.'" *Id.* However, the court ignored the rest of the sentence in which that language appears: "except that if the total hours worked is no more than 12 hours, *the second meal period may be waived* ...." Lab. Code §512(a).

This language preserves the limited waiver rights that the IWC had added to several 1998 Wage Orders, including Order 5-98, which AB 60 declared null and void. *See* Wage Order 5-98, ¶11(C) (MJN Ex. 20); *see also* AB 60, §21 (declaring this Order "null and void"). Those Wage Orders allowed workers on long shifts to waive "***a***" meal period. Wage Order 5-98, ¶11(C) (emphasis added).[23] The sentence in section 512 that *Nguyen* partially quoted codified this waiver right, expanded it to all workers, but carefully *limited* it for the protection of those workers by stating that only the *second* meal period may be waived on longer shifts (a provision that would have been entirely unnecessary if *all* meal periods

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and safety, "***[n]otwithstanding any other provision of law.***" Lab. Code §516 (AB 60, as adopted eff. 1/1/00) (emphasis added) (MJN Ex. 58, §10). Contrary to CELC's position (Br. at 1, 7, 10), then, the IWC was *not* constrained at that time by any language in the later-adopted amendment to section 516.

[23] *See* Statement as to the Basis, 1993 Amendments to Wage Order 4-89 (MJN Ex. 152) ("The vast majority of employees testifying at public hearings supported the IWC's proposal with respect to such a waiver, but only insofar as waiving 'a' meal period or 'one' meal period, not 'any' meal period.").

could be waived, as CELC contends). The *Nguyen* court ignored all of this adoption history.[24]

In short, this part of section 512 was intended to *preserve* this recently-introduced waiver right, which AB 60 otherwise would have nullified—*not* to eliminate the Wage Orders' timing requirement altogether.

CELC makes the bold pronouncement that "most California employers" altered their meal-period policies in 2000 in reliance on the words "per day" in section 512 (*see* CELC Br. at 2). Aside from the fact that CELC cannot possibly know what most California employers did, or when and why they did it, this argument overlooks that the term "per day" *does not appear anywhere in section 226.7 or in any of the Wage Order provisions that section 226.7 codified.* CELC can point out no language in section 226.7 or the Wage Orders that is even arguably inconsistent with the Orders' longstanding, protective timing requirement, or that would have justified the employer reliance CELC claims—particularly in light of the rule of *Industrial Welfare Commission v. Superior Court*, of which employers are presumed aware.

As used in section 512, "per day" is a topical reference intended to relate the subject matter of section 512 to the rest of AB 60. *See* Amicus Letter of former Assemblyman Wally Knox (author of AB 60), 09/11/08, at

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[24] The *Nguyen* court also failed to consider that the language it partially quoted necessarily assumes a *compliant* first meal period. On a ten-hour shift, the meal period must commence by the fifth hour to be compliant; another meal is necessarily triggered, at a minimum, after the tenth hour, as this language recognizes. The amendment thus creates a compliance floor for meal periods for workers on alternate workweek schedules of four 10-hour days allowed by AB 60. *See* Lab. Code §511 (added by AB 60, §5 (MJN Ex. 58)).

5. The words "per day" were used throughout AB 60 (both in the text and in the Legislative Council's Digest) whose purpose was to expand workers' daily pay protections by expanding daily overtime. *See generally* AB 60 (MJN Ex. 58); *see also Harris v. Superior Court*, ___ Cal.4th ___, 2011 WL 6823963, *2 (Dec. 28, 2011) (AB 60 enacted "[i]n response" to actions causing "about eight million workers [to lose] their right to overtime pay"). CELC assumes that the words "per day" were used everywhere else in AB 60 to *expand* workers' daily pay protections, but in section 512 to *contract* workers' daily meal period protections. That is illogical. This bill was sponsored by the California Labor Federation.[25] It was intended to *restore* protections to "eight million workers" who "lost their right to overtime pay." *Harris*, 2011 WL 6823963 at *2. There is no indication anywhere in the legislative history that the Legislature intended to restore these overtime protections with one hand while stripping away meal period protections with the other.

