No. S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORP., et al.,

Petitioners and Defendants,

v.

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

Respondent.

ADAM HOHNBAUM, et al.,

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. G1C834348 Honorable Patricia A.Y. Cowett, Judge

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORP., ET AL.

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
JULIAN W. POON, SBN 219843
KIRSTEN R. GALLER, SBN 227171
DAVID S. HAN, SBN 247789
BLAINE H. EVANSON, SBN 254338
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Amici Curiae

NATIONAL CHAMBER LITIGATION CENTER, INC.
ROBIN S. CONRAD
SHANE BRENNAN KAWKA
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Attorneys for Chamber of Commerce of the United States of America

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SHANE BRENNAN KAWKA
1615 H Street, NW
Washington, DC 20062
Telephone: (202) 463-5337

Attorneys for Chamber of Commerce of the United States of America

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APPLICATION

Pursuant to California Rule of Court 8.520(f), the Chamber of Commerce of the United States of America ("U.S. Chamber") and the California Chamber of Commerce ("CalChamber") respectfully request leave to file an amicus curiae brief in support of Defendants and Petitioners, Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P (collectively, "Brinker").

STATEMENT OF INTEREST

The U.S. Chamber is the world's largest business federation and represents an underlying membership of more than three million companies and professional organizations nationwide. It regularly advocates the interests of its members in matters before Congress, the Executive Branch, and the courts. The U.S. Chamber often submits briefs as amicus curiae in litigation raising issues of concern to the Nation's business community. This is such a case, because the U.S. Chamber's members are often targets of class action litigation involving wage-and-hour issues.

The CalChamber is a non-profit business association with over 15,000 members, both individual and corporate, representing virtually

every economic interest in the State of California. For over 100 years, it has been the voice of California business. While the CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. It acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community, like the wage-and-hour issues presented here, which will directly impact many of the CalChamber's members.[1]

Both the U.S. Chamber and CalChamber (collectively, "Amici") have reviewed the decision by the Court of Appeal and the parties' briefs before this Court. The Chambers believe they can assist this Court in reaching a correct decision by discussing (1) the proper interpretation of the meal-period obligation under the Labor

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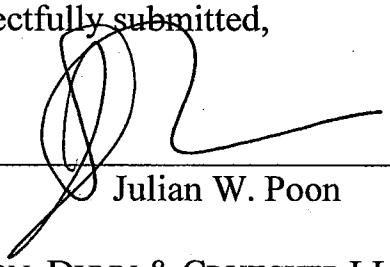
[1] Pursuant to California Rule of Court 8.520(f), the U.S. Chamber and CalChamber disclose that Wal-Mart Stores, Inc. contributed in part to the cost of preparing this brief. No other entities or persons contributed to funding the preparation or submission of the brief.

Code and Wage Orders, based on their plain text, other authorities, and policy considerations, and (2) the correct application, under any interpretation of the meal-period obligation, of class certification and due process principles to the meal-period class proposed by Plaintiffs here.

For the above reasons, the U.S. Chamber and CalChamber respectfully request leave to file the attached amicus curiae brief.

Dated: August 18, 2009 Respectfully submitted,



Julian W. Poon

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR.
JULIAN W. POON
KIRSTEN R. GALLER
DAVID S. HAN
BLAINE H. EVANSON
Attorneys for Amici Curiae

NATIONAL CHAMBER LITIGATION CENTER, INC.
ROBIN S. CONRAD
SHANE BRENNAN KAWKA
Attorneys for Chamber of Commerce of the United States of America

INTRODUCTION

This case turns on the proper interpretation of Labor Code Sections 226.7 and 512,[2] which require employers to "provide" meal periods to their employees. Plaintiffs advocate a counter-textual interpretation of the Labor Code and claim that "provide" means "ensure" and that employers must actually force their employees to take meal periods. The Court of Appeal rejected this interpretation and correctly construed "provide" to mean "make available" in keeping with its plain meaning, common sense principles of statutory interpretation, and the weight of extant authority and public-policy considerations. This Court should do the same and affirm.

The Court of Appeal's construction of "provide" draws support from nearly every case to have squarely addressed the issue. Virtually all federal cases that have done so, for example, hold that under the Labor Code and Wage Orders, employers need only *provide* meal periods—*i.e.,* make them available—rather than *ensure* that they are taken. Likewise, cases outside the meal-period context have over-

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[2] All statutory references herein are to the Labor Code unless otherwise specified.

whelmingly construed "provide" consistent with its plain meaning to mean "make available."

Policy considerations—such as the enormous burden that employers would shoulder if they had to force their employees to take all meal periods, and the perverse employee incentives that would result from such a system—also substantially favor according Sections 226.7 and 512 their plain meaning.

But Plaintiffs ask this Court to disregard the plain language of those sections and to hold that employers must actually *force* their employees to take all meal periods. Plaintiffs base their counter-textual interpretation primarily on the phrase "no employer shall employ," which appears in the first paragraph of the Wage Order, but nowhere in the statutory text. This phrase, according to Plaintiffs, trumps the word "provide" wherever it appears—in the legislative history of Sections 226.7 and 512, in both statutes' plain terms, and even in the second paragraph of the Wage Order. But the "no employer shall employ" phrase is wholly consistent with a "make available" standard and, in any event, could not override the plain meaning of the statutory text, if there were any conflict between the two, which there is not.

Plaintiffs also seek support from the meal-period waiver provisions of the Labor Code and Wage Orders. But those provisions address only waiver of the right to have meal periods made available, and thus are of no help to Plaintiffs.

The Court of Appeal therefore got it right by interpreting Sections 226.7 and 512 consistently with their plain meaning, and there is no reason to construe "provide," as used in Sections 226.7 and 512, to mean anything other than "make available."

The Court of Appeal's correct interpretation of "provide" leads to the inescapable conclusion that certification of Plaintiffs' proposed class would run afoul of California law, not to mention the Due Process Clauses of the California and Federal Constitutions.[3] Brinker's meal-period policy is clear that all employees who work shifts longer than five hours are entitled to a meal period, and even Plaintiffs estimate that the vast majority of class members took their meal periods. Plaintiffs thus do not challenge any class-wide policy denying them meal periods, but rather the application of Brinker's policy in particu-

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[3] While this appeal raises a number of certification issues, Amici will address only whether the meal-period class was properly certified.

lar circumstances in which an individual manager may have allegedly required an individual employee to work through his or her meal period at one of Brinker's 137 restaurants in California despite Brinker's express corporate policy to the contrary.

Yet the essential question of *why* a given employee may not have taken a meal period on a particular day cannot be answered on a class-wide basis, because resolving each such claim would require individualized proof from the plaintiffs and individualized rebuttal and defenses from the defendant. Each individual plaintiff would have to prove that he or she was impeded or prevented from taking his or her meal period, and the employer defendant would then be entitled to respond with evidence that it made the meal period available to be taken, but for whatever reason, the employee declined to take that meal period. Such evidence would be specific to each individual employee, and, indeed, to each individual meal period, and could not be determined or adjudicated on a class-wide basis without abridging the defendant's due-process rights. The individualized analyses thus predominate over any common questions that may be raised by Plaintiffs' putative class, thereby rendering class certification inappropriate here under this Court's well-established precedents.

Even if this Court were inclined to reverse the Court of Appeal's decision on the meaning of an employer's obligation to "provide" a meal period, Plaintiffs' proposed class still should not be certified because even if employers must "ensure" that employees take their meal periods, employers such as Brinker would still have a right to assert certain affirmative defenses that can only be resolved on an individualized basis. Such defenses include an employee's statutory waiver of his or her meal period, the employee's failure to exercise ordinary care in taking the meal period, and the argument that any missed portion of a meal period was "de minimis" and not deserving of an entire meal-period premium. Allowing classes such as Plaintiffs' to be certified would prevent defendants such as Brinker from asserting such defenses effectively in violation of defendant's due-process rights. Such a dramatic change in the substantive law would also run afoul of well-established principles of California class-action procedure.

The Court of Appeal thus correctly reversed the trial court's certification of Plaintiffs' proposed class and this Court should affirm the Court of Appeal's decision.

ARGUMENT

I. UNDER THE LABOR CODE AND WAGE ORDERS, EMPLOYERS NEED ONLY MAKE MEAL PERIODS AVAILABLE TO THEIR EMPLOYEES.

The plain language of the Labor Code and Wage Orders establishes that employers need only make meal periods available to their employees. Virtually every case to have squarely confronted this issue has so concluded, and this plain-meaning interpretation of the statutory text finds support from cases across the country outside the meal-period context. Public policy also strongly supports this view.

