

No. S_____

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

PETITION FOR REVIEW

L. Tracee Lorens (Bar No. 150138)
Wayne A. Hughes (Bar No. 48038)
LORENS & ASSOCIATES, APLC
1202 Kettner Boulevard, Suite 4100
San Diego, CA 92101
Telephone: (619) 239-1233

Robert C. Schubert (Bar No. 62684)
Kimberly A. Kralowec (Bar No. 163158)
SCHUBERT JONCKHEER KOLBE &
KRALOWEC LLP
Three Embarcadero Center, Suite 1650
San Francisco, CA 94111
Telephone: (415) 788-4220

Timothy D. Cohelan (Bar No. 60827)
Michael D. Singer (Bar No. 115301)
COHELAN & KHOURY
605 C Street, Suite 200
San Diego, CA 92101
Telephone: (619) 595-3001

William Turley (Bar No. 122408)
THE TURLEY LAW FIRM, APLC
555 West Beech Street, Suite 460
San Diego, CA 92101
Telephone: (619) 234-2833

Attorneys for Plaintiffs, Real Parties in Interest, and Petitioners

TABLE OF CONTENTS

I. ISSUES PRESENTED FOR REVIEW 1

II. WHY REVIEW SHOULD BE GRANTED..... 3

III. ARGUMENT..... 13

 A. Review Should be Granted to Settle Unresolved
 Questions of Widespread Importance Concerning
 the Meaning of California’s Meal Period and Rest
 Break Requirements..... 13

 1. The Meal Period Compliance Issue..... 13

 2. The Meal Period Timing Issue 20

 3. The Rest Break Compliance Issue..... 23

 4. The Rest Break Timing Issue 25

 B. Review Should Be Granted to Clarify the Role of
 Survey and Statistical Evidence in Wage and Hour
 Class Actions and the Scope of Appellate Review
 of Orders Granting Class Certification in Such
 Cases 26

IV. CONCLUSION..... 32

TABLE OF AUTHORITIES

Cases

Alba v. Papa John’s USA, Inc. 2007 WL 953849 (C.D. Cal. Feb. 7, 2007).....	14
Alch v. Superior Court. ___ Cal.App.4th ___, 2008 WL 3522099 (Aug. 14, 2008).....	27, 28
Bernard v. Foley 39 Cal.4th 794 (2006).....	17
Brinker v. Restaurant Corp. v. Superior Court (Hohnbaum) 165 Cal.App.4th 25 (2008)	passim
Brown v. Federal Express Corp. 2008 WL 906517 (C.D. Cal. Feb. 26, 2008).....	6, 14, 20
Burdusis v. Rent-A-Center, Inc. 2005 WL 293806 (Second District, No. B166923) (Feb. 9, 2005)	28
California Hotel & Motel Assn v. Industrial Welfare Com. 155 Cal.App.4th 676 (2007).....	21, 21
Capitol People First v. Department of Developmental Services 155 Cal.App.4th 676 (2007)	12, 27
Cervantez v. Celestica Corp. 2008 WL 2949377 (C.D. Cal. Jul. 30, 2008)	13
In re Chevron Fire Cases 2005 WL 1077516 (First District, No. A104870, May 6, 2005)	28
Cicairos v. Summit Logistics, Inc. 133 Cal.App.4th 949 (2005)	passim
City and County of San Francisco v. Farrell 32 Cal.3d 47, (1982).....	17

Collins v. Overnite Transp. Co. 105 Cal.App.4th 171, 176 (2003)	22
Cornn v. United Parcel Service, Inc. 2005 WL 588431 (N.D. Cal. 2005)	14
Estrada v. FedEx Ground Package System, Inc. 154 Cal.App.4th 1 (2007)	27
Gabriella v. Wells Fargo Fin. Corp. 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008)	6
Gentry v. Superior Court 42 Cal.4th 443 (2007)	11
Gonzales v. Jones 116 Cal.App.3d 978 (1981)	7
Hall v. Municipal Court 10 Cal.3d 641 (1974)	27
Hodges v. Superior Court 21 Cal.4th 109, 114 (1999)	17
In re Home Depot Overtime Cases 2006 WL 330169 (Fourth District, Div.2, No. E038449, Sept. 13, 2005)	28
Industrial Welfare Commission v. Superior Court 27 Cal.3d 690 (1980)	22, 23
Kenny v. Supercuts, Inc. 2008 WL 2265194 (N.D. Cal. Jun. 2, 2008).....	6
Linder v. Thrifty Oil Co. 23 Cal.4th 429 (2000)	29, 31
Lungren v. Deukmejian 45 Cal.3d 727, 736 (1988)	15
Michael U. v. Jamie B. 39 Cal.3d 78	27
Morillion v. Royal Packing 22 Cal.4th 575 (2000)	19

Murphy v. Kenneth Cole Productions, Inc. 40 Cal.4th 1094 (2007)	passim
Osborne v. Subaru of America, Inc. 198 Cal.App.3d 646 (1988)	27
Otsuka v. Polo Ralph Lauren Corp. __ F.R.D. __, 2008 WL 3285765 (N.D. Cal. Jul. 8, 2008)	14
Parris v. Lowe’s HIW, Inc. 2007 WL 2165375 (Second District, No. B191057 Jul. 30, 2007)	28
People v. Shabazz 38 Cal.4th 55, 67-68 (2006)	15
Perez v. Safety-Kleen Systems, Inc. __ F.R.D. __, 2008 WL 2949268 (N.D. Cal. Jul. 28, 2008).....	6, 20
Perez v. Safety-Kleen Systems, Inc. 2007 WL 1848037 (N.D. Cal. Jun. 27, 2007)	6
Salazar v. Avis Budget Group, Inc. __ F.R.D. __, 2008 WL 2676626 (S.D. Cal. Jul. 2, 2008).....	6
Sav-on Drug Stores, Inc. v. Superior Court 34 Cal.4th 319 (2004)	passim
State v. Altus Finance, S.A. 36 Cal.4th 1284 (2005).....	17
Stephens v. Montgomery Ward 193 Cal.App.3d 411 (1987)	27
Stevens v. GCS Service, Inc. No. 04-1337CJC (C.D. Cal., Apr. 6, 2006)	14
Troppman v. Valverde 40 Cal.4th 1121, (2007).....	15, 16
Wang v. Chinese Daily News, Inc. 231 F.R.D. 602, (C.D. Cal. 2005)	15

Washington Mutual Bank, FA v. Superior Court 24 Cal.4th 906 (2001)	12, 30, 31
White v. Starbucks Corp. 497 F.Supp.2d 1080 (N.D. Cal. Jul. 2, 2007)	passim
Wiegele v. Fedex Ground Package Sys., Inc. 2008 WL 410691, (S.D. Cal. Feb. 12, 2008).....	14
In re Zacharia D 6 Cal.4th 435 (1993)	27

Statutes

California Labor Code	
§226.7	passim
§512	passim
§516	22, 23

Administrative Materials

California Code of Regulations, Title 8	
§11050 (Wage Order 5)	passim
§11090 (Wage Order 9)	18
§11140 (Wage Order 14)	21
§11160 (Wage Order 16)	25
Department of Labor Standards Enforcement	
Opinion Letter 1999.02.16	2, 23
Opinion Letter 2001.09.17	25
Opinion Letter 2002.01.28	3, 9, 13
Opinion Letter 2002.06.14.....	22
Enforcement Manual (2002 Update)	9, 23

Legislative History

AB 60, Legislative Counsel Digest (Jul.21, 1999)	17, 21, 22
AB 2509, Third Reading, Senate Floor Analysis (Aug. 28, 2000)	17, 21
IWC Statement as to the Basis for 2000 Amendments	17

