

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 AMICUS
CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST
and
PROPOSED BRIEF OF WORKSAFE LAW CENTER ET AL. AS
AMICI CURIAE IN SUPPORT OF REAL PARTIES IN INTEREST**

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

Pursuant to California Rule of Court 8.520(f), Worksafe Law Center, La Raza Centro Legal, the Legal Aid Society – Employment Law Center, Southern California Coalition for Occupational Safety and Health, and Watsonville Law Center (collectively, “*amici*”) hereby request permission of this Court to file the attached Proposed Brief as *amici curiae* in support of Plaintiffs and Real Parties in Interest Hohnbaum et al. This application is timely made within 30 days of the filing of the last party brief.

Amici advocate for low-wage workers and other vulnerable members of our communities who are often subject to unlawful conduct by employers—including flagrant violations of California’s meal and rest break laws, and other laws of long standing that are supposed to protect workers from unsafe and unhealthy working conditions.

Each *amicus* writes as either a legal services support center, advocacy group or a direct legal aid provider for low-income workers in employment matters, including meal and rest break violations and other wage claims. Some of us advocate for stronger laws and regulations that improve and guarantee worker health and safety; others assist, directly or indirectly, thousands of low-wage workers with employment-related legal problems, including hundreds of claimants with wage and wage-related cases that are processed administratively by the California Division of Labor Standards Enforcement or through civil court.

We have an interest in this case because the meal and rest break rights at issue here are important components of California law ensuring that employers provide a safe and healthy workplace for California workers, by giving needed rest and sustenance and

by guaranteeing hard-earned pay for the vulnerable low-wage and immigrant workers on whose behalf we advocate. The issues presented in this appeal have a direct impact on the low-income workers whom *amici* serve.

In this amicus brief, we propose to limit our argument to addressing how the Court of Appeal's failure to follow broader California statutory and case law requiring provision of safe and healthy workplaces to California workers harms the health of California workers. There are tremendously important real-life issues raised by the failure to enforce mandatory meal and rest breaks, and we will describe the great harm to mental and physical health of low-wage and other vulnerable workers if this Court were to validate of the Court of Appeal's flawed or missing analysis of these issues. We will further address how society as a whole suffers when workers do not receive the most basic meal and rest breaks at work, through increased injuries and illnesses on the job as well as accidents that affect those other than the fatigued worker. Worksafe also intends to offer limited, novel, legal critiques of the Court of Appeal decision.

With regard to Rule 8.520(f)(4), no party or counsel for a party has authored any part of the proposed brief. Nor has any party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief.

STATEMENT OF INTEREST

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

A. 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, technical and legal assistance, and advocacy. Worksafe advocates for protective worker health and safety laws and effective remedies for workers, including with respect to the right to meal and rest breaks, which are critical in reducing worker illness, injuries and stress.

B. 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 with wage and hour claims before the California Labor Commission as well as in state and federal court. 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. In addition, La Raza represents clients with wage and hour claims in state and federal court. La Raza also represents workers who have been injured at work, and we are deeply concerned that the failure to ensure their meal and rest breaks will contribute to increased fatigue-related injuries and illnesses.

C. The Legal Aid Society – 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. As an advocate for low-income workers, the LAS-ELC is concerned with the potential impact of the lack of enforceable break rights on the physical and mental well-being of workers, which is just as important a term of their employment as their right to wages.

D. Southern California Coalition for Occupational Safety & Health (SoCalCOSH) educates, advocates, and mobilizes workers and policy makers to create safe and healthy workplaces in Southern California. SoCalCOSH strongly believes that meal and rest breaks, and when applicable, paid breaks, are a critical component to the health and safety of all workers as they restore physical and mental readiness to perform oftentimes demanding work activities.

E. The Watsonville Law Center has worked for seven years to ensure farmworkers injured in the workplace have access to medical treatment and benefits under the workers compensation system. WLC founded the Workers' Compensation Enforcement Collaborative, a statewide collaboration that addressed the rights of low-wage immigrant workers in California's Workers' compensation system. Our project was recently noted as a model approach for worker health in California by the California Department of Industrial Relations in a report published by the Commission on Health and Safety and Workers' Compensation. WLC is concerned that the weakening of worker protective legislation such as mandatory meal and rest periods will lead to increased workplace injuries and injured workers, and an increase in worker compensation claims that will overtax an already underfunded workers compensation system.

CONCLUSION

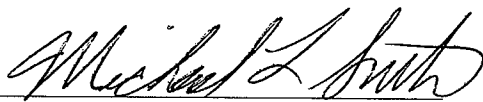
The *amici* organizations that join in this Application and attached Proposed Brief represent and assist numerous low-wage clients and other workers who are profoundly affected by the issues in this case. Our expertise and experience will assist the Court in understanding the real-world implications of the Court of Appeal's *Brinker* decision on the most vulnerable California workers.