Plaintiffs' arguments to the contrary are unavailing. They focus on the phrase "no employer shall employ" from the Wage Order, but that phrase is entirely consistent with a "make available" standard. In addition, Plaintiffs seek support from the waiver provisions of the Labor Code and Wage Orders, but those provisions address only waiver of the right to be provided with meal periods and not an employee's decision to skip an otherwise-provided meal period.

The Labor Code and Wage Orders should therefore be interpreted pursuant to their plain meaning, and this Court should hold that meal periods need only be made available to employees.

A. The Plain Language Of Labor Code Sections 226.7 And 512 Makes Clear That Meal Periods Need Only Be Made Available.

Labor Code Section 226.7 states as follows:

> (a) No employer shall *require any employee to work* during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails *to provide* an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

(Lab. Code, § 226.7, italics added.) Under the statute, therefore, an employer must "provide" an employee a meal period. The plain meaning of "provide," according to the dictionary cited by this Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104 ("*Murphy*"), is simply "[t]o make available." (Am. Heritage Dict. (4th ed. 2000) p. 1411; see also *ibid.* ["[t]o furnish; supply"]; Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 937 ["to supply or make available," "to make something available to"]; New Oxford Am. Dict. (2001) p. 1372 ["make available for use; supply," "equip or supply someone with"].) Meal periods thus must be "made available," and employers may not "require any employee to work during" them.

Section 512 contains the same requirement. It states:

> (a) An employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(Lab. Code, § 512, italics added.) Section 512, therefore, like Section 226.7, requires only that employers "provid[e]" meal periods—*i.e.,* make them available.

B. Federal Cases And Cases Outside The Meal-Period Context Interpret "Provide" As "Make Available."

Rather than repeating the same arguments and authority discussed at length by Brinker (AB 24-64),[4] Amici will instead focus on additional authority that supports interpreting "provide" consistent with its plain meaning.

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[4] As used herein, "AB" refers to Brinker's Answer Brief on the Merits, "OB" refers to Plaintiffs' Opening Brief on the Merits, and "RB" refers to Plaintiffs' Reply Brief on the Merits.

1. Federal Decisions Support A Plain-Language Interpretation Of The Labor Code.

Recent federal court decisions—in addition to those cited by Brinker (AB 55-58)—continue to hold that an employer need only make meal periods available.[5] In *Jasper v. C.R. England, Inc.* (C.D.Cal. Mar. 30, 2009) 2009 WL 873360, at *5, for example, the district court, after distinguishing *Cicairos, supra*, 133 Cal.App.4th at p. 949, and noting recent cases holding that "employers are required only to make meal breaks . . . available to employees," held that plaintiffs "hav[e] to prove that [an employer] had a policy of preventing them from taking breaks." And in *Kohler v. Hyatt Corp.* (C.D.Cal. July 23, 2008) 2008 U.S.Dist. LEXIS 63392, at *19-20 ("*Kohler*"),

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[5] Plaintiffs attempt to suggest otherwise by citing four federal cases, *Valenzuela v. Giumarra Vineyards Corp.* (E.D.Cal. 2009) 614 F.Supp.2d 1089, 1098, fn. 3 ("*Valenzuela*"); *Robles v. Sunview Vineyards of Cal., Inc.* (E.D.Cal. Mar. 31, 2009) 2009 WL 900731, at *8, fn. 3; *Doe v. D.M Camp & Sons* (E.D.Cal. Mar. 31, 2009) 2009 WL 921442, at *8, fn. 2; *Stevens v. GCS Serv., Inc.* (C.D.Cal. Apr. 6, 2006, No. 04-1337CJC) [nonpub. opn.], which supposedly support Plaintiffs' counter-textual "ensure" interpretation. (RB 18.) But *Valenzuela*, *Robles*, and *Doe* explicitly *declined* to address "[w]hether employers are required to do more" than simply "offer employees a meal period." (AB 57, fn.20.) So Plaintiffs are left with *Stevens*, an unpublished decision that, to our knowledge, has never been cited by any other court, and that relies on a discredited reading of *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 ("*Cicairos*"). (See AB 53-55, 58.)

the court also distinguished *Cicairos* and then rejected "Plaintiffs' contention that California law requires [an employer] affirmatively to ensure that each of its employees took appropriate meal and rest breaks." (See also *id.* at *19 [liability would depend on "whether an employee had been 'forced to forego' meal breaks"]; *Forrand v. Federal Express Corp.* (C.D.Cal. Feb. 18, 2009) 2009 WL 648966, at *3 ["the Court finds that California law requires employers must only make available meal . . . breaks to employees and that employees may choose not to take such breaks"] [citing *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 584-586 ("*Brown*")].)

2. Cases Outside The Meal-Period Context Demonstrate That The Plain Meaning Of "Provide" Is "Make Available."

Cases outside the meal-period context also support a plain-meaning interpretation of "provide" as "make available," and this is true of cases both in California and elsewhere. For example, in *Behrens v. Fayette Mfg. Co., Inc.* (1992) 4 Cal.App.4th 1567, the Court of Appeal interpreted a Labor Code requirement that a product be "provided for the employee's use" to mean that the product "must be given or furnished to the employee in order for the employee to ac-

complish some task."[6] (*Id.* at p. 1574 [quoting Lab. Code, § 3602, subd. (b)(3)]; see also, e.g., *Lagomarsino v. Market St. Ry. Co.* (1945) 69 Cal.App.2d 388, 395.)

Federal cases have interpreted "provide" in a similar manner. The Tenth Circuit, for example, in a case concerning the proper interpretation of a workplace-safety standard, held that "'shall be provided' [could not be read] to mean 'shall require use.'" (*Usery v. Kennecott Copper Corp.* (10th Cir. 1977) 577 F.2d 1113, 1118-1119.) This was because the "meaning usually attributed to the word provide is to furnish, supply or make available." (*Id.* at p. 1119, citing Am. Heritage Dict. (1976 ed.) p. 1053; see also *Borton, Inc. v. OSHRC* (10th Cir. 1984) 734 F.2d 508, 510 [employer had met its obligation of "provid[ing]" a ladder by making ladder available, without requiring its use]; *Castillo v. Case Farms of Ohio, Inc.* (W.D.Tex. 1999) 96 F.Supp.2d 578, 622 ["'to provide housing within the meaning of the AWPA, means to make housing available, procure housing, or furnish

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[6] Similarly, if a statute required employers to "provide" *meals* to their employees, surely that would not entail requiring employers to force their employees to eat those meals. All such a statute would require is that the employer make the meal available to the employee, which is all that the obligation to "provide" *meal periods* requires.

housing'"]; *United States v. Rocky Mountain Helicopters, Inc.* (D. Utah 1989) 704 F.Supp. 1046, 1050 ["'Provides' is not normally interpreted to mean 'shall require,' but rather 'to furnish, supply, or make available.'"].)

And several state courts have also interpreted "provide" consistently with its plain meaning as "make available." For example, in construing a "statute that requires only that the employer 'provide' safety devices," the New Mexico Supreme Court rejected a countertextual interpretation of the meaning of "provide." (*Jaramillo v. Anaconda Co.* (N.M. 1981) 625 P.2d 1245, 1246-1247.) The court explained that "[t]o construe [the "provide"] requirement as obligating the employer to monitor all devices at all times, and to 'watchdog' careless employees . . . is to read more into the statute than it contains. [Citation.] The employer had installed a kind of safety device required by law; it thus complied with the statutory mandate 'to provide' such a device." (*Id.* at p. 1246; see also, e.g., *LeSuer-Johnson v. Rollins-Burdick Hunter of Alaska* (Alaska 1991) 808 P.2d 266, 267 ["The term 'provide' is defined in Webster at 1144 as 'to make available, supply, afford; furnish with . . . .' We find that . . . [the employer] made available to its employees a field on which to play soft-

ball."]; *Thurston v. Department of Employment Sec.* (Ill.App.Ct. 1986) 498 N.E.2d 864, 865-866 [rule stating that "'Board of Review shall provide transcripts'" required "the Board . . . to either make the file available to a party for inspection at its office or to provide a copy at the party's own expense"]; *State v. Stoneking* (Iowa 1985) 379 N.W.2d 352, 356 ["using the ordinary meaning of 'provide,' the last sentence in [Iowa Code] section 321B.4 logically is construed to require only that the test be made *available* within the time period stated" (original italics)].)

These authorities make clear that, under the plain-meaning interpretation of Sections 226.7 and 512, employers need only make meal periods available.