Other Authorities

Webster’s New World Dictionary (3d. Coll. Ed. 1990)	24
---	----

I. ISSUES PRESENTED FOR REVIEW

This petition raises questions of statutory interpretation that are of widespread importance for millions of workers and their employers across California:

1. Meal Period Compliance Issue: Under the Labor Code (§§226.7 and 512) and Industrial Welfare Commission (“IWC”) Wage Orders (¶11),¹ must an employer actually relieve workers of all duty so they can take their statutorily-mandated meal periods, as held in *Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949 (2005), *review & depub. denied*, no. S139377 (01/18/06)? Or may employers comply simply by making meal periods “available,” as held in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 165 Cal.App.4th 25 (Jul. 22, 2008)?
2. Meal Period Timing Issue: Do the Labor Code (§§226.7 and 512) and Wage Orders (¶11) impose a timing requirement for meal periods? Or can employers provide a meal period at *any* time during a shift of up to ten hours without becoming liable for an extra hour of pay under section 226.7(b), as held in *Brinker*?
3. Rest Break Compliance Issue: Under the Labor Code (§226.7) and Wage Orders (¶12), which require ten

¹ Wage Order 5-2001, which governs this case, is codified at 8 Cal. Code Regs. (“CCR”) §11050. All statutory references are to the Labor Code unless otherwise specified. “PE” refers to Brinker’s exhibits in support of its writ petition. “RJN[date]” refers to requests for judicial notice filed below on the indicated date. “RJNSC” refers to the request for judicial notice filed herewith.

minutes' rest time "per four (4) hours or major fraction thereof," must employers provide a ten-minute rest break to employees who work between two and six hours, a second ten-minute rest break to employees who work more than six hours and up to ten, a third ten-minute rest break to employees who work more than ten hours and up to fourteen (etc.), as stated in DLSE Op.Ltr. 1999.02.16? Or may an employer compel employees to work an eight-hour shift with only a single rest break, as held in *Brinker*?

4. *Rest Break Timing Issue*: Under the Labor Code (§226.7) and Wage Orders (§12), may employers withhold the first rest break until after the first meal period, as held in *Brinker*?

This petition also raises two issues relating to class certification procedure that are of equally broad-ranging import for numerous pending wage and hour class actions statewide:

5. *Survey and Statistical Evidence Issue*: May trial courts accept expert survey and statistical evidence as a method of proving meal period, rest break, and/or "off-the-clock" claims on a classwide basis?
6. *Standard of Appellate Review Issue*: When an appellate court reviews an order *granting* class certification, does the appellate court prejudicially err by: (a) deciding issues not enmeshed with the class certification requirements; (b) applying newly-announced legal standards to the facts, then reversing the class certification order with prejudice, instead of remanding for the certification proponent to attempt to meet the new standards, and for the trial court

to apply the new standards to the facts in the first instance; or (c) reweighing the evidence instead of reviewing the trial court's predominance finding under the substantial evidence standard of review?

II. WHY REVIEW SHOULD BE GRANTED

Petitioners Adam Hohnbaum, Illya Haase, Romeo Osorio, Amanda June Bader, and Santana Alvarado (“petitioners”) are hourly workers for Brinker Restaurant Corporation, operator of Chili’s and the Macaroni Grill (“Brinker”). They seek review of a published Court of Appeal opinion that threatens to undermine the protections established in the Labor Code and Wage Orders and—worse—their ability to join with their 60,000 current and former co-workers and seek relief against their employer in a class action to enforce these protections.

The published *Brinker* opinion creates a clear-cut split in authority among the Courts of Appeal on one of the most hotly-litigated wage and hour questions now wending its way through the judicial system—whether employers must actually relieve workers of all duty so they can take their statutorily-mandated meal periods.

In *Cicairos*, the Third Appellate District held that “employers have ‘an affirmative obligation to ensure that workers are actually relieved of all duty’” for their meal periods. 133 Cal.App.4th at 962-63 (quoting DLSE Op.Ltr. 2002.01.28 (2RJN7564)). In *Brinker*, the Fourth District, Division One refused to follow *Cicairos*, holding instead that “employers need not ensure meal breaks are actually taken, but need only make them available.” Slip op. 44.

Review should be granted to resolve this split and restore uniformity of decision on a critical question of California law. Review

should also be granted to address the other fundamental meal period and rest break compliance issues this case raises.

These issues are ripe for review. They flow logically from *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), in which this Court addressed an important threshold question—whether the extra hour of pay mandated for meal period and rest break violations is “compensation” or a “penalty.” That question had been raised in dozens of actions pending across California, and its resolution in *Murphy* impacted thousands of non-exempt workers and employers.

This case raises the next questions—substantive ones—that courts will inevitably face in all of these actions: What do the meal period and rest break laws require of employers?

According to the Labor Commissioner, “there is great confusion and disagreement on fundamental questions of what [the law] actually requires, and what steps employers must take in order to comply with their statutory obligations.” DLSE Pub. Request, filed 10/30/07, at 4. The answers to these questions will affect “hundreds of thousands of employees” across the state. *Id.* at 5.

The importance of these questions—especially the central meal period compliance question—is demonstrated by the many pending cases in which they are being actively litigated:

- The meal period compliance question has already reached this Court at least three times—including last October, in this case. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, No. S157479 (filed 10/22/07; review

granted and transferred);² *see also RadioShack Corp. v. Superior Court (Brookler)*, No. S158083 (filed 11/08/07; review denied); *Bell v. Superior Court (H.R. Cox, Inc.)*, No. S160423 (filed 01/29/08; review denied; depublication granted).

- The question has also been raised in at least two more cases now pending before other Court of Appeal panels. *Savaglio v. Wal-Mart Stores, Inc.*, Nos. A116458, A116459, A116886 (First Dist., Div. Four) (RJNSC, Ex. A); *Brinkley v. Public Storage, Inc.*, No. B200513 (Second Dist., Div. Three) (RJNSC, Ex. B).
- Since March 2008, the question has been raised in the Ninth Circuit in at least *four* petitions for permission to appeal under Federal Rule of Civil Procedure 23(f). Two of the petitions are currently pending.³
- Across California, federal district judges have issued orders addressing the meal period compliance question in

² In October 2007, petitioners sought review of a very similar, but unpublished, opinion reversing class certification of their meal period, rest break, and off-the-clock claims. *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)*, 2007 WL 2965604, 13 Wage & Hour Cas.2d (BNA) 1664 (10/12/07 nonpub.). At the Court of Appeal's request, this Court ordered that unpublished opinion vacated and transferred the case back for further proceedings.

³ *Gabriella v. Wells Fargo Financial, Inc.*, No. 08-80120 (9th Cir., filed 08/18/08) (pending) (RJNSC, Ex. C); *Salazar v. Avis Budget Group, Inc.*, No. 08-80105 (9th Cir., filed 07/15/08) (pending) (RJNSC, Ex. D); *Kenny v. Supercuts, Inc.*, No. 08-80093 (9th Cir., filed 06/12/08) (withdrawn due to settlement); *Brown v. Federal Express Corp.*, No. 08-80031 (9th Cir., filed 03/10/08) (petition denied).

at least six separate class actions in the past fourteen months.⁴

- California trial courts continue to grapple with the question in myriad cases.⁵

Long before the new, published *Brinker* opinion, the importance of the issues raised in this case was widely recognized. Fourteen organizations filed amicus briefs below.⁶ The Court of Appeal's unpublished opinion from last October generated twelve publication

⁴ *Gabriella v. Wells Fargo Fin. Corp.*, 2008 WL 3200190 (N.D. Cal. Aug. 4, 2008); *Perez v. Safety-Kleen Sys., Inc.*, ___ F.R.D. ___, 2008 WL 2949268 (N.D. Cal. Jul. 28, 2008); *Salazar v. Avis Budget Group, Inc.*, ___ F.R.D. ___, 2008 WL 2676626 (S.D. Cal. Jul. 2, 2008); *Kenny v. Supercuts, Inc.*, 2008 WL 2265194 (N.D. Cal. Jun. 2, 2008); *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. Feb. 26, 2008); *White v. Starbucks Corp.*, 497 F.Supp.2d 1080 (N.D. Cal. Jul. 2, 2007); *Perez v. Safety-Kleen Sys., Inc.*, 2007 WL 1848037 (N.D. Cal. Jun. 27, 2007).

