Supreme Court Case No: S224611

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CHRISTOPHER MENDOZA, an individual, on behalf of himself and all other persons similarly situated
Plaintiffs – Appellant-Petitioner

MEAGAN GORDON,
Plaintiff-Intervenor-Appellant-Petitioner

v.

NORDSTROM, INC., a Washington Corporation authorization to do business in the State of California
Defendant –Appellee- Respondent

After a Request by the Ninth Circuit Court of Appeals
Case Nos.: 12-57130 consolidated with 12-57144

PLAINTIFF-INTERVENOR-APPELLANT-PETITIONER'S OPENING BRIEF

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I.

INTRODUCTION AND STATEMENT OF ISSUES

For over a hundred and twenty years, California Labor Code §§551 and 552 have been in place to protect the right of all employees in the State of California to one day's rest in seven. Despite the passage of these statutes in 1893, there is no case law from any Court, California or federal, that interprets these statutes, and in the confusion, unscrupulous employers have read these statutes to mean nothing at all. That is the case here. Plaintiff-Appellant-Petitioner Christopher Mendoza (hereinafter "Mendoza") and Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon (hereinafter "Gordon")[1] brought suit under the California Labor Code Private Attorney General's Act of 2004, Cal. Labor Code §2698, *et seq.,* (hereinafter "PAGA") because both worked more than seven days consecutively when employed by Defendant-Appellee-Respondent Nordstrom, Inc., (hereinafter "Nordstrom").

After voluminous discovery, whereby Petitioners determined that Nordstrom employees worked seven or more days consecutively on more than twenty-six thousand occasions in a twenty-three month period, and trial, Judge Cormac J. Carney of the United States District Court for the Central District of California determined that Petitioners were not compelled to go without their day of rest, and as such, waived their rights under Labor Code §§551 and 552. Petitioners appealed to the United States Ninth Circuit Court of Appeal, and rather than decide this case of first

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[1] Collectively, Mendoza and Gordon are hereinafter referred to as Petitioners.

impression, the Circuit Court certified questions to the Court. *Mendoza v. Nordstrom, Inc.* (9th Cir. 2015) 778 F.3d 834.[2]

> The questions certified to the Court are as follows:
>
> (A) California Labor Code section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven day period?
>
> (B) California Labor Code section 556 exempts employers from providing such a day of rest "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week?
>
> (C) California Labor Code section 552 provides that an employer may not "cause his employees to work more than six days in seven." What does it mean for an employer to "cause" an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?
>
> *Id.* at 837.

Inherent in these questions is the overarching question: what do these statutes, passed in 1893, reviewed by the Legislature and the Industrial Wage Commission over and over again (most recently in 2000), actually mean? That question has not been answered by any Court in one hundred and twenty-two years. As a result, unscrupulous employers have exploited the uncertainty in the law, and as a result, tens of thousands of employees

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[2] On April 29, 2015, the Court granted the Ninth Circuit's request for review. *Mendoza v. Nordstrom, Inc.* (April 29, 2015) 2015 Cal. LEXIS 2399.

are denied their right to a day of rest every single year. Indeed, in this case, the Parties counted over twenty-six thousand instances of Nordstrom employees working more than seven days consecutively over a twenty-three month period.

Nonetheless, the answers to the questions posed by the Ninth Circuit should easy. For the first question, had the Legislature wanted to impose a workweek requirement into §551, it would have done so, either in 1893 when the statute was passed, or in the 1930's, when California created overtime compensation, or when daily overtime was repealed, or in 2001, when daily overtime was restored. The word "week" was hardly unknown.[3] Moreover, as seen in the 26,000 instances of Nordstrom employees working seven or more days consecutively, and as noted by the Ninth Circuit, defining §551 by a workweek would allow employees to work up to twelve days without a single day of rest. And because those twelve days straddle two employer-defined "workweeks," the unfortunate employee would be eligible to receive not a single hour of overtime or a day of rest. This, clearly, cannot be the case. The seven days in the statute must be interpreted as they were written, and by their simple, and straight forward meaning, and be counted on a rolling basis, and not constrained to an employer's "workweek" definition.

As far as Labor Code §556 goes, with its double negative and awkward phrasing, there are three potential interpretations: (1) that an employee receives a day of rest if he/she works more than 30 hours in the

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[3] "week." *Online Etymology Dictionary*. Douglas Harper, Historian. 26 Jun. 2015.
<Dictionary.com http://dictionary.reference.com/browse/week>.

seven-day period, **or** works more than six hours in any one day of the seven; (2) that an employee is eligible for a day of rest if she works more than 30 hours in a seven-day period **and** works more than six hours in **any one** day of that seven day period; or (3) that the employee gets a day of rest if, and only if, the employee works more than 30 hours in the seven-day period, and for **each** day of work, she works more than six hours. Of these three interpretations, only the third (followed by the District Court) would allow for mischief – allowing an employer to require his employees to work 365 days per year, so long as one day in seven the employee worked less than six hours. Such an interpretation renders the benefit of a day of rest illusory, and clearly cannot be the case.

Lastly, the question of what it means to cause an employee to work more than six days consecutively confused the Ninth Circuit panel. While the language of the statute may be ambiguous, the nature of employment, how California law and this Court define employment, is not. As this Court clearly held in *Martinez v. Combs* (2010) 49 Cal. 4th 35, 58-59, to employ someone is to control their activities while working. Thus, how can an employee work an entire day without being caused to do so by their employer? This is particularly true if, as here, the employer has no written policy to provide one day's rest in seven. To hold that an employee is not caused to work and waives his/her unknown right to a day of rest by showing up for work, as the District Court did at trial, would render the benefit of a day of rest illusory. Again, this cannot be the case.

