

Nos. A116458, A116459, A116886

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR**

ANDREA SAVAGLIO, *et al.*,
Plaintiffs, Respondents and Cross-Appellants

vs.

WAL-MART STORES, INC., *et al.*,
Defendants, Appellants and Cross-Appellants

Appeal and Cross-Appeal from the Superior Court of the State of
California for the County of Alameda,
The Honorable Ronald M. Sabraw,
Case No. C 835687

**APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*;
BRIEF OF *AMICUS CURIAE* ASIAN PACIFIC AMERICAN LEGAL CENTER
OF SOUTHERN CALIFORNIA, CALIFORNIA RURAL LEGAL ASSISTANCE
FOUNDATION, HASTINGS CIVIL JUSTICE CLINIC, KATHARINE &
GEORGE ALEXANDER COMMUNITY LAW CENTER, LA RAZA CENTRO
LEGAL, LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, NATIONAL
EMPLOYMENT LAW PROJECT, AND WORKSAFE LAW CENTER IN
SUPPORT OF PLAINTIFFS/RESPONDENTS ANDREA SAVAGLIO, *ET AL.***

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**APPLICATION FOR PERMISSION TO FILE
BRIEF OF AMICUS CURIAE**

Pursuant to California Rules of Court Rule 8.200(c), Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Hastings Civil Justice Clinic, Katharine & George Alexander Community Law Center, La Raza Centro Legal, Legal Aid Society - Employment Law Center, National Employment Law Project, and Worksafe Law Center, hereby apply to this court for permission to file the following brief *amicus curiae* in support of Plaintiffs, Respondents, and Cross-Appellants Andrea Savaglio, *et al.*

INTRODUCTION

The undersigned non-profit public interest legal organizations respectfully submit this *amicus curiae* brief in support of Plaintiffs'/Respondents' positions that 1) the trial court did not abuse its discretion in certifying the meal period class, 2) the compensatory damages awards should be upheld, and 3) the punitive damages award should be upheld.

STATEMENT OF INTEREST

Amici Curiae are organizations, scholars, and professionals providing, among other services, legal counseling and representation to low-income workers in employment related matters, including wage and hour disputes. Between them, *amici* annually assist thousands of low-wage

workers with employment-related legal problems, including a substantial number of claimants who endure meal period violations. The issues presented in this appeal and addressed in this brief have a direct impact on the low-income workers who are eligible for *amici's* services.

A. 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 largest nonprofit 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. APALC represented 80 Thai garment workers forced to work behind barbed wire and under armed guard in El Monte, California. APALC represented the workers in a suit against their employers, *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 garment workers in claims for back wages and improved working conditions.

B. California Rural Legal Assistance Foundation

California Rural Legal Assistance Foundation (“CRLAF”) is a nonprofit legal services provider that represents low-income families in rural California and engages in regulatory and legislative advocacy that promotes the interests of low-wage workers, particularly farm workers. Since 1986

CRLAF has recovered wages for thousands of farm workers. These workers have been subjected to a variety of schemes intended to defraud them of the minimum wages, contract wages, overtime wages, and in some circumstances all wages due them. Through its Agricultural Workers Health Project, CRLAF regularly represents groups of farm workers who have been denied meal and rest periods. CRLAF was actively involved in developing the language of Labor Code § 226.7, as added by AB 2509 in 2000, and provided testimony in support of the bill.

C. Hastings Civil Justice Clinic

The Hastings Civil Justice Clinic (“CJC”) is the main clinical teaching program at the University of California Hastings College of the Law. The CJC provides free and direct legal services to low-income clients in the Bay Area regarding workers’ rights, housing, and social security disability benefits. With respect to workers’ rights, many of the CJC’s clients have suffered myriad violations of California’s wage and hour protections flowing from an employer’s misclassification of them as exempt employees, the withholding of meal and rest breaks, and the failure to pay overtime. The CJC was lead counsel in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, a case involving the rights of a worker who was misclassified as an exempt employee..

D. Katharine & George Alexander Community Law Center

Founded in 1993, the Katharine & George Alexander Community Law Center (“KGACLC”) is the civil clinical program of the Santa Clara University School of Law. The KGACLC provides free legal services to low-income individuals in and around Santa Clara County, and focuses its practice on consumer protection, immigration law, workers compensation, and workers’ rights. Since its founding, the KGACLC has targeted its services toward meeting the legal needs of low-wage immigrant workers, and represents many clients in wage and hour claims before the California Labor Commissioner. Both the KGACLC and its client base have a strong interest in the outcome of this case.

E. La Raza Centro Legal

La Raza Centro Legal (“LRCL”) provides free legal services to the Latino immigrant community throughout the Bay Area of California. LRCL also runs the San Francisco Day Labor Program, which, along with LRCL’s employment law unit, aids hundreds of workers to file administrative claims to vindicate violations of the California Labor Code each year.

F. Legal Aid Society—Employment Law Center

The Legal Aid Society – Employment Law Center (“The LAS-ELC”) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Founded in 1916, the LAS-ELC has worked exclusively in the area of employment law since 1970

representing clients in a broad range of employment-related matters including discrimination, sexual harassment, and wage-and-hour law. The LAS-ELC represents clients in state and federal court, and before administrative agencies, including the California Department of Fair Employment and Housing (DFEH), the Equal Employment Opportunity Commission (EEOC), the California Unemployment Insurance Appeals Board (CUIAB), and the California Division of Labor Standards Enforcement (DLSE).

G. National Employment Law Project

The National Employment Law Project (“NELP”) is a non-profit organization with almost 40 years of experience advocating for the employment and labor rights of low-wage workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual’s status as an immigrant, a participant in a workforce development program, or a worker in a nonstandard relationship such as part-time, temporary, or sub-contracted work. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under federal and state wage and hour laws.