Accordingly, while CELC repeatedly insists that a ruling in plaintiffs' favor would effect a sea change in employers' obligations, it never persuasively explains *why*, and its arguments wholly ignore the latest-enacted statute (section 226.7) and the Wage Orders. No contrary argument worthy of this Court's consideration is presented in CELC's brief.

2. California Has Also Required Employers, Since the Earliest Wage Orders and for the Protection of California Workers, to Affirmatively Relieve Workers of All Duty for their Meal Periods

CELC's brief does not address the other substantive meal period question, but the Court's ruling on this question, too, should apply

[25] *See* Amicus Curiae Brief of California Labor Federation, filed 07/30/09, at 1.

retroactively per the ordinary rule. The Wage Orders have always imposed an affirmative obligation on employers to relieve workers of all duty during their meal periods.

The relevant Wage Order language has been unchanged since 1952: "No employer shall *employ* any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ...." 8 Cal. Code Regs. §11050, ¶11(A) (emphasis added); *see* Wage Order 5-52, ¶11 (Aug. 1952) (MJN Ex. 14).

The Wage Orders' definitions are of critical importance in construing the Orders. *Martinez*, 49 Cal.4th at 61-62. In the Orders, "employ" means "engage, suffer or permit to work." 8 Cal. Code Regs. §11050, ¶2(D).

Hence, "[n]o employer shall employ" means no employer shall "suffer" or "permit" an employee to work during meal periods. An employer "suffers" or "permits" work by failing to prevent work from occurring. *Martinez*, 49 Cal.4th at 70, *passim*.

From the earliest date of their adoption, the IWC Wage Orders have confirmed this reading and the IWC's underlying intent to protect worker health and safety by requiring employers not to "suffer" or "permit" work during meal periods.

In 1916, the first Wage Order with a meal period requirement stated that "***no woman or minor shall be permitted to return to work in less than one-half hour***." Wage Order 2, ¶1(20) (Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex. 76) (emphasis added); *see also* IWC Transcript of Public Hearing in the Fruit and Vegetable Canning Industry (Mar. 28, 1917) at 43 (MJN Ex. 284) (Wage Order 2 decreed that employees "could not go back to work in less than a half hour"). This language continued unchanged in the 1923 orders, as amended in 1928 and 1929, as well as in the 1931 sanitary

order for all industries (Order 18). Wage Order 3a (May 11, 1923, eff. Aug. 8, 1923, amended Mar. 26, 1928, eff. Jun. 4, 1928), ¶12 (MJN Ex. 125); Wage Order 3a (Jun. 26, 1929, Sept. 14, 1929) (MJN Ex. 126); Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932), ¶10 (MJN Exs. 11, 80).

In 1933, the Wage Order for general and professional offices made the requirement even more explicit: "***The employer is responsible for seeing that this time is taken.***" Wage Order 9 Amended (Jun. 21, 1933, eff. Aug. 28, 1933), ¶9(a) (MJN Ex. 141) (emphasis added). In 1939, the IWC made clear that this language applies to *all* industries governed by the 1931 sanitary order. Minutes of a Meeting of the IWC (Aug. 19, 1939), at 701450133 (General Card No. 14) (MJN Ex. 291).

It was not until 1943, in the "NS" series of Orders, that the IWC removed the language quoted above. In its place, the IWC introduced the phrase "no employer shall employ," and the defined term "employ," which meant, then as now, "***engage, suffer or permit to work.***" Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶¶2(c), 3(d) (MJN Ex. 12) (emphasis added).

As the IWC explained in adopting the "NS" series, this new language was intended to serve the same function as the old: "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).

To make it even clearer that employers must take affirmative steps to relieve their workers of all duties during legally-mandated meal periods, the IWC simultaneously adopted the first iteration of the six-hour waiver language: "if the employee's work for the day will be completed within six (6) hours, such meal period need not be given." Wage Order 5NS, ¶3(d).

In 1952, that language was amended to mirror what we have today: "if the employee's work for the day will be completed within six (6) hours, *the meal period may be waived.*" Wage Order 5-52, ¶11 (MJN Ex. 14) (emphasis added). In 1963, the IWC amended this language to clarify that "the meal period may be waived *by mutual consent of employer and employee.*" Wage Order 5-63, ¶11 (MJN Ex. 16) (emphasis added).

