No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348
Honorable Patricia A.Y. Cowett, Judge

REAL PARTIES' REPLY TO BRINKER'S ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL

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I. INTRODUCTION

Brinker offers no compelling reason why this Court's forthcoming decision should not apply retroactively. Indeed, it does not even attempt to argue that this case fits within the narrow exception to the rule of presumptive retroactivity established by this Court's previous decisions, which are addressed in Real Parties' Answer to Amicus Curiae Brief of California Employment Law Council (Jan. 3, 2012) ("Real Parties' Answer").[1] Nor could such an argument succeed, given the clarity and consistency of this Court's prior decisions.

Instead of addressing any of those decisions, Brinker relies on a single California case, *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524 (2011). *See* Brinker's Answer to Post-Hearing Amicus Brief of California Employment Law Council ("Brinker Answer"), at 10. But in that case, this Court applied the general rule of retrospective application, finding no reason to depart from it.

Rather than addressing the elements identified in this Court's retroactivity case law, Brinker offers a novel theory of prospective-only application that is supposedly based on the void-for-vagueness doctrine under the Due Process Clause. *See* Brinker Answer at 8-11. But this Court's void-for-vagueness case law (which Brinker also ignores) imposes insurmountable barriers to Brinker's theory. And the handful of federal regulatory cases cited by Brinker, which apply the so-called "fair notice"

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[1] *See also* Real Parties' Opposition to Application of California Employment Law Council for Leave to File Post-Hearing Amicus Brief Addressing Retroactive Or Prospective Effect of Forthcoming Decision ("Opposition") at 4-5, 8-10 (citing cases)

doctrine under the federal Administrative Procedure Act, are each readily distinguishable on their facts.

The reality is that it is nearly impossible for a litigant, having lost an issue of statutory construction before this Court, to establish that the Court's construction was so unexpected, so radical, and so contrary to previous settled authority, as to require its prospective-only application. Brinker uses the Court's Order allowing retroactivity briefing as an excuse to reargue the underlying merits. But repeating an argument does not make it stronger, only more familiar; and nothing in Brinker's latest brief offers anything new, let alone anything that justifies a prospective-only application of the Court's forthcoming ruling.

II. DISCUSSION

A. Brinker Makes No Attempt To Justify Prospective-Only Application of the Court's Forthcoming Decision Under the Governing Retroactivity Case Law

Plaintiffs have demonstrated, based on the analysis required by a long line of retroactivity decisions, that this Court's forthcoming ruling should be applied retroactively, no matter what the substance of that ruling. *See* Real Parties' Answer at 5-24; Opposition at 3-10.[2] Brinker entirely ignores these cases, several of which plaintiffs cited and quoted in their December 2, 2011 Opposition, at 4-5 (citing, *e.g.*, *Newman v. Emerson*

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[2] *Cf. infra* at 24-25 (pointing out that if Brinker's statement of the applicable "fair notice" standard were correct, plaintiffs' reasonable reliance on the IWC's and DLSE's legal positions at the time this class action lawsuit was filed would require prospective-only application *to plaintiffs* of any ruling that adopted Brinker's construction of the meal period timing requirement).

Radio Corp., 48 Cal.3d 973 (1989); *Peterson v. Superior Court*, 31 Cal.3d 147 (1982)).

The only California case Brinker cites, for any proposition, is *Pineda*, 51 Cal.4th 524. But that case does not help Brinker at all. The issue in *Pineda* was whether ZIP code information constitutes a type of "personal identification information" that the Song-Beverly Credit Card Act of 1971, Civ. Code §1747.08, subd. (a)(2) prohibits businesses from requiring from credit card customers. This Court held that businesses may not require such ZIP code information, resting its construction on the Song-Beverly Act's plain statutory language, its consistent legislative history, and "'the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.'" 51 Cal.4th at 530 (quoting *People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 313 (1996)).

In the last paragraph of its opinion, the Court summarily rejected defendant's argument that its new construction should be applied only prospectively. While noting that two Court of Appeal decisions (the decision below and an earlier decision) had reached the contrary result, this Court nonetheless found that the statutory language and purposes were sufficiently clear to "provide[] constitutionally adequate notice of proscribed conduct." *Id.* at 540. Moreover, even if defendant had begun requesting ZIP code information in reliance on the earlier Court of Appeal decision (which the Court found it had not), that reliance would still not justify limiting the retroactive scope of the new decision, because it is "difficult to see how a single decision by an inferior court could provide a basis to depart from the assumption of retrospective operation." *Id.* at 540-41 (citing *People v. Guerra*, 37 Cal.3d 385, 401 (1984)). (Here, of course, Brinker cannot even make the argument rejected in *Pineda*, because it

cannot point to a single appellate decision supporting its construction of the meal period timing requirement, other than the vacated Court of Appeal decision in this case.) As the Court concluded, "defendant identifies no reason that would justify a departure from the usual rule of retrospective application." *Id.* at 541 (citing *Grafton Partners v. Superior Court*, 36 Cal.4th 944, 967 (2005)).

Pineda thus fully supports plaintiffs' position, not Brinker's, and reinforces the conclusion that in evaluating a party's request for prospective-only application, the Court must consider the very factors that Brinker ignores—in particular, whether the Court has announced a new rule that clearly breaks with past law, whether the losing party justifiably relied on prior law as set forth in decisions of this Court or a nearly unbroken line of extensive appellate authority, and whether fairness and public policy dictate that the usual presumption of retroactivity not apply. Real Parties' Answer at 8-25. Under the governing standard, Brinker's request for a prospective-only decision must be denied.