⁵ *See, e.g., Grassi v. Party City Corp.*, No. GIC874341 (San Diego Co., Jul. 17, 2008, Aug. 5, 2008) (RJNSC, Exs. E, F); *Castro v. White Cap Constr. Supply*, No. CSC-05-446144 (San Francisco Co., Jan. 4, 2008) at 10 (RJNSC, Ex. G)); *Brookler v. RadioShack Corp.*, No. BC313383 (Los Angeles Co., Feb. 6, 2006, Sept. 6, 2007) (RJNSC, Exs. H, I); *Torres v. ABC Security*, No. RG04-158774 (Alameda Co., Dec. 12, 2006) at 7 (RJNSC, Ex. J); *Gonzalez v. Nestle Waters N. Am. Holdings*, No. BC321485 (Los Angeles Co., Feb. 8, 2006) at 9 (RJNSC, Ex. K); *Savaglio v. Wal-Mart Stores, Inc.*, No. C-835687 (Alameda Co., Nov. 6, 2003) at 15-18 (RJNSC, Ex. L).

⁶ For workers: California Rural Legal Assistance Foundation, Contra Costa County Central Labor Council, Northern California Carpenters Regional Council, SEIU United Healthcare Workers-West, South Bay Central Labor Council, Alameda County Central Labor Council. For employers: National Retail Federation, California Restaurant Association, Employers Group, National Council of Chain Restaurants, California Hospital Association, California Retailers Association, National Association of Theatre Owners of California/Nevada, California Employment Law Council.

requests⁷ and significant attention from practitioners.⁸ Commentators eagerly anticipated a new opinion.⁹ When *Brinker* was re-argued in May, sixteen people ordered a copy of the oral argument CD. See Docket, No. D049331, 05/14/08 to 08/19/08.

The reaction to the published *Brinker* opinion dated July 22 was even more widespread.

The legal and mainstream press both covered the opinion.¹⁰ Practitioners wrote extensively on its implications, both in print¹¹ and

⁷ Filed by Brinker; Labor Commissioner Angela Bradstreet; California Employment Law Council; Employers Group; Cross Country Healthcare; Wells Fargo Bank; Bally Total Fitness Corp.; RadioShack Corp.; Atkinson, Andelson, Loya, Ruud & Romo; Proskauer Rose; Paul, Plevin, Sullivan & Connaughton; and Manatt, Phelps & Phillips.

⁸ See, e.g., Cross Country Healthcare Pub. Request, filed 10/18/07 (“[M]any ... lawyers who have been involved in meal period class actions were aware of the *Brinker* case even before the *Brinker* opinion issued. We were awaiting the decision”); Manatt, Phelps & Phillips Pub. Request, filed 10/26/07 (“Despite its unpublished status, the opinion has received widespread attention in the legal press and on internet web blogs covering California laws.”); “Wage-and-Hour Onslaught,” *Daily Journal* (Nov. 23, 2007) (discussing unpublished *Brinker* opinion); “The Wage-And-Hour Class Action Epidemic,” *Law360* (Dec. 7, 2007) (same); “Wage Scales,” *Los Angeles Lawyer*, Jun. 2008, at 25 (same); see also “Piece-Meal Rules,” *Daily Journal* (Jul. 11, 2008) (discussing meal period compliance issue raised in *Brinker*).

⁹ See, e.g., “Employment Law Roundtable,” *Daily Journal* (Aug. 1, 2008) (“We anxiously await the court of appeal’s decision in *Brinker II*”); “Wage Scales,” *supra*, at 30 (“It seems likely that the Fourth District will issue a new, and published, opinion in 2008.”).

¹⁰ “Panel Rejects Class Status for Meal Breaks,” *Daily Journal*, (Jul. 23, 2008); “Workers Can’t Catch a Break from Calif. Court,” *The Recorder* (Jul. 23, 2008); “Calif. Appeals Court Overturns Class Cert in Chili’s Suit,” *Law360* (Jul. 23, 2008); “Employers Must Give Breaks, Not Ensure They Are Taken,” *Metropolitan News-Enterprise* (Jul. 23, 2008); “Appeals court: Brinker case will not proceed as a class action,”

online.¹² On August 15, the Labor and Employment Law Section of the State Bar of California held a teleseminar, “*Brinker*: the End of California Meal and Rest Break Litigation—or Only the Beginning?”, and 142 registrants signed up.

The Executive Branch’s reaction to the opinion was also remarkable. The Governor issued a press release the same afternoon.¹³ The Labor Commissioner distributed a new interpretive memo just three days later, saying that “*Brinker* decided several significant issues regarding the interpretation of California’s meal and rest period

Dallas Business News (Jul. 23, 2008); “California appeals court backs flexible rules on meal breaks,” *Sacramento Bee* (Jul. 23, 2008); “Court upholds flexible meal breaks,” *Central Valley Business Times* (Jul. 23, 2008); “BAR-ometer,” *The Recorder* (Jul. 25, 2008) (“↓ Employees. A court says you can only file wage-and-hour suits on an individual basis.”); “Staff breaks not duty of restaurants, court decides,” *San Diego Union Tribune* (Jul. 29, 2008); “Calif. court ruling favors employers in meal break dispute,” *LegalNewsline* (Jul. 29, 2008).

¹¹ “Meal and Rest Break Class Actions: On the ‘Brinker’ of Extinction?” *Daily Journal* (Jul. 25, 2008); “A Bad Meal Deal: ‘Brinker’ Gets the Incentive Question Wrong,” *Daily Journal* (Aug. 6, 2008); “A Significant Victory for California Employers,” *Law360* (Aug. 7, 2008); “Meal and Rest Periods: Best Practices in Light of *Brinker*,” *The Daily Recorder* (Aug. 12, 2008); “Break Rulings Mark ‘Cautious Victory’ For Employers,” *Law360* (Aug. 18, 2008).

¹² For collections of links to the extensive online coverage, see “More on Brinker,” *The Complex Litigator* (Jul. 23, 2008) (<http://www.thecomplexlitigator.com/2008/07/more-on-brinker.html>, viewed 08/29/08); “Brinker Round-up,” *Storm’s California Employment Law* (Jul. 23, 2008) (<http://stormsemploymentlaw.com/brinker-round-up>, viewed 08/29/08); “Even More on Brinker,” *The Complex Litigator* (Jul. 28, 2008) (<http://www.thecomplexlitigator.com/2008/07/even-more-on-br.html>, viewed 08/29/08).