For all of the foregoing reasons, we respectfully request that the Court grant *amici*'s application and accept the enclosed brief for filing and consideration.

Executed in Oakland, California this 19th day of August, 2009.

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By:


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I. INTRODUCTION

Amici write in support of the position of Plaintiffs and Real Parties in Interest Hohnbaum et al. that the Court of Appeal erred in holding that “employers need not ensure meal breaks are actually taken, but need only make them available.” Slip op. 44. The Court of Appeal further erred in determining that employers may offer meal breaks at any time during a shift of up to ten hours without becoming liable for an extra hour of pay under section 226.7(b). These rulings of the Court of Appeal are contrary to the Labor Code and IWC Wage Order language setting out workers’ rights to meal and rest breaks. This brief, however, will address how the Court of Appeal’s failure to follow California law requiring provision of safe and healthy workplaces, *including* meal and rest breaks, harms society as a whole through increased injuries, stress and illnesses suffered by workers as well as accidents that affect those other than the fatigued worker.

II. THE PROTECTION OF WORKERS’ SAFETY AND HEALTH THROUGH MEANINGFUL MEAL AND REST BREAKS IS REQUIRED BY CALIFORNIA LAW

Strong, enforceable rights to regular meal and rest breaks that afford workers a meaningful opportunity for recovery from fatigue, and for physical and mental replenishment, are essential and integral to a safe and healthy workplace. This was recognized by the California Legislature and the Industrial Welfare Commission (IWC) in creating these rights, and by the Division of Labor Standards Enforcement (DLSE) in consistently interpreting and enforcing them

for over 50 years. Enforceable rights to meal and rest breaks are also inextricably intertwined with the *mandatory* duties of all California employers to:

- “furnish employment and a place of employment that is safe and healthful for the employees therein” (Lab. Code, § 6400, subd. (a));¹
- “adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful” (§ 6401);
- “establish, implement, and maintain an effective injury prevention program,” including a “system for ensuring that employees comply with safe and healthy work practices, which may include disciplinary action” (§ 6401.7, subds. (a), (a)(6)); and
- “do every other thing reasonably necessary to protect the life, safety, and health of employees” (§ 6401).

Indeed, as this Court recently observed, *mandatory* rest and meal breaks have “have long been viewed as part of the remedial worker protection framework,” and were adopted by the IWC early in the 20th Century out of concern for the “health and welfare of employees.” *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, 1113 [*Murphy*], citing *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 724 [*IWC v. Superior Court*]; see also *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, 975; *California Manufacturers Assn. v. Industrial Welfare Com.* (1980) 109 Cal. App. 3d 95, 114-115 [*California Manufacturers*]. The Court has also recognized that wage and hours laws concern not only the health and welfare of the workers themselves, but also the public health and the general welfare. *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 456.

In this case, the Court of Appeal made a brief, passing reference to the strong public policies requiring California employers to provide meaningful meal

¹ All further statutory references are to the California Labor Code.

and rest breaks as a means of protecting the health and safety of the millions of workers whose employment is governed by the IWC Wage Orders. Slip op. at p. 3. However, the Court of Appeal completely lost sight of those concerns when it effectively held that, notwithstanding the *mandatory* language in Labor Code sections 226.7 and 512, and paragraph 11 and 12 of the applicable IWC Wage Orders,² meal and rest breaks are entirely *optional*, that the onus is on individual employees to insist upon their rights to take legally prescribed breaks, and that California employers need do little more to fulfill their mandatory duties to “provide” meal and rest breaks than to simply adopt a policy or post a notice saying that meal and rest breaks are “allowed” or “available.” Slip op. at pp. 4, 42-46.

In this regard, the Court of Appeal rejected the holding of the Court of Appeal for the Third Appellate District in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, *rev. denied* (Supreme Ct. Case No. S139377, January 18, 2006), that an employer has “an affirmative obligation to ensure that workers are actually relieved of all duty” so that they can actually receive meal and rest breaks, as well as a duty under paragraph 7 of the applicable Wage Order “to record their employees’ meal periods” See slip op. at pp. 44-47.

Implicitly, the Court of Appeal also held that the meal and rest breaks prescribed by statute and the IWC Wage Orders are always, in all industries, and in all working environments, completely *waiveable* by employees.

² Wage Order 5-2001, which governs this case, is codified at Cal. Code Regs., tit. 8 §11050 (hereafter, Wage Order 5).