H. Worksafe Law Center

The Worksafe Law Center (“WLC”) is a Legal Services Support Center funded by the State Bar Legal Services Trust Fund Program, which

provides advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. WLC is a project of Worksafe, Inc., a California-based non-profit organization dedicated to promoting occupational safety and health through education, training, and advocacy. Worksafe focuses on eliminating all types of workplace hazards, including workplace-created toxic hazards that impact at-risk communities in California. Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers. Worksafe seeks legal redress on behalf of California workers, including low-income and other vulnerable workers, and pursues public policy initiatives related to the improvement of worker health and safety. Worksafe considers the strong meal and rest period laws enacted by the California Legislature – liberally construed to effectuate their remedial purpose, and potently enforced by state labor officials or by private attorneys in class actions – to be vitally important to the health and welfare of the millions of low-wage and immigrant workers who often toil in harsh and hazardous work environments, and who are vulnerable to retaliation when they try individually to assert their rights to a safe and healthy workplace.

Respectfully submitted.

Dated: July 17, 2008

California Rural Legal Assistance Foundation

By: _____
Cynthia L. Rice

Legal Aid Society – Employment Law Center

By: _____
Matthew Goldberg

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

ARGUMENT.....4

I. THE MEAL PERIOD LAWS IMPOSE A MANDATORY DUTY ON EMPLOYERS TO PROVIDE MEAL PERIODS.....4

A. The Express Language Of The Statutes And The Governing Wage Order Make Meal Periods Mandatory.....4

B. Wal-Mart’s Suggestion That Employers Are Merely Required To Provide An “Opportunity” For Meal Breaks Would, In Practice, Eviscerate The Right To Meal Periods9

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE MEAL PERIOD CLASS12

A. The Trial Court Correctly Held That Determining Wal-Mart’s Compliance With Meal Period Requirements Was A Question Common To All Class Members12

B. The Trial Court Correctly Relied Upon Representative Proof In Certifying The Meal Period Class14

C. Class Certification Of Employment Cases Is Not Only Appropriate, It Affirmatively Furthers California’s Express Public Policy Supporting Labor Law Protections.....18

D. Current Employees Face Significant Pressure Not To Assert Their Rights, Thus Class Treatment is Paramount To Ensure That Labor Rights Do Not Go Unenforced21

III. THE PUNITIVE DAMAGES AWARD SHOULD BE UPHELD BECAUSE THE JURY PROPERLY FOUND THAT PLAINTIFFS/RESPONDENTS WERE ACTUALLY INJURED24

A. Denial Of Breaks Causes Actual Injury to Low-Wage Workers By Depriving Them Of Time Necessary To Take Care Of Personal Tasks25

B. Denial of Breaks Causes Actual Physical Injury To Plaintiffs By Subjecting Them To A Higher Risk Of Work-Related Injuries26

CONCLUSION.....29

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Mt. Clemons Pottery Co. (1946) 328 U.S. 680.....14, 18

Brock v. Seto (9th Cir. 1986) 790 F.2d 144614

Cooper v. Fed. Reserve Bank of Richmond (1984) 467 U.S. 86713

Ellis v. Costco Wholesale Corp. (N.D.Cal., January 11, 2007) 2007 U.S.
Dist. LEXIS 2103.....14

Int’l Bhd. of Teamsters v. United States (1977) 431 U.S. 324 13-14

Mitchell v. Lublin, McGaughy & Associates (1959) 358 U.S. 20719

Rivera v. NIBCO, Inc. (9th Cir. 2004) 364 F.3d 1057.....23

Tennessee C., I. & R. Co. v. Muscoda (1944) 321 U.S. 59018

West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379.....19

STATE CASES

Aguiar v. Cintas Corp. No. 2 (2006) 144 Cal.App.4th 12114

Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 71514, 15, 17

Brown v. Kelly Broad. Co. (1989) 48 Cal.3d 711, 724.....8

California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11
Cal.4th 342.....8

Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 94916, 17, 21

<i>Earley v. Superior Court</i> (2000) 79 Cal.App.4th 1420	15
<i>Employment Development Dept. v. Superior Court</i> (1981) 30 Cal.3d 256.....	17-18
<i>Ill. Hotel & Lodging Assn. v. Ludwig</i> (Ill.Ct.App. 2007) 869 N.E.2d 846.....	27
<i>Industrial Welfare Com. v. Superior Court</i> (1980) 27 Cal.3d 690.....	19
<i>Johnson v. Calvert</i> (1993) 5 Cal.4th 84	7
<i>Klussman v. Cross Country Bank</i> (2005) 134 Cal.App.4th 1283.....	15
<i>Murphy v. Kenneth Cole Productions, Inc.</i> (2007) 40 Cal.4th 1094.....	6
<i>Ramirez v. Yosemite Water Co.</i> (1999) 20 Cal.4th 785	19
<i>Richmond v. Dart Industries</i> (1981) 29 Cal.3d 462.....	15
<i>Rocklite Products v. Municipal Court for Los Angeles Judicial Dist.</i> (1963) 217 Cal.App.2d 638	8
<i>Sav-On Drugs, Inc. v. Superior Court</i> (2004) 34 Cal.4th 319.....	13, 14, 15, 16, 18
<i>Stephens v. Montgomery Ward</i> (1987) 193 Cal.App.3d 411	13
<i>Steven S. v. Deborah D.</i> (2005) 127 Cal.App.4th 319.....	7, 8
<i>Vasquez v. Superior Court</i> (1971) 4 Cal.3d 800.....	18
<i>Zavala v. Scott Brothers Dairy, Inc.</i> (2006) 143 Cal.App.4th 585.....	21