B. Brinker's Void-for-Vagueness Challenge Is Meritless

For the first time, Brinker now contends that the meal period provisions of the Wage Orders and Labor Code sections 226.7 and 512, if interpreted in plaintiffs' favor, cannot be applied retroactively without violating the Due Process Clause and the void-for-vagueness doctrine. Brinker Answer at 8-13. This due process argument has been waived, given Brinker's failure to raise it before: for example, in its trial court briefs leading to Judge Cowett's rejection of Brinker's meal period timing arguments in July 2005; in its two writ petitions and subsequent briefing in the Court of Appeal; and in the *seven* earlier briefs it filed in this Court. *See* Real Parties' Answer at 12-13 (citing Brinker's lower court filings); *see*

generally Flatley v. Mauro, 39 Cal.4th 299, 321 (2006); *Marshall v. Bankers Life & Casualty Co.*, 2 Cal.4th 1045, 1059 (1992); *GMAC v. Kyle*, 54 Cal.2d 101, 107 (1960); *Panopulos v. Maderis*, 47 Cal.2d 337, 340-41 (1956); *Ernst v. Searle*, 218 Cal. 233, 240-41 (1933) (waiver doctrine bars arguments presented for the first time on appeal).

Even if Brinker had not waived its due process argument, Brinker cannot possibly establish as a factual matter that it lacked constitutionally adequate notice that its early lunching policy might be unlawful.

As plaintiffs previously demonstrated, Brinker had ample notice—not only from the text, history, and purposes of the Wage Orders and Labor Code provisions, but also from a DLSE opinion letter and from DLSE's actual enforcement actions taken against Brinker—that California law prohibits employers from forcing employees to take their meal period within the first hour of an eight-hour shift and requiring them to continue working without a second 30-minute meal period for up to nine more hours. After all, that was precisely what the DLSE concluded in its June 14, 2002 Opinion Letter, which stated the agency's position that such early lunching requirements violated the IWC Wage Order's meal period timing provisions:

> [T]he language of IWC Order, Section 11(A), and the statute upon which the language is based (Labor Code §512) is clear and unambiguous ... [and] makes it clear beyond any question that each five-hour "work period" stands alone. There is nothing in the language or the accompanying Statement As To The Basis which would indicate that the term "a work period of more than five hours" means anything other than what it says: a period of five hours in length during which the employee is working.
>
> Consequently, as you suggest, if an employee is assigned a meal period in the first two and one-half hours of the eight-hour workday, the employer would be prohibited from

> employing that employee past seven hour and thirty-first minute of the workday.
>
> The plain language of the Order and the statute would also prohibit an employer employing a worker eight hours a day in a restaurant from requiring the employee to take a meal period within the first hour of the work day so as to accommodate the employer's work schedule.

DLSE Op.Ltr. 2002.16.14 at 2-3 (MJN Ex. 42); *see also* DLSE Op.Ltr. 2003.08.13 at 2 (MJN Ex. 380) (Wage Orders require "a 30-minute meal period within *each* five-hour time frame" (emphasis added)). That is also what the DLSE concluded in its 2003 audit of Brinker in Santa Clara, which found massive wage and hour violations, including widespread violations of the meal period timing requirement. *See* Real Parties' Answer at 15-17. And, of course, that is what the trial court held in its 2005 decision declaring Brinker's early lunching policy unlawful. *Id.*

Despite this repeated notice, Brinker never withdrew its early lunching policy, never reevaluated it, and never even informed its Human Resources Department that the trial court had found that policy unlawful. *See infra* at 23; 2PE441. No matter what standard this Court applies, these facts establish constitutionally adequate notice that Brinker's policy might be held unlawful.

The void-for-vagueness doctrine incorporates the "core due process requirement of adequate notice." *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Cranston v. City of Richmond*, 40 Cal.3d 755, 763 (1985); *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal.2d 481, 484 (1946).

There is a significant difference, however, between an ambiguous statute and an unconstitutionally vague statute. "Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1201 (1988). Nonetheless, the vast majority of statutes and regulatory enactments pass constitutional muster. As this Court has explained,

> [a law] cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. ... Mere difficulty in ascertaining its meaning, or the fact that it is susceptible to different interpretations will not render it nugatory. Doubts as to its construction will not justify us in disregarding it.

Lockheed Aircraft Corp. v. Superior Court, 28 Cal.2d 481, 484 (1946) (citation and internal quotations omitted); *People v. Hazelton*, 14 Cal.4th 101, 109 (1996) ("the mere fact that a new statute requires interpretation does not make it unconstitutionally vague"); *Bowland v. Municipal Court*, 18 Cal.3d 479, 492 (1976) (citations omitted) ("The presumptive validity of a [law] militates against invalidating [it] merely because difficulty is found in determining whether certain marginal offenses fall within [its] language").

When the law in question constitutes "economic regulation," as here, it is subject to an even "less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (footnotes omitted); *see Barclay's Bank v. Franchise Tax Bd.*, 10 Cal.App.4th 1742, 1759-66 (1992). So, too, where a law imposes civil rather than criminal liability and

does not encroach upon or chill the exercise of protected First Amendment rights, even "greater tolerance" is required in applying the void-for-vagueness doctrine. *Hoffman*, 455 U.S. at 498-99.