The Court of Appeal does not consider, much less explain, *why* California employees should always and everywhere be free to waive their rights to meal and rest breaks. Employees do not otherwise have the option of “waiving” their rights to a safe and healthy workplace under the Labor Code and the regulations enforced by Cal/OSHA, such as the right to employer-provided safety equipment such as respirators when working with toxic substances, or harnesses when working on elevated surfaces from which a fall may result in serious bodily injury or death, or to adequate drinking water and shade when working outdoors in hot climates. The authority over enforcing and administering safety and health laws is vested not in any individual employee or complainant but in the Division of Occupational Safety and Health for “the protection of the life, safety and health of every employee.” § 6307.

This Court already has ruled that other statutes that protect worker health and welfare, namely the statutory rights to minimum wage and overtime pay, are not, under any circumstance, waivable. *Gentry*, 42 Cal.4th at 456 (finding class arbitration waiver could lead to a de facto waiver of minimum wage and overtime rights and impermissibly interfere with an employees’ ability to vindicate those unwaivable rights); *Crab Addison, Inc. v. Superior Court* (2009) 169 Cal.App.4th 958, 970 (citing *Gentry, supra* at 455: “So great is the public policy protecting employees’ right to overtime compensation that the right is ‘unwaivable’”). Overtime compensation, just like meal and rest breaks, is a means to discourage demanding workplace conditions largely for health and safety reasons. Moreover, overtime pay, minimum wages and meal and rest breaks also protect millions of

other California workers from a race to the bottom with those who would work under illegal and oppressive conditions. As this Court concluded with respect to overtime, “overtime laws serve the important public policy goal of protecting employees in a relatively weak bargaining position against the evil of overwork.” Gentry, 42 Cal.4th at 456, citing *Barrentine v. Arkansas-Best Freight System* (1981) 450 U.S. 728, 739 [discussing Fair Labor Standards Act]. Just like overtime compensation laws that cannot be waived, meal and rest breaks were adopted by the Legislature to prevent overwork and workplace injuries and this Court should unequivocally declare that they are equally unwaivable by any individual employee.

Just as troubling as the Court of Appeal’s ruling on waiver of breaks was its proclamation with regard to the “timing” of meal periods. Contrary to the language of section 512(a) and paragraph 11(A) of the applicable wage order, the court held that *nothing* in the Labor Code or Wage Orders requires an employer to provide *meaningful* and *regular* meal and rest breaks—e.g., a 30-minute unpaid meal periods as close as possible to the mid-point of a workday of up to 10 hours, (along with paid 10-minute rest breaks as close to the midpoint of the two roughly equal work periods bisected by the meal period)—at intervals that would actually comport with the purposes underlying the long-standing meal and rest break laws. See slip. op. at pp. 34-41. Indeed, the Court of Appeal goes so far as to approve an insidious “early-lunching” practice instituted by employers in the restaurant industry and elsewhere in recent years, in a vindictive reaction to effective enforcement efforts by DLSE prior to 2004 and the creation of potent monetary

sanctions recoverable in private civil actions against employers who don't ensure that their employees can *actually* receive meal and rest breaks mandated by the Labor Code and the IWC Wage Orders. See Miles E. Locker, Amicus Letter in Support of Review, Sept. 12, 2008 at p. 9. In approving the practice of "early lunching," the Court of Appeal ignores the fundamental purpose of meal and rest breaks, the need of California workers to recuperate, relieve tension, replenish their energy and tend to basic functions, by allowing employers to "provide" breaks in a way that confers none of these benefits.

III. THE COURT OF APPEAL FAILED TO COMPREHEND THE HARSH REALITY OF CALIFORNIA WORKPLACES AND THE CONSEQUENT NECESSITY OF MANDATORY MEAL AND REST BREAKS FOR VULNERABLE EMPLOYEES

Perhaps the most disturbing aspect of the Court of Appeal's decision and the cavalier (and sometimes flippant) arguments of the defendants and their amici, however, is the peculiar sense of unreality that permeates their analysis of California meal and rest break law. To read the Court of Appeal opinion and the employers' briefs in this case, one gets the impression that all non-exempt California employees—those who are paid to work on a hourly or piece-rate basis, with their only protections against abusive terms and conditions of employment being the minimum labor standards set forth in the Labor Code and the IWC Wage Orders—have the luxury of working for enlightened employers who can be counted on to respect their autonomy and individual needs, and the privilege of working in modern, clean, well-lit, climate controlled, indoor work environments, where they never have to work with dangerous machinery or do

any heavy lifting or contend with other significant workplace hazards, and have significant freedom to set their own schedules, to get up and stretch or use the bathroom whenever they wish, and to come in late or leave work early for a child's soccer game or a medical appointment.