Thus, the question before the Court is not just what do these statutes mean, but the Court is also tasked with the fundamental question of whether the right to a day of rest, an employment protection that predates

almost every other section of the Labor Code, is an actual or illusory right in the State of California.

As such, Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon respectfully requests the Court protect her right, and the right of millions of Californians, to one day's rest in seven.

II.

FACTUAL HISTORY

Nordstrom is a retailer of goods and employs between 6,000 and 8,000 hourly employees throughout the State of California. (Gordon's Excerpts of Record[4] at 462:3-15). On 26,002 occasions, these hourly employees have worked more than seven days consecutively for Nordstrom over a two and a half year period. (GER 3195:6-320:6). However, since Nordstrom sets its workweek from Sunday through Saturday (GER 670:21-22), it can cause its employees to work as many as ten days consecutively without paying any overtime. Indeed, Nordstrom takes strong measures to control overtime, and any time an hourly employee works overtime, it raises a "red flag" and the Human Resources Department contacts the hourly employee's manager to determine why the employee worked overtime. (GER 465:3-21; 444:4-23).

In contrast, there is **no** formal or written policy with regard to days of rest. (GER 671:6-13). Rather, there is an informal "culture" for managers to give their hourly employees two days off per workweek, but

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[4] The Excerpts of Record were filed with the Ninth Circuit as part of the appeal, and per the Ninth Circuit's order, the Excerpts of Record were submitted to the Court. Hereinafter, Gordon's Excerpts of Record shall be referred to as "GER," and Mendoza's Excerpts of Record are hereinafter referred to as "MER."

this was not a strict rule. (GER 774:4-11). Neither employees, nor their managers, are informed of their right to a day of rest, and there is no written policy informing them of such a right. (GER at 504:12-16, 505:15-21, 506:1-18.) This is because Nordstrom determined the day of rest statutes apply only within Nordstrom's definition of a workweek, and since managers are supposed to avoid overtime already, these day of rest statutes constituted a non-issue. (GER 670:21-671:13, 461:12-462:8).

Meagan Gordon worked for the Respondent as a sales associate from July 2010 until approximately February of 2011. (GER 311:18-19, 311:24-312:14, 315:4-5). Specifically, Ms. Gordon worked at Nordstrom's Rack, Store Number 351, located in Los Angeles, California, as a woman's fitting room attendant. (GER 311:18-19, 311:24-312:14, 312:19-25, 313:1-11). As a fitting room attendant, Ms. Gordon would allow customers access to the fitting rooms, collect unpurchased clothes from empty rooms, organize those clothes, and return them to the sales floor. (GER 319:5-11).

During her tenure at Nordstrom's Rack, Ms. Gordon worked eight days consecutively on one occasion, from January 14, 2011 to January 21, 2011, which was around inventory. (Trial Exh. No. 167, GER 612; Trial Exh. No. 239, GER 616; GER 315:8-316:25; 321:11-322:19). Her time card print reports (Trial Exh. 4 and 114, GER 516 and 587), unquestionably show she worked on January 14, 15, 16, 17, 18, 20, and 21. (*Id.*) Thus, at trial, the question was raised whether or not she worked on January 19, 2011.

However, Ms. Gordon was paid by Nordstrom for January 19, 2011 for working 8 hours that day. (GER 459:21-460:4) Per her testimony, Ms. Gordon was originally scheduled to work, traded her shift with another employee, and then when that employee did not show up for work, Ms.

Gordon was called into work. (GER 335:23-337:5; Trial Exh. 21, GER 560). Per Ms. Gordon (on cross-examination):

> Q What you have testified today in court is on that day in January it wasn't that you were scheduled to work; it's that you swapped shifts with someone else and then you were called in when the other employee didn't show up; right?
> A Yes.
> Q So that wouldn't be a scheduled day. You were actually scheduled off that day, right?
> A Well, technically I was originally scheduled that day, but they wanted to switch with me.
> Q So what you told me in your deposition wasn't quite right, was it?
> A No. It was right. That was my original schedule. I ended up having to switch with somebody. If you switch with someone and they don't show up, you guys both get in trouble. And like I said, I wasn't on the best terms. I can't afford to get in trouble.
>
> (GER 348:10-25.)

This too is consistent with the later testimony of Larry Dare (Nordstrom's witness, and Appellant Christopher Mendoza's manager at Nordstrom) – who indicated that when an employee is scheduled to work a shift, they are responsible for ensuring that shift is covered, no matter what. Per Mr. Dare:

> Q In fact, you don't remember the circumstances at all until you refresh your recollection that they were sick at all, you don't even know if you called?
> A Correct. My expectation is you're responsible for the shift. If you cannot work your shift, whether you are sick, going on vacation, whether you want to go out for the night, whether your mom's birthday, you are responsible for the shift and you are responsible for covering the shift.
>
> (GER 451:6-13.)

Ms. Gordon testified she was subject to a similar policy at her store,

she testified she believed that if she did not come into work, she would have been terminated. (GER 448:10-25). As such, she believed she was required to work eight days consecutively, and worked those days under that belief.