That language continues in place today. It means that employees may not "waive" their meal periods *except* in the narrow circumstances specified—just as it meant in the '40s, '50s, and '60s, when it was first adopted. Any other interpretation would render the language superfluous.

Labor Code sections 226.7 and 512 both "codified" the Wage Orders. While both statutes use a word not appearing in the Wage Orders—"provide"—that word is not forceful enough, by itself and with no supporting statements of legislative purpose, to establish that the Legislature intended to materially transform the substantive content of a compliance standard that had been the law in California since 1916.

The word "provide" appears in the statutes four times. Each time, it is used in only one of two ways, neither of which is consistent with the conclusion that the Legislature intended to substantively weaken California's meal period laws.

First, the word "provide" is used in section 226.7 as a shorthand way to *simultaneously* reference the Wage Orders' meal period language quoted above *and* the Wage Orders' very different rest break language—"Every employer shall *authorize and permit*" rest breaks. 8 Cal. Code Regs. §11050, ¶12(A); *see* Lab. Code section 226.7(a), (b) (term "provide" used *only* to reference both); AB 2509, Legislative Council's Digest (MJN Ex. 60) (term "provided" used *only* in sentences referencing *both* meal periods and rest breaks); AB 2509, Senate Third Reading (MJN Ex. 61) (term

"provide" used *only* in sentence referencing *both* and stating intent to "[p]lace[] into statute the existing" Wage Orders). The word "provide" is easily harmonized with the two differing compliance standards by recognizing that it is a neutral term of reference; its purpose was not to substantively modify *one* of these two standards.

Second, the word "provide" is used in section 512(a) in two sentences that *also* specify the narrow circumstances in which meal periods may be "waived": "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.*" Lab. Code §512(a), first sentence (emphasis added); *see also id.*, second sentence (same); AB 60, Legislative Counsel's Digest (MJN Ex. 58) ("providing" used *only* in sentences *also* containing waiver language).

The waiver language in this sentence mirrors that of the Wage Orders and would be superfluous if "providing" already meant that all meal periods may be waived at any time. The only logical conclusion is that the Legislature did *not* intend the word "providing" to have such effect.

Contrary to suggestions during oral argument, plaintiffs' position is not that "provide" *means* "ensure," or that it somehow imposes strict liability on employers who are unaware that their employees have failed to take scheduled meal periods. Rather, plaintiffs' position is simply that the word "provide," as used in the sentences in which it appears, was not intended by the Legislature as a mechanism for quietly reversing a 90-year-old, worker-protective meal period compliance standard. None of the committee or floor reports accompanying AB 60 (or AB 2509) state that this was the Legislature's intent. AB 60 was intended to *protect* eight

million workers who had just been stripped of their overtime rights. *See Harris*, 2011 WL 6823963 at *2. The Legislature's purpose cannot have been to strip them of their meal period rights at the same time. To reach that conclusion, some stronger indicia of intent is needed than the single word "providing."

Brinker contends that the meal period standard cannot mean what it says, because compliance would be too difficult. But it should be no more difficult for employers to comply with the meal period standard that the IWC adopted in 1916, and readopted a dozen times since, than for any other standard requiring employers to pay when they "suffer or permit" their employees to work. Only five basic steps are required for compliance, and each of them allows employers considerable flexibility in how they structure their employees' work schedules. First, employers must ***notify*** employees—and managers—of what the law requires.[26] Second, they must adopt an effective ***system to manage and control*** meal periods, usually by some form of ***scheduling*** (*see supra* at 27 & n.20) that complies with the timing requirements imposed by law and that informs workers of when they may be relieved of all duties. Third, employers must maintain a system for keeping accurate, contemporaneous ***records*** of all meal periods, as the Wage Orders already explicitly require, *see* 8 Cal. Code Regs. §11050, ¶7(A)(3), which allows inexpensive and efficient compliance monitoring (and enforcement, where required).[27] Fourth, they must ***monitor***

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[26] Brinker conceded during oral argument that compliance requires employers to notify workers of their meal period rights. *See* Oral Argument transcript, *supra.*