While such humane and civilized working conditions might prevail in the offices in which some judges, attorneys, and corporate executives are customarily employed, the reality for millions of other California workers is *so very* different. The California workers who most desperately need the protections of strong, enforceable meal and rest break laws are those who must show up on time for rigidly scheduled working hours or shifts, and who have no freedom of movement or "flexibility" to structure their activities during working hours; those who spend their working hours in cramped and poorly ventilated sweatshops; those who perform strenuous and often dangerous work involving heavy machinery on construction sites, in factories, machine shops, and industrial laundry facilities; those who are paid by the mile to drive delivery trucks, or are under such intense production quotas that they simply do not have time for regular breaks in the course of a ten- or twelve-hour shift; those who work 12-hour shifts in nursing homes and understaffed hospitals, where the economics of managed care do not allow for adequate "floater" staff to cover meal and rest breaks; those who work in garment factories or poultry processing plants or similar jobs that require tens of thousands of repetitive hand movements per shift, and are at risk of disabling

injuries without adequate breaks;³ those who work with heavy farm machinery that drives them along at an unrelenting pace, often at temperatures that soar above 90 degrees during harvest season, who must satisfy both their bosses' demands and peer pressure from younger able-bodied members of their work crews, to make enough money at "piece rate" to feed themselves and their families; those who suffer chronic health conditions such as diabetes, and require regular meals to maintain their blood sugar level; and those who dare not speak up to demand a break to go to the bathroom or to get a drink of water or a bite to eat, for fear of losing their jobs.

IV. EMPLOYERS' COMPLIANCE WITH THEIR MEAL AND REST BREAK OBLIGATIONS IS NECESSARY FOR THE WELFARE OF BOTH WORKERS AND THE GENERAL PUBLIC

As this Court knows from *Murphy*, the IWC Wage Orders have included meal and rest break requirements since "1916 and 1932, respectively." *Murphy, supra*, 40 Cal.4th at p. 1105. It was not until 2001, however, that private monetary incentives were enacted to ensure employers' compliance. *See Wage*

³ A particularly graphic description of the horrific working conditions in U.S. meat packing industries may be found in a recent newspaper series, *The Cruellest Cuts* (February 10-14, 2008), *The Charlotte (N.C.) Observer*, <http://www.charlotteobserver.com/poultry/>, accessed August 18, 2009. This series details both the crippling physical injuries poultry processors suffer from work involving up to 20,000 repetitive hand movements in a single working day (see *id.*, *Epidemic of Pain*, <http://www.charlotteobserver.com/595/story/223425.html>, accessed August 18, 2009), and abusive employment practices used to punish workers, many of whom are undocumented immigrants, when they dare to complain about unsafe working conditions (see *id.*, *Labor Law Fails to Help Workers*, <http://www.charlotteobserver.com/573/story/191970.html>, accessed August 18, 2009.)

Order 5, ¶¶11(B), 12(B), effective Oct. 1, 2000 [additional hour of pay for missed breaks]; §226.7, effective Jan. 1, 2001 [same]. As we have already noted, moreover, important “health and safety considerations ... are what motivated the IWC to adopt mandatory meal and rest periods in the first place.” *Murphy, supra*, 40 Cal.4th at p. 1113; see also *Gentry, supra*, 42 Cal.4th at p. 456 [wage and hours laws “concern not only the health and welfare of the workers themselves, but also the public health and general welfare,”]; *Kerr’s Catering Service v. Dept. of Indus. Rel.* (1962) 57 Cal.2d 319, 330 [The purpose of meal and rest break requirements is to foster the general health and welfare of employees.].

A. The Serious Toll of Work-Related Fatigue, Stress and Injuries on Workers and Society

Fatigue is first and foremost a concern for the ordinary employee, whether she or he works in an office, factory, hospital, or construction site, or drives a bus, or works in the agricultural fields, or cleans buildings, or serves food or drinks. Fatigue, if allowed to build up, can result in serious injuries, disease, lost time, and medical costs. Testimony of Pam Tau Lee (Researcher, Labor Occupational Health Program, U. of Cal., Berkeley), DLSE Hrg., Feb. 8, 2005, as summarized at <http://www.lohp.org/In The Spotlight/Meal Breaks/meal breaks.html>, accessed August 18, 2009.

Compounded by America’s lengthening work hours (see Golden & Jorgensen (2002) *Time After Time—Mandatory overtime in the U.S. economy*, Economic Policy Institute, <http://www.epinet.org/briefingpapers/120/bp120.pdf>, accessed August 18, 2009), the effects of increasing job stress are mounting for

workers in many sectors of our economy. Immediate effects of job stress include headaches, sleep disturbances, difficulty in concentrating, short tempers, and upset stomachs. See National Institute for Occupational Safety and Health (1999) *Stress ... At Work*, DHHS (NIOSH) Pub. No. 99-101, <http://www.cdc.gov/niosh/docs/99-101>, accessed August 18, 2009. Evidence is rapidly accumulating to suggest that work-related stress plays an important role in several types of chronic health problems—especially cardiovascular disease, musculoskeletal disorders, and psychological disorders. *Id.* at pp. 10-11.