In this Gordon was hardly alone. In preparation for trial, Nordstrom produced clock-in and clock-out data for its California employees from December 22, 2008 to November 19, 2011. (MER02496, MER02507, MER02091-99, p. 2-3). In this twenty-three month period, Nordstrom employees in the State of California worked more than six days consecutively on 26,002 occasions, at a rate of 1,130 occasions per month. (MER02084-ER02106 at ¶12). At that rate, over the sixty-seven months that have elapsed since the start of the statute of limitations in this action (December 22, 2008), Nordstrom employees in the State of California would have worked more than six days consecutively on over seventy-five thousand occasions.[5] Contrary to Nordstrom's position, the lack of days of rest for its employees is a serious issue.

III.

PROCEDURAL HISTORY

On December 22, 2009, Christopher Mendoza filed his complaint against Nordstrom, Inc. seeking to represent a class of Nordstrom's hourly, non-exempt employees in the State of California for Defendant and who (1) worked seven or more consecutive days (2) worked a split shift and were not compensated according to the applicable Wage Order, (3) did not

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[5] Though Nordstrom to this day does not have a day of rest policy, it does guard against the employees working and receiving overtime compensation. So, on most of the occasions the employees work seven or more consecutive days, they will not receive any compensation for it.

receive an accurately itemized wage statement and (4) were not timely paid wages upon termination during a four year class period. (*see generally* Notice of Removal, Doc. No. 1, Exhibit A, GER 1120). Defendant was served the complaint on December 24, 2009 (*see* Notice of Removal, Doc. 1, Exhibit B, ER 1155) and filed its answer in the state court and removed the case on diversity grounds, on January 25, 2010, citing the Class Action Fairness Act, 28 U.S.C. §1332 (d). (*see* Notice of Removal, Doc. 1 and Exhibit C, GER 1157).

On March 22, 2011, Nordstrom moved for Summary Judgment on all claims. (Doc. 27, GER 1080). While that motion was pending, Meagan Gordon sought to intervene into the action, which was stipulated to by the parties. (Doc. 34, GER 1057). As with Mendoza, Meagan Gordon brought claims alleging she worked split shifts without compensation, worked seven or more days consecutively, did not receive accurate itemized wage statements and was not timely paid wages upon termination. (Doc. 35, GER 1040). Shortly thereafter, the District Court ruled on Nordstrom's Motion for Summary Judgment, holding that Mendoza's (and, subsequently, Gordon's) claims for split shifts, unitemized wage statements and a failure to pay all wages upon termination were invalid because Mendoza (and Gordon) were paid well above the minimum wage. (Doc. 48, GER 41). These claims are not subject to the current appeal.

The District Court, however, allowed Petitioners' claims under Labor Code §§551 and 552, which prohibit the working of seven or more days consecutively, to go forward (*Id.*). Thereafter Mendoza and Gordon continued to prosecute their claims under Labor Code §§551 and 552. Because Petitioners only sought penalties under PAGA, which per *Arias v. Superior Court* (2009) 46 Cal. 4th 969, is a representative action, the Court

struck the class action allegations, and the action proceeded as a representative action. (Doc. 123, GER 37).

As only penalties would be assessed, the Parties proceeded to try the case as a bench trial in front of the Hon. Judge Cormac J. Carney on June 19, 2012 and June 21, 2012. (Doc 230, GER 30 and 31). At the end of trial, the District Court requested the Parties submit concluding briefs, and on September 21, 2012, the District Court issued its Memorandum of Decision. (Doc. 271, GER 4). In its decision, the District Court held that while §§551 and 552 prohibit an employer from requiring an employee to work seven or more days consecutively, and that while the nature of the Petitioners' employment did not require working seven or more days consecutively, the Petitioners waived their right to one day's off in seven, and that they did not comply with the requirements of Labor Code §556 because both worked less than six hours on one or two days during their stretch of consecutive days of work. Further, and specifically for Gordon, the District Court determined she waived her right to a day of rest because when she was asked to work on January 19, 2011, she agreed to do so. (Doc. 271, GER 21).

Thereafter, the District Court issued an order to show cause as to why the case should proceed on a representative basis. (Doc. 280, GER 39). Despite being provided with evidence of 26,002 instances of employees being scheduled to work, and working seven or more days consecutively, the District Court held the Petitioners were not aggrieved employees under PAGA, and dismissed the action on November 5, 2012. (Doc. 287, GER 1). Appellant Gordon filed her notice of appeal on November 27, 2012. (Doc. 294, GER 54). At the hearing on the appeal, the Ninth Circuit broached the idea of certifying questions to the Court, which

lead to the ultimate decision. *Mendoza v. Nordstrom, Inc.* (9th Cir. 2015) 778 F.3d 834.

IV.

ARGUMENT

A. Imposing A Workweek Requirement On Labor Code §551 Makes The Day Of Rest Benefit Illusory

The first question by the Ninth Circuit is whether or not the day of rest protection granted by Labor Code §551 should be constrained by an employer-defined workweek. *Mendoza v. Nordstrom, Inc., supra,* 778 F.3d at 838-39. After all, the day of rest statutes are found in the same chapter of the Labor Code as California's overtime statutes, which are constrained by a workweek. *See* Labor Code §§510, 511, and 513.

However, as also noted by the Ninth Circuit, the statutes in question, Labor Code §§551 and 552, do not use the word "week" in their language. Labor Code §551 states:

> Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven.

Labor Code §552 goes on to state:

> No employer of labor shall cause his employees to work more than six days in seven.

