Case No. S166350

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.
Petitioners,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO
Respondent,
ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER, and SANTANA ALVARADO,
Real Parties in Interest

Appeal from the Fourth District Court of Appeal, 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

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS AND REAL PARTIES IN INTEREST, AND PROPOSED BRIEF

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APPLICATION FOR PERMISSION TO FILE BRIEF
AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f), Bet Tzedek Legal Services, Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Centro Legal de La Raza, La Raza Centro Legal, Legal Aid Society – Employment Law Center, Maintenance Cooperation Trust Fund, National Employment Law Project, Stanford Community Law Clinic, and Wage Justice Center ("*amici*") hereby request permission of this Court to file the attached brief as *amici curiae* in support of Plaintiffs, Real Parties in Interest, and Respondent. This application is timely made within 30 days of the filing of the last party brief. No party or counsel for any party authored this brief in whole or in part, nor made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

The proposed brief offers an important perspective on two issues presented by this case: (1) why meal and rest breaks are critical for workers in low-wage jobs and (2) why the Court of Appeal's holding that employers need not "ensure" that workers take lunch breaks will mean that California's most vulnerable workers are unable to benefit from a legislative scheme intended to protect them. The brief will assist the Court in deciding whether the Court of Appeal correctly interpreted Cal. Labor Code §§ 226.7 and 512.

Amici provide, among other services, legal counseling and representation to low-income workers in employment matters, including meal and rest violations, minimum

wage and overtime disputes. Together, *amici* annually assist thousands of low-wage workers with employment-related legal problems, including hundreds of claimants with wage and wage-related cases filed with the California Division of Labor Standards Enforcement or in civil courts. *Amici* represent workers employed in California's agricultural, car wash, garment, construction, restaurant and janitorial services industries, among other low-wage industries. The issues presented in this appeal have a direct impact on the low-income workers whom *amici* serve.

Amici have reviewed the decision by the Court of Appeal and the parties' briefs before this Court. *Amici* concur with the arguments in Plaintiffs and Real Parties in Interest's briefs before this Court and will not repeat those arguments here. However, *amici* believe they can be of assistance to the Court in illuminating (1) the historical basis for California's regulation of meal and rest breaks in the workplace, including extensive governmental, medical, and sociological research from the Industrial Revolution forward; and (2) current real-world conditions in California's low-wage economy and the likely impact of the Court of Appeal's ruling on low-wage workers' ability to avail themselves of the right to meal and rest breaks mandated by the Legislature.

STATEMENT OF INTEREST

A brief description of the work and mission of *amici*, explaining their interest in the case, is as follows:

A. Bet Tzedek Legal Services

Bet Tzedek – Hebrew for the "House of Justice" – was established in 1974, and provides free legal services to seniors, the indigent, and the disabled. Bet Tzedek

represents Los Angeles County residents on a non-sectarian basis in the areas of housing, welfare benefits, consumer fraud, and employment. Bet Tzedek's Employment Rights Project assists low-wage workers through a combination of individual representation before the Labor Commissioner, litigation, legislative advocacy, and community education. Bet Tzedek's clients are employed in a wide variety of industries, including the restaurant, housekeeping, manufacturing, gardening, garment, and construction industries. The majority of the organization's employment clients have been denied rest and/or meal periods. For men and women working in these low-wage industries, missed meal and rest periods often result in physical injuries. Bet Tzedek has frequently seen workers discouraged from taking the meal and rest breaks to which they are entitled by law.

B. The Asian Pacific American Legal Center of Southern California

The Asian Pacific American Legal Center of Southern California ("APALC") was founded in 1983 and is the nation's largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. As part of its civil rights work, APALC has served hundreds of low-wage workers and aided them in bringing claims for unpaid wages. APALC successfully litigated a suit against the employers of 80 Thai garment workers forced to work behind barbed wire and under armed guard in El Monte, California (*Bureerong v. Uvawas*, 922 F.Supp. 1450 (C.D. Cal. 1996), and 959 F.Supp. 1231(C.D. Cal. 1997)), and continues to represent low-wage

workers in Southern California who are denied statutorily mandated wages and safe working conditions.

C. California Rural Legal Assistance Foundation

The California Rural Legal Assistance Foundation ("CRLAF") is a non-profit legal services provider that represents low income families in rural California and engages in regulatory and legislative advocacy which promotes the interests of farm workers and other working poor. Since 1986, CRLAF has recovered wages and other compensation for thousands of farm workers who have worked in a broad variety of farm operations. These workers are routinely defrauded out of wages due them and endure dangerous working conditions which expose them to pesticides, heat illness, and acute and sustained ergonomic stress. CRLAF supported and provided testimony in support of Labor Code § 226.7 which chronicled the persistent and widespread failure of agricultural employers to provide meals and rest periods to their employees. This testimony was based, in part, on surveys which suggest that the more than 70% of farm laborers working at a piece rate do not regularly receive the meal and rest periods mandated by Labor Code § 226.7 and the applicable provisions of the IWC Wage Orders. In industries such as dairy, unrealistic time pressures imposed on workers make it impossible to complete the work on time and still be able to take a meal or rest period.

D. Centro Legal de La Raza

Centro Legal de la Raza ("Centro Legal") was founded in 1969 to provide culturally and linguistically competent legal aid services to the low-income, predominantly Spanish-speaking residents of Oakland's Fruitvale District. Through

phone calls and walk-ins, Centro Legal today serves approximately 4,000 clients annually with assistance ranging from brief services to representation in court in the areas of landlord/tenant law, workers' rights, family law, consumer protection, immigration law and support to victims of domestic violence. In representing workers, Centro Legal frequently confronts substantial violations of California's meal and rest break requirements.

E. La Raza Centro Legal

Founded in 1973, La Raza Centro Legal ("La Raza") provides free legal services to the Latino immigrant community throughout the Bay Area of California. La Raza's Worker's Rights Unit represents hundreds of low-wage workers each year through the Berman Hearing Process of the California Labor Commission. The majority of La Raza's clients work in the restaurant, retail, day labor, domestic worker, and janitorial industries where violations of the California Labor Code are commonplace. La Raza also represents clients with wage and hour claims in state and federal court.

F. Legal Aid Society-Employment Law Center

The Legal Aid Society of San Francisco—Employment Law Center ("LAS-ELC"), founded in 1916, provides free legal services to low-income and unemployed people who cannot afford private counsel. Since the 1970's, the LAS-ELC has addressed the employment issues of its clients through a combination of impact litigation and direct services. Through its Workers' Rights Clinic and its Unemployment and Wage Claims Project, the LAS-ELC has provided counsel and representation to thousands of clients

with wage claims before the California Labor Commissioner. The LAS-ELC also represents clients with wage-and-hour claims in state and federal court.

G. Maintenance Cooperation Trust Fund

The Maintenance Cooperation Trust Fund (MCTF) is a California statewide watchdog organization working to abolish illegal and unfair business practices in the janitorial industry. MCTF exposes unlawful operations, encourages accountability, promotes responsible business practices, and helps level the playing field in the interests of clients, employers, workers, and the general public. Since its inception in 1999, MCTF has assisted in the collection of more than $26 million in unpaid wages for more than 5,000 janitors by engaging in impact employment law investigation, public advocacy, agency reform, legislative reform, and educational outreach.

H. National Employment Law Project

The National Employment Law Project ("NELP") is a non-profit law and policy organization with 40 years of experience advocating for the employment and labor rights of the nation's workers. NELP has litigated and participated as *amicus curiae* in numerous cases addressing the rights of workers under federal and state wage and hour, workplace safety, and other worker protection laws. With offices in California, New York City, Seattle, the Midwest, and Washington, DC, NELP provides technical support and assistance to advocates from the private bar, public interest bar, labor unions and community worker organizations. NELP works to ensure that labor standards are enforced for all workers and to bolster the economic security of working families bearing more risks than ever in the current economy. NELP has consistently advocated for

workers to receive the basic workplace protections guaranteed in federal and state labor and employment laws, and to promote broad coverage under these laws to carry out the laws' remedial purpose.

I. Stanford Community Law Clinic

The Stanford Community Law Clinic ("SCLC") is a community-based clinical teaching program of Stanford Law School. SCLC provides free legal services to low-income clients in the mid-Peninsula in workers' rights, housing, criminal record clearance and other matters. The overwhelming demand for SCLC's services is in the workers' rights area, with particular need for assistance with wage and hour claims. The SCLC represents scores of clients before the Labor Commissioner each year.

J. Wage Justice Center

The Wage Justice Center is a non-profit public interest law firm dedicated to fighting for greater economic equality for California's working poor and economic justice for all workers. The Wage Justice Center uses innovative legal theories and legal tools borrowed from commercial collections law to collect back wages and penalties owed to low-income workers. Most of these back wages were collected in cases involving highly unscrupulous and exploitative business practices that are rampant in the underground economy. By developing new strategies to enforce wage rights and educate workers and the public, the Wage Justice Center empowers long-abused workers to assert their basic rights and collect unpaid wages from employers who have previously escaped consequences for illegally underpaying their employees.