C. Public Policy Supports A Plain-Meaning Interpretation Of Sections 226.7 And 512.

Sound considerations of public policy also undergird a plain-meaning interpretation of Sections 226.7 and 512. For example, under a "make available" standard, employees have greater flexibility with their time at and away from work. Brinker servers testified, for example, that they preferred skipping meal periods provided to them because "they lost money by having to clock out and forego tips." (AB 60, fn. 23.) And one named Plaintiff testified that he declined

meal periods that were provided to him because he was concerned that another employee would provide inadequate service to customers at his tables. (AB 60, fn. 22.) Other employees might decline meal periods to take on a second job or because of family commitments. (See AB 59-62.) The flexibility of a "make available" standard allows these situations—and others like them—to occur.

In addition, a "make available" standard spares employers the enormous burden of policing their employees to ensure that meal periods are taken. Under Plaintiffs' "ensure" standard, an employer would have to undertake such policing to make sure that each of its employees was taking a full thirty-minute meal period before the fifth hour of his or her shift in order to avoid paying the costly meal-period premiums. Yet, such policing duties "would be impossible to implement" for significant segments of various industries "in which large employers may have hundreds or thousands of employees working multiple shifts." (*White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088 ("*White*").) Such policing would also saddle California employers with undue costs and burdens. (See *Brown, supra*, 249 F.R.D. at p. 585 ["Requiring enforcement of meal breaks would place an undue burden on employers whose employees are nu-

merous or who . . . do not appear to remain in contact with the employer during the day."].) To undertake this policing duty, employers might have to install expensive new monitoring systems or substantially upgrade their current technologies. But such systems and technologies still would not explain *why* employees missed breaks and would also be susceptible to misuse by employees. More than just technology would thus be required. New personnel would also have to be hired to investigate situations in which meal periods were apparently missed, to monitor employees, and to handle the significant amount of new paperwork such a policing system would generate.

Plaintiffs nonetheless claim that because the Wage Orders require employers to "record every meal period," "[t]he mandatory meal period compliance standard adds nothing to the burden employers already bear." (OB 75.) But meal-period records do not reflect *why* meal periods were not taken, or even if they were taken at all. (See, e.g., AB 15 [noting Plaintiffs' witnesses who testified that employees would forget to clock in or out]; AB 109-110). Such records thus would not ease the undue burden on employers of ensuring that all employees took their meal periods.

Plaintiffs' interpretation would also force employers to discipline and possibly terminate employees who missed or cut short their meal periods. Indeed, this would create situations "in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee." (*White, supra*, 497 F.Supp.2d at p. 1089.) An "ensure" interpretation would also invite abuse by some employees trying to game the system to collect extra compensation in the form of premium payments. (*Ibid.* ["employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation"]; *Brown, supra*, 249 F.R.D. at p. 585 ["It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws."].) These perverse incentives could not have been intended by the Legislature.

In sum, policy considerations weigh decidedly in favor of according Sections 226.7 and 512 their plain meaning.

D. Neither The Wage Orders Nor Section 512's Waiver Provisions Support Plaintiff's Counter-Textual Interpretation Of The Labor Code.

Disregarding the plain language of Sections 226.7 and 512, Plaintiffs insist that "provide" means "ensure" and that employers must force employees to take meal periods in full and on time. But Plaintiff's interpretation of the meal-period obligation finds no support in the Wage Order's language or in the statutory waiver provisions.

1. The Wage Orders Fully Support A "Make Available" Standard And, In Any Event, Cannot Trump The Plain Meaning Of The Statutory Text.

Plaintiffs' primary argument is that the phrase "no employer shall employ," which appears in the first paragraph of the Wage Orders, mandates their counter-textual interpretation of the Labor Code. (See, e.g., OB 36; RB 5, 9-10.)[7] This argument is flawed for the following reasons.

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[7] The Wage Order states:

> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent

[Footnote continued on next page]

As an initial matter, a proper interpretation of Sections 226.7 and 512 begins with the language of those statutes, rather than with the phrase "no employer shall employ" from the Wage Orders. (See *Murphy, supra*, 40 Cal.4th at p. 1103 [when interpreting a statute, "it is well-settled that we must look first to the words of the statute"].) And the unambiguous language of Sections 226.7 and 512 makes clear that meal periods need only be made available. (See *ante* Section I.A.) Moreover, the current version of the Wage Order was promulgated after the enactment of Section 512. (AB 41-42.) Thus,

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[Footnote continued from previous page]

> of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

(8 Cal. Code Regs., § 11050, subds. (11)(A)-(B).)

the Wage Order's "[n]o employer shall employ" language must be read in light of Section 512's definition of the basic obligation to "provid[e]" meal periods. (8 Cal. Code Regs., § 11050, subd. 11(A); Lab. Code, § 512, subd. (a); see *Clean Air Constituency v. State Air Res. Bd.* (1974) 11 Cal.3d 801, 815-816.) By emphasizing the Wage Orders over the Labor Code, Plaintiffs have it backwards.

Further, Plaintiffs rely so heavily on the phrase "no employer shall employ" that, under their interpretation, the word "provide" is either ignored or interpreted as "ensure" wherever it appears—in the legislative history of Sections 512 and 226.7, in both statutes' plain language, and in the second paragraph of the Wage Orders' meal-period provision (8 Cal. Code Regs., § 11050, subd. 11(B)).[8] (See, e.g., RB 7 ["The word 'provide' [in Section 226.7] serves to . . . capture . . . the Wage Orders' directive meal period compliance standard ('no employer shall employ')."]; RB 8 [The Wage Orders "use[d] the

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[8] Plaintiffs criticize the Court of Appeal for allegedly "focus[ing] in on a single word" (OB 42), but it is Plaintiffs' focus on the phrase "no employer shall employ" that is overly rigid and that requires a contortion of the "plain and commonsense meaning" of the words in the Labor Code and Wage Orders (*Murphy, supra*, 40 Cal.4th at p. 1103). Thus, Plaintiffs, not the Court of Appeal or Brinker, are the ones "advocat[ing] blind adherence" to some definition. (OB 42.)

word 'provide' [in the second paragraph of the Wage Order] to incorporate the adjacent paragraph['s] compliance standards"—*i.e.,* the phrase "no employer shall employ."]; OB 40 ["[T]he Wage Orders use the term 'provide' as a shorthand way to refer . . . to the directive meal period requirement"—*i.e.,* "no employer shall employ"; "Section 226.7(b) . . . uses the word 'provide' to refer to . . . the Wage Orders' directive meal period requirement"; and "Labor Code section 512(a) . . . uses the word 'provide' in similar fashion."].)

Indeed, Plaintiffs' interpretation also entirely disregards the fact that other Wage Orders use the word "provide" with respect to a second meal period,[9] while also using "no employer shall employ" with respect to the first. (See, e.g., 8 Cal. Code Regs., § 11070, subd. (11)(B) ["An employer may not employ an employee for a work period of more than ten (10) hours per day without *providing* the employee with a second meal period of not less than 30 minutes." (italics

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[9] Plaintiffs are wrong that "provide" is only used in what they call the "remedy provisions" of the Wage Orders (8 Cal. Code Regs., § 11050, subd. 11(B)), but not in the "compliance provisions" (8 Cal. Code Regs., § 11050, subd. 11(A)). (RB 8-9.) "Provide" does appear in the "compliance provisions" with respect to the second meal period in several of the Wage Orders. (See, e.g., 8 Cal. Code Regs., § 11070, subd. (11)(B).)

added)].) Under the plain language of the Wage Orders, it is clear that second meal periods need only be made available. Plaintiffs' heavy reliance on "no employer shall employ" is thus entirely misplaced because it suggests that the Industrial Welfare Commission ("IWC") created an obligation to "provid[e]" second meal periods that differs from the obligation with respect to the first. Surely, the IWC did not intend to create such a purposeless anomaly. Thus, Plaintiffs' argument can only survive by completely ignoring the directive to "provide" a second meal period. But this interpretation should be rejected because it violates "one of the guiding principles of statutory construction, that significance be accorded every word of an act." (*People v. Johnson* (2002) 28 Cal.4th 240, 246-247.)

Furthermore, even if "provide" is mere surplusage that only "incorporates" the phrase "no employer shall employ," that would still be of no help to Plaintiffs because that phrase fully supports Brinker's text-based interpretation of the Labor Code. "No employer shall employ" addresses only an employer's obligation not to employ any-

one—or "permit [anyone] to work"[10]—without *offering* a meal period, and says nothing to indicate that an employer must force its employees to take every meal period offered. Indeed, under 8 Cal. Code Regs., § 11050, subd. 11(B), only if "an employer fails to provide an employee a meal period"—*i.e.,* fails to make one available—would there be any violation.