Two general principles guide courts evaluating claims of unconstitutional vagueness. "The first principle is derived from the concrete necessity that abstract legal comments must be applied in a specific context. A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness." *Acuna*, 14 Cal.4th at 1116. This context includes the purpose and objectives that the law at issue was designed to serve, *id.* at 1118; *see also Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1107-08 (1995), and the nature of the defendant's challenged conduct, including whether it is close to the line of being permissible. *See Cranston*, 40 Cal.3d at 772 (rule that employees may be discharged for "[c]onduct unbecoming to an employee of the City Service" was not unconstitutionally vague as applied to police officer who led fellow officers on high-speed car chase, even though language was "admittedly uncertain"); *Kaufman v. ACS Sys., Inc.*, 110 Cal.App.4th 886, 920 (2003) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)) ("Objections to vagueness under the Due Process Clause rest on the lack of notice [and therefore] may be overcome in any specific case where reasonable persons would know that their conduct is at risk."); *Bowland*, 18 Cal.3d at 492 (courts evaluating "vagueness" claims look "not merely at the hypothetical cases to which the statute has uncertain applicability, but also at the act allegedly committed by the charged defendant. ... [Parties] cannot complain of the vagueness of a statute if the conduct with which they are charged falls clearly within its bounds.").

"The second guiding principle is the notion of '*reasonable* specificity' or '"'[*r*]*easonable* certainty.'" ... [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *Acuna*, 14 Cal.4th at 1117 (citations omitted; emphasis in original).

Based on these principles, this Court and the United States Supreme Court have repeatedly rejected due process challenges to laws that defendants claimed gave insufficient notice of what conduct was protected and prohibited. *See, e.g., Cranston*, 40 Cal.3d at 762-63 ("conduct unbecoming an employee of the City Service"); *Lockheed*, 28 Cal.2d at 484 (law prohibiting employers from "controlling or directing or tending to control or direct the political activities or affiliations of employees"); *Grayned*, 408 U.S. at 107-08 (law prohibiting persons who "willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class thereof"); *Hoffman*, 455 U.S. at 491 (ordinance prohibiting unlicensed sale of items "designed or marketed for use with illegal cannabis or drugs").

Applying these principles to the case at hand, it is clear that Brinker's void-for-vagueness challenge must be rejected. Looking to the governing law as a whole—including its text, legislative and regulatory history, administrative construction, and purposes—and, in an as-applied challenge as here, looking too at whether Brinker should have known, under all the circumstances, that it risked liability by engaging in the

challenged conduct, the Court must conclude that California's meal period timing requirement was not so obscure and unknowable as to constitutionally preclude its application to Brinker for the period covered by this lawsuit.

1. The Text, History, and Purposes of California's Meal Period Timing Laws Provide Sufficient Clarity of Meaning as to Satisfy Any Possible Due Process Concerns

Brinker dredges up the same deeply flawed textual arguments it has been making throughout this litigation in contending that California law permits employers to require workers to take their 30-minute meal period at the beginning of a shift, even if that means requiring them to work considerably more than five hours without a second meal period before the end of the shift. *See* Brinker Answer at 2-8. [3]

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[3] Instead of addressing how its own early lunching policy works or the impacts that policy has on its own employees, Brinker offers the hypothetical of a long-term coffee shop employee who is allowed to take an early meal period to have lunch with his wife. Brinker Answer at 16. There are two obvious ways in which that hypothetical differs from the reality about how Brinker treats its own employees. First, as the record demonstrates, the restaurant employees whom Brinker forces to take early meal periods (with the alternative of no meal period at all) frequently work far more than that employee's 5½ hours between the end of the meal period and the end of the shift. *See, e.g.,* 21PE5770-71, 5832-36. Second, while Brinker suggests that its hypothetical employee may still be entitled to "one or two rest breaks" after returning from lunch with his wife, Brinker Answer at 16, Brinker's own employees *never* get a second rest break (and, based on evidence the trial court found credible and accepted, are often pressured by management not to take any rest breaks at all, *see* Real Parties' Answer at 19 n.10, citing record). In this case, it is undisputed that Brinker: 1) prohibits any rest breaks at all *prior* to early lunching; and 2) does not permit any rest break until *after* four hours have elapsed subsequent to the end of that early lunch period. *See* 21PE5913-14 (Director of Human Resources and Compliance Ginger Hukill); *see also*

Brinker's principal argument for prospective-only application is that it had no notice, either actual or constructive, that its early lunching policy might be declared unlawful. Surely Brinker had at least constructive notice, though, because California law for many years has precluded employers from requiring employees to work more than five hours at a stretch without a 30-minute meal period.

Brinker makes no new arguments in support of its position, but instead simply repeats the same points it made in its earlier briefs. Brinker Answer at 2-8. In fact, Brinker's answer is most noteworthy not for what it argues, but for what arguments of plaintiffs it fails to address.

Like CELC, Brinker relies entirely on section 512 while completely ignoring section 226.7, which was signed into law fourteen months *after* section 512 was adopted[4] and three months after the IWC adopted its current Wage Orders.[5] For three reasons, section 226.7 is outcome-

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Oral Argument Transcript (comments of Justice Werdegar concerning plaintiffs' classwide challenge to legality of Brinker's uniform rest break policies). Consequently, plaintiffs and the putative class members *at most* get one rest break only on the days they are required to take an early lunch pursuant to Brinker's classwide early lunching policy.

[4] *Compare* AB 60, chaptered July 21, 1999 (MJN Ex. 58) *with* AB 2509, chaptered Sept. 29, 2000 (MJN Ex. 60). *See also* SB 88, chaptered Sept. 19, 2000 (MJN Ex. 63).

[5] *See* AB 60, §11 (adding Lab. Code §517(a), directing IWC to adopt Wage Orders no later than July 1, 2000); Wage Order 5-2001 (adopted Jun. 30, 2000) (MJN Ex. 5); *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1105, 1109-10 (2007) (current Orders adopted June 30, 2000, as the Legislature was "fully aware"); *see also Sara M. v. Superior Court*, 36 Cal.4th 998, 1015 (2005) (Legislature presumed aware of regulations adopted pursuant to express statutory direction); *Mountain Lion Foundation v. Fish & Game Comm'n*, 16 Cal.4th 105, 129 (1997) (same).

determinative on meal period timing, and, necessarily, as to Brinker's constructive notice of the timing requirement.