CONCLUSION

Amici organizations represent and assist scores of low-income clients who are significantly affected by the issues in this case. *Amici's* experience and expertise will assist the Court in understanding the full reach of the *Brinker* decision on often-overlooked sectors of California's economy. For all of the foregoing reasons, *Amici Curiae* Bet Tzedek Legal Services, Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Centro Legal de La Raza, La Raza Centro Legal, Legal Aid Society – Employment Law Center, Maintenance Cooperation Trust Fund, National Employment Law Project, Stanford Community Law Clinic, and Wage Justice Center respectfully request that the Court grant *amici's* application and accept the enclosed brief for filing and consideration.

Dated: August 17, 2009 .

Respectfully Submitted,

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PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS AND REAL PARTIES IN INTEREST

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INTRODUCTION

For well over one hundred years, industrial experts, scientists, scholars and governments have studied the need for workplace meal and rest periods, concluding indisputably that such measures benefit employers, employees and the public by increasing productivity and decreasing fatigue, injuries, and even death in the workplace. Historical research discussed in section I below documents both the historical reluctance of employers to make appropriate pauses available to employees as well as the dramatic ill-effects of the failure to ensure such appropriate pauses throughout the workday. *Amici*, who collectively represent thousands of low-wage workers annually, confirm that conditions for many low-wage workers in California today are little different than in the classic sweatshops and early automated workplaces that gave rise to the movement for worker protections in the first place. Viewed through the lens of history, and with an understanding of the reality of the contemporary low-wage workplace, the necessity for interpreting California's meal and rest break provisions in the manner advocated by Plaintiffs and Real Parties in Interest in their briefs before this Court is apparent.

In section II of this brief, *amici* document the contemporary, real-world conditions under which hundreds of thousands of workers in California's low-wage economy labor. These conditions include rampant violations of meal and rest period laws resulting from (1) the pay and profit structures of many low-wage industries that discourage or punish workers from taking breaks without explicit employer cooperation; (2) the dramatically unequal bargaining position of employees in low-wage industries *vis à vis* their employers; and (3) employer acts - both blatant and subtle - to discourage or prohibit

employees from availing themselves of their right to appropriate breaks. As a result, if the standards for the provision and timing of meal and rest periods set forth by the Court of Appeal below are upheld, workplace conditions for hundreds of thousands of California's most vulnerable employees will worsen.

For the reasons discussed below, *Amici Curiae* Bet Tzedek Legal Services, Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Centro Legal de La Raza, La Raza Centro Legal, Legal Aid Society – Employment Law Center, Maintenance Cooperation Trust Fund, National Employment Law Project, Stanford Community Law Clinic, and Wage Justice Center respectfully request that this Court reverse the decision below and hold (1) that Labor Code §§ 226.7 and 512 and Industrial Welfare Commission ("IWC") Wage Orders require employers to relieve workers of all duties in order for them to take statutorily-mandated meal periods; and (2) that existing law requires employers to provide meal and rest breaks within the clear and sensible time frames long understood to be required by the plain language of the statutes and relevant Wage Orders.

ARGUMENT

I. CALIFORNIA'S MEAL AND REST BREAK LAWS WERE ENACTED AGAINST A HISTORICAL BACKGROUND OF EXTENSIVE GOVERNMENTAL, MEDICAL AND SOCIOLOGICAL RESEARCH ON THE VALUE OF PAUSES IN THE WORKDAY

Amici concur with Plaintiffs and Real Parties in Interest that the plain statutory language and legislative and regulatory history of California's meal and rest break provisions require that employers affirmatively relieve employees of duties in order for employees to take meal breaks, and that these provisions also impose timing requirements on the provision of meal and rest breaks throughout the workday. [1]

Petitioners Brinker Restaurant Corporation, *et al.* ("Brinker") argue that the Court of Appeal's contrary holdings are supported by "sound policy considerations" because they give employees "the freedom to manage their schedules and balance their commitments." Brinker's Answer Brief on the Merits (No. S166350) at 59 (2009). This assertion is flatly

[1] *Amici* concur with Plaintiffs and Real Parties in Interest Adam Hohnbaum, *et al.* that current California law imposes different standards of compliance for the provision of meal breaks ("No employer shall employ" 8 C.C.R. §11050 (11)(A)) and rest breaks ("Every employer shall authorize and permit" 8 C.C.R. §11050(12)(A)). The historical research discussed in this section did not, of course, recognize this distinction, and instead focused generally on the value of pauses in the work day and the timing of such pauses. Thus, for purposes of section I, regarding the history of meal and rest break protections, *amici* use the term "rest breaks" as an umbrella term encompassing all pauses in the work day, including what current California law now categorizes separately as meal breaks and rest breaks.

contradicted not only by the extensive experience of *amici* documented in section II of this brief, but by over 100 years of research on rest breaks in the workplace.[2]

A. Working Conditions Before Regulation of Meal and Rest Breaks

In automated workplaces in the late nineteenth and early twentieth centuries, workers endured long hours and prison-like conditions. Employers often viewed low-wage labor as a cheap commodity, replaceable with other workers readily available in the workforce.[3] Even outside of factories, many workers, in industries ranging from medical personnel to department store clerks, experienced workdays as long as 13 hours as the norm.[4] Development of assembly line mass production further exacerbated harsh working conditions, as workers' hours became more productive and efficient, while their tasks became more repetitive and intense.[5] These working conditions foreclosed the

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[2] Brinker's policy arguments in support of the Court of Appeal's holding that employers need not ensure that employees take meal periods center on the potential for increased flexibility that, in Brinker's formulation, will result in hypothetical benefits to certain employees. *Amici* recognize that the "make available" standard applied to both meal and rest breaks by the Court of Appeal (*see Brinker Restaurant Corp. v. Superior Court*, 165 Cal.App.4th 25 (2008)) may result in increased flexibility for some workers in California who desire that flexibility. However, whether the compliance standards for the provision of meal and rest breaks should be changed to convenience certain workers is a decision properly left to the Legislature, not this Court.

[3] *See, e.g.*, Marc Linder & Ingrid Nygaard, VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME, 12 (Cornell Univ. Press 1998). This brief owes an enormous debt to the comprehensive work of Linder and Nygaard in compiling and analyzing over 100 sources dating from early in the industrial age, from which much data cited in section I was drawn.

[4] *Id.* at 70. Workdays between ten and thirteen hours were the norm for many employees until at least 1915. *Id.*

[5] *See, e.g.*, G.H. Miles & O. Skilbeck, *An Experiment on Change of Work*, 1 J. Nat. Inst. Indus. Psychol. 236 (1923). A classic example of a shorter, more intense, but less "porous" workday (i.e., one with less idle time interspersed throughout the workday) was Henry Ford's conversion of his Highland Park, Michigan, plant from two nine-hour shifts

possibility of working different muscle groups, caused repetitive stress injuries, and worsened performance.[6]

B. The Value of Pauses in the Workday Has Been Confirmed for Over a Century

In response to these workplace conditions, scientists, efficiency experts, industrial psychologists, and motion study experts in industrializing nations began to study the need for rest during the workday from the beginning of the Industrial Era.[7] Early research, repeatedly confirmed by subsequent studies, established that rest breaks benefit not only workers but also employers, for productivity was conclusively shown to increase as a result of taking strategic rest pauses. Governments also took an interest in these rest break studies, recognizing the potential benefits to productivity and to the public health. With the advent of World War I, governments came to view increased worker productivity as an important element of national security.[8]

In all, before 1950, over 100 studies, books, and articles found in labor, scientific, medical, psychological, physiological, and industrial literary genres, written across the industrialized world, documented the need for and value of rest breaks. The bulk of this literature was written by the early twentieth century, and some reports were produced as

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to three eight-hour shifts in 1914. Ford even permitted lunch wagons to enter the factory so as to reduce the amount of time the workers needed to be away from the assembly lines. Reduced to its most basic biological functions, eating served "only ... the quick refueling of the human machine." David Gartman, AUTO SLAVERY: THE LABOR PROCESS IN THE AMERICAN AUTOMOBILE INDUSTRY, 1897-1950 130 (1986).

[6] Gartman, *supra* note 5, at 98-99.

[7] Linder & Nygaard, *supra* note 3, at 10.