¹³ “Gov. Schwarzenegger Issues Statement on Meals and Rest Breaks for Employees” (07/22/08) (<http://gov.ca.gov/press-release/10273/>, viewed 08/29/08).

requirements.”¹⁴ The Commissioner also amended the DLSE Enforcement Manual to “conform to *Brinker*” and withdrew an opinion letter cited in *Brinker*.¹⁵ This new enforcement policy is directly contrary to its prior one, which was consistent with *Cicairos* and was applied in countless Berman proceedings and employer audits.¹⁶

In sum, the many cases in which the meal period compliance question has arisen, along with the significant interest the *Brinker* decision generated in the press, among practitioners, and within the Executive Branch, all demonstrate the importance of the issue and the need for uniformity of decision. Without guidance from this Court, the split in authority between *Brinker* and *Cicairos* will only fester below.

The Court should also grant review to decide several other critical questions about what the meal and rest break laws require. As the Labor Commissioner recognized, these questions are “significant”¹⁷

¹⁴ Memorandum from Labor Commissioner Angela Bradstreet, *et al.*, to DLSE Staff (Jul. 25, 2008) (hereafter “DLSE July 2008 Interp.Memo.”) (http://www.dir.ca.gov/DLSE/Brinker_memo_to_staff-7-25-08.pdf, viewed 08/29/08); see “Bradstreet Riles Labor Unions. High Court Ahead?” *Legal Pad* (Aug. 5, 2008) (http://legalpad.typepad.com/my_weblog/2008/08/bradstreet-rile.html, viewed 08/29/08).

¹⁵ DLSE Enforcement Manual Revisions, July 2008 v.2, at 2-4 (revisions dated 07/25/08) (http://www.dir.ca.gov/dlse/DLSEManual/DLSE_EnfcManual_Revisions.pdf, viewed 08/29/08); DLSE Withdrawn Opinion Letters (noting 07/25/08 withdrawal of Op.Ltr. 1999.02.16 (cited in *Brinker*, slip op. 25)) (<http://www.dir.ca.gov/dlse/OpinionLetters-Withdrawn.htm>, viewed 08/29/08).

¹⁶ See, e.g., DLSE Op.Ltr. 2002.01.28 (2RJN7564); DLSE Enforcement Manual (2002 Update) at 45-4 (“It is the employer’s burden to compel the worker to cease work during the meal period.”) (RJN05/11/07, Ex. 4).

¹⁷ DLSE July 2008 Interp.Memo., at 1.

and “highly controversial.”¹⁸ They also impact millions of workers, and courts will inevitably face them in the many pending cases.

One question is whether the Labor Code and Wage Orders impose any *timing* requirement for meal periods. The Court of Appeal held that a meal period is required for employees who work a shift longer than five hours, but need not be given at any particular time during the workday. Slip op. 36-37. Hence, by moving the meal period to the beginning or the end of the shift, employers may force employees to work nearly ten hours straight without a meal. According to the Labor Commissioner, “[t]he confusion surrounding this issue is neither hypothetical nor isolated.” DLSE Pub. Request, filed 10/30/07, at 2.

The other important questions relate to rest breaks.

May employers refuse to provide rest breaks until after employees have worked four full hours—even though the Wage Orders require “ten (10) minutes net rest time per four (4) hours *or major fraction thereof*”? The Court of Appeal said yes, contrary to 60 years of DLSE teaching. Slip op. 24-28. This means that an employee working an eight-hour shift would accrue just one rest break, not two—a revolutionary reinterpretation of California’s rest break laws.

And may employers require workers to postpone their rest breaks until after the first meal period—pushing the meal period to the beginning of the work period and the rest time to the end—even though the DLSE believes that “the first rest period should come sometime before the meal break”? The Court of Appeal said yes again. Slip op. 28-29.

¹⁸ DLSE Publication Request, filed 10/30/07, at 2.

The Labor Commissioner called these questions “some of the most fundamental aspects of California statutory meal and rest period requirements.” DLSE Pub. Request, filed 10/30/07, at 1.

These holdings pose an immediate threat to employee health and welfare and are likely to lead to widespread employer subterfuge. Review should be granted simply to prevent that from happening, even on a short-term basis, while the high Court considers the holdings’ validity. *See Gentry v. Superior Court*, 42 Cal.4th 443, 456 (2007) (“wage and hours laws “concern not only the health and welfare of the workers themselves, but also the public health and general welfare”” (citation omitted)); *Murphy*, 40 Cal.4th at 1113 (“health and safety considerations ... are what motivated the IWC to adopt mandatory meal and rest periods in the first place”).

But there is more.

This petition raises a second set of critical issues that will inevitably arise in meal period, rest break, and off-the-clock class actions across California: Can expert survey and statistical evidence be used to establish these claims classwide? And, under what circumstances may an appellate court *reverse* a trial court order *granting* class certification?

In *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), this Court approved the use of expert statistical and sampling evidence in class action litigation. Notwithstanding *Sav-on*, however, lower courts have reached differing conclusions on the propriety of such evidence when proffered as a method of common proof.

In this case, the Court of Appeal’s approach was to reweigh, and then reject, petitioners’ proffered survey and statistical evidence—

finding as a matter of law that the meal period, rest break, and off-the-clock claims “can *only* be decided on a case-by-case basis.” Slip op. 48 (emphasis added). That approach differs from recent decisions of other Court of Appeal panels, who not only accepted such proof, but *reversed* the trial courts when they rejected it. *See, e.g., Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676 (2007).

Conflicting opinions also illustrate confusion among lower courts concerning the standard of review after *Sav-on*. Indeed, in this case, had the Court of Appeal applied the correct standard of review, the class certification order would have been affirmed. *Sav-on* prohibits the reweighing process the panel indulged in. And, had the panel followed *Washington Mutual Bank, FA v. Superior Court*, 24 Cal.4th 906 (2001), and refrained from applying its new legal standards to the evidence, the class certification order could not have been reversed *with prejudice*. *Washington Mutual* required remand for petitioners to attempt to meet the new legal standards and for the trial court to “consider afresh” whether certification is appropriate.

Review should be granted to provide guidance to trial courts in meal period, rest break, and off-the-clock class actions who will soon be asked, or may already have been asked, to assess classwide expert survey and statistical evidence. Review should further be granted to provide guidance to appellate courts on the standard of review to be employed when reviewing these class certification decisions.

III. ARGUMENT

A. Review Should be Granted to Settle Unresolved Questions of Widespread Importance Concerning the Meaning of California’s Meal Period and Rest Break Requirements

1. The Meal Period Compliance Issue

As this Court knows from *Murphy*, the Wage Orders have included meal and rest break requirements since “1916 and 1932, respectively.” *Murphy*, 40 Cal.4th at 1105. It was not until late 2000 and 2001, however, that private monetary incentives were adopted to ensure employers’ compliance. See 8CCR§11050¶¶11(B), 12(B) (effective Oct. 1, 2000) (additional hour of pay for missed breaks); §226.7(b) (effective Jan. 1, 2001) (same).

Over the ensuing eight years, the lower courts have had to construe the meal and rest break provisions on their own while awaiting definitive guidance from this Court. *Murphy* provided badly-needed direction, but also left critical questions unresolved—particularly regarding employers’ meal period obligations. This led directly to the split in authority created by the published *Brinker* opinion in this case.

In *Cicairos*—the first published opinion from a California court on this question—the Third District held that an employer’s “obligation to provide ... an adequate meal period is not satisfied by assuming that the meal periods were taken, because employers have ‘an affirmative obligation to ensure that workers are actually relieved of all duty.’” 133 Cal.App.4th at 962-63 (quoting DLSE Op.Ltr. 2002.01.28 (2RJN7564)) (emphasis added).