In neither statute does the Legislature use the word "week" or "workweek." This can hardly be an error of drafting, since the word "week" predates modern English,[6] the Legislature in 1893 would certainly have known what

[6] See e.g.,"week, n." *OED Online*. Oxford University Press, June 2015. Web. 29 June 2015.

the word "week" meant, and was aware of its usage. Indeed, other state legislatures, in drafting their day of rest statutes, include the word "week."[7]

Nor can it be said that §§551 and 552 were forgotten, or ignored by the Legislature in their one hundred and twenty years of existence. The statutes at issue here, located in Cal. Labor Code § 500 *et seq.*, underwent thorough revision in 1999 following the introduction of AB 60 titled "The Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999." (1999 Cal. Legis. Serv. Ch. 134 (A.B. 60). AB 60 sought to amend sections 510, 554, 556, and 1182.1 of the Labor Code and to add sections 500, 511-17, and 558. It was this time the word "workweek" was added in section 500, **but not added** to §§551 and 552.

AB 60's main purpose was to restore daily overtime laws in California for the benefit of employee safety and welfare. It has long been recognized that overtime compensation laws serve the "dual purpose of inducing the employer to reduce the hours of work and to employ more (individuals) and of compensating the employees for the burden of a long workweek." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419,423-24, 65 S.Ct. 1242 (1945); *see also Keyes Motors, Inc. v. Division of Labor Standards Enforcement*, 197 Cal.App.3d 557, 564 (1987) (premium pay regulates maximum hours consistent with employees' health and safety needs).

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[7] *See e.g.,* New York Labor Law §161; *See e.g.,* Wis. Stat. §103.85; *See e.g.,* 820 I.L.C.S. 140); *See e.g., Kent. Revised Statutes* §436.160; *See e.g.,* Maryland Labor Code §3-704; *See e.g.,* Mass. General Law §149:48; *See e.g.,* NH Revised Statutes §275:32-35. Most of these statutes limit their day of rest by a **calendar week**, as opposed to an **employer-defined** "workweek."

Further, "(n)umerous studies have linked long work hours to increased rates of accident and injury." DLSE Enforcement Manual §43.4. Had the Legislature wanted to limit §§551 and 552 to a single workweek, as opposed to a rolling seven days, it could have done so at that time. It did not because it wanted to protect workers.

Moreover, even the regulations interpreting §§551 and 552 do not constrain the statutes by a workweek. As stated by the regulation regarding these statutes:

> The provisions of Labor Code Sections 551 and 552 regarding one (1) day's rest in seven (7) shall not be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work **seven (7) or more consecutive** days; provided, however, that in each calendar month, the employee shall receive the equivalent of one (1) day's rest in seven (7).
>
> 8 C.C.R. §11170 (5) (G).

This regulation, by the way, mirrors the language of Labor Code §554, which also indicates that §§551 and 552 are not constrained by a "workweek." Indeed after reviewing all the legislative history, the only indication that §§551 and 552 were ever constrained by any particular week (as opposed to seven rolling days) comes from old Industrial Wage Commission Wage Orders that indicate women and children should take Sundays as their day of rest. (MER01516-MER01672). But these wage orders never spoke definitively that §551 applies only to a workweek, and could not have limited §551 by a workweek absent the Legislature rewriting the statute. *Industrial Welfare Commission v. Superior Court* (1980) 27 Cal. 3d 690, 725-729.

Thus, on the basis of the language used, to constrain Labor Code §§551 and 552 by a workweek definition makes no sense. "The starting

point for [the] interpretation of a statute is always its language," *Azarte v. Ashcroft*, 394 F.3d 1278, 1285 (9th Cir. 2005) *citing Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 739, 109 S.Ct. 2166 (1989). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Azarte, supra,* 394 F.3d at 1285, *citing Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146 (1992). Thus, the plain meaning of §§551 and 552, which does not include the word "week," despite the fact the word existed in the English language in 1893, and is found in other states' day of rest statutes, and which could have been amended to include the word "workweek" at any time in the past one hundred and twenty years, indicates that the Legislature did not intend to limit the right to a day of rest by the workweek.

Moreover, interpreting §§551 and 552 as not being constrained by a workweek fits with the Court's rule that the Labor Code is supposed to be read in the light most favorable to the employee, not the employer.

> [In] light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. . . They are not construed within the narrow limits letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished.

Industrial Welfare Com. v. Superior Court, (1980) 27 Cal.3d 690, 702 (emphasis added); *see also Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103-1104 *Henning v. Industrial Welfare Com* (1988) 46 Cal.3d 1262, 1269; *Kerr's Catering Service v. Department of Industrial Relations (Kerr's Catering)*, 57 Cal.2d 319, 330 (1962) ("[I]t is

obvious that both the Legislature and our courts have accorded to wages special considerations other than merely fixing minimums, and that the purpose in doing so is based on the welfare of the wage earner.") So, even where there might be an ambiguity in the law, the proper course is to read the statute in the light most protective of the employee.

Thus, the general object sought to be accomplished is to provide rest necessary for the health and safety of employees. "The need to provide for one day of rest at periodic intervals has been recognized by legislative enactments, both state and federal." 73 Am. Jur. 2d Sundays and Holidays § 4. As the United States Supreme Court has long recognized, "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. *McGowan v. Maryland*, 366 U.S. 420, 479, 81 S.Ct. 1153 (1961).