FEDERAL AUTHORITIES & STATUTES

29 U.S.C. § 201	18
29 U.S.C. § 216.....	19

STATE AUTHORITIES & STATUTES

Cal. Code Civ. Proc. § 18587

8 Cal. Code Regs. § 3395.....28

8 Cal. Code Regs. § 11050.....5

Labor Code § 98.3.....20

Labor Code § 219.....6, 20, 21

Labor Code § 226.7.....2, 5, 6, 20

Labor Code § 512.....5, 6

Labor Code § 1193.5.....20

Labor Code § 1195.5.....20

Labor Code § 1198.....19

Labor Code §§ 2698, et seq (Labor Code Private Attorneys General Act).....15, 20

Dept. of Industrial Relations, DLSE, Opn. Letter 1995.06.02, p. 221

OTHER AUTHORITIES

“2004 DISCRIMINATION COMPLAINT REPORT” California Division of
Labor Standards Enforcement, 2004. available at:
<http://www.dir.ca.gov/dlse/2004DiscriminationComplaintReport.doc>23

Arax, *Deaths Rally Farm Workers*, Los Angeles Times (July 28, 2005) p.
B128

Boushey et al., <u>Hardships in America: The Real Story of Working Families</u> (2001) p. 30, fig. B.....	25
Dababneh, <i>Impact of added rest breaks on the productivity and well being of workers</i> , Ergonomics Vol. 44 No. 2 (2001) p. 164	26
Ferris, <i>Farmworker who collapsed is on respirator in Bakersfield</i> , Sacramento Bee (July 16, 2008) p. B3	28
Foo, <i>The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation</i> (1994) 103 Yale L.J. 2179, 2182	22
Green, <i>Work-Related Musculoskeletal Disorders and Breaks</i> (2003) WorkPlace, available at: http://www.workpace.com/moreworkrelatedmusculoske	27
Hartford Loss Control Department, <i>Rest Breaks and Cumulative Trauma Disorders</i> (2002) pp. 1-3	27
Hedge, <u>Effects of Ergonomic Management Software on Employee Performance</u> (1999) p. 5	26
Kenner, <i>Working Time, Jaeger and the Seven-Year Itch</i> (2004) 11 Colum. J. Eur. L. 53, 55	26
Lobel, <i>Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel</i> (2001) 24 Harv. Women's L.J. 89, 91.....	22
Lung, <i>Overwork and Overtime</i> (2005) 39 Ind. L.Rev. 51, 66-67.....	22

INTRODUCTION

Amici curiae are low-wage worker advocates who regularly represent workers who have been denied meal and/or rest periods. While many of these cases are on behalf of individuals, most workers are denied meal periods, not on an individual basis, but as part of a business model or approach which relies upon uninterrupted work by crews or large groups of workers to ensure that the cows get milked, the food gets served, the crops get picked, the check-out counter is staffed, and the production line runs without interruption. Many of these workers are unaware of their right to breaks. Others are pressured to forego them, directly or indirectly, by the demands of the job, the expectations of employers, and/or the fear of retaliation. A worker might never be directly told that he must give up his meal or rest break. In fact there might be a company policy on the wall, or a Wage Order that lays out the guarantees. Nonetheless the message is clear, take a break and jeopardize your job.

Amici curiae witness the realities facing low-wage workers on a daily basis. CRLA Foundation represents clients in several cases where crews of workers were required to milk hundreds of cows during an 11-hour shift. It was impossible to complete the work and take breaks, so they ate while working. Older farmworkers in the Coachella Valley were “asked” in groups if they “wanted” to reduce their workday by skipping breaks. The

younger, vocal workers opted for the “shorter” day; the employer implemented it and all workers were expected to adhere to the schedule. Fearful of being fired, workers, some of whom were in their 50s, did not speak up; they tried to keep up. Similar scenarios exist throughout California in a variety of workplaces. If you are one of the five people who are needed to keep a production line running, and your production quota is jeopardized every time the line shuts down, you keep that line running, even if it means no break. If the boss points out, ten minutes before you are due to take your lunch, that eight cars are waiting to be washed, you don’t take your lunch until those cars are done. The pressure on low-wage workers to forego breaks is enormous.

Defendants in these cases frequently assert that they provided the opportunity to workers to take their meal periods, but that workers, as individuals, determined that they did not want to take their meal periods. Employers throw their hands up in feigned frustration and argue that – short of physically restraining workers from their seemingly Herculean efforts to defy company policy and work rather than eat – employers have no means of escaping liability for the additional compensation required under Labor Code § 226.7. In representative actions they argue that each of these decisions to forego or shorten a meal period, is an individual waiver, unique to each employee, which they must be allowed to prove in individual cases.

Appellants/Cross Appellants (hereafter “Wal-Mart”) raise the same argument. Wal-Mart offers a construction of the applicable statute and regulations that upends the meal and rest period mandates, placing the burden on workers to affirmatively seek meals and rest periods. Under Wal-Mart’s theory a worker must, in effect prove that each missed or short meal period was not waived; irrespective of the weight of the evidence and a jury’s conclusion that the practices implemented by Wal-Mart resulted in a failure to provide meal periods in a manner generally applicable to the workforce.

Wal-Mart further argues that workers should be prevented from seeking class relief for meal period violations because individual issues predominate over common issues.

Wal-Mart makes these arguments in the face of their own internal audits which demonstrated that significant numbers of meal periods were not being provided and that employees were citing the inability to get breaks as a reason that some employees were quitting – hardly an indication of a voluntary waiver of breaks. Evidence at trial demonstrated that Wal-Mart failed to advise its employees or managers of meal period mandates. This was true even after internal audits demonstrated workers were not receiving those breaks. (Combined Respondents’ and Cross Appellants’ Opening Brief (hereafter “ROB”) at pp. 7-10.)

If successful, the effect of these arguments would be no less than the complete evisceration of workers' longstanding right to meal periods. This would run counter to longstanding California public policy and is inconsistent with the plain meaning and intent of existing minimum labor standards.

ARGUMENT

Amici concur with the arguments set out in Plaintiffs'/Respondents' briefs before this court, and will not repeat them here. However, *amici* believe that they can be of assistance to this court by providing further briefing on the following issues, each of which is critical to the enforcement of California workplace protections for *amici's* low-wage clients:

- (1) The meal period laws impose a mandatory duty on employers to provide meal periods;
- (2) The trial court did not abuse its discretion in certifying the meal period class; and
- (3) The punitive damages award should be upheld because the jury properly found that plaintiffs were actually injured.