Missed breaks are an important causal factor in these conditions among employees in many industries. In a decision upholding a state law that requires hotels to permit hotel room cleaners three breaks per shift, an Illinois appellate court recently recognized that hotel room cleaners can suffer from work-related neck and lower back pain when forced to skip breaks. *Illinois Hotel & Lodging Ass'n v. Ludwig* (2007) 374 Ill.App.3d 193, app. den. by 225 Ill.2d 633, 875 N.E.2d 1111 (2007). Workers in high-temperature work environments such as warehouses, bakeries, laundries, and agricultural fields, risk heat illness—and even death—when they do not receive sufficient and timely breaks. See Cal. Code Regs., tit. 8, §3395.

The lack of enforceable breaks is particularly brutal for agricultural workers and other workers who toil in extreme heat. According to a recent report on heat illness prepared for the California Division of Occupational Safety and Health (“DOSH”), the agency conducted 38 investigations of confirmed heat illness in 2006, eight resulting in death. Prudhomme & Neidhardt (June 1, 2007)

2006 Heat Illness Case Study, presentation at Occupational Safety and Health Standards Board meeting, Oakland, CA. Both the United States military and the American Conference of Governmental Industrial Hygienists have developed detailed protocols to prevent heat illness in hot working environments, including charts to illustrate rest-to-work ratios that should be adopted for that purpose, in recognition of the crucial role that breaks play in recovery from the effects of heat. U.S. Surgeon General (2005) *Heat Injury Prevention Program Memorandum*, Appendix. 1, <http://chppm-www.apgea.army.mil/heat/>, accessed August 18, 2009; Am. Conf. of Gov. Indus. Hygienists (2001) *Heat Stress and Strain, Threshold Limit Values*.

Even current California requirements for meal and rest breaks, let alone the complete lack of meaningful breaks advocated by Brinker, fall short of expert recommendations for prevention of heat illness. The University of California Cooperative Extension recommends that under mild conditions, workers wearing protective gear should take a 10-minute break per hour, with a 5-minute break every half-hour when heat stress conditions increase. “A Guide to Agricultural Heat Stress,” University of California Cooperative Extension (2009) at 5 (<http://are.berkeley.edu/heat/heatstressguide.htm> (accessed August 18, 2009)).⁴

⁴ Nor is there any sign that Cal/OSHA rulemaking will protect workers from heat illness through increased breaks and better access to shade. In June 2009 and again in July 2009, the Occupational Safety and Health Standards Board failed to approve emergency heat standards. See “Cal-OSHA balks at tougher heat rules for outdoor workers” *Sacramento Bee*, July 17, 2009 <http://www.sacbee.com/capitolandcalifornia/story/2033137.html> (accessed August 18, 2009). The State of California and Division of Occupational Safety and Health have now been sued by the United Farm Workers and a group of workers for their failure to protect farm workers from extreme heat. See “State

Work-related fatigue and stress continue to be major causes of serious injuries and illnesses, not only for workers but for those around them as well. It has been well documented that fatigue can also lead to major accidents.

Testimony of P. Lee, DLSE Hrg., Feb. 8, 2005. Official investigations of the Chernobyl and Three Mile Island disasters found that employee fatigue played a very significant role in these tragic incidents. *Id.*

As these examples indicate and as this Court noted in *Gentry*, the risk of accidents falls not only on employees suffering from fatigue, but on other workers and members of the public as well. 42 Cal.4th 443 at p. 456; see also *Murphy, supra*, 40 Cal.4th at p. 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 . . .”).

Examples of the effect of worker fatigue on others abound. For example, the National Transportation Safety Board found pilot fatigue to be a contributing factor in the February 2009 plane crash that killed all 49 persons on board as well as one on the ground in Buffalo, NY. “To reduce pilot fatigue, FAA moves to revise rules” *Christian Science Monitor*, Aug. 6, 2009, <http://www.csmonitor.com/2009/0806/p02s20-usgn.html>, accessed Aug 18, 2009. The NTSB has also recently concluded that driver fatigue was the likely cause in a 2008 motor coach crash that ejected 51 passengers, killing nine people in Utah. “NTSB recommends contingency plans,” *Denver Post*, May 30, 2009,

sued over heat work rules, enforcement” (July 31, 2009) *Sacramento Bee* <http://www.sacbee.com/capitolandcalifornia/story/2070987.html> (accessed August 18, 2009).

http://www.denverpost.com/search/ci_12485211, accessed August 18, 2009. And a recent survey of medical interns by Harvard Medical School found that those working several extended-duration shifts per month reported more attentional failures during clinical activities, including surgery, including 300% more fatigue-related preventable adverse events resulting in a fatality. Barger et al. (2006) “Impact of Extended-Duration Shifts on Medical Errors, Adverse Events, and Attentional Failures.” PLoS Med 3(12): e487.