First, as plaintiffs have repeatedly pointed out, section 226.7 explicitly makes employers statutorily liable for violating *the Wage Orders*, not for violating section 512. If the Legislature had intended section 512 to materially diminish the Wage Orders' worker protection provisions, it would have incorporated section 512, *not* the Wage Orders, into section 226.7. The decision to incorporate the Wage Orders instead of section 512 was deliberate. *See Murphy*, 40 Cal.4th at 1110 ("Legislature was fully aware of the IWC's wage orders in enacting section 226.7").

Second, section 226.7 contains *no language* that Brinker or its amici have ever argued is inconsistent with the Wage Orders' timing requirement. Plaintiffs highlighted this point in their Opposition (at 9), yet Brinker still offers no response.

Third, even if, as Brinker argues, section 512 somehow eliminated the Wage Orders' timing requirement (which it did not), because section 226.7 is the later-enacted statute it necessarily "*supersede*[*s*]" section 512 in the event of a conflict. *Collection Bureau of San Jose v. Rumsey*, 24 Cal.4th 301, 310 (2000) (emphasis added); *see also Simpson v. Cranston*, 56 Cal.2d 63, 68-69 (1961) (later enactment "controls" over earlier statute); *City of Petaluma v. Pacific Tel. & Tel. Co.*, 44 Cal.2d 284, 288 (1955) (same).

Brinker does not respond to any of these points. Nor does it offer any support for CELC's flawed analysis of section 516. Tellingly, Brinker's answer does not cite section 516 at all. As plaintiffs have demonstrated, section 516 is irrelevant for two reasons: 1) the IWC adopted the current Wage Orders when it was explicitly empowered to do

so "[n]otwithstanding any other provision of law." AB 60, §10 (§516's original text as adopted eff. 1/1/00); and 2) under the longstanding rule of *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980), the IWC's Wage Orders may be more protective of worker rights than the Labor Code, which sets only a minimum floor. *Id.* at 733 (citing *California Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 290-94 (1943); *Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 599-601 (1968); 2 Ops.Cal.Atty.Gen. 456, 457 (1943)).

Brinker's efforts to sidestep the Wage Orders' plain language (Answer at 2-8) also suffer from several noteworthy flaws of omission.

Brinker ignores the Wage Orders' term "work period," which is used throughout the Wage Orders to mean "a continuing period of hours worked." 8 Cal. Code Regs. §11050, ¶¶7(A)(3), 11(A), 12(A).[6] The Wage Orders prohibit employers from employing workers "*for a work period of more than five (5) hours* without a meal period ...." *Id.* ¶12(A). The meaning is plain—no period of work may exceed five hours. 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."[7]

Brinker does not dispute that this language has been unchanged since 1952 (*see* Wage Order 5-52, ¶11 (MJN Ex. 14)), but contends that the 1952 amendment "deleted" any requirement for "a meal period after five consecutive hours of work." Brinker Answer at 9. This argument ignores the IWC's 1952 meeting minutes, cited by several members of this Court

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[6] Memorandum of IWC Executive Officer, "MEAL PERIODS" (03/05/92) (MJN Ex. 376#24; 800410152).

[7] Letter from IWC Executive Officer (July 13, 1982) (MJN Ex. 376#20; 800410113) (emphasis added).

during oral argument, which confirm that the Orders, as amended to include the term "work period," require that "*a meal period shall be every 5 hours*"—*not* "only one meal period within the first 5 hours," as Brinker contends. Minutes of a Meeting of the IWC (May 16, 1952), at 703456236 (emphasis added) (hereafter "1952 Minutes"), adopting Order 5-52 and repealing Order 5R, ¶10 (1957) (MJN Ex. 13) ("five (5) consecutive hours *after reporting to work*" (emphasis added)). This language confirms that Brinker's early lunching practice is unlawful.

The argument also ignores the fact that for decades, the IWC deliberately *retained* language prohibiting any "excessive" periods of work, until 1943 when it introduced the term "work period" to serve the same function. Real Parties' Answer at 28-29. The IWC reintroduced this term in the 1952 Orders for the explicit purpose of requiring that "a meal period shall be *every 5 hours*" (1952 Minutes (emphasis added)).[8]

Brinker's argument also ignores what the Wage Orders go on to state: that "when a *work period* of not more than six hours will *complete the day's work* the meal period may be waived by mutual consent of employer and employee." 8 Cal. Code Regs. §11050, ¶11(A) (emphasis added).[9] As recognized during oral argument, this language makes clear

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[8] Brinker's reliance on the short-lived phrase "five (5) consecutive hours *after reporting to work*" (*see* Wage Order 5R, ¶10 (MJN Ex. 13)) continues to be misplaced. Brinker Answer at 11-12. As previously explained, that amendment temporarily required just a single meal period after the first five-hour work period of the day ("after reporting to work"). In 1952, the IWC *eliminated* that language, restoring the term "work period" and with it, the timing requirement. The 1952 meeting minutes could not be clearer on this point.