I. THE MEAL PERIOD LAWS IMPOSE A MANDATORY DUTY ON EMPLOYERS TO PROVIDE MEAL PERIODS.

A. The Express Language Of The Statutes And The Governing Wage Order Make Meal Periods Mandatory.

The governing wage order mandates that “[n]o employer shall

employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes. . . .” 8 Cal. Code of Regs. § 11050(11)(A). This section prohibits an employer from suffering or permitting an employee to work during a meal period.¹ The Labor Code provides that “[n]o employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.” Cal. Labor Code § 226.7(a). That section imposes a financial obligation to pay an additional hour of pay if the employer “...fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission...” Cal. Labor Code § 226.7(b).

There are only three limited exceptions to this mandate (each defined in Labor Code § 512 or the Wage Order): meal periods may be waived for workdays of less than 6 hours,² “on duty” meal periods are allowed under certain circumstances;³ and the second meal period may be waived for

1 ““Employ” means to engage, suffer, or permit to work.” 8 Cal. Code of Regs. §11050(2)(E).

2 “[W]hen a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.” 8 Cal. Code of Regs. § 11050(11)(A).

3 An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on the job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time. 8 Cal. Code of Regs. § 11050(11)(C).

workdays in excess of 10 hours.⁴ Each of these exceptions requires express mutual consent. On duty meal periods and waivers of the right to a second meal period require a written agreement.⁵ Subject to these three exceptions, Labor Code § 219(a) provides that the protections afforded by Labor Code § 226.7 (among other provisions) may not be waived by any agreement.

Wal-Mart argues that it has fulfilled its obligation by providing employees “the opportunity” to take meal periods and that employers need only “make *available*” such opportunities to workers (emphasis in original). (Appellants’ Opening Brief (“AOB”), at pp. 21-22.) Wal-Mart further argues that meal periods can be waived for a variety of individualized reasons. (AOB at pp. 76-77.)

Wal-Mart’s interpretation is completely at odds with established rules of statutory construction, which mandate that courts look first to the words of the statute and their plain and commonsense meaning. See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103. Neither the regulation nor the statute defines the employer’s obligation as

4 Labor Code § 512 mandates a second meal period for certain employees who work in excess of 10 hours. “[I]f the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.” Labor Code § 512(a).

5 Wal-Mart offered evidence of written waivers, but that evidence was rejected as a defense because it did not effectively notify employees of the rights being waived. ROB at pp. 22-23).

merely providing an “opportunity” for a meal break. Wal-Mart urges a construction that requires that the court insert a term into both the statute and the regulation that simply is not there.

“In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. . .” Cal. Code of Civil Proc. § 1858. Courts themselves have recognized that this is not their purview. *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, 327.

“The courts are often called upon to construe statutes in factual settings not contemplated by the Legislature, and in doing so, may not disregard the statute and decide the case according to other criteria, such as the court's own ‘sense of the demands of public policy.’” *Id.* (quoting *Johnson v. Calvert* (1993) 5 Cal.4th 84, 89).

Granting an employee the “opportunity” to take a break and “providing” a break are entirely different things. By inserting the term “opportunity,” Wal-Mart places the burden on the employee to affirmatively assert and insist upon his/her right to each break for each work period. This is tantamount to saying that at the end of each workday an employee must affirmatively ask to be paid, or that right to payment is waived. That language is not in the statute or the regulation, and cannot be

grafted in by an employer or by the courts.

Both the Industrial Welfare Commission (IWC) and the Legislature took specific steps to address the need for flexibility on the part of employers and workers when mandating meal periods, and provided explicit exceptions, discussed *supra*, to those mandates.

“[I]t is presumed that the Legislature knows how to create an exception to the provisions of a statute, and that where it does not create an exception, it is presumed that it did not intend to do so.” *Steven S*, 127 Cal.App.4th 319, 327 (citing *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349).

The IWC and the Legislature did provide for waivers of the mandated right to breaks, but only with respect to those expressly provided. It cannot be inferred that they intended to allow a waiver by some other manner that was not specifically addressed. See *Rocklite Products v. Municipal Court for Los Angeles Judicial Dist.* (1963) 217 Cal.App.2d 638, 645; *Brown v. Kelly Broad. Co.* (1989) 48 Cal.3d 711, 724.

It is clear that the employer must provide meal periods unless they are waived in conformance with the explicit terms of the Wage Order or applicable statute.

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B. Wal-Mart’s Suggestion That Employers Are Merely Required To Provide An “Opportunity” For Meal Breaks Would, In Practice, Eviscerate The Right To Meal Periods.

Amici are advocates who represent low-wage workers employed in a wide variety of industries, including the garment, agriculture, food service, food processing, landscaping, janitorial, home care, and hospitality industries. Each of these settings present circumstances where an employer can establish a written or oral policy of providing breaks that is completely undermined by the reality of the workplace. Wal-Mart’s proffered interpretation of the meal period requirements would, in practice, completely undermine the ability of these workers to take their rightful meal periods.

For example, cannery employees generally work on an assembly line. The line runs whether or not the workers are present, and if they leave without relief, product is lost. Servers, cooks, and dishwashers – working in small restaurants and/or during off-peak hours – are often the only staff on site at their job. If they take their meal breaks, customers are not served, orders are not cooked, and dishes stack up. Under these conditions, an “opportunity” to take breaks is illusory.

Each of these workers would risk discipline or even termination if they abandoned their work without relief. This is true regardless of whether

a meal or break policy is posted. It can hardly be said that these workers “choose” not to take these breaks. It is not an individual choice, as Wal-Mart suggests; it is a deprivation that results from a workforce-wide practice implemented by the employer.

Employers have complete control over whether and when workers can take a break, and for how long, by virtue of whether a relief person is assigned. The net effect is that, by scheduling workers with limited relief and overlap, employers can effectively deprive workers of the ability to take their meal period breaks absent affirmative and consistent steps.