[8] Linder & Nygaard, *supra* note 3, at 26-27.

early as the 1880s.[9] Similarly, before 1950, no fewer than twenty-seven separate studies and reports were published by government agencies in the United States and Britain reporting employee injuries and drops in productivity caused by lack of rest periods and recommending sweeping rest period standards for all blue-collar workers.[10]

1. Many early arguments for work pauses focused on increased productivity

Many of the early arguments in favor of rest breaks in the workplace were couched in terms of how breaks could benefit employers by increasing productivity in workers.[11] In the 1890s, American management consultant and "father of the modern work pause" Frederick Taylor researched how to make a worker's daily routine more efficient.[12] Taylor's goal was to discover "what really constituted a full day's work . . . that a man could properly do, year in and year out, and still thrive."[13] At around the same time, scholars in Germany developed new fields of study that focused on optimizing a worker's performance.[14] Work scientists initially investigated the experimental impact of

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[9] *See generally* Linder & Nygaard, *supra* note 3.

[10] *See* Linder & Nygaard, *supra* note 3, at 1-120 and sources cited therin.

[11] *See, e.g.*, Bernard Muscio, LECTURES ON INDUSTRIAL PSYCHOLOGY 80 (2d ed. 1920); Reinhard Bendix, WORK AND AUTHORITY IN INDUSTRY: IDEOLOGIES OF MANAGEMENT IN THE COURSE OF INDUSTRIALIZATION 203 (1956); Frederick Taylor, SHOP MANAGEMENT 30-33 (1912); Harold Burtt, PSYCHOLOGY AND INDUSTRIAL EFFICIENCY 171-89 (1929).

[12] Linder & Nygaard, *supra* note 3, at 22.

[13] Frederick Taylor, PRINCIPLES OF SCIENTIFIC MANAGEMENT 56 (1912).

[14] David Lanes, THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT 281-323 (1972). German scholars created the discipline of *Arbeitswissenschaft* (science of work), which eventually came to encompass *Arbeitsphysiologie* (industrial physiology), *Arbeitspsychologie* (industrial psychology), and *Industrielle Betriebslehre* (industrial organization).

pauses on such mental activities as arithmetical operations.[15] The goal was to determine whether allowing workers to rest could increase worker performance overall and thus enhance profitability.[16] Researchers argued that rest pauses should be instituted at the points of lowest productivity during a day, so that the pause was "the most worthwhile."[17]

Early efficiency experts Frank and Lillian Gilbreth sought to educate workers and employers that fatigue was the common enemy of individual workers and management, and that they should "fight it together for our best interests, severally and collectively . . . The worker now comes to realize that he hurts the management and himself when he gets too tired."[18] Other experts, too, argued that rest pauses should be implemented so that "even with the present length of working day, production can be increased."[19] Studies by economist P. Sargant Florence and early practitioners of industrial psychology reported that rest periods not only increased efficiency but raised output in excess of that which was lost as a result of the reduced working time.[20]

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[15] Linder & Nygaard, *supra* note 3, at 20.
[16] *See, e.g.*, Otto Graf, *Die Arbeitspause in Theorie und Praxis*, 9 Psychologishe Arbeiten 592, cited in Linder & Nygaard, *supra* note 3, at 20.
[17] *Id.*
[18] Frank Gilbreth & Lillian Gilbreth, FATIGUE STUDY: THE ELIMINATION OF HUMANITY'S GREATEST UNNECESSARY WASTE: A FIRST STEP IN MOTION STUDY 49-50 (2d ed. 1919).
[19] George Shepard, *Effect of Rest Periods on Production*, 7 Personnel J. 186, 187 (1928).
[20] P. Sargant Florence, *An Official American Study on Industrial Fatigue*, 30 Econ. J. 163, 172-73 (1920); Henry Welch & Charles Myers, TEN YEARS OF INDUSTRIAL PSYCHOLOGY 15-17 (1932).

2. Health and safety concerns were central to arguments in favor of rest periods

By the 1920s, a combination of psychological and medical benefits were also regularly cited in support of rest periods.[21] Elton Mayo, a professor at the Harvard Business School, argued that rest pauses "greatly increased production by (a) restoring normal circulation and relieving postural fatigue, and (b) effectively interrupting pessimistic revery."[22] An influential 1918 study portrayed the human body as a "machine" that needed constant maintenance in order for it to perform optimally.[23] One vital aspect of such maintenance, experts argued, was to make workers rest in order to alleviate the effects of monotony.[24]

Psychologists argued that workers who know a break is coming will work faster and with higher concentration just before the break.[25] Other fatigue researchers concurred, suggesting that "it is probable that the increase in contentment alone is sufficient to justify the system. Very few workers can look forward with interest and enthusiasm to an unbroken work-period of 4.5 or 5 hours, but the knowledge of an

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[21] Contemporary research on the health and safety benefits of rest pauses was collected for this Court in Suzanne Murphy, et al., Amicus Letter of Worksafe, Inc. to California Supreme Court in Support of Petition for Review, *Brinker Restaurants Corp. v. Superior Court* (Case No. S166350) (September 29, 2008).

[22] Elton Mayo, *Revery and Industrial Fatigue*, 3 J. Personnel Res. 273, 274-75 (1924).

[23] Frederic Lee, *Industrial Efficiency: The Bearings of Physiological Science Thereon: A Review of Recent Work*, 33 Pub. Health Reports 29, 30 (1918).

[24] H. M. Vernon, T. Bedford, & C. G. Warner, *Rest Pauses in Heavy and Moderately Heavy Industrial Work* 3 (Industrial Fatigue Research Board Rep. No. 41, 1927).

[25] Medical Research Council, *Eighteenth Annual Report of the Industrial Health Research Board to 30th June 1938* 6 (1938).

expected rest about half-way through the spell makes the task appear less overwhelming and creates a more buoyant attitude towards the work."[26]

The health value of being able to use restroom facilities is a recurring theme in the early literature on rest breaks, at a time when many workplaces had no such facilities. Observers of workplaces in the early industrial era noted that workers unable to use restrooms often experienced health complications or resorted to inhumane and humiliating measures. For example, in 1882, the journal *The Sanitary Engineer* noted that decent toilet accommodations were "too often lacking in our manufacturing establishments."[27] In 1873, the British Parliament reported that among female factory workers, "derangements of the digestive organs are common, e.g., pyrosis [heartburn], sickness, constipation, vertigo, and headache, generated by neglect of the calls of nature through the early hours of work, the short intervals at meals."[28] German scientists were among the first to argue that workers who were not allowed enough time to relieve themselves suffered health problems and reduced productivity.[29]

The advent of World War I brought about "an unprecedented effort to maintain production at its highest point."[30] Workplace fatigue was recast as an issue of national

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[26] S. Wyatt & J. A. Fraser, *Studies in Repetitive Work with Special Reference to Rest Pauses* 16 (Industrial Fatigue Research Board Rep. No. 32, 1925).
[27] *See, e.g.*, *Sanitary Closets for Shops*, 6 Sanitary Engineer 560 (1882), *cited in* Linder & Nygaard, *supra* note 3, at 63.
[28] J. H. Bridges & T. Holmes, *Report to the Local Government Board on Proposed Changes in Hours and Ages of Employment in Textile Factories* 39 (C. 754, 1873).
[29] Otto Lipmann, LEHRBUCH DER ARBEITSWISSENSCHAFT 231, 234 (1932) *cited in* Linder & Nygaard, *supra* note 3, at 64.
[30] National Industrial Conference Board ("NICB"), *Rest Periods for Industrial Workers* 1 (Research Rep. No. 13, 1919).

security of concern to the state. Inspired by British studies that reported positive results from the introduction of rest periods in combating diminished productivity, disciplinary problems, and labor unrest, the U.S. Government began studying the benefits of rest periods in earnest.[31] A major study conducted in 1917-18 in two large war-related plants by the U.S. Public Health Service, together with the Committee on Industrial Fatigue of the Council of National Defense and the Committee on Fatigue in Industrial Pursuits of the National Research Council, provided the first extensive body of information on the efficacy of rest periods in U.S. industry.[32] The results "prove[d] more conclusively than [had] been proved before that with the long workday the interruption of work is on average more than compensated by the recuperation afford by the recess."[33]

Finally, researchers also considered the timing of pauses in the workday in their studies of the benefits of rest breaks. In 1927, the British Industrial Health Research Board stated, "The opinion is often held that an unbroken spell of 4.5 or five hours is detrimental to efficiency and the well-being of the worker, and that one or more pauses should be introduced with the spell of work."[34] Also in the 1920s, German scientists recommended that workers be given ten-minute rest periods every two hours, specifically for using the restrooms.[35]

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[31] Linder & Nygaard, *supra* note 3, at 26.
[32] *Id.* at 27.
[33] *Id.*
[34] Wyatt & Fraser, *supra* note 26, at 1.
[35] Lipmann, *supra* note 29, at 231, 234 *cited in* Linder & Nygaard, *supra* note 3, at 64.