[27] The Wage Orders have required employers to record meal periods since 1943, and the requirement's wording has been unchanged since 1963. *See* Wage Order 5NS, ¶¶8(a)(7), 2(f)(2) (requiring employers to keep records of "[h]ours employed," defined as "all time during which ... [a]n employee is *suffered or permitted to work*, whether or not required to do

compliance, which means employers must review their own employee time records to confirm that proper meal periods have been taken, and must promptly investigate if employees complain about being denied breaks or being pressured to skip breaks, or if the employer has some other reason to believe that employees are working through or cutting short their scheduled meal periods. Finally, they must ***pay*** any premiums owed under section 226.7(b).[28]

As this Court explained in *Martinez*, 49 Cal.4th at 70, "the basis of liability [in a case claiming unpaid wages] is the [employer's] knowledge of and failure to prevent the work from occurring." *Accord Morillion*, 22 Cal.4th at 585. If the employer does not know, and has no reasonable basis for knowing, that a worker has not taken his or her full, timely meal periods, that employer should not be liable, under any standard. However, if the employer's own legally required records show a pattern of missed meals, or if the employer does not schedule meal periods or tell its workers when they must take their meal periods, but instead piles on the work to dissuade or discourage its workers from taking a break, it has not complied

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so" (emphasis added)); Wage Order 5-63, ¶7(a)(3) (MJN Ex. 16) (same as current language). The sole purpose of this recording requirement was to enable monitoring and enforcement of the meal period requirement. *See, e.g.*, Report of the IWC Wage Board for Order 7 – Mercantile Industry (Dec. 14-15, 1966), at 4-5 (MJN Ex. 330) (meal period requirement could not be enforced "without the recording of all in-and-out time, including meal periods"); Excerpt from Manufacturing Industry Wage Board, 1978-1979, at 16 (MJN Ex. 339) ("Recording meal periods makes it possible to enforce meal periods *by looking at records.*" (emphasis added)); *see also* Locker-Broad Amicus Brief at 36-40 (discussing recording requirement).

[28] *See Savaglio v. Wal-Mart Stores, Inc.*, Nos. A116458, A116459, A116886 (Cal. App. First Dist., Div. Four), Appellants' Opening Brief (Aug. 24, 2007) at 13 (MJN Ex. 72) (noting that employer achieve a 99.6% compliance rate by following these four straightforward steps); *id.*, Reporter's Transcript on Appeal, Vol. 27, pp. 4872-73 (MJN Ex. 73).

with the law—even if it has a paper policy stating that meal periods are available. In these circumstances, the employer needs to consider other options, such as making workload adjustments or hiring more staff (such as breakers, or hiring additional managers to make sure workers take their meal periods). The one-hour wage remedy of Labor Code section 226.7(b) is designed to create an incentive for employers to use their existing controls for the purpose of making sure workers take their meal periods, just as employers use these controls to make sure workers do not work overtime. *See Murphy*, 40 Cal.4th at 1110 (remedy intended to provide an incentive for employers to comply with the law).[29]

Brinker's most recent supplemental brief cites the unpublished district court opinion in *Nguyen*, 2011 WL 6018284, as additional support for its position that under California law, an employer has no greater obligation than to "ma[k]e available" meal periods by informing employees of its general policy permitting them. The haphazard legal analysis in that case is entirely unpersuasive, because the federal trial judge did not conduct any independent analysis, let alone consider the implications of the

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[29] These straightforward principles would not cause any of the hardships that Brinker and its amici have raised. An employer can always ask a worker to postpone a meal period or rest break if a workplace emergency arises, and if the employer has been flexible enough in its scheduling it can often do so without even incurring the obligation to pay an additional hour's wages. The supposed concern about nurses being forced to leave a patient's bedside during a crisis, or security officers abandoning their posts during a terrorist threat, are entirely unfounded. If the employer maintains proper staffing levels, gives adequate advance notice of break times, and schedules those breaks before the very end of the available window, these issues will rarely occur. And if they do, the solution is have the employee attend to the crisis at hand, while paying the additional hour of wages required by law, just like an employer has no choice but to pay the statutory overtime premium when a work crisis requires unexpected overtime work.

distinction in wording between the Wage Orders' compliance standards for meal periods ("no employer shall employ") and rest breaks ("authorize and permit"), or the explicit waiver language in the Wage Orders and in Labor Code section 512. The judge in *Nguyen* also entirely ignored the extensive administrative history showing that the Wage Orders impose two differing compliance standards for meal periods and rest breaks, or the compelling evidence that the Legislature intended to codify *those* two separate standards.[30]

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[30] The district court decisions cited in *Nguyen* all suffer from similar analytical flaws.