Even if the statutes were unclear – which they are not – the appropriate interpretation of these statutes is that they are not constrained by employer-defined workweeks. Otherwise, as here, the benefit of one day's rest in seven is illusory. In the case at hand, Nordstrom had written policies that demanded its employees be able to work on any given day or any given time, but it had no written policy to provide rest days. (GER 317:17-318:9, 319:2-19, 320:2-17; 506:1-18). In fact, the only constraint on the number of days an employee works is based on whether the employee would be eligible for overtime under Cal. Lab. Code §510. (GER 504:12-16, 505:15-21, 506:1-18; 461:12-462:2, 764:21-25). It is no wonder that in a relatively short period of time, Nordstrom employees worked seven or more consecutive days over twenty-six thousand times.

Ultimately, the question of whether a day of rest is a true benefit to employees granted by the State, or an illusory benefit comes down to this

interpretation. If a workweek interpretation is used, employees can work as many as twelve days without a day of rest. Here, both Petitioners worked seven or more days in a time period that straddled two different workweeks, with Mendoza working eleven days consecutively on one occasion. (MER03783-84, MER03789, MER03974-95, Trial Exh. No. 167, GER 612; Trial Exh. No. 239, GER 616; GER 315:8-316:25; 321:11-322:19). Under the plain reading of the statutes, both were denied their one day of rest in seven. But if the constraint of a workweek is imposed, neither would have been entitled to a day of rest despite working in excess of fifty hours during those time periods. Nor would any of the other twenty-six thousand instances where Nordstrom employees who also worked seven or more days consecutively. The benefit of a day of rest would be illusory. That simply cannot be the case.

B. The Best Interpretation of Labor Code § 556 Avoids Rendering Any Portion of the Statute Surplusage And Avoids An Outrageous Result

The second question posed by the Ninth Circuit relates to Labor Code § 556, which limits the benefit of a day of rest to full-time employees.

> Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week[8] or six hours in any one day thereof.
>
> Cal. Lab. Code § 556.

Now, as the Ninth Circuit points out, the language of §556 is a bit ambiguous in its meaning. *Mendoza v. Nordstrom, Inc., supra,* 778 F.3d at

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[8] Notably, the statute uses the word "week" but not the term "workweek" which is used elsewhere in the Chapter. While not necessarily relevant here, the usage of the word "week" obviously refers to the seven consecutive days the employee works.

839-41. Indeed, there are three potential interpretations: (1) that an employee receives a day of rest if she works more than 30 hours in the seven-day period, **or** works more than six hours in any one day of the seven; (2) that an employee receives a day of rest if she works more than 30 hours in a seven-day period **and** works more than six hours on **any** one day of that seven day period; or (3) that the employee receives day of rest if, and only if, the employee works more than 30 hours in the seven-day period, and for each day of work, she works more than six hours. Of these three interpretations, only the third has the effect of completely undermining the purpose of the statute, while also rendering parts of the statute meaningless. Unfortunately, it was this interpretation that the District Court followed.

In the past, this Court has discussed how statutes should be interpreted. Specifically, the Court's holding in *Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 798, outlined the methods of determining the meaning of a statute:

> We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 724 [257 Cal. Rptr. 708, 771 P.2d 406].) In the case of a constitutional provision enacted by the voters, their intent governs. (*Kaiser v. Hopkins* (1936) 6 Cal.2d 537, 538 [58 P.2d 1278]; *Armstrong v. County of San Mateo* (1983) 146 Cal. App. 3d 597, 618 [194 Cal. Rptr. 294].) To determine intent, " The court turns first to the words themselves for the answer.'" (*Brown v. Kelly Broadcasting Co., supra*, 48 Cal. 3d 711, 724, quoting *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230 [110 Cal. Rptr. 144, 514 P.2d 1224].) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren v. Deukmejian*

(1988) 45 Cal. 3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299].)

(Emphasis added.)

Further, this Court has also put great emphasis on avoiding surplusage, as this Court held in *People v. Arias* (2008) 45 Cal. 4th 169, 180, regarding statutory construction:

> First, in reviewing the text of a statute, we must follow the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary. "**Significance should be given, if possible, to every word of an act.** [Citation.] Conversely, a construction that renders a word surplusage should be avoided. [Citations.]" [9]

(Emphasis Added.)

This canon of statutory construction is hardly new. As Henry Campbell Black, of *Black's Legal Dictionary,* wrote, "It is the duty of the courts to give effect, if possible, to every word of the written law." Black, Henry Campbell, *Handbook of Statutory Construction, 2nd Ed.* (1911) West Publishing, §60, p. 165. Mr. Black further states, "No sentence, clause, or word should be construed as unmeaning or surplusage." (*Id.*)

Additionally, there is the golden rule of statutory interpretation. This Court previously held:

> We must therefore consider the general purpose of the statute. We do this because of our obligation to construe the language of a statute "so as to effectuate the purpose of the law" (*Select*

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[9] Accord *California Manufacturers Assn. v. Public Utilities Commission*, 24 Cal. 3d 836, 844 ["Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided."]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal. App. 4th 1099, 1110; *Said v. Jegan* (2007) 146 Cal. App. 4th 1375; *Cal. State Employees' Ass'n v. State Pers. Bd.* (1986) 178 Cal. App. 3d 372; *Woodmansee v. Lowery* (1959) 167 Cal. App. 2d 645.

> *Base Materials* v. *Board of Equal., supra*, 51 Cal.2d 640, 645) and in conformity with a well-settled principle of statutory construction that "'the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted and especially in order to avoid absurdity or to prevent injustice.' [Citation.]" (*People* ex rel. *S. F. Bay etc. Com.* v. *Town of Emeryville* (1968) 69 Cal.2d 533, 543-544 [72 Cal.Rptr. 790, 446 P.2d 790].)