C. Historical Barriers to Implementation of Rest Breaks Included Wage Structures and Lack of Employer Cooperation

Even as the benefits of workplace rest breaks were studied and reported, such breaks were not widely implemented. In a 1919 study of several hundred employers who claimed to be implementing rest periods, the U.S. National Industrial Conference Board ("NICB") found that more than half of the employers were not providing their workers with rest periods at all.[36] The NICB concluded that "the use of such pauses in American establishments is the exception rather than the rule."[37] A 1915 study found that "managers, in general, apparently did not even entertain the idea of" instituting rest periods.[38] Even after World War I-era studies that showed overall productivity increased when workers were given breaks, few managers and supervisors adopted such policies,[39] finding it "hard ... to believe that more work can be accomplished in a shorter time ... with respect both to length of work week and to rest pauses."[40]

Moreover, certain wage structures impeded the successful implementation of rest periods in many workplaces. Specifically, piece work, or work paid by a fixed "piece rate" for each unit completed or action performed, creates a strong disincentive for workers to take breaks of any kind. In language strikingly similar to that used by advocates describing contemporary low-wage workplaces, a 1919 study noted that "When employees are engaged on piece work, and especially in the case of girls, one often finds that insufficient water is consumed and the requirements of nature are

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[36] NICB, *Rest Periods for Industrial workers*, *supra* note 30, at 2.
[37] *Id* at 12.
[38] Robert Hoxie, SCIENTIFIC MANAGEMENT AND LABOR 91 (1915).
[39] Linder & Nygaard, *supra* note 3, at 28.
[40] Thomas Harrell, INDUSTRIAL PSYCHOLOGY 224 (1950).

neglected. The girls will simply not lose the money involved by taking time off for these things. The only solution for this is that the employer will give ample time, without loss to the employee, to attend to these essentials."[41]

Many employers historically resisted implementing rest periods by requiring workers who took breaks to perform more work at other times, by providing breaks only when workers affirmatively requested them while discouraging such requests, and by actively discouraging or punishing workers who did take breaks. Some employers insisted that any time taken for breaks be added to the end of the work day.[42] Workers at a Philips radio factory in Britain in the 1930s were given an unpaid ten-minute break, after which management increased the speed of the assembly line so that workers could "make up the time by working even faster."[43]

A 1910 United States government study of conditions in telephone companies reported: "in some places the relief period is regarded by the managers as a privilege rather than as a right; hence only the girls who ask for it are given relief, and only when they ask for it."[44] The study noted that "Where this system obtains, girls feel a reluctance to ask for relief; sometimes they feel that to do so is to jeopardize promotions."[45]

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[41] Harry Mock, INDUSTRIAL MEDICINE AND SURGERY 422 (1919).
[42] *See, e.g.*, H. M. Vernon & M. D. Vernon, *A Study of Five-Hour Work Spells for Women, with Reference to Rest Pauses, in* TWO STUDIES ON HOURS OF WORK 1, 1-2, 10 (Industrial Fatigue Research Board Rep. No. 47, 1928).
[43] Miriam Glucksmann, WOMEN ASSEMBLE: WOMEN WORKERS AND THE NEW INDUSTRIES IN INTER-WAR BRITAIN 178 (1990).
[44] *Investigation of Telephone Companies* 32 (S. Doc. No. 380, 61st Cong., 2d Sess. 1910).
[45] *Id.* at 33.

Instances of employers discouraging rest breaks have been documented from the beginning of the Industrial Age. The *New York Tribune* editorialized in 1885 on behalf of store clerks who could not rest and instead feigned "attentiveness by constantly standing" – a posture that brought on "needless physical weariness."[46] In shops, customers could see "pale faces . . . and other signs of exhaustion . . . among the poor girls who stood on foot from morning to night without rest."[47] When saleswomen occasionally fainted, "they were stretched out on the concrete floor of the retiring room, and if they did not recover rapidly, they were sent home and their pay envelopes suffered in consequence."[48] Even when forced by law to provide rest periods and appropriate restroom facilities, employers readily took advantage of vagueness in the laws.[49] In Connecticut in 1914, for example, where a state statute prescribed "suitable water closet accommodations for the use of" employees, a significant number of employers apparently provided toilets at remote or inaccessible locations. Thus, the Connecticut Bureau of Labor Statistics felt compelled to offer this amendment to change the language of the state statute in 1914: "That every store be compelled by law to have a toilet for women on the premises and that no woman be obliged to cross outside premises, go to another

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[46] Editorial, *Another Reform Needed*, NEW YORK TRIBUNE, June 23, 1885, at 4.
[47] Maud Nathan, THE STORY OF AN EPOCH-MAKING MOVEMENT 6, 52 (1926).
[48] *Id.* Moreover, the Lancet, a leading British medical journal, noted in 1880, "if the shop-walkers saw any of their staff resting, even leaning against the counters, they would be reprimanded, and even threatened with a fine or dismissal, because they did not, at the expense of health and the cost of life-long disease and misery, help to keep up the semblance of ceaseless toil." Editorial, *Cruelty to Women*, Lancet, May 29, 1880, at 845.
[49] Linder & Nygaard, *supra* note 3, at 53.

building or descend into a cellar by means of a trap door in the floor to such a convenience."[50]

Employers also used humiliating tactics to discourage rest break use. For example, in New York City department stores in the 1920s, "Doors were taken down [from] toilet [stalls], and not even a curtain was put up to replace them, the explanation being that if the saleswomen were concealed, they might remain away from their work an inordinately long time."[51] Other employers required that the girls obtain a pass: "Needless to say, many of the girls prefer to stay at their posts indefinitely rather than ask the floor walker . . . for a pass. His injunction to 'hurry back' or to 'be quick' adds not a little to the unpleasantness of a rule which wears heavily upon even the less sensitive girls. When this rule is linked with a time limit and with inconvenient location of toilet rooms, conditions are prejudicial to health no less than if sanitation were actually defective."[52]

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[50] State of Connecticut, *Report of the Bureau of Labor on the Conditions of Wage-Earning Women and Girls* 9 (1914).

[51] Nathan, *supra* note 47, at 8.

[52] Elizabeth Butler, SALESWOMEN IN MERCANTILE STORES: BALTIMORE, 1909, at 37-38 (1912). In 1910, the Russell Sage Foundation's Pittsburgh Survey reported on employers' usual practices for providing restrooms: "First, select the most remote part of the shop... Then put in the cheapest apparatus and one that will be inconvenient and uncomfortable so that men will not be inclined to come often or stay long. Then when it is found that the men take home the toilet paper, stop supplying it. The men will then take in newspapers and read them. Remove the lights to prevent reading. The condition of the place will then become [unsanitary] because the men can not see the condition of the seats and no longer use them as intended." Steven Cohen, *The Pittsburgh Survey and the Social Survey Movement: A Sociological Road Not Taken, in* THE SOCIAL SURVEY IN HISTORICAL PERSPECTIVE, 1840-1940 245 (Martin Bulmer et al. eds. 1991).

D. Government Regulation of Rest Periods in the Workplace

In the United States, some state governments began enacting modest rest break laws as early as the 1890s, declaring that employers must provide bathroom facilities for their workers.[53] Other states began mandating 10 minute rest breaks- often only for female workers - in the early twentieth century, while labor unions worked to secure rest breaks through collective bargaining agreements.[54] Professors Linder and Nygaard report that by 1937, twenty-one states mandated a meal or rest period, though in many states the protection extended to women only.[55] A few states, including California, passed rest break statutes for women as well as meal break laws.[56] In many jurisdictions these rights were not extended to men until the passage in 1972 of Title VII of the Civil Rights Act, prohibiting employment discrimination based on sex.[57] In 1974, California passed its first non-gendered rest period laws, requiring a 10 minute rest break for every 4 hours of work and a 30 minute meal break for every 5 hours of work.[58] Although the passage of

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[53] Linder & Nygaard, *supra* note 3, at 53.
[54] *Id.* at 53.
[55] *Id.* at 77.
[56] *Id.* (noting 1932 passage of mandatory rest breaks in California). *See also Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094,1105 (2007) (noting that state Industrial Wage Commission Wage Orders have required meal and rest breaks "since 1916 and 1932, respectively.").
[57] 42 U.S.C. § 2000e *et seq.*; *see also see also California Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 25 Cal.3d 200, 207 (1979) ("Prior to 1972, the [Industrial Welfare Commission] had authority to determine the wages, hours, and working conditions of women and minors, but not of men. The Legislature extended the authority of the commission to determine the minimum wage for men in 1972 and the hours and working conditions for men in 1973.") (citations omitted); Linder & Nygaard, *supra* note 3, at 81-109 (discussing the struggle over gender-specific protective statutes before and after the passage of Title VII).
[58] California Labor Code §§ 226.7, 512. *See also* 8 C.C.R. 11050(11), (12) (2009).