Workers are already subjected to other practices that effectively eliminate their ability to take breaks. Garment workers and farm laborers routinely work on a piece rate basis, meaning that their pay is dependent on their amount of production, rather than on the time worked. They have formal or informal individual production quotas, which, if not met, are the basis for termination. These quotas cannot be met if workers lose 50 minutes of potential work time each shift by taking lunch and rest breaks. In the agriculture sector, employers use peer pressure to discourage workers from taking breaks. They impose crew production quotas or offer the crew the opportunity to go home early if they “waive” their breaks and meet production early. Younger, stronger workers then set the pace that other workers know they must maintain in order to keep their jobs.

Even without imposing formal quotas, the sheer amount of work and fixed number of workers often make it impossible for agricultural workers, dishwashers, janitors and maids to complete their work before the sun goes down, the office opens up, or the hotel room is rented to the next customer. Under these circumstances, they face enormous pressure to continue working. Breaks often amount to no more than hurrying to the restroom, or grabbing food from a truck or vending machine.

Amicus CRLA Foundation has represented several groups of dairy workers who were expected to move hundreds of cows through a milking barn at established intervals. In one barn the employer installed a bell to ring out every 15 minutes so that workers would know if they fell behind the pace. If one worker stopped to eat, the work of two others was impacted and they were all threatened with discipline or termination for not keeping up. It is in this context – amidst the pressures and realities of the workplace, and the disparate power between workers and employers – that the court must evaluate Wal-Mart’s proffered interpretation of California’s meal period requirements. The practical consequences of such an interpretation would be additional pressure to “voluntarily” skip these meal periods, thus undermining the very purpose of this longstanding right.

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II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE MEAL PERIOD CLASS.

The record contains abundant evidence that Wal-Mart had a workforce wide failure to provide meal and rest periods that was repeatedly acknowledged by management and had imposed conditions, and implemented practices applicable to its entire workforce that impeded the ability of workers to take meal breaks. (ROB at pp. 7-8, 23-24.)

The jury properly weighed the evidence and legal standards in determining whether Plaintiffs had met their burden to establish that class certification was appropriate. Wal-Mart has failed to demonstrate that the court committed reversible error, either in its interpretation of the applicable statutes and regulations, or in its evaluation of whether common questions predominated.

A. The Trial Court Correctly Held That Determining Wal-Mart's Compliance With Meal Period Requirements Was A Question Common To All Class Members.

Plaintiffs/Respondents presented evidence that Wal-Mart's written policies were not enforced and were in fact undermined, not on an individual basis, but as the result of organization-wide practices. (ROB at pp. 37-39.) This policy of paying lip service to the law, while prohibiting its exercise in practice, is precisely the type of policy that can only be effectively eliminated by workforce-wide enforcement.

Wal-Mart is mandated to provide meal periods to all its employees. The court's certification order acknowledged these mandates, and then left to the merits the question of whether Wal-Mart complied with them. Determining whether compliance can be done on a class-wide basis turned on the consideration of facts and circumstances that may be unique to Wal-Mart's operations, but were nonetheless common to the workers they employ. The offer of proof regarding Wal-Mart's compliance with these laws is generalized and applied to the full workforce, not individuals, therefore common issues predominated and class treatment was proper. See *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421.

Wal-Mart suggests that if there are any individual issues that are necessary to a determination of whether it is liable to a particular employee, then class certification is inappropriate. (AOB at pp. 64-73). Even if there remain some individual issues, this fact is not fatal to class certification. *Sav-On Drugs, Inc. v. Superior Court* (2004) 34 Cal.4th 319. Rather, the pertinent concern, which the court properly addressed, is whether common issues predominate over individual issues. In a pattern and practice case, whether federal or state, there is always the possibility that liability against an individual employee may remain to be determined after resolution of the common issues. See *Cooper v. Fed. Reserve Bank of Richmond* (1984) 467 U.S. 867, 876 & n.9; *Int'l Bhd. of Teamsters v. United States* (1977) 431

U.S. 324, 361; *Sav-On Drugs, Inc.*, 34 Cal.4th at 332-33. The courts are clear that statistical sampling is sufficient to establish a workforce-wide pattern or practice for the purpose of class certification, whereas individualized considerations are left to the determination of damages. See *Ellis v. Costco Wholesale Corp.* (N.D.Cal., January 11, 2007) 2007 U.S. Dist. LEXIS 2103.

B. The Trial Court Correctly Relied Upon Representative Proof In Certifying The Meal Period Class.

It goes without saying that each employment operation is unique. It necessarily follows that the steps an employer must take to ensure that meal periods are provided differ from operation to operation, but not necessarily from employee to employee or work site to work site. Indeed, courts have repeatedly recognized the fact that wage and hour policies and practices are susceptible to general and representative proof. *Anderson v. Mt. Clemons Pottery Co* (1946) 328 U.S. 680, 686-87; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 748. See also *Aguiar v. Cintas Corp. No. 2* (2006) 144 Cal.App.4th 121 (enforcement of living wage law turned on determination of whether employees worked 20 or more hours on public contracts, which could be ascertained from employee records); *Brock v. Seto* (9th Cir. 1986) 790 F.2d 1446 (representative testimony regarding overtime violations was sufficient to establish liability for wages to other

workers, and must be enforced on a workforce wide basis in order to effectuate the public policy behind the regulation of wages and working conditions); *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1434 (class representatives assume a fiduciary responsibility to prosecute the action on behalf of the absent parties); *Bell*, 115 Cal.App.4th at 745, 746 (class relief available to determine whether insurance adjusters were misclassified as non-exempt employees). See also Cal. Labor Code § 2698, *et seq.*, the California Labor Code Private Attorneys General Act.

This California Supreme Court addressed labor law enforcement directly in the context of class actions and held that it is consistent with “public policy which encourages the use of the class action device.” *Sav-On Drugs, Inc.*, 34 Cal.4th at 340 (quoting *Richmond v. Dart Industries* (1981) 29 Cal.3d 462, 473). California courts have recognized that the pursuit of class-wide relief for violation of statutory protections is a substantive right. See, e.g. *Klussman v. Cross Country Bank* (2005) 134 Cal.App.4th 1283, 1296.