Notwithstanding this holding, employers continued to argue that meal periods need only be offered, not ensured. Such arguments led

two federal district court judges to issue directly contrary decisions in 2006 and 2007. In *Stevens v. GCS Service, Inc.*, no. 04-1337CJC (C.D. Cal. Apr. 6, 2006), the court followed *Cicairos* and held that the employer had an “affirmative obligation” to ensure employees were relieved of all duty during meal breaks. (18PE5032:12-15, 5033:25-27; RJNSC, Ex. M at 22:12-15, 23:25-27.) In *White*, the court held that “the California Supreme Court, if faced with this issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks.” *White*, 497 F.Supp.2d at 1088-89 (emphasis in original).

In 2008, several more federal district judges followed *White* instead of *Cicairos*. One said that “[t]he Court does not believe that the California Supreme Court would adopt the enforcement rule” of *Cicairos*. *Brown*, 249 F.R.D. at 586. Another said that “[i]f this issue were before it, the California Supreme Court would adopt defendants’ construction of the meal period provisions.” *Salazar*, 2008 WL 2676626 at *4; *see also Kenny*, 2008 WL 2265194 at *3-*6 (following *White* and *Brown* instead of *Cicairos*).

To add to the confusion, several federal district courts have *granted* class certification of meal period and/or rest break claims. Most of these reasoned that the meal period compliance issue is a predominating common legal question to be decided at the merits stage of the case. *Cervantez v. Celestica Corp.*, 2008 WL 2949377 (C.D. Cal. Jul. 30, 2008); *Otsuka v. Polo Ralph Lauren Corp.*, ___ F.R.D. ___, 2008 WL 3285765, *3 (N.D. Cal. Jul. 8, 2008); *Wiegele v. Fedex Ground Package Sys., Inc.*, 2008 WL 410691, *3, *8 (S.D. Cal. Feb. 12, 2008); *Alba v. Papa John’s USA, Inc.*, 2007 WL 953849, *14 (C.D. Cal. Feb. 7, 2007); *Cornn v. United Parcel Service, Inc.*, 2005 WL 588431,

*4, *11-*12 (N.D. Cal. Mar. 14, 2005), *reconsid. granted in part on other grounds*, 2005 WL 2072091 (N.D. Cal. Aug. 26, 2005); *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 612-13 (C.D. Cal. 2005).

These cases stand in stark contrast to *White* and progeny, all of which *denied* class certification after reaching and deciding this common merits question.

Then, in July 2008, the Fourth District published *Brinker*. It held that “meal periods need only be made available, not ensured,” because “[t]he term ‘provide’ is defined in Merriam-Webster’s Collegiate Dictionary ... as ‘to supply or *make available*.’” Slip op. 42 (emphasis original). Instead of following *Cicairos*, the *Brinker* court cribbed most of its analysis from *White* and *Brown*. *Id.* at 43-46.

The paramount flaw in *Brinker*’s analysis is that it did not observe the statutory interpretation rules established in this Court’s precedents. Instead, it relied blindly on a dictionary.

By limiting its analysis to the single word “provide” in section 512(a), *Brinker* failed to adhere to the well-established rule of statutory construction that “[t]he meaning of a statute may not be determined from a single word or sentence.” *Troppman v. Valverde*, 40 Cal.4th 1121, 1135 n.10 (2007) (quoting *People v. Shabazz*, 38 Cal.4th 55, 67-68 (2006)); *see also Lungren v. Deukmejian*, 45 Cal.3d 727, 736 (1988) (same). Rather, “words must be construed *in context*, and provisions relating to the same subject matter must be harmonized to the extent possible.” *Troppman*, 40 Cal.4th at 1135 n.10 (emphasis added).

Labor Code section 226.7(b)—which *Brinker* ignored—uses the word “provide” to refer to *either* meal periods *or* rest breaks, depending on the *context*: “If an employer fails to **provide** an employee **a meal**

period or rest period in accordance with an applicable [IWC Wage Order].” (Emphasis added.)

Had *Brinker* turned to the applicable Wage Orders, as section 226.7, subdivisions (a) and (b) both instruct, it would have seen that very different language is used to describe employers’ obligations. For meal periods, paragraph 11(A) uses directive language: “*No employer shall employ* any person for a work period of more than five (5) hours without a meal period” 8 Cal. Code Regs. §11050(¶11(A)) (emphasis added). For rest periods, paragraph 12(A) uses permissive language: “Every employer shall *authorize and permit* all employees to take rest periods” *Id.* §11050(¶12(A)) (emphasis added).

By its plain terms, the differing language creates different employer compliance standards. Yet *Brinker* did not mention section 226.7 or the Wage Orders at all, much less discern the differing language. Instead, *Brinker* narrowly focused in on the word “provide” in section 512(a).

In so doing, *Brinker* failed to observe that the Wage Orders, like section 226.7, use the word “provide” to refer to *either* of the two differing compliance standards, depending on the *context*. 8CCR§11050(¶11(B)) (“If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order ...”); *id.* §11050(¶12(B)) (“If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order ...”) (emphasis added).

Considered “in context” (*Troppman*, 40 Cal.4th at 1135 n.10), the word “provide” means either “no employer shall employ,” for meal periods, or “authorize and permit,” for rest breaks. In other words, “provide” is “susceptible of more than one reasonable interpretation.”

Murphy, 40 Cal.4th at 1103. Hence, courts must “turn to extrinsic aids to assist in interpretation,” such as administrative constructions and legislative history. *Id.* Although significant administrative and legislative materials were before the *Brinker* court, all of which supported petitioners’ view,¹⁹ the panel considered *none*.²⁰

Instead of considering the language of *all* the statutes, or *any* of the relevant legislative history, *Brinker* relied on a dictionary as its sole statutory interpretation tool. However, “[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results.” *State v. Altus Finance, S.A.*, 36 Cal.4th 1284, 1295 (2005) (quoting *Hodges v. Superior Court*, 21 Cal.4th 109, 114 (1999)). This Court has never advocated blind adherence to dictionary definitions. *See City and County of San Francisco v. Farrell*, 32 Cal.3d 47, 53-54 (1982) (declining to apply dictionary definitions of word that did not comport with context or statute’s purpose); *Bernard v. Foley*, 39 Cal.4th 794, 808 (2006) (same); *Altus Finance*, 36 Cal.4th at 1295-96 (same).

¹⁹ *See supra* note 16 (administrative constructions); *see also, e.g.*, AB 2509, Third Reading, Senate Floor Bill Analysis, at 4 (Aug. 28, 2000) (RJN12/17/07, Ex. 1) (using word “provide” to reference Wage Orders’ two different “existing provisions” for meal periods and rest breaks); AB 60, Legislative Counsel Digest, at 2 (July 21, 1999) http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0051-0100/ab_60_bill_19990721_chaptered.pdf (same) (viewed 08/29/08); IWC Statement as to the Basis for 2000 Amendments (RJN05/07/08, Ex. 1).

²⁰ The Court of Appeal granted judicial notice of *some* administrative and legislative materials (*see* Orders 04/16/07, 05/14/07), but denied requests for judicial notice of other materials as “unnecessary”—while also saying that the denials “should not be construed as meaning this court will not consider” them. *See* Orders 04/23/08, 07/17/08.

Here, the definition of “provide” that *Brinker* pulled from a dictionary contravenes the Labor Code’s purpose to protect employees and is inconsistent with the two ways “provide” is used in sections 226.7 and the Wage Orders. It should not have been so thoughtlessly adopted.

In contrast to *Brinker*, *Cicairos* comports with all of the above principles. Instead of following *Cicairos*, however, *Brinker* adopted *White*’s effort to distinguish it. Slip op. 45-47.