Title VII at the federal level spurred a reexamination of gendered state protective laws, neither Congress nor the federal enforcement agencies have been heavily involved in the evolution of meal and rest break protections. Beginning in 1970, the federal Occupational Safety and Health Act (OSHA)[59] regulated certain workplace conditions, including the number of restrooms needed and the amount of time required to use them.[60]

II. THE STANDARD ADOPTED BY THE COURT OF APPEAL EVISCERATES THE RIGHT OF LOW-WAGE WORKERS TO STATUTORILY-MANDATED MEAL AND REST PERIODS

Amici represent employees in low-wage industries and have firsthand experience with workplace conditions and meal and rest break practices in California's low-wage economy. As demonstrated by specific examples below, these conditions and practices remain strikingly similar to the historical workplace conditions described in Section I above, before regulation of meal and rest periods. Given rampant non-compliance with the plain language of the Labor Code and relevant Wage Orders, this Court's adoption of the Court of Appeal's standard for providing meal breaks and scheduling both meal and rest breaks will result, as a practical matter, in the elimination of these basic worker protections.

This Court has repeatedly reaffirmed the fundamental nature of California's labor standards and the importance of construing these laws broadly to protect workers. *See, e.g., Murphy v Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1105 (2007) ("We have also recognized that statutes governing conditions of employment are to be construed

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[59] 29 U.S.C. §§ 651-678. *See also* 29 CFR § 1910 (2009).
[60] 29 U.S.C. §§ 653, 655, 657. *See also* 29 CFR § 1910.141(c) (2009).

broadly in favor of protecting employees."); *Industrial Welfare Commission v. Superior Court*, 27 Cal.3d 690, 702 (1980) ("[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.") This Court has also repeatedly acknowledged the specific importance of meal and rest period provisions. *See, e.g.*, *Gentry v. Superior Court*, 42 Cal. 4th 443, 456 (2007) (noting that the risk of accidents falls not only on employees who miss breaks, but on other workers and members of the public); *Murphy,* 40 Cal. 4th 1094 at 1113 ("Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers who often perform manual labor . . . .").

A. Hundreds of Thousands of Employees Work in California's Low-Wage and "Underground" Economies, Where Violations of Labor Protections Are Rampant

"Underground economy" is a term that government agencies, advocates, and scholars use to describe the sector of the workforce that avoids labor, tax and licensing laws by dealing in cash and/or by employing other methods that allow concealment of activity from licensing and regulatory agencies.[61] While many businesses in the

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[61] *See, e.g.*, Economic & Employment Enforcement Coalition (EEEC), *Report to the Director of the California Department of Finance & California Joint Legislative Budget Committee* 1-2 (2007) (hereinafter "EEEC Rpt."), *available at* http://www.labor.ca.gov/pdf/EEEC_Final_Report.pdf. The EEEC includes the California Labor & Workforce Development Agency, the State Departments of Industrial Relations, Labor Standards Enforcement, Occupational Safety & Health, and Employment Development, as well as the California Contractors State License Board and the federal

underground economy pay their employees "under the table" in cash, this sector also includes businesses that use traditional payroll methods, but that nonetheless chronically violate minimum labor standards, such as meal and rest break protections, safety rules, or overtime pay requirements.[62]

The Economic & Employment Enforcement Coalition (EEEC), a partnership of the California Labor & Workforce Development Agency, five other state agencies, and the U.S. Department of Labor, has targeted seven industries for enforcement actions based on their history of recurring tax, labor and safety violations. These industries are agriculture, car wash, construction, garment manufacturing, restaurants, horseracing, and janitorial services.[63]

With the exception of horseracing, these are all industries in which *amici* see frequent violations of meal and rest break protections. In its 2007 report to the

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Department of Labor, who work jointly on enforcement actions. EEEC Homepage, *available at* http://www.labor.ca.gov/eeec.htm.

[62] *See* EEEC Rpt. *supra* note 61, at 1; *see also* Daniel Flaming, Brent Haydamack, & Pascale Joassart, *Hopeful Workers, Marginal Jobs: LA's Off-the-Books Labor Force* (Economic Roundtable 2005) (hereinafter "*Hopeful Workers, Marginal Jobs*") at 4; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale Law Journal 2179, 2180 (1994). *Amici* note that not every worker in the underground economy is a low-wage worker. For example, some construction companies pay well above minimum wage, but ignore other legal obligations, by paying in cash or violating tax, labor or health and safety requirements. On average, however, wages in the underground economy are significantly lower than those in the conventional economy. *See, e.g.*, Paul M. Ong & Jordan Rickles, *Analysis of the California Labor and Workforce Development Agency's Enforcement of Wage and Hour Laws*, Paper 17, Ralph and Goldy Lewis Center for Regional Policy Studies, University of California, Los Angeles 21 (2004) (estimating mean hourly earnings for California workers not recorded on payroll at $9 to $10 per hour, compared to $16 to $19 per hour for those recorded on payroll).

[63] EEEC Rpt., *supra* note 61, at 9-11.

legislature, the EEEC specifically notes the prevalence of meal and rest break violations in the agricultural, car wash, garment, and restaurant sectors.[64] In addition to these industries, *amici* note the prevalence of meal and rest period violations in the following industries: medical clinics; homecare/personal attendants; meat packing; non-garment light manufacturing; landscaping; bus driving; grocery; and security services.[65]

1. Hundreds of thousands of workers are employed in California's underground economy

By definition, the size of the underground economy is difficult to measure. At the state level, some estimates show that California's underground economy generates anywhere from $60-$140 billion annually.[66] These numbers suggest that the underground economy is responsible for anywhere from three to 40 percent of total economic activity in California, and that roughly 17 percent of the total labor force is employed in this sector.[67] The Los Angeles County Economic Development Corporation estimated in 2003 that the statewide underground economy included over 600,000 workers in just five industries (high-tech, agricultural, construction, trade and apparel).[68] Extrapolating from federal and state data, the Los Angeles-based Economic Roundtable estimated in 2005 that there were 679,000 "informal workers" in Los Angeles County

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[64] EEEC Rpt., *supra* note 61, at 9-10.
[65] *See Voices from the Underground Economy: The Experiences of Workers and Advocates seeking Meal and Rest Breaks in Low-Wage Industries* 4 (USC Gould School of Law Access to Justice Practicum and Bet Tzedek Legal Services, August 2009) (hereinafter "*Voices from the Underground Economy*"), *available at* www.bettzedek.org/PDF/voicesfromtheunderground.pdf.
[66] Ong & Rickles, *supra* note 62, at 21.
[67] *Id.*
[68] *Id.*

alone[69], and that most net job growth in Los Angeles is occurring in the "informal" sector.[70]

In the County of Los Angeles alone there are an estimated 22,000 car wash workers;[71] many tens of thousands of domestic caregivers;[72] 25,000 day laborers;[73] and 65,000 gardeners.[74] At the state level, it is estimated that there are over 85,000 gardeners;[75] 90,000 housekeepers;[76] 100,000 garment workers;[77] 320,000 waiters and waitresses;[78] over 240,000 agricultural workers,[79] and over 200,000 janitorial workers.[80]

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[69] *Hopeful Workers, Marginal Jobs*, *supra* note 62 at 1. The Economic Roundtable's definition of the "informal economy" is synonymous with that of "underground economy" as used in this brief: "jobs that do not show up in formal data sources and that operate outside of established labor laws. They are jobs that would otherwise be considered legal but are not effectively regulated." *Id.* at 4.

[70] *Id.* at 38.

[71] Carwash Workers Organizing Committee of the United Steelworkers, *Cleaning Up the Carwash Industry: Empowering Workers and Protecting Communities* 3 (2008).

[72] Iryll Sue Umel, *Cultivating Strength: The Role of the Pilipino Worker's Center Courage Campaign in Addressing Labor Violations Committed Against Filipinos in the Los Angeles Private Home Care Industry*, 12 Asian Pac. Am. L. J. 35, 36 (2006-2007). This article estimates the number of Filipino caregivers in Los Angeles to be approximately 20,000. The overall number of caregivers is therefore likely several times higher.

[73] Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. Sch. L. Rev. 465, 487 (2005-2006).

[74] Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles's Ban on Gas-Powered Leaf Blowers*, 33 U.C. Davis L. Rev. 1087, 1090 (2000).

[75] *See* California Employment Development Department, California Occupational Guides, Gardeners and Groundskeepers, *available at* http://www.calmis.ca.gov/file/occguide/gardener.htm.

[76] California Employment Development Department, California Occupational Guides, Maids and Housekeeping Cleaners, *available at* http://www.calmis.ca.gov/file/occguide/maidhous.htm.

[77] Asian Immigrant Women Workers' Clinic, *We Spend Our Days Working in Pain: A Report on Workplace Injuries in the Garment Industry* (2002) (hereinafter "*We Spend Our Days Working in Pain*"), Introduction Section, *available at*

Not all of these workers are necessarily part of the underground economy, since not all employers in these sectors ignore their legal obligations. However, because employers in the underground economy often pay employees in cash and do not report the workers or the earnings to the state,[81] these estimates likely understate the actual number of employees working in each industry.