[9] This language has been unchanged since 1963. *See* Wage Order 5-63, ¶11 (MJN Ex. 16); *see also* Locker-Broad Amicus Brief at 17-18.

that the Orders require a second meal period not later than five hours after the first one, because otherwise, there would be nothing to waive.[10]

In its "due process" argument, Brinker tries to sweep the Wage Orders' adoption history under the rug, calling it "inapposite." Brinker Answer at 11 n.2. However, that history could not be clearer in establishing that the Wage Orders—through use of the term "work period"—protect worker health and safety by prohibiting work schedules "leaving a stretch of 6 hours to be worked after lunch." Minutes of a Meeting of the IWC (Jan. 29, 1943), at 703426115 (MJN Ex. 297) (construing Wage Order 5NS (1943), ¶3(d) (MJN Ex. 12) (prohibiting "work period[s] of more than five (5) hours" without a meal)).[11]

As in its merits briefs, Brinker compares the Wage Orders' meal period language to the rest break language, which states that rest breaks "'insofar as practicable shall be in the middle of each work period.'" Brinker Answer at 6-7 (quoting 8 Cal. Code Regs. §11050, ¶12(A)). Brinker's reliance on this language continues to be misplaced. The *meal period* timing requirement operates by limiting the length of the "work period" to five hours. The *rest break* provision requires rest breaks to be timed "in the middle of each work period." These are two different, but complementary and equally effective, ways of imposing a timing requirement. The rest break language takes nothing away from the

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[10] Brinker quotes the Statement as to the Basis for the 2000 Amendments to Wage Orders 1 through 15 and the Interim Wage Order (MJN Ex. 32), Brinker Answer at 3-4, but the quoted language is not at all inconsistent with the conclusion that if the day's concluding work period exceeds five hours, the Wage Orders require a meal period, which may then be waived by mutual consent.

[11] *See also* Real Parties' Answer at 29-30 & n.21 (additional historical materials supporting this conclusion).

operation or efficacy of the meal period language as construed in, before, and after 1952. It certainly does not negate the many textual and historical reasons why Brinker was on at least constructive notice that its early lunching policy would be found unlawful.

Brinker also repeats its argument based on the motion picture Order. Brinker Answer at 7 (citing 8 Cal. Code Regs. §11120, ¶11(A)). Yet it still offers no response to plaintiffs' showing (RBM 23-24) that when this language was introduced in 1966, the IWC understood that the Wage Orders *already* required "meal periods *at intervals* of no more than five and one-half hours." Report and Recommendations of the Wage Board for IWC Wage Order 12—Motion Picture Industry (Oct. 21, 1966) at 6 (MJN Ex. 328) ("1966 Report"); *see* RBM at 23-24.[12] The more explicit timing language was added to this Order only because the motion picture Wage Board originally intended to preserve the 5½-hour interval "for the first meal period," but to "extend[] ... the interval ... to six hours" for "those work periods in which a second or subsequent meal periods are required." 1966 Report at 6. After drafting a new sentence to accomplish that objective (the sentence on which Brinker now relies), the IWC then decided to extend the *first* interval as well. It did so by changing the language of the first sentence from "five and one-half hours" to "six hours." *Id.*; *see* Wage Order 12-68, ¶11(a) (MJN Ex. 250). While it could have accomplished the same result without keeping the previously-drafted new sentence, the final Order kept both.

In short, the motion picture Order derives from a (perhaps inelegant) 1968 amendment intended to "extend the *interval*" between work periods

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[12] *See also* Locker-Broad amicus brief at 4-5 (discussing early motion picture Order language).

from 5½ hours to six. Notwithstanding the second sentence, the amendment created no new or unique requirement for meal periods "at intervals." That requirement already existed in the first sentence, had for decades, and continues today. *See* 1966 Report at 6; *see also* Statement as to the Basis for Wage Order 12-80, ¶11 (MJN Ex. 252) ("the basic provisions" of motion picture Order's meal period language "date back more than 30 years"). If it did not, none of the IWC's many statements about timing—including multiple reports and minutes confirming that meal periods must occur at proper "intervals"—would have any meaning at all. *See* Real Parties' Answer at 29-30 & n.21 (citing IWC source materials).

Instead of addressing the Wage Orders' language head-on, Brinker, like CELC, rests its due process argument almost entirely on section 512, a statute intended to "codify" the Wage Orders, not to dilute their longstanding worker health and safety protections. Brinker Answer at 2-6.[13] Nothing in section 512 is inconsistent with the Wage Orders' timing requirement. But if it were, that would simply mean that the Wage Orders are more protective, as the 30-year-old rule of *Industrial Welfare Commission v. Superior Court* permits them to be, not that a prospective-only application is proper.

Like CELC, Brinker also continues to rely on the words "per day" in section 512. Brinker Answer at 5-6. Yet Brinker still has no response to plaintiffs' point (RBM at 26; Opposition at 9) that "per day" was simply a topical reference included for the purpose of relating section 512 to the rest of the bill. *See* Amicus Letter of former Assemblyman Wally Knox (author of AB 60), dated 09/11/08, at 5; *see also* Real Parties' Answer at 32-33.

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[13] AB 60, Legislative Counsel's Digest, at 2 (MJN Ex. 60) (section 512 "would codify" the "[e]xisting" Wage Orders).

AB 60 was about daily work time, and was intended to restore protections to "eight million workers" who "lost their right to overtime pay." *Harris v. Superior Court*, ___ Cal.4th ___, 2011 WL 6823963, *2 (Dec. 28, 2011). "Per day" does not signal an intent by the Legislature to restore workers' daily overtime protections with one hand while simultaneously stripping away workers' daily meal period protections with the other. It would make no sense to interpret the words this way given "the manifest purpose of the enactment as a whole." *Arias v. Superior Court*, 46 Cal.4th 969, 979 (2009) (citing *Lungren v. Deukmejian*, 45 Cal.3d 727, 735 (1988)).[14]

Brinker contends that "per day" in section 512 means that workers are entitled to a single meal period, taken at any time during the day that the employer may choose, if they work more than five hours. If that were really the Legislature's intent, it would not have said it was "codifying" the Wage Orders, which do not use the words "per day." Instead, the Legislature would have used clearer and more straightforward language to accomplish that objective, such as "aggregate daily work time" or "total daily work time," which is the standard phrasing used in the Wage Orders for the concept Brinker is advancing. *See, e.g.*, 8 Cal. Code Regs. §11050, ¶12(A) ("a rest period need not be authorized for employees *whose total daily work time* is less than three and one-half (3½) hours" (emphasis added)). The words "per day" do not clearly articulate this concept—not

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[14] Nor would it make sense given the Legislature's decision, in AB 60, to "reinstate" a series of Wage Orders containing the very meal period timing requirement Brinker contends AB 60 eliminated. AB 60, §21 (MJN Ex. 58) ("Wage Orders 1-89, 4-89 as amended in 1993, 5-89 as amended in 1993, 7-80, and 9-90 are reinstated...."); MJN Exs. 100, 151-152, 157-158, 187, 218.

for purposes of statutory construction and certainly not for due process notice purposes.