Plaintiffs, however, highlight what they claim is a "stark contrast between the meal period standard ('no employer shall employ') and the rest break standard ('authorize and permit')." (RB 9.) This "stark contrast," according to Plaintiffs, establishes that employers have a duty to ensure that meal periods are taken. But, as Brinker has forcefully argued, there is no contrast, and the meal- and rest-period provisions in the Wage Order "are identical in the only way that matters: Neither provision contains language indicating that employers must *force* employees to take the breaks they provide." (AB 30-32.)[11]

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10 Plaintiffs harp on the definition of "employ," which the Wage Order says is "engage, suffer, or permit to work," and insist that it supports their counter-textual reading of the Labor Code. (RB 5, 9-10.) But the Wage Order only describes how often the meal periods must be given and does not establish that employees must take them.

11 Plaintiffs make much of Wage Order 14, which covers agricultural workers and uses the phrase "authorize and permit" for

[Footnote continued on next page]

Indeed, the only case Plaintiffs rely on for support, *Valenzuela, supra*, 614 F.Supp.2d at p. 1098, states that a "plain reading of the meal period language . . . standing alone, suggests . . . that 'authorize and permit' should be read as equivalent to 'no employer shall.'"

Finally, even if the Wage Orders somehow could be read to support Plaintiffs' interpretation, the Wage Orders nonetheless could not contravene the plain language of the statutes (Sections 226.7 and 512), which only require employers to make meal periods available.[12] As noted in *California Teachers Ass'n v. California Com'n on*

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both meal and rest periods. (See OB 38; RB 10; 8 Cal. Code Regs., § 11040, subds. 11(A)-(B).) Plaintiffs suggest that Wage Order 14's use of "authorize and permit" with regard to meal periods demonstrates that "no employer shall employ," the meal-period language in all the other Wage Orders, obligates employers to ensure that meals are taken. Under Plaintiffs' logic, this would mean that agricultural workers covered by Wage Order 14, whom Plaintiffs characterize as deserving the most "protection[]" (see OB 5, 73), would actually receive less "protection[]" (OB 5) than workers covered by the other Wage Orders. Such a result would be nonsensical. Rather, under a proper interpretation of the Wage Orders, agricultural workers receive the same safeguards that the Legislature has afforded all other workers.

12 Section 516, which states that "*[e]xcept as provided in Section 512*, the Industrial Welfare Commission may adopt or amend working condition orders with respect to . . . meal periods," also forecloses Plaintiffs' interpretation of the Wage Orders. (Lab. Code, § 516, italics added; see AB 45-46.)

Teacher Credentialing (2003) 111 Cal.App.4th 1001, 1011, "[t]o the extent a regulation conflicts with a statute, it is well settled that the statute controls." (See also *Ass'n for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391 ["Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void."]; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321 ["a regulation which impairs the scope of a statute must be declared void"].)

The Wage Orders thus provide no support for Plaintiffs' counter-textual interpretation of the Labor Code.

2. The Waiver Provisions In The Labor Code And Wage Orders Involve Only The Right To Be Provided Meal Periods.

Plaintiffs also contend that the "Court of Appeal's interpretation contradicts the plain language of the statutes and Wage Orders, which expressly allow meal periods to be waived only in limited circumstances." (OB 45.) The statutory waiver provisions, however, address only the duty imposed by "the plain language of the statutes and Wage Orders"—that is, the obligation to make meal periods available. Thus, the waiver provisions concern only waiver of the right to have a meal period made available. Whether an employee ac-

tually takes a meal period provided to him or her is not governed by these provisions. As noted in *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 645 ("*Kenny*"), "[t]he structure of [Section 512] and the Wage Order demonstrate that the waiver applies to the employer's obligation to 'provide' a meal break, not to the employee's decision to take a meal break." (See also *ibid.* ["The Court does not interpret the waiver language to mean that an employer must ensure that an employee actually take a meal period made available."].)

Still, Plaintiffs suggest otherwise by pointing to the "authorize and permit" language in the Wage Orders and arguing that the lack of a rest-break waiver provision demonstrates that, unlike meal periods, rest breaks "may be generally [skipped or] waived already." (OB 48-49.) Thus, according to Plaintiffs, because the Wage Orders *do* contain waiver provisions for meal periods, meal periods cannot be skipped. But this argument ignores Wage Order 14,[13] which uses the

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[13] Wage Order 14 states, in relevant part, that "[e]very employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by

[Footnote continued on next page]

phrase "authorize and permit" with regard to meal periods and states that, under certain circumstances, "*the meal period may be waived* by mutual consent of employer and employee." (8 Cal. Code Regs., § 11040, subd. 11, italics added.) Thus, under Wage Order 14, even under Plaintiffs' interpretation, meal periods that have been provided to employees may be skipped—and yet that Wage Order contains a meal-period waiver provision. This disproves Plaintiffs' claim that skipping a meal period is no different than waiving the right to have that meal period made available. (RB 11; OB 48-49.) Indeed, if Plaintiffs' claim that "authorize and permit" allows breaks to "be generally waived" were true (OB 49), then there would have been no reason for the IWC to have included the meal-period waiver provision in Wage Order 14. But the IWC did. (See *Johnson, supra*, 28 Cal.4th at pp. 246-247 ["one of the guiding principles of statutory construction[is] that significance be accorded every word of an act"].) Accordingly, the waiver provisions of the Labor Code and Wage Orders ad-

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mutual consent of employer and employee" and that "[e]very employer shall authorize and permit all employees to take rest periods." (8 Cal. Code Regs., § 11040, subds. 11-12.)

dress only waiver of the right to be *provided* meal periods, and not an employee's voluntary skipping of an otherwise-provided meal period.

The Court of Appeal thus got it right, and there is no reason to depart from its plain-meaning interpretation of the Labor Code and Wage Orders.

II. ADJUDICATING ON A CLASS-WIDE BASIS WHETHER AN EMPLOYER HAS "PROVIDE[D]" ITS EMPLOYEES A MEAL PERIOD WOULD VIOLATE CALIFORNIA LAW AND THE CALIFORNIA AND FEDERAL CONSTITUTIONS.

Under a proper interpretation of an employer's obligation to "provide" meal periods, Plaintiffs' proposed class could not properly be certified. Where there is a "necessity for . . . very particularized individual liability determinations," "'the community of interest requirement [under Civ. Proc., § 382] is not satisfied [because] every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class.'" (*Dunbar v. Albertsons, Inc.* (2006) 141

Cal.App.4th 1422, 1431-1432.)[14] Numerous individualized inquiries regarding *why* an employee failed to take a given meal period would predominate over any common questions presented in Plaintiffs' proposed class, and class-wide adjudication of Plaintiffs' claims would therefore be wholly inappropriate. Indeed, even under Plaintiffs' proposed reading of the statute, if Brinker were forced to defend itself on a class-wide basis, it would be precluded from asserting its defenses effectively, in violation of California law and the California and Federal Constitutions.

A. Under A Proper Interpretation Of "Provide," Individualized Issues Predominate Over Any Common Issues.

1. The Nature Of A Meal-Period Claim Does Not Lend Itself To Class-Wide Adjudication.

In *Sav-On Drug Stores, Inc. v. Superior Court* (2000) 34 Cal.4th 319 ("*Sav-On*"), this Court held that the "critical inquiry" when certifying a class is whether "the theory of recovery advanced

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[14] (See also *Lockheed Martin v. Superior Court* (2003) 29 Cal.4th 1096, 1108, 1111 ("*Lockheed Martin*") [affirming the overturning of class certification because plaintiffs had not sustained their burden of "not merely . . . show[ing] that some common issues exist, but, rather, . . . plac[ing] substantial evidence in the record that common issues *predominate*" (original italics)].)

by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Id.* at p. 327.) Courts must "examine the issues framed by the pleadings and the law applicable to the causes of action alleged" and determine whether "common questions of law or fact predominate." (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 164 ["Courts should stand ready to 'say what the law is' when its content will determine whether dissimilarities exist within a proposed class."].) The starting point, therefore, is the elements of the claim Plaintiffs must prove, and the elements required for them to prove it.[15]

Under a proper interpretation of "provide"—namely, "make available"—the facts Plaintiffs must prove in support of their claims are wholly inappropriate for class-wide adjudication. Plaintiffs must

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15 Plaintiffs are wrong that the Court of Appeal improperly re-weighed the evidence Plaintiffs offered in support of class certification. The Court of Appeal reversed the trial court's order because the trial court had applied the wrong legal standard, not because the Court of Appeal rejected the trial court's factual determinations. (AB 102-105; see, e.g., *Washington Mut. Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 911-912 ("*Washington Mut.*").)

prove not simply that they were unable to take a meal period, but rather that they were somehow "*forced to forego*" their meal periods. (*Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 532 ("*Salazar*"); see Section I.A-B, *ante*.) They must offer reliable evidence that Brinker somehow "impede[d], discourage[d] or prohibit[ed]" employees from taking their breaks. (*Perez v. Safety-Kleen Sys.* (N.D.Cal. 2008) 253 F.R.D. 508, 515 ("*Perez*").) Thus, even if Plaintiffs were able to prove from computerized time records that they did not take a meal period, they would still need to show *why* the meal period was not taken, and prove that it was not due to the employee's choice or negligence, but rather because the employer prevented them from taking a meal period. (*Kohler*, *supra*, 2008 U.S.Dist. Lexis 63392, at *19; *Kenny*, *supra*, 252 F.R.D. at p. 646.)