Cicairos is not meaningfully distinguishable from this case:

- Here, as in *Cicairos*, the governing Wage Order “required” the defendant “to record employee meal periods” and “monitor compliance.” Slip op. 45 (quoting *White*); see 8CCR§11050¶7(A)(3) (Wage Order 5) (“Meal periods...shall be recorded.”); 8CCR§11090¶7(A)(3) (Wage Order 9) (same).
- In *Ciciaros*, “evidence showed that the defendant’s management pressured drivers to make more than one trip daily, making it harder to stop for lunch.” Slip op. 45 (quoting *White*). Here, evidence showed that *Brinker*’s management understaffed its restaurants, “making it harder to stop for lunch.” 1PE122:13-16, 124:11-14, 126:11-13, 126:18-20, 130:22-23, 132:10-13, 138:10-13, 143:12-16, 148:13-14, 166:16-19, 168:13-16.
- The *Cicairos* defendant “knew that employees were driving while eating and not take steps to address the situation.” Slip op. 45 (quoting *White*). *Brinker* knew from the 2002 DLSE enforcement proceeding that employees were not receiving

meal periods (slip op. 6-7), yet did nothing to rectify this beyond adopting a written policy (2PE451; 21PE5770; 1PE213).

While refusing to consider legislative history, *Brinker* had no compunction considering “public policy” as an indicator of legislative intent. According to *Brinker*, if employers were affirmatively obligated to relieve workers of all duty for meal periods, then

employers would be forced to police their employees and force them to take meal breaks. With thousands of employees working multiple shifts, this would be an impossible task. If they were unable to do so, employers would have to pay an extra hour of pay any time an employee voluntarily chose not to take a meal period, or to take a shortened one.

Slip op. 47 (citing *White*).

Nonsense.

“[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed.” *Morillion v. Royal Packing*, 22 Cal.4th 575, 585 (2000). Every day, employers set their employees’ daily work hours, thereby controlling when the employees start and stop working. They do this for “thousands of employees working multiple shifts.” Employers who do not exercise this control, and tolerate additional work, become liable for overtime. Employers can avoid meal period premium payments by requiring employees to stop working for the required thirty minutes—just as they do to avoid overtime costs. *Cicairos* perceived no such “public policy” problem.

Until the split in authority between *Brinker* and *Cicairos* is resolved, opposing litigants will continue to rely on different parts of

Murphy to support their view of the law.²¹ *Brinker* did not cite *Murphy* on this point, which only adds to the confusion over what *Murphy* means.

In sum, the meal period compliance question is “[p]robably the next big issue in meal break litigation—and one that *Murphy* does not settle.” “Wage Scales,” *supra*, at 30. The Court should grant review to elaborate on *Murphy* and decide, once and for all, this important question.

2. The Meal Period Timing Issue

Brinker also held that neither the Wage Orders nor the Labor Code has any timing requirement for meal periods. Slip op. 34-41. According to *Brinker*, employers may require employees to take their meal periods when they first come to work, or just before they leave for the day, even if the day’s shift is *ten hours long*. *Id.* The Wage Orders (¶11(A)), however, prohibit employers from employing workers “for a work period of more than five (5) hours without a meal period of not less than 30 minutes.”²²

The consequences of this ruling are dire. Under *Brinker*, workers on double shifts (two consecutive eight-hour shifts totaling sixteen

²¹ Compare *Brown*, 249 F.R.D. at 585 and *Perez*, 2008 WL 2949268 at *5 (both citing *Murphy*) with *Brookler v. RadioShack Corp.*, No. BC313383 (Los Angeles Co., Sept. 6, 2007) at 1 (RJNSC, Ex. I) (*Murphy* “provides no guidance or new interpretation” of meal period issue); see also *Brinker’s* Supp. Reply, 05/14/07, at 1; Real Parties’ Supp. Brief, 08/27/07, at 17 (both citing *Murphy* for opposing positions).

²² *Brinker* characterizes this as “plaintiffs’ rolling five-hour meal period claim,” but in fact petitioners contend that timing violations trigger an extra hour of pay—or that the meal period should be moved closer to the midpoint of the day.

hours) could receive a meal when they arrive for work and a meal at the end of the work day—fifteen-plus hours later. Because *Brinker* affects all non-exempt California workers,²³ it would mean that not only restaurant workers, but also workers in many other industries, including assembly-line factory workers, could all be required to work over fifteen hours straight without a meal period.

Brinker was able to adopt this “no-timing” rule only by casting doubt on the continuing validity of two of this Court’s precedents.

First, *Brinker* creates confusion about *California Hotel & Motel Assn v. Industrial Welfare Com.*, 25 Cal.3d 200 (1979), in which this Court stated that “[a] meal period of 30 minutes per 5 hours of work is generally required.” 25 Cal.3d at 205 n.7. *Brinker* dismissed *California Hotel* as “distinguishable” because it interpreted Wage Order 5-76, not Wage Order 5-2001. Slip op. 38. But the relevant wording of both Wage Orders is *identical* and has been unchanged for at least 32 years. Compare Wage Order 5-76 (¶11) (RJN12/17/07, Ex. 3) with Wage Order 5-2001(¶11(A)) (8CCR§11050(¶11(A))). *Brinker* failed to notice this.

Instead of following *California Hotel*, *Brinker* focused in on the words “per day,” which appear in Labor Code section 512 but not the Wage Orders. Section 512, however, was enacted to “codify” the “existing” Wage Orders—which require a meal period for each five-hour work period or a premium payment for each violation. AB 60, Legislative Counsel Digest, *supra*, at 2; AB 2509, Third Reading, Senate Floor Analysis, at 4 (Aug. 28, 2000) (RJN12/17/07, Ex. 1) (“a

²³ The only exception is agricultural workers governed by Wage Order 14 (8CCR§11140).

thirty-minute meal period every five hours”); DLSE Op.Ltr. 2002.06.14 (18PE5045-46).

Because *Brinker* considered only parts of the legislative history, it did not perceive this. As a result, *Brinker* adopted an interpretation of “per day” that does not “codify” “existing” law, but radically amends it—indeed, that “invalid[ates]” it. Slip op. 40.

Second, *Brinker* creates questions about whether Labor Code section 516 was intended to nullify *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690 (1980). Section 516 states:

Except as provided in section 512, the [IWC] may *adopt or amend* working condition orders with respect to ... meal periods ... for any workers in California *consistent with the health and welfare of those workers*.

Lab. Code §516 (emphasis added).

According to *Brinker*, section 516 prohibits courts from interpreting *existing* Wage Orders to provide *greater* protections than section 512. Slip op. 39-40. This conclusion is flawed in two ways. First, section 516 only limits the IWC’s ability to “adopt” new Wage Orders or “amend” existing ones, neither of which happened here. Second, nothing in section 516 or its legislative history suggests that it was intended to abrogate this Court’s holding in *IWC v. Superior Court* that the Labor Commissioner may adopt “more restrictive provisions”—*i.e.*, *stronger* employee protections—than the Labor Code. 27 Cal.3d at 733. To the contrary, by codifying the existing Wage Orders in section 512, the legislature meant to prohibit the IWC from *weakening* their protections—which the IWC had tried to do for overtime in 1997. AB 60, Legislative Counsel Digest, *supra*, at 2; *see Collins v. Overnite Transp. Co.*, 105 Cal.App.4th 171, 176 (2003) (AB 60 was largely “a

response to the IWC’s amendment of five wage orders [in] 1997, which, among other things, eliminated the state’s daily overtime rule in favor of the less restrictive [federal] weekly overtime rule”).