Moyer v. Workmen's Comp. Appeals Bd., (1973) 10 Cal. 3d 222, 232.

> "[Where] the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted." (*Clements* v. *T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233 [273 P.2d 5].) This principle has been called a "'golden rule of statutory interpretation.'" (*Armstrong* v. *County of San Mateo* (1983) 146 Cal. App. 3d 597, 615 [194 Cal. Rptr. 294], quoting 2A Sutherland, Statutory Construction (4th ed.) § 45.12, p. 37.) Stated differently, "Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation." (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) A court should not adopt a statutory construction that will lead to results contrary to the Legislature's apparent purpose.

Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control District (1989), 49 Cal. 3d 408, 425; *Accord People ex rel. Lungren v. Superior Court* (1997) 14 Cal. 4th 294. Thus, this Court has recognized that in interpreting statutes, the Court should not just avoid surplusage, but also prevent any result that would undermine the overall benefit the statute is supposed to provide.

This need to avoid surplusage and undermine the Legislature's apparent purpose is especially important where, as here, the language of the statute is problematic. As the United States Supreme Court recently held:

> Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Group*, 573 U. S., at ___ (slip op., at 15) (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous.
>
> Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). Here, the statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very "death spirals" that Congress designed the Act to avoid. See *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 419-420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

King v. Burwell, 576 U.S. ___(June 25, 2015), 2015 U.S. LEXIS 4248 *26-29. Thus, again, the Court should interpret the statute to preserve the right of employees to have a day of rest while also avoiding invalidating any part of the statute.

Of the three possible interpretations, only one – the interpretation requiring that every day of work be in excess of six hours – fails these tests. For instance, if the Court were to read §556 as requiring employees work

more than six hours on every day they work consecutively, there would be no reason whatsoever to have the thirty hour weekly requirement. After all, an employee who works more than six hours a day for seven days would work forty-two (42) hours but an employee who works five hours per day for seven days would work thirty-five (35) hours. Counsel for Nordstrom demonstrated this point clearly when, *it crossed out the thirty hour section of §556*, in arguing that §556 requires an employee to work more than six hours for every day they work seven or more consecutive days. (GER 236:6-19).

Additionally, reading §556 in the fashion that Nordstrom advocated previously would invite all sorts of mischief. For instance, an employer could require its employees to work eight hours a day for six days in a row and then on the seventh day, require the employees to work five and a half hours, and so long as the seven days straddle two workweeks, the employee could work fifty-three and a half hours, but not be entitled to a day of rest or an hour of overtime compensation.[10] Clearly, this is not what the Legislature intended in guaranteeing employees a day of rest but limiting that day of rest to full-time employees.

In contrast, requiring that an employee work in excess of thirty hours in the seven day period he or she works consecutively, and that one of those days worked be longer than six hours (as was the case for both Petitioners), does not invalidate either hourly requirement, and it serves to

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[10] This is not an exaggeration. During Gordon's eight-day stretch, she worked over fifty hours. (GER 459:21-460:4). Mendoza similarly worked more than forty hours during the occasions he worked seven or more days consecutively. (MER03783-84, MER03789, MER03974-95).

protect employees from the one thing the Legislature was trying to prevent – overwork.

C. An Employer Causes Its Employee to Work Seven or More Consecutive Days When It Allows The Employee to Work Seven or More Consecutive Days

1. As An Employer, Nordstrom Controls the Working Hours of its Employees

As noted above Labor Code §552, states, "[n]o employer of labor shall cause his employees to work more than six days in seven." As the Ninth Circuit notes, the word "cause" is not generally found in other statutes of the Labor Code, and so there is a real question as to what the word "cause" means in the context of employment. While that word confused the Ninth Circuit, the word "cause" in an employment context, where the employer controls the actions of his employees, should be clear – when an employee works seven or more days consecutively, he or she does so because their employer has caused them to do so.

To reach that conclusion, first, it must be remembered that since §552 is a statute governing employment, there is a presumption in favor of the employee. As this Court held in *Murphy v. Kenneth Cole Productions, Inc* (2007) 40 Cal. 4th 1094, 1103:

> If the statutory language is clear and unambiguous our inquiry ends. "If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs." (*People v. Snook* (1997) 16 Cal.4th 1210, 1215 [69 Cal. Rptr. 2d 615, 947 P.2d 808]; see *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 [80 Cal. Rptr. 2d 828, 968 P.2d 539].) In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299].) **We have also recognized that statutes**

> **governing conditions of employment are to be construed broadly in favor of protecting employees.** (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340 [17 Cal. Rptr. 3d 906, 96 P.3d 194]; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal. Rptr. 2d 844, 978 P.2d 2] (*Ramirez*); *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985 [4 Cal. Rptr. 2d 837, 824 P.2d 643].)
>
> (Emphasis Added).

Despite this, at the District Court, Judge Carney interpreted "cause" as to mean "require." And absent a physical coercion, an employer would not cause an employee to work seven or more days consecutively if the employee acquiesced to working on any given day. That is an incorrect interpretation. Black's Legal Dictionary, which was published in 1891, six years prior to when these statutes were first enacted, defines "cause" as "that which produces an effect; whatever moves, impels or leads." Black's Legal Dictionary, 1st Ed. (1891) at p. 181. (Doc 262-1, ER675-677.)