National figures also show a large and by some measures growing underground economy.[82] The International Monetary Fund has estimated that the underground economy in the entire United States more than doubled from 4% of GDP in 1970 to 9% in 2000,[83] and the National Center for Policy Analysis estimates that as many as 25

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http://www.aiwa.org/workingreport.pdf (online version of the report is not paginated; thus citations to this source refer to sections).

[78] California Employment Development Department, California Occupational Guides, Waiters and Waitresses, *available at* http://www.calmis.ca.gov/file/occguide/waiter.htm.

[79] California Employment Development Department, California Occupational Guides, Farmworkers and Laborers, Crop and Nursery, *available at* http://www.labormarketinfo.edd.ca.gov/cgi/databrowsing/occExplorerQSDetails.asp?searchCriteria=farm+worker&careerID=&menuChoice=occexplorer&geogArea=0601000000&soccode=452092&search=Explore+Occupation.

[80] California Employment Development Department, California Occupational Guides, Janitors and Cleaners, *available at* http://www.calmis.ca.gov/file/occguide/janitor.htm.

[81] *See* EEEC Homepage, http://www.labor.ca.gov/eeec.htm.

[82] *See, e.g.*, Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, *An Introduction to the 'Gloves-Off' Economy*, UCLA Institute for Research on Labor & Employment, (2008), *reprinted in* Bernhardt, Boushey, Dresser, & Tilly, THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET (Cornell Univ. Press, 2008) at 14 ("our assessment is that the erosion and outright rejection of labor standards have become increasingly common. . . .") and 15-16 (citing studies finding increases in labor law violations and erosion of workplace standards).

[83] Friedrich Schneider & Dominik Enste, *Hiding in the Shadows: The Growth of the Underground Economy* (International Monetary Fund 2002), *available at* http://www.imf.org/external/pubs/ft/issues/issues30/index.htm.

million Americans earn a large part of their income from underground economic activities.[84]

A recent Congressional Budget Office ("CBO") report shows that nationally, a majority of the employees in low-wage industries (defined in CBO's report as those in the lower half of the hourly wage distribution) are women (fifty-four percent), and a disproportionate number are immigrants.[85] Both documented and undocumented immigrants are disproportionately represented in the low-wage and underground economy.[86]

2. Labor violations are rampant in California's underground economy

As with employment figures, there are no precise statistics about the frequency of labor law violations in the underground economy, but governmental agency enforcement efforts confirm the conclusion of *amici* that violations of fundamental labor protections are widespread in California. For example, the Joint Enforcement Strike Force ("JESF"), an inter-agency initiative created in 1993 to promote cooperation between state agencies

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[84] National Center for Policy Analysis, *The Unmeasured Underground Economy* (2001), *available at* http://www.ncpa.org/sub/dpd/index.php?Article_ID=12688. *See also* Ong & Rickles, *supra* note 62, at 21 (citing sources).

[85] Congressional Budget Office, *Changes in Low-Wage Labor Markets Between 1979 and 2005* 18 (2006).

[86] The Urban Institute has concluded that immigrants made up 21% of low-wage workers (defined as those earning less than twice the federal minimum wage) in 2005, and that undocumented workers made up nearly 10% of low-wage workers in the nation as a whole. Undocumented workers made up 23% of lower-skilled workers (those without a high school education) in the U.S. *See* Randolph Capps, Karina Fortuny, and Michael E Fix, *Trends in the Low-Wage Immigrant Labor Force, 2000-2005* 2-3 (Urban Institute, 2007), *available at* http://www.urban.org/UploadedPDF/411426_Low-Wage_Immigrant_Labor.pdf. *See also Voices from the Underground Economy*, *supra* note 65, at 23, 24 and notes 113-117(citing sources).

charged with enforcing labor, licensing, and tax laws,[87] identified $245 million in unreported wages in 2002. From 2004 to 2006, the JESF conducted 1,731 payroll tax audits; issued payroll tax assessments totaling $84.6 million; discovered 30,243 workers who had not been reported to the state; and cited employers for various labor cost violations totaling $10.8 million.[88]

The multi-agency EEEC reported in 2007 that over 5600 employees had not been reported to the state in the two fiscal years covered by the EEEC's 2007 report, and that employers had concealed over $109 million in wages.[89] These figures represent only the results of EEEC's inspections in seven targeted industries, and do not purport to describe the universe of violations in the underground economy as a whole.

Amici know of no studies or data focusing on the prevalence of meal and rest break violations alone. However, a recent report published by advocates for low-wage workers in California suggests that when employers violate minimum wage, overtime, or reporting requirements, it is overwhelmingly likely that they also violate meal and rest break provisions. *Voices from the Underground Economy*, *supra* note 65, at 15. For example, *amicus* Bet Tzedek Legal Services reported that, while it does not file cases

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[87] The JESF was created by gubernatorial executive order and has since been codified by statute. Cal. Unemp. Ins. Code § 329. The JESF includes the Employment Development Department, the Departments of Consumer Affairs, Justice, and Industrial Relations, the Franchise Tax Board, the Board of Equalization, and (since 2002), the Department of Insurance. In contrast to EEEC, which focuses on the underground economy, JESF is designed to focus on a wide variety of industries. EEEC Rpt., *supra* note 61, at 7.

[88] Daniel S. Levine, *'Underground' Squeezes Honest Firms*, San Francisco Business Times (August 22, 2003), *reported in* Ong & Rickles, *supra* note 62, at 22.

[89] EEEC Rpt., *supra* note 61, at 12 (unreported wages); Appendices 2 & 3 (number of employees).

based on meal and rest break violations alone, meal and rest break violations were alleged in an estimated 93% of the 570 employment cases that its advocates have filed or negotiated in the last three years. *Id.* at 15. Similarly, *amicus* Centro Legal de La Raza reported that it helps workers file approximately fifty employment claims per year, of which 90-95% involve meal and/or rest break violations. *Id.* Garment Worker Center reported that in the last three years advocates have filed, negotiated, and advised on 300 employment cases, 95% of which involved meal and rest break violations. *Id.* *Amicus* Legal Aid Society—Employment Law Center in San Francisco resolved approximately fifty-five cases annually in 2006, 2007, and 2008, of which at least 50% involved meal or rest break violations. *Id.* *Amicus* Maintenance Cooperation Trust Fund reported that it has helped process 400 employment claims in the last three years, of which 95% involved meal and rest break violations. *Id.* Young Workers United reported that it has filed and negotiated over one hundred employment cases in the last 3 years, approximately 50% of which involved meal or rest break violations. *Id.* at 16. *Amicus* Wage Justice Center reported that from 2006 through 2009 it obtained settlements for 203 workers and provided brief services for an additional 90 workers, and that approximately 95% of these cases involved meal or rest break violations. *Id.*

Likewise, the Legal Aid Foundation of Los Angeles reported that of the 143 claims it helped workers bring before the Labor Commission in 2006, 99 included rest break issues (69%) and 85 included meal break issues (59%). *Id.* at 15. Likewise, Neighborhood Legal Services of Los Angeles County ("NLS") reported that of the 150 cases it has argued on behalf of workers in front of the Labor Commissioner over the last

three years, 70% involved meal or rest break claims. Of the 1600 claims for which NLS provided brief assistance, rather than full representation, during this same time period, 60% involved meal or rest break claims. *Id.* at 16. The prevalence of meal and rest break violations in California's lowest-paid workplaces is beyond dispute.

B. Given the Realities of the Low-Wage Economy, the Standards Created by The Court Of Appeal Will Further Undermine the Ability of California's Most Vulnerable Workers to Demand and Enforce Their Rights to Statutorily-Mandated Meal and Rest Breaks

The prevalence of meal and rest violations in California's low-wage and underground economies indicates that even before the Court of Appeal issued its decision in this case, a number of barriers stand between low-wage workers and their ability to avail themselves of meal and rest breaks. Indeed, *Amici* note that many of the historical barriers to full implementation of meal and rest period laws discussed in section I *supra* remain fully in place in California's contemporary low-wage and underground economies. These barriers include (1) the pay and profit structures of many low-wage industries, including piece work, that discourage or punish workers from taking breaks without explicit employer cooperation; (2) the dramatically unequal bargaining position of employees in low-wage industries *vis à vis* their employers; and (3) employer acts - both blatant and subtle - to discourage or prohibit employees from availing themselves of their right to appropriate breaks. These barriers become insurmountable when the obligation to control the workplace is not squarely placed on the employer as the Legislature intended.

In *Brinker*, the Court of Appeal held that an employer need not "ensure" that employees receive meal breaks, but need only see that the breaks are "made available" to the employees. *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25, 50 (2008). The Court of Appeal further held that employers are under no obligation to provide meal breaks at or near the middle of an employee's workday. *Id.* at 53-54.