By holding that the words “per day” in section 512 protect employees less vigorously than the Wage Orders (§11(A)), the Court of Appeal injected uncertainty into the law governing the interplay between the Labor Code and Wage Orders—uncertainty that *IWC v. Superior Court* no longer puts to rest. *Brinker* itself expressly questioned the continuing validity of *California Hotel*. Slip op. 39.

The meal period timing question is important and sure to come up in the many pending class actions that this case already impacts. This Court’s most recent pronouncements—*IWC v. Superior Court* and *California Hotel*—are 27 and 28 years old, respectively, and are subject to misinterpretation, as *Brinker* demonstrates. Review should be granted to clarify these opinions’ import in light of section 516 and resolve the timing question together with the compliance question.

3. The Rest Break Compliance Issue

Brinker also significantly curtails employees’ rest break rights.

Under DLSE interpretation of sixty years’ standing, a rest break “per four hours of work *or major fraction thereof*” means “any time over the midpoint of any four-hour block of time.” Wage Order 5 (§12(A)) (emphasis added); DLSE Op.Ltr. 1999.02.16 (quoting 1948 Interp.Memo.) (underscoring in original) (RJN12/17/07, Ex. 1); DLSE Enforcement Manual (2002 Update), §45.3.1 (“DLSE follows the clear language of the law and considers any time in excess of two (2) hours to be a major fraction mentioned in the regulation”) (22PE6226)).

Brinker flatly rejected this interpretation. Slip op. 22-28. Instead, *Brinker* held that a rest break is not triggered until “after” an employee “has worked a full four hours.” *Id.* at 24. Hence, an employee working an eight-hour shift would be entitled to a first rest break after the fourth hour, but no second one, because the second one would not be triggered until “after” the eighth hour—when the employee has already gone home. By contrast, the DLSE’s longstanding interpretation triggers a rest break at the second hour plus another at the sixth hour—two per day for an eight-hour shift.

In other words, *Brinker* cuts in half the number of rest breaks employers must provide.

Brinker refused to defer to the DLSE’s interpretation because in 1952, the Wage Order was amended to say “major fraction” instead of “majority fraction.” Slip op. 26-27. Using a dictionary once again, the *Brinker* panel looked up the word “majority”—but not the word “major.” *Id.* at 27. If the panel had looked up both words, it would have discovered that “major” is the adjective form of the noun “majority.” “Major” means “constituting the *majority* or larger part.” *Webster’s New World Dictionary* (3d College Ed. 1990) (sense 3; emphasis added). “Major,” not “majority,” is the grammatically correct modifier of the noun “fraction.”

Accordingly, substituting “major” for “majority” should have changed nothing. Yet *Brinker* converts this grammatical correction into a sweeping, substantive amendment of the rest break laws.

Brinker also relies on the Wage Order’s exception for “employees whose total daily work time is less than ... 3½ hours,” and concludes that this language—added in 1952—cannot be reconciled with the DLSE’s interpretation. Slip op. 25-27. Wrong. The IWC

could (and did) reasonably conclude that employees who work longer shifts should receive breaks at the midpoint of each four-hour time block, while employees who work less than 3½ hours need not receive a break. *Brinker* cites *no* authority for its contrary conclusion.

Brinker materially diminishes the rest break rights of millions of California workers. The DLSE’s extreme reaction—withdrawing its opinion letter on this point—compounds the impact and makes the significance of the issue manifest. The Court is urged to grant review and address this point along with the companion meal period issues.

4. The Rest Break Timing Issue

Brinker also held that an employer need not provide a rest break before the first meal period—even though the DLSE believes “the first rest period should come sometime before the meal break.” Slip op. 28-29; *see* DLSE Op.Ltr., 2001.09.21 (22PE6221).

Brinker rejected the DLSE’s opinion letter (Op.Ltr. 2001.09.17) as “inapplicable to this case” because it discussed a different Wage Order. Slip op. 29. However, the relevant language of both Wage Orders is identical. *Compare* Wage Order 16 (8CCR§11160(¶¶10(A), 11(A))) *with* Wage Order 5 (8CCR§11050(¶¶11(A), 12(A))). The DLSE has recognized that for language “present in all of the wage orders,” the interpretations in Op.Ltr. 2001.09.17 apply to all. DLSE Op.Ltr. 2002.01.28 (2RJN7564).

Brinker also said that the DLSE’s interpretation applies only if an employer “regularly requires employees to work five hours *prior to* their 30[-]minute lunch break”—then said that plaintiffs do not contend *Brinker* does this. Slip op. 29 (emphasis added). This overlooks what petitioners *do* contend—that *Brinker* regularly requires employees to

work more than five hours *after* their meal break. The rationale behind the DLSE's opinion is identical whether the overlength work period comes before or after the meal. The solution is to move the meal period near the midpoint of the workday, and provide rest breaks before and after the meal, thereby eliminating *all* overlength work periods.

This issue, too, is of critical importance to California workers and should be reviewed along with the others.

B. Review Should Be Granted to Clarify the Role of Survey and Statistical Evidence in Wage and Hour Class Actions and the Scope of Appellate Review of Orders Granting Class Certification in Such Cases

In *Sav-on*, this Court expressly endorsed the use of expert sampling and statistical evidence as a method of classwide proof in wage and hour cases:

California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.

34 Cal.4th at 333. This Court held that an order granting class certification predicated on proffered classwide survey and statistical evidence was improperly reversed. *Id.*, *passim*.

Despite this guidance, in post-*Sav-on* rulings, the trial and appellate courts have reached strikingly inconsistent conclusions about whether and how survey and statistical evidence should be used as a form of common proof, particularly in wage and hour class actions.

This case is emblematic of the problem. Here, the trial court held that common questions predominated and *granted* class certification,

impliedly finding that petitioners’ proffered expert survey and statistical evidence was an appropriate method of classwide proof. 1PE1-2.²⁴ The Court of Appeal *reversed*—in an opinion that re-weighs the proffered expert survey and statistical evidence, then finds it inadequate as a matter of law to support certification of petitioners’ meal period, rest break, and off-the-clock claims. Slip op. 48 (survey and statistical evidence “could *only* show the fact that meal breaks were not taken, or were shortened, not *why*” (emphasis added)); *id.* at 32, 47, 49, 51.

Other appellate courts have flatly disagreed with such an approach, and directed the trial courts to consider—not reject—proffered survey and statistical evidence.

For example, in *Capitol People*, the trial court *denied* certification, and the appellate court *reversed*, holding that the “use of sampling or statistical proof” had been improperly “restricted”—the opposite of what happened here. 155 Cal.App.4th at 313. By “discarding” this evidence “out of hand,” “the trial court turned its back on methods of proof commonly allowed in the class action context.” *Id.* at 316; *see also Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 13-14 (2007) (affirming class certification based on representative testimony); *Alch v. Superior Court*, ___ Cal.App.4th ___, 2008 WL 3522099, *9 (Aug. 14, 2008) (“[Plaintiffs] cannot prove their

²⁴ Brinker did not request a statement of decision with findings of fact or conclusions of law. Therefore, the trial court is presumed to have made all findings that are legally necessary to support its ruling. *Michael U. v. Jamie B.*, 39 Cal.3d 787, 792-793 (1985), *superseded by statute on other grounds as noted in In re Zacharia D.*, 6 Cal.4th 435, 448 (1993); *Hall v. Municipal Court*, 10 Cal.3d 641, 643 (1974). Class certification orders need not recite findings of fact or conclusions of law, especially when (as here) no party requests them. *Osborne v. Subaru of America, Inc.*, 198 Cal.App.3d 646, 651 n.1 (1988); *Stephens v. Montgomery Ward*, 193 Cal.App.3d 411, 417 (1987).

disparate impact claims without access to evidence from which they can perform a statistical analysis.”).