In both *Sav-On* and *Richmond*, the defendants urged the court to reject representative testimony or class certification on the grounds that individualized proof was lacking as to liability or damages. In both cases, however, the court determined that the facts proffered, though requiring the resolution of factual or legal disputes, were common as to all employees

and therefore appropriately considered on a workforce-wide or representative basis. The *Sav-on* court's analysis is the same as that adopted by the court in this action. "A reasonable court could conclude that issues respecting the proper legal classification of AM's and OM's actual activities, along with issues respecting defendant's policies and practices and issues respecting operational standardization, are likely to predominate in a class proceeding over any individualized calculations of actual overtime hours that might ultimately prove necessary." *Sav-on Drugs, Inc.*, 34 Cal.4th at 331. It is likewise the case with respect to meal periods. The long established practice of accepting representative testimony and statistical analysis in cases of wage and hour violations is precisely due to the kind of "operational standardization" which establishes a company's pattern or practice that is instituted on a workforce wide basis.

Given the reality of the workplace, the trial court in this case properly acknowledged that there might be issues of fact as to exactly what steps Wal-Mart would have to take to ensure that meal periods are provided. One California court of appeals has dealt with this reality and provided express support for the ruling in this case. In *Cicairos v. Summit Logistics, Inc.*, the employer, Summit Logistics, had an express policy, contained in a collective bargaining agreement, which mandated meal breaks and granted two rest breaks. *Cicairos v. Summit Logistics, Inc.*

(2005) 133 Cal.App.4th 949, 955. Despite this language, plaintiffs offered evidence of various impediments that prevented or discouraged workers from taking breaks. The employer did not schedule or make any effort to keep track of its employees' meal breaks despite California's legal requirement to keep accurate records of meal periods. *Id.* at 962.

Additionally, managers pressured drivers to take a second trip, which made drivers feel they shouldn't take a second break. *Id.* The court found this sufficient to establish a question of fact as to whether the employer, Summit Logistics, had met its obligation to provide breaks. *Id.* No individualized proof was required.

Plaintiffs made a showing of Wal-Mart's generalized practices resulting in the denial of meal periods, which was properly considered by the jury in light of conflicting evidence offered by Wal-Mart.

It was appropriate to certify the class and proceed in this manner. Once a general finding of denied meal periods is made, the remaining issues, such as determining the number of meal breaks each worker was denied or whether certain evidence should be disregarded because it was based on faulty data fall squarely within the calculation of damages or restitution due to members of the class. Individualized proof on the issue of damages is not a basis for denying certification. *Bell*, 5 Cal.App.4th at 742; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256,

265-266; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815-16; *Sav-On Drugs, Inc.*, 34 Cal.4th at 333.

The court properly applied these principals when certifying the class. The jury properly weighed the evidence, found a generally applicable denial of meal periods, and determined the number of breaks denied and compensation due, in fact reducing the amount sought by the Plaintiffs, presumably in recognition of the validity of some of Wal-Mart's defenses.

C. Class Certification Of Employment Cases Is Not Only Appropriate, It Affirmatively Furthers California's Express Public Policy Supporting Labor Law Protections.

Since the inception of labor law protections, legislatures and courts have recognized that illegal employment practices are often work-force wide and therefore lend themselves to work-force wide treatment through class or representative actions. *Anderson*, 328 U.S. 680. While many states, including California, had labor law protections on the books prior to the enactment of the Fair Labor Standards Act (FLSA), the FLSA represents national recognition of the unequal power between workers and their bosses, and the need for uniform standards of employment. 29 U.S.C. §§ 201, et seq. "Congress intended ... to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Tennessee C., I. & R. Co. v. Muscoda* (1944) 321 U.S. 590, 602 (superseded by statute on other grounds). The

very essence of minimum wage and hour standards is to limit the circumstances within which an employer and employee can negotiate the terms of working conditions. *West Coast Hotel Co. v. Parrish* (1937) 300 U.S. 379, 399 (upholding state minimum wage protections driven by a public policy designed to address “[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage.” *Id.*)

With the exception of concerted activity statutes, labor laws are by and large designed to limit the choices of both the employer and the employee and ensure across-the-board enforcement. Federal and state courts have construed their protections in favor of workers. *Mitchell v. Lublin, McGaughy & Associates* (1959) 358 U.S. 207, 210-11; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 702. As a result, they are well suited for class treatment, as the FLSA itself acknowledges, recognizing enforcement actions by a representative plaintiff or the Secretary of Labor. 29 U.S.C. § 216(b), 29 U.S.C. § 216(c).

California law also limits the rights of employers and employees to negotiate below the minimum standards established by law and recognizes the workforce wide approach to labor protections. Labor Code § 1198 provides that “[t]he maximum hours of work and the standard conditions of

labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” Labor Code § 219(a) similarly provides that “no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied.” Labor Code § 226.7 is expressly contained in the article referred to in § 219. Workforce wide enforcement is authorized by statutes. The Labor Commissioner is empowered to recover wages and penalties for all employees affected by an unlawful practice. Cal. Labor Code §§ 98.3, 1193.5, and 1195.5. Recently the Legislature provided a specific cause of action for individual employees to act as private attorneys general to enforce penalties for labor law violations and to recover penalties applicable to all affected workers. Cal. Labor Code §§ 2698, *et seq.*

The California meal period mandates, like mandates for minimum wage, maximum hours, and health and safety, were designed to ensure that the health and safety of workers is protected irrespective of negotiations between parties who are inherently unequal. Specific and limited exceptions are provided in the Wage Orders and statutes, none of which are asserted by Wal-Mart. There is no other basis for arguing individual waiver; they are simply not permitted for these minimum standards.