In other words, the standard for providing meal periods adopted by the Court of Appeal would allow employers to comply with the law by doing nothing more than announcing a policy of a right to such meal breaks. This standard places a burden on employees to demand and take meal breaks. Moreover, workers who wish to claim compensation for meal period violations under Labor Code § 227.6 will face an additional barrier to vindicating their rights when their employers suggest that workers waived their breaks by working through them "voluntarily." Given the realities of the low-wage workplace and the vulnerability of California's lowest-paid workers, the Court of Appeal's ruling can only entrench the widespread abuse of meal and rest laws described herein.

1. The pay and profit structure in some industries discourages or punishes workers for taking breaks without explicit employer cooperation

In the experience of *amici*, many low-wage workers are reluctant to assert their right to meal and rest breaks because industries in the contemporary underground economy are often structured in ways that discourage workers from taking breaks. These structures, which include payment of piece-rate wages and contracts that require work to

be performed within specific time frames, precisely replicate the working conditions that concerned early scholars and activists during the age of industrialization.

For example, the contemporary garment industry, which in this country is based largely in Los Angeles, is characterized by small orders, frequent changes in assembly lines, and a dependence on a quick turnaround.[90] Many garment workers are paid a "piece-rate" for each garment produced, rather than a fixed hourly rate, often resulting in sub-minimum wages for a day's or week's work.[91] This employment structure creates an incentive for employees to work through the day without taking breaks. The more garments an employee produces, the more the employee earns. Moreover, the employer or customer often imposes deadlines for the production of a specific order of garments.[92] Garment workers in California often work sitting in a steel chair at a sewing machine for ten or more hours a day without breaks, conditions that are known to cause musculoskeletal pain and other health problems.[93]

Similarly, in the janitorial services industry, companies are often contracted to do a job based on a certain rate for a certain amount of time (for example, cleaning a grocery store in six hours for a fixed rate).[94] Depending on staffing levels, a job may take far

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[90] *We Spend Our Days Working in Pain*, *supra* note 77 at note 6 and accompanying text.
[91] *See*, *e.g.*, Andrew Gumbel, *Fashion Victims: Inside the Sweatshops of Los Angeles*, UK Independent (August 3, 2001) (describing DLSE enforcement against Los Angeles garment factory whose workers averaged $150-200 per week for a 70 hour work week, or $2 to $3 per hour); *available at* http://www.commondreams.org/headlines01/0803-02.htm.
[92] *We Spend Our Days Working in Pain*, *supra* note 77 at note 6 and accompanying text.
[93] *Id.*, Clinical Findings section.
[94] *Voices from the Underground Economy*, *supra* note 65, at 18.

longer to do than the time provided for in the contract.[95] This structure creates pressure for janitors to continue working through their breaks because they are only paid for the amount of time in the contract: any extra time it takes workers to finish the job is time for which they will not be paid.[96] Pressure not to take breaks is compounded in this industry when workers are required to complete their work by a certain fixed time, because, for example, the store or office being cleaned must open to the public.[97]

In the car wash industry, many worksites resemble traditional assembly lines in which workers rinse, wash, and dry cars that are put onto an automated conveyer, and then drive cars off of the conveyer as new cars move down the line. Workers on these chains generally do not control the pace at which cars are placed on the line, and cannot take breaks unless their employers stop the automated conveyer.[98]

In the agricultural industry, between 2005 and 2008 no fewer than 13 workers have died in the fields from confirmed heat stress illness. In three of six agricultural heat fatalities confirmed in 2005, investigation reports show that the victims succumbed to the heat while working under conditions where all required meal and rest periods were not

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[95] *Id.*

[96] *Id.* at 18-19.

[97] *Id.* at 19. With respect to the janitorial services industry, *amicus* MCTF further notes, "Workloads are so heavy that people do not have time to rest. In the majority of cases, if someone does take time to rest during their shift, it is for a maximum of ten or fifteen minutes, but almost never the full thirty-minute lunch period plus two ten-minute rest periods. We normally ask people how they go for more than eight hours of manual labor without eating, and are told that they eat a snack while working—eat an apple while pushing the vacuum cleaner or drink a soda while waiting for the wax to dry, but always vigilant about completing their work." *Id.*

[98] *Cleaning Up the Carwash Industry*, *supra* note 71, at 5; *Voices from the Underground Economy*, *supra* note 65, at 19.

"taken."[99] In the agricultural industry, meal and rest period violations are driven by the use of piece rates, and crew and individual production standards that cannot be met if workers take meal or rest breaks.[100]

The recent *Voices From the Underground Economy* report details the experience of many *amici* and other low-wage worker advocates, who report that one of the most common reasons low-wage workers do not take legally mandated meal and rest breaks is that there is no realistic way workers can take their breaks and still complete the work they have been assigned in the amount of time allotted, unless the employer manages the workload and the workplace so as to make breaks possible. *Voices from the Underground Economy*, *supra* note 65, at 19-21. For example, *amicus* Centro Legal de La Raza represented a caterer/food preparation employee who never received meal or rest breaks in the fourteen years he worked for his employer. *Id.* at 20. While this employee was not explicitly told that he could *not* take a break, his employer gave him so much work that he was never able to take them and complete his work. *Id.* Neighborhood Legal Services of Los Angeles County represented three motel workers who worked ten to twelve hours per day, six to seven days per week, maintaining seventy motel rooms.

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[99] Amicus Letter of California Rural Legal Assistance Foundation to California Supreme Court in Support of Petition for Review, *Brinker Restaurants Corp. v. Superior Court* (Case No. S166350) (September 26, 2008).

[100] Susan Ferriss, *In California's fields, risks rise with the temperature*, The Sacramento Bee, A1 (August 21, 2008) (citing government reports). A recent lawsuit alleges that Cal-OSHA's failure to investigate, monitor, and take remedial measures to enforce worker protections in conditions of extreme heat violates California state law. The complaint, *available at* https://www.aclu-sc.org/documents/view/199, includes citation to numerous reports and investigative findings regarding the prevalence of heat-related deaths among California farmworkers.

Because only two workers were scheduled to clean the rooms on any given day, the workers, practically speaking, had no time to take breaks. *Id.*

Chi L. was a garment worker who worked for a factory where she worked six days a week for eight hours a day without ever being given lunch breaks. *Id.* at 20. Chi understood the importance of taking regular rest breaks: "Rest breaks are very important to workers because if we do not get rest breaks we are more likely to make mistakes and get into accidents. We work so closely with equipment like sewing machines and steam irons that mistakes can lead to bad injuries." *Id.* However, she also explained why she was never able to take advantage of these important protections: "Unless an employer makes sure that the workers stop for at least 30 minutes, we are never able to stop and take our lunch breaks because there is always work to do." *Id.*

Jin Lian F. was a cook at a restaurant who worked six days a week, ten hours a day, and was never able to take statutorily-required 30-minute meal breaks. *Id.* at 21. "The restaurant was busy and I had to work constantly," recounts Jin. *Id.* "Sometimes we'd sit down to eat together, but never for more than 15 minutes or so and then we'd have to jump up and return to our duties. It was exhausting and we were on our feet constantly in the kitchen." *Id.* Kang C., a cook in a small restaurant, reports a similar experience. *Id.* at 20-21. Kang worked for six days a weeks, twelve hours a day, and was permitted only twenty minutes a day for a meal break, during which he was still required to cook. *Id.* "Ironically, we are surrounded by food," explains Kang, "but unless an employer makes sure that the cooks and wait staff can stop for 30 minutes, we are never able to stop and take our lunch breaks because there is always work to do." *Id.*

There is no question that if the Court of Appeal's decision is upheld, placing the onus of ensuring that meal breaks are taken on workers rather than on employers, workers in the underground and lowest-wage sectors will virtually never receive them.

2. The dramatically unequal bargaining position of employees in low-wage industries *vis à vis* their employers undermines the ability of employees to assert their right to breaks

This Court has long recognized that language and immigration status can act as barriers to certain low-wage workers in vindicating their workplace rights. *See, e.g.*, *Gentry v. Superior Court*, 42 Cal. 4th at 461 (2007) (noting that some employees may not sue when their right to overtime pay is violated because "[s]ome workers, particularly immigrants with limited English language skills, may be unfamiliar with the overtime laws."). In California, immigrants, both documented and undocumented, provide a labor market for low-paying, labor-intensive jobs that often involve dangerous working conditions.[101] "The undocumented immigrant population is a significant sector of the informal economy, and many of the industries where these residents find work are flagships of the informal labor market."[102] While undocumented workers are entitled to the protection of California's labor laws, including meal and rest provisions (Cal. Lab. Code § 1171.5), the fear of deportation or other immigration consequences has a chilling effect on such workers' willingness to assert their legal rights, and can embolden unscrupulous employers to make express or implied threats to report employees to

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[101] *See, e.g.*, Capps et.al, *Trends in the Low Wage Immigrant Labor Force, 2000-2005*, *supra* note 86, at 2-3; *Hopeful Workers, Marginal Jobs*, *supra* note 62, at 30-31; Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 Yale Law Journal 2179, 1282 (1994).