Now, in addition to using the 1891 definition of cause, the other aspect of this analysis is the definition of the employer-employee relationship. As the Court is aware, employment is defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Cal. Code Regs. tit. 8, § 11040(2)(K). This very Court has determined that "the phrase' suffered or permitted to work, whether or not required to do so' ... encompasses a meaning distinct from merely 'working.'" *Morillion v. Royal Packing Co* (2000) 22 Cal.4th 575, 584. Thus, per the Court, the question is whether or not the employer constrains or otherwise limits the action of its employees. In other words, does the employer exercise some control over the employee? *Id.*

To further elaborate this point, this Court in *Martinez v. Combs* (2010) 49 Cal. 4th 35, 58-59, held that the term "suffer or permit" refers to the employer's ability to stop an employee from working, as well as, control how, where, and whether the employee works ("Here, neither Apio nor Combs suffered or permitted plaintiffs to work because neither had the power to prevent plaintiffs from working. Munoz and his foremen had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work.")

This is especially true where, as here, the employees are working in a retail store under general supervision. Indeed, Nordstrom maintains exclusive control over its employees' schedules, requiring managers not only create schedules, but approve and manually write in all changes to employee schedules. (ER 317:17-318:9, 319:2-19, 320:2-17; 506:1-18). So, certainly an employer, who by definition, controls the actions of its employees, and as here, controlled their scheduling, must have "caused," or "that which produces an effect; whatever moves, impels or leads."

Thus, the failure of the employer to police the working hours of its employees could cause an employee to work seven or more consecutive days. Or, more likely, a supervisor who calls an employee and asks them to come into work on a seventh day, or an eighth day, as was the case with Meagan Gordon, would cause her to work without a day of rest. Both Meagan Gordon and Christopher Mendoza were asked to work additional shifts by their supervisors, and felt compelled to do so. (GER 348:10-25; MER01311:16-19; MER00893-915). In fact, Meagan Gordon acquiesced to working additional days because **she believed her job was in jeopardy**.

(GER 348:10-25). But even if that were not the case, it is ultimately Nordstrom, the employer, who controls the hours and days of work.[11]

2. The Court's Decision in *Brinker v. Superior Court* Indicates that by Not Having a Legally Compliant Policy Nordstrom Caused Its Employees to Work Seven or More Consecutive Days

Both the District Court and the Ninth Circuit cite the Court's decision in *Brinker Restaurant Group v. Superior Court* (2012) 54 Cal. 4th 1004 for the purpose of determining whether Nordstrom caused Petitioners to work seven or more days consecutively. Per the Ninth Circuit:

> In Brinker, a putative class of hourly restaurant employees sued Brinker Restaurant Corporation, alleging that Brinker had failed to provide its employees with the meal and rest breaks required under California state law. 273 P.3d at 521. The question for decision was whether an implicit waiver, as distinct from a mutual written waiver, was effective to relieve the employer of liability for failure to provide such a break. The California Supreme Court held that an employer must relieve the employee of all duty during the requisite break, but that the employer has no duty to ensure that the employee does not in fact choose to continue to work during that time. Id. at 537-38.
>
> The district court relied on Brinker to conclude that, so long as an employee is not compelled to work in violation of the day-of-rest statute, the employer has not violated the statute. We are not persuaded that Brinker provides guidance here.

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[11] At the District Court and in the Ninth Circuit there was a great deal of briefing on the issue of waiver, and whether an employee can waive a statutory right by acquiescence, rather than in writing. Since this issue was not brought before the Court in the Ninth Circuit's order, it will not be discussed at length here. It should be noted, however, that under Labor Code §512, an employee can waive his or her right to a meal period in writing, but a day of rest, per the district court, could be waived by showing up to work when asked to do so.

> The statutory text is different. California Labor Code section 512(a) prohibits an employer from employing someone for more than five hours per day "without providing" a meal period, for example. The verb to "provide" generally means to "supply." Webster's Third New International Dictionary 1827 (unabridged ed. 1961) (noting that "PROVIDE and SUPPLY are often interchangeable"). The employer had only to "supply" a break, not also to ensure that each employee used what was supplied. By contrast, the question here is what act on the part of an employer counts as "causing" an employee to work more than the day-of-rest statutes allow. To "cause" can mean to "induce," see id. at 356, so is it enough for an employer to encourage or reward an employee who agrees to work additional consecutive days? In another context, causation is defined in terms of the "natural and probable consequence" of one's action. People v. Roberts, 2 Cal. 4th 271, 6 Cal. Rptr. 2d 276, 826 P.2d 274, 300 (Cal. 1992). Is it enough for an employer to permit employees to trade shifts voluntarily, when a natural and probable consequence may be that an employee works more than the day-of-rest statutes allow? Brinker does not suggest an answer. Cf. Cal. Lab. Code § 513 (prohibiting an employer from "encouraging or otherwise soliciting" a request for makeup work time).
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> *Mendoza v. Nordstrom, Inc., supra,* 778 F.3d at 840-41.

While Gordon agrees that in most respects *Brinker* deals with a different statute and standard, it should be noted that Nordstrom, as the Petitioners' employer, had an affirmative duty to enact a legally compliant policy. It did not. Per the Court in *Brinker*:

> An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it.