B. The Modern Work Life’s Contribution to Stress and Injuries

Despite the advantages to employers of safe and healthy workplaces, employers seem to believe they must, as a result of economic pressure, intensify the workday. “Over the last two decades, American workers have been clocking more and more hours on the job, and they now work more hours than workers in any other industrialized country.” Golden & Jorgensen, *supra*, at p. 2. In addition to scheduling longer workdays and workweeks, employers have sought to increase productivity by speeding up production lines, providing incentives for increased output, maintaining a leaner workforce, and simply pressing workers to work harder, increasingly through the use of sophisticated computer tracking that records employee performance and provides a basis for imposing discipline on employees whose performance lags behind the desired pace. *Id.* Indeed, noting that trends in the economy have led to a restructuring of traditional employment practices, the authors of a National Institute for Occupational Safety and Health (“NIOSH”) study recently reported that “the average work year for prime-age working couples has increased by nearly 700 hours in the last two decades

(citations) and that high levels of emotional exhaustion at the end of the workday are the norm for 25% to 30% of the workforce (citation).” NIOSH (2006) *The Changing Organization of Work and the Safety and Health of Working People*, NIOSH Publication No. 2002-116, at p. 1, <http://www.cdc.gov/niosh/docs/2002-116/>, accessed August 18, 2009; see also National Institute for Occupational Safety and Health (2004 *Overtime and Extended Work Shifts*, NIOSH Publication No. 2004-143, <http://www.cdc.gov/niosh/docs/2004-143/>, accessed August 18, 2009 [summarizing results of 52 studies published between 1995 and 2002].

C. Meal and Rest Breaks Effectively Prevent Illness and Injuries

In the face of the formidable challenge to society presented by overwork, stress and injuries, there is compelling evidence that meal and rest breaks can significantly improve these conditions. There is an ample body of scientific literature, much of it dating back to the early 20th Century, which demonstrates that by counteracting fatigue and providing a respite from stress, meal and rest breaks play an important role in preventing injuries and maintaining a safe and healthy workplace.⁵

Although risks differ from job to job and workplace to workplace, the evidence still overwhelmingly supports the importance of counteracting these risks with breaks. For example, a team of scientists conducted numerous studies of municipal bus drivers in San Francisco with the cooperation of the San Francisco Municipal Transit Railway and Local 250A of the Transport Workers Union, AFL-CIO. Greiner, B.A., et. al. (1997) *Objective measurement of*

occupational stress factors — an example with San Francisco urban transit operators, J. Occup. Health Psychol. 2:325-342. Their studies confirmed that drivers whose routes placed them under greater time pressure had higher rates of hypertension, after taking into account age, gender, and seniority. Greiner, B.A. (2004) *Occupational stressors and hypertension: a multi-method study using observer-based job analysis and self-reports in urban transit operators*, Social Science and Medicine, 59:1081-1094. These same researchers point to the lack of guaranteed rest breaks combined with inflexible time scheduling as causes for fatigue, a principal factor in accident causation for bus drivers. Greiner, B.A. et al. (1998) *Objective stress factors, accidents, and absenteeism in transit operators: a theoretical framework and empirical evidence*, J. Occup. Health Psychol. 3(2): 130-46.

In fact, numerous studies have shown that regular breaks are effective in reducing the risk of accidents and injuries. E.g., Tucker et al. (2003) *Rest Breaks and Accident Risk*, The Lancet, Vol. 361, No. 9358, p. 680; see also Hamed, M.M. et al. (1998) *Analysis of commercial mini-bus accidents*, Accident Analysis and Prevention, 30:555-567 [mini-bus drivers who had too few rest breaks had higher accident rates]; Dababneh et al. (2001) *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 44 pt. 2 Ergonomics, pp. 164-174 [Addition of four 9-minute breaks improved lower extremity pain while not lowering production in meat-processing workers]; Kenner (2004/2005) *Working Time, Jaeger and the Seven-Year Itch*, 11 Colum. J. Eur. L. 53, 55; Faucett et al.,

⁵ A fuller discussion of this historical research is found in Amicus Brief of Bet

Rest break interventions in stoop labor tasks. (2007) *Appl Ergon.* 38(2):219-26
(frequent, brief rest breaks may improve worker symptoms for strenuous work).