Further undercutting Brinker's reliance on "per day" in section 512 is the fact that the Legislature did *not* use those words in the later-enacted section 226.7. Instead, the Legislature deliberately chose to reference and incorporate only the Wage Orders. Accordingly, even if section 512 may have diminished the Wage Orders' timing requirement (which it did not), section 226.7 *restored* it.

Brinker's final "due process" construction argument rests on a misreading of the second sentence of section 512(a). Brinker Answer at 4-5. As explained in Real Parties' Answer (at 31-32), this sentence preserves the limited waiver rights that the IWC had added to several 1998 Wage Orders, including Order 5-98. *See* Wage Order 5-98, ¶11(C) (MJN Ex. 20). Without this sentence, AB 60 would have eliminated the limited waiver right by declaring the 1998 orders "null and void." AB 60, §21 (declaring Order 5-98 and others "null and void"). The Legislature *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 can be waived on longer shifts. *See* Lab. Code §512(a) (second sentence).

Brinker ignores all of this adoption history, which demonstrates that 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.[15]

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[15] Brinker also fails to consider that the sentence 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.

For all these reasons, Brinker's efforts to resurrect its merits arguments as due process arguments must fail. Logically, this Court cannot even reach the prospective-versus-retroactive question until it has first concluded that the text, history, and purposes of the Wage Orders and Labor Code provisions support the trial court's construction of the meal period timing requirement (which provided an independent basis for its class certification order). Those same indicia of legislative and regulatory intent surely put Brinker on at least constructive notice that its early lunching policy was unlawful. And for the additional reasons stated below, Brinker undoubtedly had actual notice as well.

2. Even if California Meal Period Law Were Unclear, Brinker Also Had Actual Notice Sufficient to Satisfy Any Due Process Concerns that Its Early Lunching Policy Was Unlawful

There is substantial evidence in the record that Brinker knew or should have known when it formulated and implemented the policies at issue in this lawsuit that its early lunching policy was unlawful. Before 2002, when Brinker entered into its $10 million settlement with the DLSE (which encompassed Brinker's workplace practices between October 1, 1999 and December 31, 2001, 17PE4789-4804, *see* Real Parties' Answer at 15-17), Brinker had no formalized meal period policy and rarely offered its employees any meal periods at all (according to evidence before the trial court in support of plaintiffs' class certification motion, in this case in which no merits discovery has yet been allowed, *e.g.*, 1PE158). Brinker's Legal Compliance Manager testified that Brinker first developed and

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The amendment thus creates a compliance floor for meal periods for workers on the alternate workweek schedules of four 10-hour days allowed by AB 60. *See* Lab. Code §511 (added by AB 60, §5 (MJN Ex. 58)).

distributed its written meal-and-rest-break policy in 2002. 1PE270; *accord*, 3PE644 at 1:19-22. That policy (which continues to be Brinker's governing policy) states that workers are entitled to "a" meal period only if they work "a shift" exceeding five hours—*not* that they are entitled to a meal period for each period of work exceeding five hours: "I am entitled to a 30-minute meal period *when I work a shift* that is over five hours." 19PE5172 (emphasis added).

Brinker concedes that its customary practice is to require "early lunching," that is, to tell workers that they must take their meal periods, if at all, at or near the beginning of their shifts. *See* 21PE5914-15 (Ginger Hukill, Director of Human Resources and Compliance). Long before this lawsuit was filed, though, Brinker was on notice that this policy was unlawful.[16]

For example, the DLSE's June 14, 2002 Opinion Letter explicitly stated: "The plain language of the [wage] order and [Labor Code §512] would also prohibit an employer employing a worker eight hours a day in a restaurant from requiring the employee to take a meal period within the first hour of the work day so as to accommodate the employer's work schedule." *See supra* at 5-6. Seven months later, when the DLSE conducted its

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[16] Plaintiffs can easily prove these violations on a class-wide basis, because Brinker's computerized time records show the start and end times of each work period, each shift, and each meal period (if any) taken on that shift, as the Wage Orders require. 8 Cal. Code Regs. §11050, ¶7(A)(3). As a result, in each instance in which Brinker required an employee to take an early lunch near the start of the shift and then to work without a second meal period for more than five hours before the shift ended, those times and events will be documented in Brinker's own contemporaneous records (which it has the legal duty to maintain accurately, and which its managers had the authority to correct if inaccurate, *see* 2PE308-11).

follow-up audit of Brinker in Santa Clara to determine whether Brinker had brought itself into compliance, the DLSE concluded that Brinker was *still* violating California law, and specifically noted Brinker's ongoing practice of unlawfully requiring early lunching. 21PE5770-71.[17] Thus, whether or not Brinker agreed with the DLSE's construction of the governing law, it was certainly on notice, for due process purposes, that its early lunching policy might be unlawful.[18]

Any question Brinker may have had was resolved by the trial court, whose July 2005 order stated: "Defendant appears to be in violation of §512 by not providing a 'meal period' per every five hours of work." 1PE204, 208. Whether "advisory," "erroneous" or not, *see* Brinker Answer at 12-13, this ruling was certainly sufficient to put Brinker on notice that its

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[17] Specifically, the DLSE found: "Meal periods were not provided for every five (5) hours worked. Some were either taken in the first hour or greater than 5.25 hours later [or even] after 6.5 hours later. .... No second meal periods for the total hours worked more than 5 hours after the first meal period." 21PE5770; see also id. (finding "No Rest Periods").