One case rested its holding on a single word in the regulatory scheme—"provide"—but completely overlooked the Wage Orders' differing standards for meal periods ("no employer shall employ") and rest breaks ("authorize and permit")—and compounded its error by entirely ignoring the administrative and legislative history. *Brown v. Federal Express Corp.*, 249 F.R.D. 580, 584-85 (C.D. Cal. 2008) (quoting ¶11 of the Wage Orders but nowhere mentioning ¶12).

Two cases acknowledged that the Labor Code "codified existing wage orders," but then overlooked the Wage Orders' differing compliance language, instead relying entirely on earlier decisions, including *Brown* and (in one case) *Brinker*. *Perez v. Safety-Kleen Systems, Inc.*, 253 F.R.D. 508, 512-15 (N.D. Cal. 2008) (citing *Brown* and *Brinker*); *see Marlo v. United Parcel Service, Inc.*, 2009 WL 1258491, *5, *8-*9 (C.D. Cal. May 5, 2009) (citing *Brown*).

One case parroted the Wage Orders' language, but failed to consider the implications of the differing compliance standards, then exacerbated this oversight by citing *no* legislative or administrative history. *White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1085, 1087-89 (N.D. Cal. 2007).

One case simply followed earlier decisions without independent analysis and without quoting or considering *any* of the language—statute or Wage Order. *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180, 208 (N.D. Cal. 2009).

Certainly, federal trial judges can be wrong about questions of California law. For example, before *Murphy*, several federal courts incorrectly held that the 226.7(b) remedy was a "penalty." *See, e.g.*,

When the regulatory and legislative history are properly considered, and material differences in language between the meal period provisions and rest break provisions are given effect, it becomes apparent that the IWC and Legislature *did* intend different standards to apply to meal periods (which are unpaid) and rest breaks (which are not). Applying the Court's ruling prospectively would undermine those important public policies, and would, of course, run counter to the many cases cited by plaintiffs that applied the *correct* legal standard (such as *Cicairos*, 133 Cal.App.4th 949, *Jaimez v. DAIOHS USA, Inc.*, 181 Cal.App.4th 1286 (2010), and *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal.App.4th 1524 (2008)).

There are, of course, other federal cases that adopt the standard of the *Cicairos* line of decisions. While those cases obviously have no precedential value either, several are thoughtfully reasoned (and surely put employers on notice that they could not rely on a contrary standard). For example, in *Valenzuela v. Giumarra Vineyards Corp.*, 614 F.Supp.2d 1089, 1098 n.3 (E.D. Cal. 2009), Chief Judge Ishii carefully analyzed the differences between the meal period and rest period language in connection with Wage Order 14 (which adopted the more lenient "authorize and permit" standard for meal periods for agricultural workers, while the IWC's mandatory, non-waivable meal period requirement was retained in each of the other Wage Orders) and concluded:

> Both parties agree that "IWC Wage Order 14 does 'mandate' agricultural employers to 'authorize and permit' meal and rest periods, but it does not mandate that employees take meal periods." .... This interpretation is in accord with a DLSE advice letter on the issue:

Corder v. Houston's Rests., Inc., 424 F.Supp.2d 1205, 1210 (C.D. Cal. 2006); *Pulido v. Coca-Cola Enters., Inc.*, 2006 WL 1699328, *5 (C.D. Cal. May 25, 2006).

> While the pre-1980 Orders had contained the meal period language "No employer shall employ any person...," currently contained in Labor Code §512 and the other wage orders, that provision was amended in the 1980 Agricultural Wage Order (14-80) to provide that the employer must "authorize and permit" a meal period. *The prohibitive language remained the same in all of the other wage orders.*

Valenzuela, 614 F.Supp.3d at 1094 (citing DLSE Op. Ltr. 2003.08.13 (MJN Ex. 380)).