As demonstrated above, rest breaks are a “state-mandated minimum labor standard.” *Cicairos*, 133 Cal.App.4th at 954, italics omitted, quoting Dept. of Industrial Relations, DLSE, Opn. Letter 1995.06.02, p. 2. By enacting Labor Code § 219, subdivision (a), the Legislature made both rest breaks and wage-stub itemization requirements specifically nonwaivable and non-abridgeable by contract. *Zavala v. Scott Brothers Dairy, Inc.* (2006) 143 Cal.App.4th 585, 594-95. Once a minimum standard is enacted, there is no room for singular negotiations, except as expressly provided by statute or regulation. Accordingly, practices that are applicable to a workforce are generally properly pursued by class or representative actions. This is true despite the fact that the ultimate proof of damages – not liability – will be an individualized showing.

There is no reason to treat meal period litigation any differently than other litigation of minimum wage and hour standards. Upon a proper showing of workforce wide violations, class certification, and entry of judgment on a class-wide basis, are appropriate.

D. Current Employees Face Significant Pressure Not To Assert Their Rights, Thus Class Treatment is Paramount To Ensure That Labor Rights Do Not Go Unenforced.

While the burdens associated with filing litigation are challenging to any potential plaintiff, the risks faced by employees (and, by association, their families) is substantial: it threatens not only their current livelihood,

but also their ability to obtain future employment.

Low-wage workers, like those represented by *amici*, are often immigrants with limited English abilities and relatively little education. These workers, who disproportionately include women and minorities, are all too often victims of minimum wage and hour violations. (See, e.g., Foo, *The Informal Economy: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation* (1994) 103 Yale L.J. 2179, 2182; Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel* (2001) 24 Harv. Women's L.J. 89, 91.) They work in their communities or in crews or groups organized by friends or relatives who have contacts with employers, or their foremen, or subcontractors. To raise a concern about a missed meal or rest period is to face termination. To encourage your co-workers to do so as well is to tell your sister, cousin, son, and closest friends to risk their jobs along with you. For agricultural workers and garment workers who are employed through labor contractors, access to every major employer in the area may be cut-off if a worker is labeled a troublemaker by one employer.

Immigrants face the additional threat that employers will respond to a complaint with a call to immigration officials. (Lung, *Overwork and Overtime* (2005) 39 Ind. L.Rev. 51, 66-67; Foo, *supra*, at p. 2182.) Such

workers “confront the harsh reality that, in addition to possible discharge, their employer will likely report them to [Immigration and Customs Enforcement] and they will be subject to deportation proceedings or criminal prosecution.” *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1064.)

These are not idle fears. In 2004, more than 1,000 discrimination claims were filed with the Labor Commissioner. These are workers who have faced discriminatory or retaliatory acts from their employers after speaking up in the workplace to enforce their rights. (“2004 DISCRIMINATION COMPLAINT REPORT” California Division of Labor Standards Enforcement, 2004. The report can be found on the DLSE website at:

<http://www.dir.ca.gov/dlse/2004DiscriminationComplaintReport.doc>.)

Additionally, many low-wage workers lack the knowledge about their rights to minimum wage, overtime, and health and safety rights. *Amici* and other low-wage worker advocates see thousands of workers each year at wage and hour clinics, outreach sessions, and office appointments who leave with a new understanding of their rights under the law, but nonetheless return to their jobs without taking any action. Often the best advice that can be given is “come back when the season is over, or when you get laid off.” Workers who don’t return to file claims lose hundreds or

thousands of dollars of wages, wages that never make it into the economy, or the tax base. Workers who do return face the burden of going public about their claims and the potential resulting retaliation, as well as bear the costs of missing work while attending depositions, settlement conferences and hearings. Not every worker has the courage or economic security to wage such a battle, and that is exactly what employers are counting on. For every worker who brings an individual meal period case, there are 10, 20, or 1,000 employees in the same workplace who were too afraid or didn't know enough to pursue their rights.

Class treatment of these critical labor rights is the only mechanism that provides both an opportunity for workers to recover what has been stolen from them and a disincentive to employers who are balancing the costs and benefits of violating the law.

III. THE PUNITIVE DAMAGES AWARD SHOULD BE UPHELD BECAUSE THE JURY PROPERLY FOUND THAT PLAINTIFFS/RESPONDENTS WERE ACTUALLY INJURED.

Amici endorse Plaintiffs'/Respondents' position that the jury properly found the existence of actual injury. (ROB at pp. 51-56.) Labor law protections further both individual interests and the public interest in a healthy and productive workforce. A finding of actual injury naturally flows from the denial of statutorily mandated breaks and serves as the basis for Plaintiffs'/Respondents' punitive damages award. Such a withholding

both deprives workers of the time needed to take care of their personal tasks and subjects them individually, and as a class, to a heightened susceptibility to work-related injuries.

A. **Denial Of Breaks Causes Actual Injury to Low-Wage Workers By Depriving Them Of Time Necessary To Take Care Of Personal Tasks.**

All Californians have experienced the rising cost of living, including drastically increased costs of housing and healthcare. In this economic environment, *amici's* low-income clients face serious hardship in meeting the food, housing, healthcare, and childcare needs of their families. In fact, a recent study by the Economic Policy Institute found that 74% of families subsisting at the federal poverty level – an income level roughly comparable to the annual earnings of a full-time minimum wage worker – suffer from an inability to meet one or more of such basic needs. (See Boushey et al., *Hardships in America: The Real Story of Working Families* (2001) p. 30, fig. B.)

To make ends meet, *amici's* low-income clients often hold two jobs or work long hours in a single job. Whether working two jobs or working long hours at one job, these employees are almost always on duty. Breaks are often necessary to enable workers to accomplish important personal tasks, in addition to eating and using the restroom. These tasks include such basic chores as paying bills, going to the bank, and making important

phone calls to a doctor or childcare provider. When an employer refuses to allow an employee to take breaks – or pressures an employer not to take advantage of the “opportunity” for a break - the employee suffers more than a loss of the time. They lose the ability to handle routine matters that many other workers take for granted.