[102] *Hopeful Workers, Marginal Jobs*, *supra* note 62, at 25.

immigration authorities if they complain about illegal working conditions.[103] *Amicus* APALC reports that workers in the garment industry, who are often Latina or Asian immigrants, do not question even the worst of the working conditions in garment factories because they feel vulnerable and fear losing their jobs. *Voices from the Underground Economy*, *supra* note 65, at 24.

Furthermore, many workers in low-wage industries speak no or very limited English, regardless of their immigration status.[104] Workers who do not speak English also face greater obstacles in accessing legal resources and are less likely to be aware of their rights and employers' obligations under the law. The workers who are most likely to be working in industries involving intense manual labor and/or long working hours are precisely those workers who are least likely to assert their rights to meal and rest breaks in the absence of explicit employer directives.

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[103] *See, e.g.*, Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, UCLA School of Law Public Law & Legal Theory Research Paper No. 07-36 (2008) at 48-49. *Cultivating Strength: The Role of the Pilipino Worker's Center Courage Campaign in Addressing Labor Violations Committed Against Filipinos in the Los Angeles Private Home Care Industry*, *supra* note 72, at 43; Mujeres Unidas et al., *Behind Closed Doors: Working Conditions of California Household Workers* 2 (2007); *Voices from the Underground Economy*, *supra* note 65, at 23-24.

[104] *See e.g.*, *We Spend Our Days Working in Pain*, *supra* note 77, Background Section (reporting that the vast majority of the state's 100,000 garment workers are Latina or Asian immigrants with limited English language skills); *Cleaning Up the Carwash Industry*, *supra* note 71, at 5 (majority of carwash workers in California are monolingual Spanish-speaking immigrants from Latin America). The Urban Institute's 2007 report found that immigrants make up substantial fractions of the workforce in industries regularly identified as frequent violators of labor laws: 40% all employees in construction and building and grounds maintenance, a third in manufacturing, and more than a fifth in food preparation and transportation. Capps, et.al., *supra* note 86, at 8.

3. Employers in the low-wage and underground economies often discourage or prohibit employees from availing themselves of their right to appropriate breaks, and retaliate against workers who do request or take breaks

When workers in the underground economy attempt to take breaks or complain about the inability to do so, employers in many cases retaliate by firing or threatening to fire the complaining employee; reducing the number of hours the employee is scheduled to work; assigning less desirable work to the employee; or sending the employee home for a day or longer. *Voices from the Underground Economy*, *supra* note 65, at 21. Such explicit adverse action against employees who seek to take breaks would, of course, remain illegal even under the standard adopted by the Court of Appeal for the provision of meal breaks. But if the law does not require employers to *ensure* that workers take statutorily-mandated meal breaks, it is certain that these illegal practices will prevent workers from taking breaks while allowing employers to argue that workers simply "choose" to work through their meal periods, thus potentially avoiding liability in many cases.

Many contemporary tactics used by employers to discourage or prohibit employees from taking breaks strikingly replicate employer practices from a century or more ago, as documented by early industrial research outlined in section I above. For example, as noted above, car wash work resembles that of a traditional assembly line, where the pace of the work is set by the employer and where the employer's profits depend on how many units are processed—e.g., how many cars pass through the car

wash—in a given amount of time.[105] During peak seasons, carwash employees regularly work more than ten hours per day without an opportunity to take a full meal or rest break.[106] *Amicus* Bet Tzedek Legal Services has reported that in several of its cases involving car washes, employees who asked for breaks were sent home, assigned to positions that do not result in tips, or told they should look elsewhere for work. *Voices from the Underground Economy*, *supra* note 65, at 21.

Likewise, Garment Worker Center reports intense pressure to keep up a fast pace in the garment industry: "Workers were denied the right to take their full thirty minute lunch period. They were only allowed a twenty minute break for their lunch and rest period in the course of their ten hour work day. During these twenty minutes, workers were rushed back to work, and were yelled at and verbally abused if they left their workstation aside from these twenty minutes. Workers were expected to produce large amounts of production and were paid by piece; if they did not produce enough they were threatened with being fired." *Id.* at 22.

Specific examples of the risks employees in the low-wage economy face when they assert their right to meal and rest breaks abound in the practice of *amici* organizations. *Amicus* Bet Tzedek Legal Services represented a garment worker who, after complaining to her manager about the lack of meal and rest breaks in a garment factory, was reassigned to work on more difficult garments, meaning she worked at a slower pace and therefore earned less money at a piece rate. *Id.* at 21-22. Maria M., a

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[105] *Cleaning Up the Carwash Industry*, *supra* note 71, at 5.
[106] *Id.* at 7.

client of Young Workers United, worked twelve hour days, six days per week, for a *taqueria* in Northern California. *Id.* at 23. She received no breaks, overtime pay, or sick leave, being forced to come to work and work without breaks even while she was undergoing chemotherapy for treatment of cancer. After ten years, her employer fired her for speaking up against management taking workers' tips and not providing adequate breaks and overtime pay. *Id.* Young Workers United reports: "The threat of being fired is used in almost every single case we have dealt with to force workers to not complain about the violations of every single one of their labor rights including overtime, minimum wage, and meal and rest breaks." *Id.* at 21.

Patricia Y., another client of Young Workers United, worked for seven years in a *taqueria* in San Francisco, working eleven hours per day, six days per week, even while pregnant. *Id.* at 22. If she took a break during the workday and her manager saw that a customer was unattended, he would yell at her and threaten to fire her. *Id.*

Telma M. worked in a garment factory ten hours per day, six days per week, for three years. *Id.* at 23. Telma was permitted to take only a single break during the day, with the time and duration of the break at her employer's discretion. She suffered intense pain in her feet, legs, arm, neck, and back from working at a garment trimming machine. *Id.* When she made an appointment to see a doctor for her pain, her employer instructed her to postpone her appointment until there was less work. When Telma did not postpone her appointment, she was fired. *Id.*

Javier A. worked as a gardener in San Luis Obispo County, working six days per week for eight to nine hours per day with a single break. *Id.* at 23. Javier reported that

his employer permitted workers to take thirty-minute lunch breaks, but no other rest breaks throughout the day, even though they worked in temperatures that were often higher than ninety degrees. He reported: "I often became extremely tired, weak and sometimes dizzy before the meal break and toward the end of the day, but I was afraid that if I took a break I would be disciplined or even fired." *Id.*

Arturo G., a night janitor at a large retail store, worked seven days per week, nine hours a day, and rarely was permitted to take a break. *Id.* at 22. His employer suspended employees for two to three days if he learned that they had taken a break to eat. *Id.* *Amicus* Maintenance Cooperation Trust Fund reports having seen numerous cases in the janitorial services industry "where workers are disciplined or fired simply for asserting or demanding their rights, including that to take rest and meal periods. They come to be seen as trouble-makers by the employer and are forced out of the company (fired)." *Id.* at 21.

C. This Court Must Reaffirm the Long-Understood Requirements of California's Meal and Rest Break Provisions Lest Violations Become More Frequent and Entrenched

Meal and rest breaks are fundamental labor protections, adopted by state legislatures, including California's, in response to over a century of documentation of the benefits of such pauses to workers, employers, and the public. The workforce employed in California's low-wage and underground economies – unlike the professional workforce employed in offices and other workplaces in the state where minimum labor standards are observed – faces many of the same barriers to workplace meal and rest periods faced by workers in the early years of industrialization in this country.

Contrary to plain statutory language and extensive legislative and regulatory history, the Court of Appeal held that an employer need not "ensure" that employees receive meal breaks, but need only see that the breaks are "made available" to the employees, *Brinker*, 165 Cal. App. 4th at 50, and that employers are under no obligation to provide meal breaks at or near the middle of an employee's work day, *id.* at 53-54. Based on their experience, *amici* contend that if this Court were to adopt the same standard, the inevitable result of this holding will be to entrench and increase violations of meal and rest break protections in industries where wage and profit structures discourage employees from taking breaks, where employees have dramatically unequal bargaining power *vis à vis* their employers, and where employers actively discourage employees from taking breaks during the workday.

The hundreds of thousands of California residents employed in the low-wage and underground economies have little chance of availing themselves of these fundamental protections unless the burden of ensuring that employees take meal periods is placed squarely on the employer, as the law has long been understood to do. Similarly, low-wage workers are unlikely to receive the actual benefit of a pause in the workday unless employers are required to schedule meal and rest periods within specific sensible time frames, as the law has also long been understood to do. *Amici* therefore respectfully request that the Court reverse the Court of Appeal's decision and hold (1) that Labor Code §§ 226.7 and 512 and Industrial Welfare Commission ("IWC") Wage Orders require employers to relieve workers of all duties in order for them to take statutorily-mandated meal periods; and (2) that existing law requires employers to provide meal and

rest breaks within the clear and sensible time frames long understood to be required by the plain language of the statutes and relevant Wage Orders.

CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeal should be reversed.

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