As numerous courts have held, certification of these claims for class adjudication is inappropriate because "individualized inquiries concerning the circumstances of each class member's missed meal breaks would have to be conducted." (*Kohler*, *supra*, 2008 U.S.Dist. LEXIS 63392, at *19; see also *Kenny*, *supra*, 252 F.R.D. at p. 646 ["plaintiff has failed to identify any theory of liability that presents a common question"]; *Brown*, *supra*, 249 F.R.D. at pp. 585-587; *Sala-*

zar, *supra*, 251 F.R.D. at pp. 531-532.)[16] Each member of Plaintiffs' putative class may have a different argument as to why she allegedly missed her meal period. As the Court of Appeal below explained, some employees skipped meal periods of their own free volition (*e.g.*, to earn extra money, to leave early, or to take a meal period at a more convenient time); others may have skipped their meal period due to a manager's request or inadequate staffing. (Slip Op. pp. 47-48; see also *Kenny*, at p. 646 [citing multiple reasons for missing a meal period, including "work[ing] through [a] meal break in order to earn more in tips or [to avoid keeping] a valued customer waiting. . . . On the other hand, . . . [a] store manager [may] instruct[] an employee to help a customer rather than take a lunch break"].) But each putative plaintiff's claim would be different and would require proof of individualized facts—an employee would be required to put forth evidence that she was forced to forego a meal period, which the em-

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16 While these cases were decided under Federal Rule of Civil Procedure 23, "[i]n the absence of California authority, California courts may look to the Federal Rules of Civil Procedure and the federal cases interpreting them.' [Citation]." (*In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298; see also *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 [California courts look to federal law "when seeking guidance on issues of class action procedure."].)

ployer could rebut with, for example, testimony from the plaintiff's manager. And "[e]ven with respect to an individual employee, the evidence supporting [her] claim could vary depending on the circumstances of each particular missed meal break." (*Kohler*, at *19.) There is simply no way of proving that the putative class *as a whole* missed meal periods for the *same reason*. The innumerable individualized issues in adjudicating each putative plaintiff's claim clearly predominate over any common issues that exist.

Plaintiffs point to the question of *whether* each employee missed a meal period as the "common" issue warranting certification of their putative class because, they claim, payroll records can show which meal periods were taken and which were not. (OB 126.) But even if these records could reliably show when meal periods were not taken, the records still could not show *why* the meal periods were not taken. (See Section I.C, *ante*.) As discussed above, the determination of *why* a meal period was taken involves numerous individualized inquiries, which completely outweigh the supposedly common issue of *whether* the meal period was taken. Plaintiffs' argument to the contrary ignores the standard for proving that they were not "provide[d] a meal period." (See *Kenny*, *supra*, 252 F.R.D. at p. 646 [common

questions "predominate only if defendant's liability for the additional hour of pay is established simply because the employee did not clock in and out for a full 30-minute meal break"].) Because the standard for liability requires not only that a plaintiff show he missed a meal period but also that he was "forced to forego" it, the "resolution of [this] common question . . . would not resolve the issue of [Brinker's] liability for statutory wage violations." (*Kohler*, *supra*, 2008 U.S.Dist. LEXIS 63392, at *19, citing *Kenny*, at p. 646.)

Plaintiffs also claim that "'most courts' have certified, and continue to certify [meal- and rest-period] claims" (RB 48), and cite a number of cases they say support the trial court's certification of the meal- and rest-period classes. But *none* of the cases involved a *California meal-period* claim where, as here, there was not a common policy being challenged. Some of the cases they cite did not involve meal-period claims,[17] and those that did all involved challenges to a clearly stated common class-wide policy that did not provide meal pe-

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[17] (E.g., *Smith v. Cardinal Logistics Management Corp.* (N.D.Cal. Sept. 5, 2008) 2008 WL 4156364, at *1 [misclassification case]; *Kurihara v. Best Buy Co.* (N.D.Cal. Aug. 30, 2007) 2007 WL 2501698 ("*Kurihara*") [unpaid wages]; *Chun-Hoon v. McKee Foods Corp.* (N.D.Cal. Oct. 31, 2006) 2006 WL 3093764 [misclassification].)

riods for the plaintiffs.[18] Indeed, several of the cases they cite involved *misclassification* pursuant to a common, class-wide policy,[19] but this line of cases has been disapproved by the Ninth Circuit in *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 944-947 ("*Vinole*") [abrogating, inter alia, *Wiegele v. Fedex Ground Package Sys., Inc.* (S.D.Cal. Feb. 12, 2008) 2008 WL 410691; *Wang v. Chinese Daily News, Inc.* (C.D.Cal. 2005) 231 F.R.D. 602]. Plaintiffs cite no analogous case in which a court has certified a class of plaintiffs seeking California premiums for meal or rest periods that were missed despite there being a policy that allowed for such periods.[20]

Cases involving a common policy or practice of denying *all* employees their meal periods are wholly inapposite to the present

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18 (E.g., *Cervantez v. Celestica Corp.* (C.D.Cal. 2008) 253 F.R.D. 562, 573 ("*Cervantez*"); *Kurihara, supra*, 2007 WL 2501698, at *2; *Ortega v. J.B. Hunt Transp., Inc.* (C.D.Cal. May 18, 2009) 2009 WL 1851330, at *6.)

19 (E.g., *Krzesniak v. Cendant Corp.* (N.D.Cal. June 20, 2007) 2007 WL 1795703; *Alba v. Papa John's USA, Inc.* (C.D.Cal. Feb. 7, 2007) 2007 WL 953849, at *14; *Tierno v. Rite Aid Corp.* (N.D.Cal. Aug. 31, 2006) 2006 WL 2535056, at *5-10.)

20 One of the cases Plaintiffs cite did not even involve class certification, but rather just an arbitration provision. (*Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, 1304.)

case, and it may be that in some of those cases there may not have been individualized questions regarding why a given employee missed a meal period. (*E.g., Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs.* (S.D.Cal. Feb. 2, 2009) 2009 U.S.Dist. LEXIS 7171, at *17-19 ("*Amalgamated Transit*"); *Cervantez, supra*, 253 F.R.D. at p. 573.) For example, in *Amalgamated Transit*, the court certified a class where an employer had a companywide policy of offering no meal periods and paying no meal-period premiums. (2009 U.S.Dist. LEXIS 7171, at *19.) But there was plainly no such policy or practice in this case,[21] and Plaintiffs do not even purport to challenge a single policy of not providing meal periods (rather than, for example, its application in varying circumstances).

To be sure, Plaintiffs claim that there was a "companywide pattern and practice" and "companywide awareness" of understaffing, which "lead[] to missed meal periods [and] rest breaks." (RB 43.) But the record shows Plaintiffs are incorrect,[22] and even if it were true that some portion of the class missed meal periods through under-

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21 (AB 9, 11-12.)

22 According to Plaintiffs' own evidence, for most of the class period, meal periods were apparently missed less than 25 percent of the time. (1PE54.)

staffing, that would not be a companywide policy that could form the basis for class-wide adjudication. Plaintiffs do not allege (and certainly have not proven) that understaffing led every class member (or even most) to miss his or her meal period for the same reason. Rather, in each case the question of whether an individual restaurant's understaffing meant that a meal period was not available to a given employee on a given day is necessarily individualized, and requires competing testimony from at least the employee and the manager who allegedly understaffed the restaurant. Plaintiffs nowhere challenge any *companywide* policy or action that affects each putative class member uniformly, and because each class member's claim requires individualized analyses, class-wide adjudication of Plaintiffs' claims would be wholly inappropriate.

2. Brinker's Defenses Predominate Over Any Common Questions.

Plaintiffs attempt to characterize the individualized issues bound up with adjudication of their meal- and rest-period claims as "affirmative defenses" (OB 127; RB 49), but they are wrong both in the way they characterize Brinker's defenses and also in their assertion that individualized affirmative defenses do not militate against class certification.