Transcripts of IWC hearings held in connection with revisions to Wage Order 14, discussed in *Valenzuela,* illustrate how the IWC intended its mandatory meal periods to operate. Chairperson Elorduy stated that under the existing meal period standard (which the IWC relaxed in Wage Order 14 for agricultural workers only), employers are required to "police" the workplace for the health and safety of the employees and the public to address the potential of an "employee's desire [] to work without a meal period or without a relief period because they are on piecework." *Id.* at 1098 (quoting 1979 Transcript at 140:5-141:10 (MJN Ex. 25)); *see* 1979 Transcript at 134:8-11 (comment by Commissioner Waxman; "intent" of amending Order 14 to say "authorize and permit" instead of "no employer shall employ" was that employees should be "allow[ed] to take the time off" "but that the employer *was not mandatorily forcing that worker to take the time off*" (emphasis added)); *see also* IWC Statement as to the Basis for Wage Order 14-80 (Sept. 7, 1979), ¶11 (MJN Ex. 28) (meal period language amended "to *make it a little more flexible* in response to evidence about the nature of agricultural work.") (emphasis added).

These statements led Chief Judge Ishii to conclude in a ruling that is squarely at odds with *Nguyen* and Brinker's other federal court authorities:

> Given the testimony from the hearings cited in this order, the court strongly suspects that the "no employer shall employ" language ***imposes an affirmative duty on an employer to ensure that meal periods are taken.*** Thus, the court does not rely on these cases from our sister districts in interpreting meal periods regulations under IWC Order 14-2001.

Id. at 1098 n.3 (emphasis added).

Chief Judge Ishii's well-reasoned analysis in *Valenzuela* is entirely consistent with the IWC Statement as to the Basis of the 2000 Wage Orders, which states that "an employee who works more than six hours in a workday *must receive* a 30-minute meal period." Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order—2000 (June 30, 2000, eff. Jan. 1, 2001), §11 (MJN, Ex. 32) (emphasis added). This does not mean employers are "strictly liable" for missed meal periods; they are statutorily liable for violations in the same manner they are liable for any other uncompensated or undercompensated work they suffer or permit employees to perform. But where an employer discourages its employees from taking their full 30-minute meal periods and knows or should know employees are working when they should be on break, the employer should be liable just as it would be for pre- and post-shift work and overtime work under the well-settled "suffer and permit" this standard.[31]

For all of these reasons, not only must the Court find no basis for concluding, as a matter of retroactivity analysis, that Brinker's substantive legal positions rested on a uniform and unbroken line of appellate case authorities, but the Court must also conclude that Brinker's positions are legally insupportable. Construing the applicable Labor Code and Wage

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[31] *Martinez*, 49 Cal.4th at 70; *Morillion*, 22 Cal.4th at 585; *see Forrester*, 646 F.2d 413; *Burry*, 338 F.2d 442.

Order provisions in light of their plain wording, historical provenance, and evident worker-protective purposes compels the conclusion that plaintiffs' construction, not Brinker's, accurately captures the intended meaning of those important health and safety provisions.

III. CONCLUSION

For the reasons stated above, the Court's forthcoming ruling should be fully retroactive, in accordance with the general rule.

Dated: January 3, 2012

Respectfully submitted,

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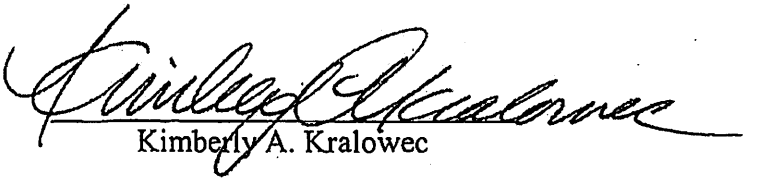
WORD COUNT CERTIFICATE

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text does not exceed 14,000 words, including footnotes.

Dated: January 3, 2012



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PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REAL PARTIES' ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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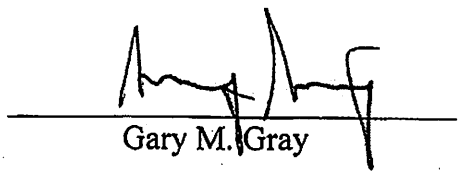
Executed January 3, 2012, at San Francisco, California.



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