Findings regarding the benefits of breaks for those other than the employee are also persuasive. A Swedish study examining reaction times of long distance drivers found that drivers receiving a break performed significantly better than those who did not. Even breaks of as little as 5 to 10 minutes were shown to have a positive effect on recovery from fatigue and the overall performance level of the drivers. Lisper & Eriksson (1980) *Effects of the length of a rest break and food intake on subsidiary reaction-time performance in an 8-hour driving task.* *J. of Applied Psychol.* Vol. 65 No. 1:117.⁶

None of this research regarding breaks, or the tragic real-life consequences of the lack of effective breaks, is remotely surprising – it is completely commonsensical that workers who receive regular and sufficient meal and rest breaks have lower stress levels, and are safer and even more productive. There are dozens more studies on different permutations of existence, length, and timing of rest breaks, generally with the same predictable correlation on stress relief, safety and productivity.⁷

Tzedek et al, pp. 5-10

⁶ Lisper and Eriksson also found that breaks with food improved performance more than breaks without food. *Id.* at 120.

⁷ E.g., Galinsky et al. (2000) *A field study of supplementary rest breaks for data-entry operators.* *Ergonomics*; 43(5):622-38 (increased breaks by 20 minutes per day resulted in reduced musculoskeletal discomfort, eyestrain, and other symptoms of stress such as fatigue *with no reduction of performance*); Ebben, (2003) *Improved Ergonomics for Standing Work.* *Occup. Health Saf.*; 72(4): 72-6 (Frequent and sufficient rest breaks are required to reduce the hazards of standing when working); Folkard & Tucker, “Shift work, safety and productivity” (Mar

Given the foregoing, it is clear breaks provide an enormous benefit for society by improving safety on roads and wherever else fatigued workers may be found, whether operating a wrecking ball on a busy construction site, transporting people and goods, prescribing our medications or performing surgery, butchering cattle into meat or preparing and serving our food. Employers who provide meaningful breaks may also reap the additional benefit of reduced workers' compensation and liability costs.⁸

Against this backdrop, employers' claims to represent the best interest of employees by championing flexibility and autonomy in scheduling working time appear hollow and self-serving at best. As this Court recently observed:

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 [citations omitted] ... Additionally, being forced to forego rest and meal periods denies employees time free from employer control that is often needed to be able to accomplish important personal tasks. *Morillion v. Royal Packing Co.* [(2000)] 22 Cal.4th [575,] 586.

Murphy, supra, 40 Cal.4th at p. 1113, citing Tucker, Dababneh, and Kenner, *supra*.

The Court of Appeal, the defendants in this case, and the employer amici who have been involved to date, are either unaware of or indifferent to the foregoing body of scientific research. *Amici* submit that these studies are critical to a proper resolution of the legal issues presented in this case. Accordingly,

2003) *Occup Med.*; 53(2):95-101 (Long night shifts with frequent rest breaks may well be safer than shorter night shifts with less frequent breaks).

⁸ By the early 1990s, the direct and indirect cost of workplace injuries and illness reached an estimated \$171 billion per year. See Leigh et al. (1997) *Occupational*

amici urge that the Court give due weight to the health and safety policies underlying the Legislature's determination that California workers need strong rights to regular meal and rest breaks as set forth in the IWC Wage Orders.

D. Employers Must Bear the Burden of Providing Regular Breaks That Comply With the Requirements of the Labor Code and Wage Orders

Amici believe that there is at least one additional aspect of the Court of Appeal's decision that has grave implications for worker health and safety in hazardous workplaces and industries, and thus deserves careful consideration as this Court considers the issues. Whether or not it consciously intended to do so, the Court of Appeal has effectively shifted the burden to California employees—including many vulnerable, low-wage and immigrant workers employed in key California industries, including construction, garment manufacturing, janitorial and housekeeping services, trucking, and agriculture—to insist each day that their employers comply with their mandatory duties under the Labor Code and IWC Wage Orders with respect to meal and rest breaks, while it simultaneously diluted and hobbled private enforcement of those rights by holding, in effect, that failure to do so will constitute a waiver of those rights.⁹ A break missed is a break

injury and illness in the US: estimates of costs, morbidity and mortality. Arch Intern Med.: 157 (14) 1557-1568.

⁹ The Court of Appeal also ignored the important health and safety implications, both for workers and the public, if broad-based relief for violations of the meal and rest break laws cannot be obtained through *private* enforcement actions—especially since the Labor Commissioner has abdicated her duties under sections 90.5 and 95 to vigorously enforce these minimum labor standards to ensure employees are not required or permitted to work under substandard, unlawful conditions. See Alameda Central Labor Council et al., *Amici Letter in Support of Review*, Sept. 5, 2008, at pp. 4-8. In any event, civil actions brought by labor organizations and other private parties have long served as an important adjunct to

waived forever, according to the Court of Appeal’s analysis. *See* Slip. op. at 44. As noted *supra* at p.11, the Court of Appeal decision would also allow employers to game the system through such schemes as the “early lunching” practice approved in this case, to avoid their obligations to provide regular, meaningful meal and rest breaks under the Labor Code and Wage Orders. In these respects, the Court of Appeal’s decision is both untenable and inhumane.