Proving why an employee failed to take an otherwise "provide[d]" meal period is part of Plaintiffs' prima facie case, and thus not an affirmative defense. To be sure, defendants can assert, among other defenses (see Section II.B, *post*), that an individual employee exercised his statutory waiver of the right to be provided with a meal period under Section 512. But an employee does not "waive" a meal period within the meaning of Section 512 merely by not taking the meal period an employer properly provided. (See Section I.D.2, *ante*.)

Moreover, Plaintiffs are simply wrong that the predominance inquiry does not account for individualized issues presented by affirmative defenses. (See, e.g., *Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 544 ["while some issues, such as the statute of limitations for a cause of action alleging a violation of the right of publicity in California, might be common for all members of the class, others—such as the affirmative defenses of consent, waiver, or estoppel—clearly were not"]; *Clausing v. San Francisco Unified Sch. Dist.* (1990) 221 Cal.App.3d 1224, 1234 [case cannot be "amenable to class certification," in part because, "[e]ven if it could be determined that the policies and practices of the District encouraged or permitted

physical and mental abuse of students in the asserted class," "[i]n each individual instance, the District and the individuals involved would be entitled to different affirmative defenses and immunities"].)[23] In other words, if, as here, the individualized issues regarding the adjudication of affirmative defenses predominate over any issues common to the class, class certification would be wholly improper.[24]

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[23] (See also *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 912-913 [upholding the denial of class certification, notwithstanding the "many common questions of law and fact" in the case, because "in the instant case 'every member of the alleged class would have to litigate numerous and substantial questions determining his individual right to recover against the named . . . defendants," including "the defense of abandonment of the mineral interests as to each alleged member of the class," "following the rendering of a 'class judgment' which determined in plaintiffs' favor whatever questions were common among the plaintiffs sought to be represented as a class'" (citations omitted)]; *Lockheed Martin*, *supra*, 29 Cal.4th at p. 1116 (conc. opn. of Brown, J., joined by Baxter, J. and Chin, J.) [agreeing that class certification was inappropriate, in part because "the resolution of various affirmative defenses . . . also requires separate adjudication for each class member"]; *In re N. Dist. of Cal., Dalkon Shield IUD Products Liab. Litig.* (9th Cir. 1982) 693 F.2d 847, 853 [vacating class certification order, noting that "affirmative defenses" such as "failure to follow directions" "may depend on facts peculiar to each plaintiff's case" in products liability actions, thereby precluding class certification].)

[24] In addition, certification of a class that deprived a defendant of its ability to effectively present an affirmative defense would be improper under California procedure, and also unconstitutional. (See Section II.C, *post*.)

Plaintiffs rely heavily on *Sav-On* (OB 128-132), but in *Sav-On*, according to the Court, the defendants *were* able to present the affirmative defense at issue because it was "susceptible of common proof." (34 Cal.4th at p. 337.) In *Sav-On*, the trial court had concluded that the evidence of the differences in the way the class members performed their jobs and the time they spent on various tasks were not so varied as to preclude class treatment across the "600 [to] 1,400 members" of the class. (*Id.* at p. 326; see *id.* at pp. 342-344 (conc. opn. of Brown, J.) [citing evidence that "defendant consistently required AM's to work over 40 hours a week,"[25] "'[t]he type of work performed by [AM's] does not vary by store," "the actual work performed by [AM's] on a daily basis was virtually identical in Sav-on stores, and remains so," and "the OM's perform a finite number of tasks on a regular basis."]; *id.* at p. 343 [noting the "substantial evidence that the realistic requirements of the AM job are identical for all AM's and that AM's, on average, spend the same amount of time on the same types of tasks"].) And this Court held that the individualized differences across class members raised by defendants simply con-

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25 "AM"s referred to assistant managers, and "OM"s referred to operating managers.

cerned the "calculation of individual damages" and "the amount," rather than the fact, thereof. (*Id.* at pp. 332-333.)

In *Sav-On*, in short, defendants did not raise the kind of highly individualized defenses and other considerations that, as here, directly impacted whether defendants were even *liable* to individual plaintiff class members for violations of the law or not. And *Sav-On* nowhere established a rule that affirmative defenses can somehow be swept under the rug in order to adjudicate plaintiffs' claims on a class-wide basis. Only when the issues to be litigated—both plaintiffs' prima facie case and defendant's affirmative defenses—are susceptible to common, class-wide proof can a class properly be certified.

Thus, in cases such as this one, where the challenge is not to a common policy or practice of not providing meal periods, but to a number of missed meal periods in a variety of situations, class-wide adjudication is improper, and the Court of Appeal was correct in holding that these individualized issues predominate over any issues common to the class. (See also *Brown*, *supra*, 249 F.R.D. at pp. 581-583 ["Although [an employer] may have consistent policies that apply across job classifications, their impact on an employee's ability to take breaks necessarily depends on each individual's job duties."].)

3. Plaintiffs Are Unable To Prove Their Claims Solely By Relying On Statistical Data.

Plaintiffs claim that even if they are required to prove the reason a meal period was missed, they should be allowed to do so with statistical proof, and that this evidence would have provided sufficient support for certifying the class. (OB 123.) But every court to consider this argument in a similar context has rejected it. (See, e.g., *Kenny*, *supra*, 252 F.R.D. at p. 646 ["[P]laintiff's contention that a review of the time records of the 68 declarants creates an inference of a company-wide practice that interfered with the employees' right to a meal break also fails. The time records actually demonstrate the individual nature of the inquiry." (internal citation omitted)].) And Plaintiffs do not cite a single case in which a court has relied on statistical proof in certifying a California meal-period case. Although statistical evidence may be appropriate in certain cases involving uniform class-wide policies and conduct, it cannot support certification of Plaintiffs' claims here because the individualized inquiries necessary in adjudicating a claim under California's meal-period statute do not lend themselves to class-wide statistical proof.

Plaintiffs rely principally on this Court's decision in *Sav-On*, *supra*, 34 Cal.4th at p. 333, where it stated that there is no "per se bar . . . to certification based partly on pattern and practice evidence or similar evidence of a defendant's class-wide behavior." But *Sav-On* also held that "the use of statistical sampling in an overtime class action 'does not dispense with proof of damages but rather offers a different method of proof'" (*ibid.*, citing *Bell v. Farmers Ins. Exch.* (2004) 115 Cal.App.4th 715, 750 ("*Bell*")), and Plaintiffs nowhere show that their purported statistical evidence could establish what they must prove under the law in order to prevail.

The distinctions between *Sav-On* and this case are instructive: *Sav-On* involved the question of whether an employer had misclassified its employees, and the conduct at issue in *Sav-On*, and particularly the conduct which the statistical evidence was used to prove, involved "centralized practices" and "common behavior towards similarly situated plaintiffs." (*Sav-On*, *supra*, 34 Cal.4th at p. 333.) Plaintiffs in *Sav-On* offered evidence of a "policy and practice" of "deliberate misclassification" (*id.* at p. 329); indeed, in stark contrast to this case, the *Sav-On* plaintiffs and defendants *agreed* on which duties the employees performed and the only dispute was whether those duties

were "managerial" such that the employer's classification was correct (*id.* at p. 331). In other cases, where the conduct at issue was *not* common across the class, courts have repeatedly rejected the use of statistical evidence. (See, e.g., *Vinole*, *supra*, 2009 WL 1926444, at *10 ["[T]he use of . . . questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, expert testimony, etc., . . . are not persuasive [where] Plaintiffs' claims require a fact-intensive, individual analysis of each employee's exempt status."]; *Kenny*, *supra*, 252 F.R.D. at p. 646.)

In this case there is not, as there was in *Sav-On*, a *uniform* policy or practice such that statistical evidence could establish any common practice by the employer or common experience by class members. (See pp. 38-39, *ante*.) And in the absence of a common companywide policy of not providing meal periods, it is unclear how statistical evidence could ever be used to prove *why* a given employee was not provided or denied a meal period in violation of a policy providing for meal periods.

B. Even Under Plaintiffs' Interpretation Of "Provide," Their Claims Cannot Be Adjudicated On A Class-Wide Basis.

Even if Plaintiffs were correct that the meal-period statute requires employers to "ensure" that their employees take their meal period, there are still numerous issues affecting the adjudication of meal-period claims that are not susceptible to class-wide adjudication. Defendants in meal-period actions obviously may raise defenses to an employee's claim that he or she missed a meal period, and there are numerous individualized inquiries required to adjudicate these defenses.