In fact, survey and statistical evidence *can* show *why* a meal period or rest break was missed, or *why* off-the-clock work was done.²⁵ In *Sav-on*, this Court easily agreed that such evidence could prove the nature of the class members’ day-to-day work. 34 Cal.4th at 333; *see also Alch*, 2008 WL 3522099 at *8-*10.

Post-*Sav-on* cases, however, illustrate the lack of decisional uniformity and the widely divergent results that have been reached as far as survey and statistical evidence is concerned.²⁶ Such divergent outcomes demonstrate that the trial and appellate courts both need further guidance concerning survey and statistical evidence after *Sav-on*.

²⁵ See 25PE6924-6938, *passim*. The Court of Appeal denied petitioners’ motion to augment the record to include the post-certification deposition testimony of their two survey and statistics experts. RJN12/17/07; Order 04/23/08.

²⁶ See, e.g., *Parris v. Lowe’s HIW, Inc.*, 2007 WL 2165375, *2, *5 (Second Dist, no. B191057, 07/30/07) (trial court rejected argument that “pervasive scope of [off-the-clock] problem and the damages owed the class could be determined [through] statistical sampling evidence”; appellate court *reversed*, holding “[c]laims such as this are precisely the sort proper for class adjudication.”); *In re Chevron Fire Cases*, 2005 WL 1077516, *4, *7 (First District, no. A104870, 05/06/05) (trial court rejected proffered survey and statistical evidence; appellate court *affirmed*); *Burdusis v. Rent-A-Center, Inc.*, 2005 WL 293806, *4-*7 (Second District, no. B166923, 02/09/05) (meal and rest case; trial court *denied* certification; appellate court *reversed* with directions to consider possible use of survey and statistical evidence); *In re Home Depot Overtime Cases*, 2006 WL 330169, *13-*15 (Fourth District, no. E038449, 09/13/05) (trial court *granted* certification; appellate court *reversed* with directions to reconsider whether survey and statistical evidence was appropriate).

The inconsistent results likewise indicate a need for more guidance as to the standard of appellate review after *Sav-on*. Recent review petitions filed with this Court echo these concerns.²⁷

In this case, *Brinker* contravened this Court’s appellate review precedents in three ways.

First, it stepped outside the boundaries of appropriate appellate review and intruded on the merits, contrary to *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429 (2000). Instead of acknowledging that the questions of law it decided were common to all class members and therefore supported *affirmance*, the Court of Appeal chose to reach out and *decide* them. Yet not all of those questions were “enmeshed” with the elements of certification. *See id.* at 443 (merits issues not to be decided at certification stage unless “enmeshed with class action requirements”). This approach contravened *Linder*.

Second, the Court of Appeal re-weighed the evidence—not just the survey and statistical evidence, but also the opposing declarations—contrary to *Sav-on*. Slip op. 49 (weighing “plaintiffs’ employee declarations” against “Brinker’s manager declarations”); *id.* at 33 (“[W]e are ... concluding under the facts presented to the trial court in this case ... the claims in this case are not suitable for class treatment.”); *id.* at 15-17, 32, 51-52. The opinion even has factual findings on disputed evidence: “[D]uring a mealtime rush, ... an employee might not want to take a break in order to maximize tips” Slip op. 29.

²⁷ *See, e.g., Parris v. Lowe’s HIW, Inc.*, No. S155492 (filed 09/10/07; review denied) (addressing standard of appellate review of class certification orders); *Bufile v. Dollar Fin. Corp.*, No. S164570 (filed 06/23/08; review denied) (same).

Compounding this error, *Brinker* re-weighed the evidence of a “waiver” affirmative defense and concluded it could defeat class certification—though the trial court found it insubstantial. Slip op. 50. In *Sav-on*, this Court made clear that requiring plaintiffs to prove commonality as to affirmative defenses impermissibly shifts the burden of proof. 34 Cal.4th at 337, 338.

Finally, *Brinker* contravened *Washington Mutual* by ordering class certification denied “with prejudice.” Slip op. 53. Under *Washington Mutual*, when an appellate court vacates a class certification order based on erroneous legal assumptions, it must then remand for the trial court to apply the correct legal assumptions and “consider afresh” whether class certification should be granted. 24 Cal.4th at 298. Yet *Brinker* refused to permit petitioners to attempt to meet the new legal standards *Brinker* adopted, or to allow the trial court to evaluate the evidence in light of those standards in the first instance.

Denying class certification with prejudice was not only contrary to *Washington Mutual*, but also manifestly unfair. Petitioners prepared to meet the evidentiary showing required by *Cicairos* and the DLSE opinion letters—not whatever showing *Brinker*’s “watershed”²⁸ contrary rulings might require. What’s more, merits discovery had not been allowed (2RJN7391, 7394-95), and petitioners’ evidentiary showing was necessarily preliminary. The trial court had ordered expert witness exchanges and depositions and had set a briefing and hearing schedule on survey and statistical evidence. 2RJN7442-44, 7522-48. The Court of Appeal interrupted that process when it stayed

²⁸ “Brinker: The Watershed Meal Period Decision Comes Down,” *What’s New in Employment Law?* (07/22/08) (<http://shawvalenza.blogspot.com/2008/07/brinker-watershed-meal-period-decision.html>, viewed 08/29/08).

all proceedings—then *denied* petitioners’ motion to augment the record with the additional survey and statistical evidence they were preparing to present below (RJN12/17/07; Order 04/23/08)—then ruled for itself that as a matter of law no such evidence could possibly meet its newly-announced legal standards, ever.

Petitioners should have been afforded an opportunity to complete the pending trial-level proceedings and attempt to meet the new legal standards on remand.

This Court should grant review to explain how *Sav-on* and *Linder* operate in the specific context of meal period, rest break, and off-the-clock class actions—especially when expert survey and statistical evidence is proffered to prove those claims classwide. This Court should also grant review to confirm *Sav-on*’s continuing vitality as precedent²⁹ and to ensure that appellate courts comply with *Linder* and *Washington Mutual*. And this Court should grant review to ensure that California law continues to provide an effective enforcement mechanism for the state’s mandatory meal and rest break requirements.

²⁹ “Is it going too far to wonder if *Sav-On* is a dead letter [after *Brinker*], both in its ‘pro-class’ and ‘pro-discretion’ senses?” Jon-Erik Storm, *Storm’s California Employment Law* (10/12/07) (<http://stormemploymentlaw.com/brinker-restr-corp-v-hohnbaum-4th-dist-no-d049331-unpublished/>) (viewed 08/29/08) (emphasis original).

IV. CONCLUSION

For the reasons discussed above, petitioners respectfully ask the Court to grant review to resolve important questions affecting hourly workers across California, to ensure uniformity of decision, and to preserve the class action enforcement mechanism for California's wage and hour laws.

Dated: August 29, 2008

Respectfully submitted,

LORENS & ASSOCIATES, APLC
L. Tracee Lorens

SCHUBERT JONCKHEER KOLBE
& KRALLOWEC LLP
Kimberly A. Kralowec

COHELAN & KHOURY
Michael D. Singer

THE TURLEY LAW FIRM, APLC
William Turley

By _____
Kimberly A. Kralowec

Attorneys for Real Parties in Interest
and Petitioners

**CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT**

Pursuant to Rule of Court 8.504(d)(1), the undersigned hereby certifies that the computer program used to generate this brief indicates that it does not exceed 8,400 words (including footnotes and excluding the parts identified in Rule 8.504(d)(3)).

Dated: August 29, 2008

Kimberly A. Kralowec