This shifting of the burden onto workers to demand breaks simply means that many workers, in particular the most vulnerable workers employed by the most creatively unprincipled California employers, will no longer have the right to breaks. As catalogued by the brief of Amici Curiae Bet Tzedek et al., there is virtually no limit to the ways in which some California employers will undermine their employees’ meal and rest break rights if they are unfettered by the language of the Labor Code and Wage Orders.¹⁰ Indeed, in this case Brinker pervasively understaffed its restaurants, leading to the failure to relieve employees of all duty so that they could take the meal periods that sections 226.7, 512 and the Wage Order require. *See* Plaintiffs’ Opening Brief at 9, fn. 2 and citations to record therein. Employees’ ability to demand breaks is diminished even further in the

enforcement efforts of the DLSE, the Employment Development Department (EDD), the Division of Occupational Safety and Health (DOSH), and other agencies within the Department of Industrial Relations (DIR) that do not—and probably never will—have adequate resources to address all of the unlawful employment practices that plague low-wage worker, especially those employed in the “underground economy” in California; indeed, legislative policy strongly supports private enforcement of wage and hour laws in this context. *See Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1092-1095 conc. op. of Moreno, J.; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1430-1431; Sen. Bill 796 (2003-2004 Reg. Sess.), ch. 906, §1(c); Lab. Code, §218.

¹⁰ *See* Amicus Curiae Brief of Bet Tzedek et al., pp. 26-31, 33-36.

case of those who have difficulty communicating with employers because of language barriers and those with undocumented immigration status.¹¹

This subversion by employers of the Legislature's intent that workers receive meal and rest breaks as an important protection for their safety and well-being will be just the beginning of things to come if the Court of Appeal's decision is upheld and Brinker's behavior validated.

V. CONCLUSION

In 2000, the Legislature did its best to ensure that California workers would have strong, privately enforceable rights to regular, duty-free meal and rest breaks, scheduled by their employers at intervals that provide real opportunities for recovery from fatigue, and for physical and mental replenishment. As we have recited herein, there is abundant evidence that meaningful meal and rest breaks are necessary for the physical and mental well-being of workers and civilians alike. Workers experience a higher incidence of fatigue, stress and accidents when they are forced to work without meaningful breaks, and all of society suffers as a result. The time has come for the Court to give these important worker health and safety laws the powerful remedial effect the Legislature intended.

Amici are especially concerned that this Court consider, and take seriously, the impacts the Court of Appeal decision will have on vulnerable low-wage workers who have little or no control over their work schedules or working

¹¹ *See id.* at pp. 31-32.


conditions, and for whom *guaranteed* meal and rest breaks are vitally important to their health and safety—and in some cases a matter of life or death.

Accordingly, for all the foregoing reasons, and for the reasons stated in the opening and reply briefs of the Petitioner, *amici* urge this Court to decide in favor of workers' *vitally* important meal and rest breaks rights.

Dated: August 19, 2009

Respectfully submitted,

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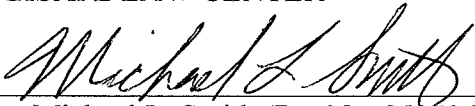
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VI. CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204 (c)(1), I hereby certify that the text of the foregoing *Amicus Curiae* Brief consists of 6266 words, as counted by the Microsoft Word program used to generate this brief.

Respectfully submitted,

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PROOF OF SERVICE
(CCP §1013)

Case Name: Brinker Restaurant Corp., et al., v. Superior Court (Hohnbaum),
Supreme Court Case No. S166350
Court of Appeal Case No. D049331
Superior Court Case No. GIC834348

I am a citizen of the United States and an employee of Worksafe, Inc., in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. I am employed by Worksafe, Inc.; my business address is 171 12th Street, Suite 300, Oakland, California 94607. On August 19, 2009, I served the following document(s):

**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN
SUPPORT OF REAL PARTIES IN INTEREST
and
PROPOSED BRIEF OF WORKSAFE LAW CENTER ET AL. AS AMICI CURIAE
IN SUPPORT OF REAL PARTIES IN INTEREST**

on the person(s) listed below, as follows:

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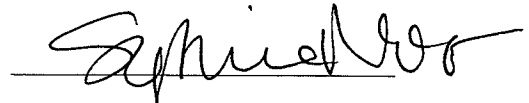
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California Court of Appeal

- BY MAIL** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California. I am readily familiar with the practice of Worksafe, Inc., for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.
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- BY PERSONAL SERVICE** I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused the same to be delivered by hand to the offices of each addressee.
- BY FACSIMILE** I caused to be transmitted each document listed herein via the fax number(s) listed above or on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on August 19, 2009.


Sophie Noero