First, employees may indisputably "waive" their right to be provided with meal periods (Cal. Lab. Code, § 512, subd. (a) [waiver appropriate by "mutual consent of both the employer and employee"]; *Hefferan v. Freebairn* (1995) 34 Cal.2d 715, 722), and therefore even if Brinker were required to "ensure" its employees took their meal periods, any given employee could plainly have "waive[d]" that right. And there is no possible way of adjudicating, on a class-wide basis, whether the employees waived any given meal period by "mutual consent" of the employee and employer, and thus no way for a defendant to effectively present its waiver defense in a class action.

Second, employers may raise as a defense the failure of their employees to exercise ordinary care and diligence in taking the meal periods with which they were provided. (See *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044-1045.) If an employee could have with ordinary care taken a meal period, but failed to do so given the employee's own negligence, then employer-defendants such as Brinker must be allowed to assert this defense. And it is impossible to generalize, in a non-arbitrary way across a large class, regarding whether individual class members failed to follow, with diligence and care, Brinker's directions to take meal periods in full and on time. To reach a principled conclusion, the factfinder would have to look at the particular fact-specific circumstances and motivations of each individual employee in each instance in which he or she may have, through his or her own fault, refused to take his or her scheduled meal breaks on time or as required.

Third, employers may have a defense that any missed portion of a meal period was "de minimis," where an employee was provided with and took a meal period that was less than, but close to, the thirty minutes allowed by statute. Whether any such missed portion was "de minimis" would vary depending on the facts and circumstances of any

particular meal period. (See, e.g., *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1059, 1064 ("*Lindow*") [finding, on the facts of that case, that a claim for overtime compensation of 15 minutes per day, or approximately 3% of the work day, would be de minimis and thus non-compensable]; *id.* at p. 1062 ["Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." (citing cases)]; *Hill v. United States* (6th Cir. 1984) 751 F.2d 810, 811, 815 [finding, on the facts of that case, that "the one-half hour designated as the lunch period" for certain postal workers, constituting approximately 6% of their work day, was de minimis and non-compensable].)

Adjudicating this defense on a class-wide basis would therefore be wholly inappropriate. (See, e.g., *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692 [remanding because "the precise scope of th[e] application [of the de minimis rule] can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue"]; *Lindow*, at p. 1062 ["There is no precise amount of time that may be denied compensation as *de minimis*. No rigid rule can be applied with mathematical certainty. [Citations.] Rather, common sense must be applied to the facts of each case."].)

Brinker's ability to present these defenses and have them meaningfully adjudicated would be precluded or at least severely curtailed regardless of which standard of liability this Court adopts, and the Court of Appeal was thus correct in reversing the trial court's certification of the class.

C. Adjudicating Plaintiffs' Claims As A Class Would Impermissibly Alter Substantive Law And Violate Brinker's Constitutional Right To Present Every Available Defense.

In addition to the overwhelming predominance of individual issues over any that may be common to the class, certification of Plaintiffs' putative class under either interpretation of "provide" would have the impermissible effect of changing the substantive law applicable to their claims, which this Court and many other courts have held is inappropriate. After all, as shown above, Brinker would be precluded in either case from effectively presenting all of its defenses.

As this Court has long recognized, while class actions are "designed to foster justice, [they] may create injustice. The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." (*City of San Jose v. Superior Court* (1974) 12

Cal.3d 447, 458 ("*City of San Jose*").) This Court has sought to make class actions more effective, and has urged trial courts to be "innovative," but:

> [i]t has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes. Instead, it has consistently admonished trial courts to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.

(*Id.* at p. 459.)

In particular, in *City of San Jose*, this Court "decline[d] to alter [a] rule of substantive law to make class actions more available. Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going. [Fn. omitted.]" (12 Cal.3d at p. 462; see also *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1210 [class certification inappropriate unless defendant given "an opportunity to contest each individual claim on any ground not resolved in the trial of common issues"]; *Granberry v. Islay Invs.* (1995) 9 Cal.4th 738, 749 ["[I]t is inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture plaintiffs have chosen."]; *Washington Mut.*, *supra*, 24 Cal.4th at p. 918; *Am-*

chem Prods., Inc. v. Windsor (1997) 521 U.S. 591, 612-613 [stating federal rule to same effect].)[26]

Certification of Plaintiffs' meal-period claims would have this precise effect of precluding Brinker from fully asserting defenses it otherwise would be able to assert in individual actions. The class-wide, statistical proof Plaintiffs assert they would use to prove their claims would eviscerate Brinker's ability to challenge, with respect to each missed meal period, whether the meal period was provided but not taken. And Plaintiffs nowhere claim that Brinker's affirmative defenses could be asserted effectively on a class-wide basis; they argue that the inability to prove these defenses on a class-wide basis should

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[26] (See also *McLaughlin v. Philip Morris USA, Inc.* (2d Cir. 2008) 522 F.3d 215, 220 ("*McLaughlin*") ["Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof."]; *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.* ("*Bridgestone*") (7th Cir. 2002) 288 F.3d 1012, 1020 ["Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected."]; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (3d Cir. 2001) 259 F.3d 154, 191-192 ["As noted, actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member."]; Nagareda, *supra*, 84 N.Y.U. L.Rev. at p. 164 ["The existence of a demand for class certification should not alter the prevailing mode of interpretation in governing law."].)

not defeat certification (RB 49-50),[27] but the only way that is possible, as Plaintiffs implicitly concede, is to deny Brinker its right to present these defenses. Thus, even if Plaintiffs could somehow prove that any common issues in this case predominated over the individualized issues, Plaintiffs still have provided no explanation for how a court could adjudicate the individualized issues necessary to resolve their claims without changing the law in such a way that would deprive Brinker of arguments and defenses it otherwise would be able to present in an individual lawsuit.

In addition to violating well-established principles of California procedure, certifying Plaintiff's proposed class would violate Brinker's due-process rights under the Federal and California Constitutions, because defendants undeniably must be allowed to present defenses provided for by the governing substantive law. "The fundamental requisite of due process of law is the opportunity to be heard." (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267, quoting *Grannis v. Ordean* (1914) 234 U.S. 385, 394.) And a litigant's "right to litigate the

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[27] Again, Plaintiffs confuse "waiver," an affirmative defense, with an employee's failure to take an otherwise-provided meal period. While the former is an affirmative defense, the latter is part of Plaintiffs' prima facie case. (See Section II.A.1, *ante*.)

issues raised" is "guaranteed . . . by the Due Process Clause" (*United States v. Armour & Co.* (1971) 402 U.S. 673, 682), including the right "to present every available defense" (*Lindsey v. Normet* (1972) 405 U.S. 56, 66, quoting *Am. Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168).[28] Most recently, the U.S. Supreme Court held in *Philip Morris* that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present *every* available defense.' [Citation.]" (*Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 ("*Philip Morris*"), italics added; see also *Bell, supra,* 115 Cal.App.4th at p. 757 [agreeing "that the trial management plan would raise due process issues if it served to restrict [defendant's] right to present evidence against [plaintiffs'] claims" (citation omitted)]; *Nelson v. Adams USA, Inc.* (2000) 529 U.S. 460, 468.)

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28 (See also *Union Fire Ins. Co. of Pittsburgh v. City Sav., F.S.B.* (3d Cir. 1994) 28 F.3d 376, 394 [an interpretation of a statute preventing "parties . . . from presenting defenses . . . to claims which ha[d] been filed against them" must be avoided]; *W. Elec. Co. v. Stern* (3d Cir. 1976) 544 F.2d 1196, 1199 [defendants have a federal due process "right to present a full defense," which includes the right to present "any relevant rebuttal evidence," such as that there was no violation "against one or more members of the class"].)