[18] While Brinker complains that the DLSE's interpretations were not "consistent," Brinker Answer at 11, none of the inconsistencies Brinker cites occurred until *after* plaintiffs filed this class action, which reached back four years before the August 16, 2004 filing date. 1PE15. Moreover, while Brinker is correct that the DLSE withdrew its June 14, 2002 opinion letter in "the year Plaintiffs filed this lawsuit," that withdrawal did not occur until December 20, 2004, more than six months *after* this lawsuit was filed. MSJ Ex. 53. *Cf. Murphy*, 40 Cal.4th at 1105 n.7 (noting "highly politicized" changes in DLSE's position, including its withdrawal of worker-favorable opinion letters in December 2004: "While the DLSE's construction of a statute is entitled to consideration and respect, it is not binding and it is ultimately for the judiciary to interpret this statute. (*Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.) Additionally, when an agency's construction '"flatly contradicts"' its original interpretation, it is not entitled to 'significant deference.' (*Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1278.)").

conduct was unlawful. Yet the record is uncontroverted that Brinker stubbornly continued its early lunching policy despite this notice. *See* Real Parties' Answer at 16-17, citing 2PE451 (Joseph Taylor testimony; Brinker had made "no effort to make sure it was in compliance with California Law or the DLSE injunction.").[19]

Under this Court's void-for-vagueness case law, Brinker does not have even a colorable due process argument.

C. Brinker's Reliance on Federal Regulatory "Fair Notice" Cases Is Unavailing

Unable to cite a single void-for-vagueness case from this Court to support its position, Brinker instead mostly relies on a handful of federal regulatory cases discussing the "fair notice" doctrine under the Administrative Procedure Act, 5 U.S.C. §§701 et seq. ("APA"). These cases add nothing to the analysis, though, because to the extent they rely on due process considerations they are easily distinguishable.

The "fair notice" cases arise from the administrative law principle that when a federal regulatory agency construes the statute it is charged with administering, a reviewing court must defer to that regulatory construction, even if the court would not have adopted that same construction itself. *See* 5 U.S.C. §706(2)(A); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). To avoid unfairness to the regulated parties, courts deferring to such regulatory interpretations in a criminal case or a civil case seeking substantial penalties sometimes ask whether the regulated party had sufficiently "fair notice" of the agency's interpretation when the challenged conduct took place. *See, e.g.*,

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[19] *See also* 1PE266; 2PE329, 440, 451-54, 456-57.

McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993); *Arkansas Dept. of Human Services v. Sibelius*, ___ F.Supp.2d ___, 2011 WL 4826983, *14 (D. D.C. Oct. 12, 2011).

Brinker concludes from the "fair notice" cases that greater certainty may be required from administrative regulations than from statutes. Brinker Answer at 9-10. To the extent that is true, however, it is only because of federal administrative law considerations, not because due process requires it.[20] For purposes of *this* case, which arises under California state law and not the federal APA, Brinker's "fair notice" authorities are relevant only to the extent they rely on the Due Process Clause. But as plaintiffs have shown, retroactive application of this Court's forthcoming ruling fully satisfies due process, given: 1) the language, history, and purposes of the applicable meal period law; and 2) Brinker's actual, as well as constructive, notice of what that law required. *See supra* at 10-23.

Factually, too, each of Brinker's cases is easily distinguishable. Indeed, if Brinker were correct about what due process requires, a ruling by this Court accepting *Brinker*'s analysis of meal period timing would have to be prospective as to *plaintiffs*, because when plaintiffs filed this suit the

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[20] *See* Ringgenberg, *United States v. Chrysler: The Conflict Between Fair Warning and Adjudicative Retroactivity in D.C. Circuit Administrative Law*, 74 NYU L. Rev. 914, 927 (1999) ("Historically and legally, the fair warning rule started with the Due Process Clause's void-for-vagueness doctrine[, but] the current articulation of the fair warning rule reaches cases beyond this constitutional scope."); *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (fair notice doctrine is not of constitutional scope) (citing *Rollins Environmental Services Inc. v. EPA*, 937 F.2d 649, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part)).

consistent administrative construction of the applicable Wage Order and Labor Code provisions flatly prohibited Brinker's early lunching policy, and therefore *plaintiffs* had no "fair notice" that the DLSE's and IWC's construction would become a matter of such dispute.

Plaintiffs are not, of course, not seeking a prospective-only ruling. The point is simply that if Brinker's proposed application of the federal administrative "fair notice" doctrine were accepted on the facts of this case, then a large proportion of this Court's (and every other court's) decisions would have to be applied prospectively. That has never been the law.[21]

Brinker begins with two cases from the Ninth Circuit. One of those, *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commission*, 681 F.2d 1189 (9th Cir. 1982), is irrelevant, as it had nothing to do with the "fair notice" doctrine or the question of retroactive versus prospective application of judicial decisions.[22] The second, *United States v.*

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[21] *Cf. Arkansas Dept. of Human Services*, 2011 WL 4826983 at *15 ("If an agency were prevented on notice grounds from enforcing its interpretation of a regulation against any party who proffered a reasonable alternative interpretation and suffered any monetary loss, the practice of deferring to an agency's reasonable interpretation of its regulations would be rendered essentially meaningless. Courts would be flooded with challenges to administrative actions, and agencies would be unable to administer their regulations efficiently. The 'fair notice' doctrine has not been—and ought not be—extended this far." (citation omitted)).