B. Denial of Breaks Causes Actual Physical Injury To Plaintiffs By Subjecting Them To A Higher Risk Of Work-Related Injuries.

The denial of an employee’s right to take breaks also increases the likelihood that an employee will suffer a work-related injury. Requiring employees to work for long periods of time without breaks affects workers’ concentration, endangering their health and safety by creating a greater risk of accidents and injury. (See Kenner, *Working Time, Jaeger and the Seven-Year Itch* (2004) 11 Colum. J. Eur. L. 53, 55; Hedge, *Effects of Ergonomic Management Software on Employee Performance* (1999) p. 5.) Multiple studies have demonstrated that limited break opportunity is a major contributing factor to musculoskeletal problems, including cumulative trauma disorders, which account for more than 60% of all occupational illnesses in the U.S. (See Hedge, *supra*, at pp. 3, 5 (studying the effects of breaks on workers whose job primarily entails using computers); Dababneh, *Impact of added rest breaks on the productivity and well being of workers*, *Ergonomics* Vol. 44 No. 2 (2001) p. 164 (studying the effect of breaks in a

meat-processing plant); Green, *Work-Related Musculoskeletal Disorders and Breaks* (2003) WorkPlace
<<http://www.workpace.com/moreworkrelatedmusculoske>> [as of July 16, 2008]; The Hartford Loss Control Department, *Rest Breaks and Cumulative Trauma Disorders* (2002) pp. 1-3.)

Although the risk of injury affects workers at every income level, the danger is particularly significant for low-wage workers who often perform manual labor, ranging from tending crops to washing dishes to operating heavy equipment in the construction industry. Due to the repetitive physical character of their work, many low-wage workers are especially vulnerable to the sort of musculoskeletal injuries that a break-less work schedule encourages. For example, in upholding the constitutionality of a statute requiring mandatory breaks for hotel attendants, a recent Illinois appellate court acknowledged a significant increase in neck and back injuries for hotel workers. *Ill. Hotel & Lodging Assn. v. Ludwig* (Ill.Ct.App. 2007) 869 N.E.2d 846, 849.

Many manual labor jobs are conducted in the outdoors, and a denial of breaks for these employees can subject them to further safety risks of enduring long exposure to extremely hot or cold weather. For example, counsel for *amicus* California Rural Legal Assistance Foundation represents the family of a farm worker who died from heat stress as a result of working

in temperatures exceeding 100 degrees without meal or rest periods.

During a heat wave in July, 2005 at least three farm workers died after working for multiple hours in intense heat, one of whom did not get a 30 minute lunch break the day he died. (Arax, *Deaths Rally Farm Workers*, Los Angeles Times (July 28, 2005) p. B1.) In response to heat-stress related deaths occurring in the summer of 2005, the California Division of Occupational Health and Safety issued a Heat Advisory stressing the importance of rest breaks and passed a regulation imposing additional rights to breaks. 8 Cal. Code of Regs. § 3395. Unfortunately, it has not stopped the deaths. California has already experienced at least 3 heat related deaths during this harvest season, which is only half over. (Ferris, *Farmworker who collapsed is on respirator in Bakersfield*, Sacramento Bee (July 16, 2008) p. B3.)

Since many low-wage workers necessarily live paycheck to paycheck and support their families on a very tight budget, they simply cannot afford to become injured. Thus, any physical injury is inextricably connected to heightened personal and economic injury. Because the consequences of an injury might be losing a job or having to subsist on a smaller sum of money from disability or other government benefits for which they might qualify, it is critical that employers provide meal and rest periods to help prevent workers from becoming injured.

This data is consistent with the testimony provided by Wal-Mart class members that the loss of breaks caused them to be tired, upset, and frustrated and caused physical symptoms such as mental exhaustion, migraines and hunger. (ROB at p. 10.)

CONCLUSION

For the reasons stated herein, *amici* respectfully request that this court affirm the trial court's certification of the meal period class and uphold the compensatory and punitive damages awards.

Dated: July 17, 2008
Foundation

California Rural Legal Assistance

By: _____
Cynthia L. Rice

Legal Aid Society – Employment Law Center

By: _____
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**STATEMENT OF COMPLIANCE WITH CALIFORNIA RULES OF
COURT RULE 8.204(c)**

I, Matthew Goldberg, counsel of Record for *Amici Curiae*, certify that I personally checked the word count of the foregoing brief submitted on behalf of *Amici Curiae* using the properties/statistics feature of the Microsoft Word program and certify that the word count is less than 14,000 words.

July 17, 2008

Matthew Goldberg

Attorneys for *Amicus Curiae* Asian Pacific
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California Rural Legal Assistance Foundation,
Hastings Civil Justice Clinic, Katharine &
George Alexander Community Law Center, La
Raza Centro Legal, Legal Aid Society -
Employment Law Center, National Employment
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PROOF OF SERVICE

I, Djuna Gray, declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed in the City and County of San Francisco by The LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, located at 600 Harrison Street, Suite 120, San Francisco, CA 94107, whose members are members of the State Bar of California; am not a party to or interested in the within entitled action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

- APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*;
- BRIEF OF *AMICUS CURIAE* ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, HASTINGS CIVIL JUSTICE CLINIC, KATHARINE & GEORGE ALEXANDER COMMUNITY LAW CENTER, LA RAZA CENTRO LEGAL, LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAW PROJECT, AND WORKSAFE LAW CENTER.

X **By Mail:** I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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I further declare that I caused to be served four true and correct copies of the following document in the manner indicated below:

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X **By Personal Service:** I placed four true and correct copies of each document listed above in a sealed envelope to each person named below at the address(es) shown below and gave same to a messenger for personal delivery by 5:00 p.m. on this date.

Service on the Courts

Clerk of the Court
Supreme Court of California
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San Francisco, California 94102

Service on the Courts

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing documents were printed on recycled paper, and that this Certificate of Service was executed by me on July 17, 2008.

Djuna Gray