This is particularly problematic under California's meal-period statute, which contains a punitive element. (*Murphy*, *supra*, 40 Cal.4th at p. 1109.)[29] Certification of punitive claims is inappropriate where the due process analysis that must be undertaken with every punitive award is necessarily individualized. (See *Philip Morris*, *supra*, 549 U.S. at pp. 353-354; *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 417-418, 429 ("*State Farm*"); *BMW of N. Am. v. Gore* (1995) 517 U.S. 559, 574 ("*Gore*"); *In re Simon II Litig.* (2d Cir. 2005) 407 F.3d 125, 136-138 [vacating the certification of a punitive-damages class, noting that the district court "fail[ed] to ensure that a jury [would] be able to assess an award that" would bear "a sufficient nexus," and be "reasonable and proportionate," to plaintiffs'

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[29] Because of this "punitive" aspect of meal-period premiums, an award for premiums is subject to due process review. (See *Exxon Shipping Co. v. Baker* (2008) 128 S.Ct. 2605, 2622 [likening federal treble-damages statute and state penalty statutes to a punitive-damages award, and concluding that such statutes have a "broadly analogous object"]; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1289 [punitive sanctions award "could not properly be based on Reynolds's nationwide financial figures without violating Reynolds's due process rights"]; *Harris v. Mexican Specialty Foods, Inc.* (2009) 564 F.3d 1301, 1309 ["When a damages award is punitive in nature, it is subject to constitutional excessiveness review."]; cf. *Murray v. GMAC Mortgage Corp.* (7th Cir. 2006) 434 F.3d 948, 952; *Parker v. Time Warner Entm't Co.* (2d Cir. 2003) 331 F.3d 13, 22.)

harm].) Due process requires that a punitive award "have a nexus to the specific harm suffered by the plaintiff" (*State Farm*, at p. 422), and that no plaintiff receive a punitive award based on a defendant's conduct toward another (*Philip Morris*, at p. 353). But unless all members of a class suffer the exact same harm (which they plainly did not here), that analysis will be different for each plaintiff in a class, and cannot be adjudicated on a class-wide basis. (*Cooper v. Southern Co.* (11th Cir. 2004) 390 F.3d 695, 721 [punitive claims "require *detailed, case-by-case fact finding*, carefully calibrated for each individual employee"]; *Lemon v. Int'l Union of Operating Eng'rs* (7th Cir. 2000) 216 F.3d 577, 581 [punitive awards require "a fact-specific inquiry into that plaintiff's circumstances"]; *Allison v. Citgo Petroleum Corp.* (5th Cir. 1998) 151 F.3d 402, 418.)[30]

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[30] (See also Sheila B. Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions* (2008) 60 Baylor L.Rev. 880, 907 ["[T]he Court [in *State Farm*] made clear: the amount of a punitive damages award is a fact-specific inquiry that depends on the specific amount of an individual's compensatory damages award."]; Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions* (2005) 58 Vand. L.Rev. 995, 1040-41; Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform* (2005) 28 Harv. J.L. & Pub. Pol'y 855, 856; Richard Epstein,

[Footnote continued on next page]

In sum, allowing this case to proceed as a class action would preclude Brinker from asserting its defenses to Plaintiffs' highly individualized claims that they were denied their meal periods. Certifying such a class would violate California class-action procedure as well as the Due Process Clauses of the Federal and California Constitutions. The Court of Appeal thus correctly reversed the trial court's certification of Plaintiffs' class.

D. Large Class Actions For Monetary Damages, As In This Case, Pose Serious Risks Of Abuse.

Class actions like the one the trial court certified in this case pose an acute risk of abuse and improperly skew the adversarial process against defendants, oftentimes forcing defendants to settle unmeritorious cases. Courts should therefore exercise great caution in certifying classes where the putative class is made up of a diverse set of individual plaintiffs with wholly different experiences, especially when the class size and potential damages amount is large.

Class-action litigation involving class members with differing experiences unavoidably presents a skewed picture for the jury, be-

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[Footnote continued from previous page]

Class Actions: Aggregation, Amplification, and Distortion (2003) 2003 U.Chi. Legal F. 475, 490.)

cause class-action "plaintiffs enjoy[] the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff pieced together for litigation.'" (*Broussard v. Meineke Discount Muffler Shops, Inc.* (4th Cir. 1998) 155 F.3d 331, 344.) Class-action defendants must litigate against this "perfect" plaintiff rather than the "typical" class member; in other words, defendants are forced to defend against a "fictional composite" (*id.* at p. 345), which may result in an inordinately high amount of damages. (See *McLaughlin, supra,* 522 F.3d at p. 232.)

This risk is multiplied exponentially in cases, like the present, involving large numbers of class members. Empirical studies show that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose larger monetary awards. (See *Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746, citing Bordens & Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions* (1989) 73 Judicature 22.) As the class size, and therefore the potential damages award, increases, plaintiffs obtain more and more leverage over defendants in settlement negotiations, resulting in an effective ability to "blackmail" defendants into settling. (See *Coopers & Lybrand v. Livesay* (1978) 437

U.S. 463, 476 ["Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."]; *Bridgestone, supra*, 288 F.3d at p. 1015-1016 ["Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims."]; *Matter of Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298 ["Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (citing Henry J. Friendly, Federal Jurisdiction: A General View (1973) p. 120)].) For this reason, "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." (Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits* (2002) 51 Duke L.J. 1251, 1292.)

These risks warrant great caution on the part of courts in certifying large class actions, such as the one proposed here, that combines

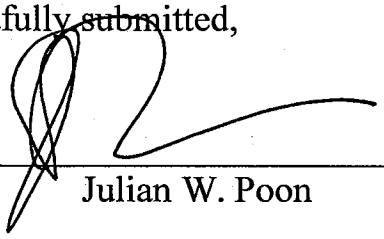
individualized claims and large potential damages awards. For all the reasons discussed above the Court of Appeal was correct in reversing the trial court's certification of Plaintiffs' proposed class, the claims of which are wholly incapable of fair and appropriate class-wide adjudication.

CONCLUSION

The Court of Appeal correctly held that under Labor Code Sections 226.7 and 512 "employers need only make meal breaks available, not 'ensure' they are taken." (Slip Op. p. 34.) This reading of the Labor Code follows from the plain language of the statutes, other authorities, and sound policy considerations, and Plaintiffs have not demonstrated otherwise. This reading also precludes the certification of Plaintiffs' putative class, because determining whether a meal period was "made available" requires numerous individualized analyses regarding *why* a meal period was not taken, which are wholly inappropriate for class-wide adjudication. The Court of Appeal therefore

properly reversed the trial court's certification of Plaintiff's proposed class, and this Court should thus affirm.

Dated: August 18, 2009 Respectfully submitted,



Julian W. Poon

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR.
JULIAN W. POON
KIRSTEN R. GALLER
DAVID S. HAN
BLAINE H. EVANSON
Attorneys for Amici Curiae

NATIONAL CHAMBER LITIGATION CENTER, INC.
ROBIN S. CONRAD
SHANE BRENNAN KAWKA
Attorneys for Chamber of Commerce of the United States of America

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.504(d)(1), of the California Rules of Court, the undersigned hereby certifies that the foregoing Petition For Review is in 14 point Times New Roman font and contains 12,599 words, according to the word count generated by the computer program used to produce the brief.

Dated: August 18, 2009

Blaine H. Evanson
Attorneys for Amici Curiae

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DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of Los Angeles. My business address is 333 South Grand Avenue, Los Angeles, CA 90071. On August 18, 2009, I caused to be served the following documents:

**** BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS BRINKER RESTAURANT CORP., ET AL. ****

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

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L. Tracee Lorens Wayne A. Hughes Lorens & Associates APLC 701 B Street, Suite 1400 San Diego, CA 92101	Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.
Timothy D. Cohelan Michael D. Singer Cohelan Khoury & Singer 605 C Street, Suite 200 San Diego, CA 92101	Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.

Robert C. Schubert Kimberly A. Kralowec Schubert, Jonckheer Kolbe & Kralowec LLP Three Embarcadero Center #1650 San Francisco, CA 94111	Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.
William Turley The Turley Law Firm APLC 555 West Beech Street, Suite 460 San Diego, CA 92101	Attorneys for Plaintiffs, Real Parties in Interest and Petitioners Adam Hohnbaum, et al.
Karen J. Kubin Morrison & Foerester LLP 425 Market Street San Francisco, CA 94105	Attorneys for Defendants and Petitioners Brinker Restaurant Corp., et al.
Rex S. Heinke Joanna Shargel Akin Gump Strauss Hauer & Feld 2029 Century Park East, Suite 2400 Los Angeles, CA 90067	Attorneys for Defendants and Petitioners Brinker Restaurant Corp., et al.
Laura M. Franze M. Brett Burns Hunton & Williams LLP 550 South Hope Street, Suite 2000 Los Angeles, CA 90071	Attorneys for Defendants and Petitioners Brinker Restaurant Corp., et al.
Hon. David B. Oberholtzer San Diego County Superior Court Hall of Justice, Dept. 67 330 W. Broadway San Diego, CA 92101	Superior Court of California, County of San Diego
Hon. Patricia A.Y. Cowett San Diego County Superior Court 220 West Broadway San Diego, CA 92101	Superior Court of California, County of San Diego

Clerk of the Court
San Diego County Superior Court
220 West Broadway
San Diego, CA 92101

Superior Court of California,
County of San Diego

California Court of Appeal
Fourth Appellate Dist., Division One
750 B Street, Suite 300
San Diego, CA 92101

California Court of Appeal

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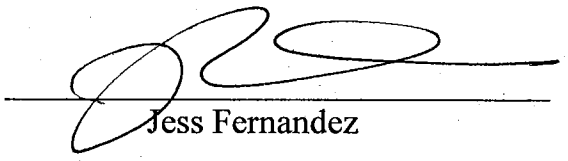

Jess Fernandez