[22] In *Phelps Dodge*, the agency contended that a regulation governing "electrically powered equipment" applied to activity involving non-electrical mechanical equipment. 681 F.2d at 1191. The Ninth Circuit declined to defer to that interpretation, citing considerable textual and regulatory evidence that the regulation had never been intended to apply to mechanical devices. *Id.* at 1192-93. While agency deference is an important principle of federal administrative law, the court held, it does not trump the courts' obligation to apply traditional tools of statutory and regulatory construction. *See also Murphy*, 40 Cal.4th at 1105 n.7.

AMC Entertainment, Inc., 549 F.3d 760 (9th Cir. 2008), is easily distinguishable.

In *AMC*, the Ninth Circuit considered a "fair notice" challenge to the Attorney General's interpretation of a regulation requiring "lines of sight" for wheelchair-bound movie theater patrons. 549 F.3d at 762. After finding no helpful legislative or regulatory history, administrative enforcement practice, or other materials to explain the regulation, *id.* at 764-65, 767, the Ninth Circuit accepted the Attorney General's construction under the highly deferential APA standard of review, *id.* at 766 (citing *Oregon Paralyzed Veterans v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003)). Nonetheless, the court held as a matter of "fair notice" that the defendant would be required to comply with the Attorney General's construction as of the date the Attorney General had first announced it, which was in an amicus brief filed 10 years earlier in a case in the Western District of Texas. *Id.* at 767-68. While emphasizing that constructive notice rather than actual notice is all that due process requires, the Ninth Circuit concluded that the defendant had no notice at all prior to that filing. *Id.* at 769-70. Consequently, the court remanded to the district court to determine, not whether the decision would be retroactive, but whether the retroactivity cut-off date would be the date 10 years earlier when the Attorney General filed its amicus brief in Texas, or some other more appropriate date. *See id.*

Of course, in the present case, Brinker *did* have considerable notice—both actual and advance—which it willfully and consistently ignored.

Brinker fares no better with its three cases from the D.C. Circuit: *General Electric Co. v. United States Environmental Protection Agency*, 53

F.3d 1324 (D.C. Cir. 1995); *Gates & Fox Co., Inc. v. Occupational Safety and Health Review Com.*, 790 F.2d 154 (D.C. Cir. 1986); and *United States v. Chrysler Corporation*, 158 F.3d 1350 (D.C. Cir. 1998).

In *General Electric*, the D.C. Circuit declined to enforce a fine imposed for violating regulations interpreted in a manner of which the defendant had neither actual nor constructive notice, that the agency itself admitted was "not apparent," and that was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed [the defendant] of the agency's perspective." *Id.* at 1329-30, 1332-34. In *Gates & Fox*, the agency advanced an interpretation with no textual support whatsoever—that a regulation requiring rescue equipment for employees who worked "near the advancing face" of a tunnel applied to workers nowhere near any advancing face. 790 F.2d at 155-56. In *Chrysler Corporation*, the agency whose regulation was challenged did not attempt to defend that regulation on the ground that the defendant had adequate notice of the new rule; instead, the agency argued "that notice is not required"—a position the D.C. Circuit not surprisingly rejected. 158 F.3d at 1354.

These facts of each of these cases stand in sharp contrast to the present case, where the meal period timing requirement is not only supported by the text, history, and—for the entire period predating the filing of this lawsuit—consistent administrative interpretation, but the DLSE (and the trial court) put Brinker on *actual* notice that its early lunching policy violated Wage Order 5 and the Labor Code. *See supra* at 20-23.

One final point bears emphasis. CELC's amicus brief made a series of outlandish, unsupported assertions about the economic burdens that

would supposedly result if this Court affirms the trial court's ruling declaring unlawful Brinker's early lunching policy. Plaintiffs responded by pointing to the lack of any factual basis for CELC's predictions, and the common-sense reasons why those made-up concerns were entirely overblown. *See* Opposition at 15-17; Real Parties' Answer at 12-13, 17, 20-24. Brinker now urges the Court to accept CELC's unsupported assertions and imaginative arithmetic, claiming without any factual support of its own that retroactive application "could cost innocent employers many millions of dollars." Brinker Answer at 16-17. Yet Brinker offers no response to plaintiffs' rebuttal analysis, which it does not even acknowledge—despite responding to nearly every other argument in plaintiffs' Opposition. *See* Brinker Answer at 6, 11 n.2, 12, 13.

Quite simply, there is no evidence that early lunching policies like Brinker's are prevalent among California employers, while there is considerable basis for concluding they are not. *See* Real Parties' Answer at 20. Neither CELC nor Brinker identified any other case, either past or pending, in which this issue has arisen (except to a limited extent, *Nguyen*, which we have already distinguished, *see* Real Parties' Answer at 31-32 & n.24, 40-42 & n.30). And in Brinker's Answer, the only example it can provide is the hypothetical coffee shop owner who allows a long-term employee with a nine-hour shift to take an early lunch to share time with his wife—hardly evidence of massive statewide non-compliance.

III. CONCLUSION

For the reasons stated above and in Real Parties' Answer, the Court's forthcoming ruling should be fully retroactive.

Dated: January 13, 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 8,400 words, including footnotes.

Dated: January 13, 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' REPLY TO BRINKER'S 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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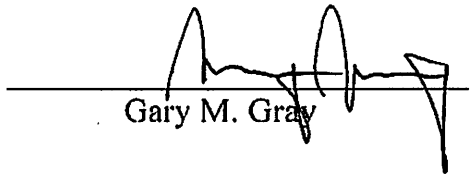

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