Brinker Restaurant Corp. v. Superior Court supra, 53 Cal. 4th at1033. As the Court in *Bradley v. Networkers International, LLC* (2012) 211 Cal. App. 4th 1129, 1142-44 clarified:

> In *Brinker*, the California Supreme Court applied these general principles to review a trial court's order certifying a class of about 60,000 employees in an action alleging a major restaurant chain owner violated state laws requiring meal and rest breaks for nonexempt hourly employees and requiring accurate recording of employee work time. (*Brinker, supra*, 53 Cal.4th at pp. 1017–1021.) The *Brinker* trial court had certified three subclasses: (1) a class alleging employees were not provided their required 10-minute rest breaks; (2) a class alleging employees were not provided timely and sufficient meal breaks; and (3) a class alleging employees worked "off the clock" (without pay). (*Id.* at pp. 1019–1020.) On appeal, this court held the trial court erred in certifying each of the subclasses and reversed the certification order. (*Id.* at p. 1021.) The California Supreme Court granted the plaintiff's petition for review, and four years later issued an opinion agreeing and disagreeing with various portions of our holdings and analysis, and reaching a different conclusion with respect to each subclass.
>
> First, with respect to the rest break subclass, the *Brinker* court clarified that the applicable wage order requires employers to provide an employee with a 10-minute rest break for shifts lasting three and one-half hours to six hours, and a 20-minute rest break for shifts lasting six hours to 10 hours. (*Brinker, supra*, 53 Cal.4th at p. 1029.) However, under the *Brinker* employer's written rest period policy, the employees were provided only one rest break for every four hours worked (when they should be provided a second break after six hours). (*Id.* at p. 1033.) On these facts, the California Supreme Court held the trial court properly certified the class because "[c]lasswide liability could be established through common proof" showing that "under this uniform policy," the employer "refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours."

Indeed, the California Court of Appeal in *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal. App. 4th 220, noted it made a similar error in its earlier holding. Per the Court:

> In *Faulkinbury I*, we concluded that even if Boyd's on-duty meal break policy was unlawful, Boyd would be liable only when it actually failed to provide a required off-duty meal break. *Brinker* leads us now to conclude Boyd would be liable upon a determination that Boyd's uniform on-duty meal break policy was unlawful. In *Brinker*, the Court of Appeal, in reversing class certification, had concluded that because rest breaks could be waived, any showing on a class basis that class members missed or took shortened rest breaks would not " 'necessarily establish, without further individualized proof,' " that the employers had violated the Labor Code and the relevant IWC wage order. (*Brinker, supra*, 53 Cal.4th at p. 1033.) The Supreme Court stated that conclusion was error. An employer is required to permit and authorize the required rest breaks, and if it adopts a uniform policy that does not do so, then "it has violated the wage order and is liable." (*Ibid.*) In other words, the employer's liability arises by adopting a uniform policy that violates the wage and hour laws.
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> *Id.* at 235.

Thus, even if the District Court was correct in conflating the requirements of meal periods to days of rest (which the Ninth Circuit, appropriately, held was incorrect), it ignores the fact that the failure to have a legally compliant policy caused Nordstrom's employees to work seven or more days **because it denied employees the knowledge of their right to a day of rest**, and the ability to request a day of rest without any repercussions.

The evidence clearly indicated Nordstrom had no written policy about giving employees days off. (GER 670:21-671:21, 687:1-2, 774:4-11). The only "policy" was the informal standard of two days off per Nordstrom defined workweek which would allow employees to work up to

ten days consecutively, and even that was not deemed a hard and fast rule. (GER 774:4-11). In fact, Nordstrom studied whether or not to create a policy, and **chose not to do so.** (GER 784:8-785:25, 504:3-25). So, even under the *Brinker* standard, Nordstrom never provided days of rest.

This is again, essential to the analysis because without a policy, or without an acknowledgement of the employees' rights, there is no effective way for an employee to assert his or her right to a day of rest, particularly when they are being graded, in part, on their willingness to work at any time.

As such, even if Nordstrom had not forced its employees to work on any given day, it was required to have a policy of providing one day's rest in seven so that employees could be aware of their right to take a day of rest. **It did not, and as such, caused employees to work seven or more days consecutively.** That failure to have such a policy removes any potential voluntariness to any agreement to work an extra day. Again, absent a policy or an wide-spread acknowledgment of rights, an employee would never know to insist on his/her statutory day of rest, a supervisor would never know of his/her duty to provide a day of rest, and the supervisor's supervisor would not know whether or not the employee was right to ask for a day of rest. Instead, the employee would have to fear being labeled a malingerer, and lose his or her job because of it.

D. The District Court Erred in Not Permitting A New PAGA Representative to Step Forward

While this was not a part of the Ninth Circuit's list of certified questions, there was one other point of law that arose during the trial. That is, what should a Court do when it determines that the named plaintiff in a

PAGA representative action is not an aggrieved employee, but there is evidence that there are thousands of other employees who could fill that role. That particular issue came up in this action, when the District Court, in dismissing this action, did so because it determined that neither Christopher Mendoza nor Meagan Gordon were aggrieved employees. (Doc 287, GER 1-3). Under the current state of the law, the District Court's decision may be binding on both the Petitioners and the thousands of Nordstrom employees who worked seven or more consecutive days. As this is a representative action, it is unclear if a decision on the merits can be limited to Petitioners. As this Court stated earlier:

> Because an aggrieved employee's action under the Labor Code Private Attorneys General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (*Lab. Code, § 2699, subds. (a), (g)*), and an action to recover civil penalties "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties" (*People v. Pacific Land Research Co. (1977) 20 Cal.3d 10, 17).* **When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. *(Rest.2d Judgments, § 41, subd. (1)(d), com. d, p. 397.)* Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the act, and therefore defendants' due process concerns are to that extent unfounded.**

Arias v. Superior Court (2009) 46 Cal. 4th 969, 986 (Emphasis Added).

Under the language of *Arias*, the District Court's decision does appear to be binding on not just Petitioners, but also on the thousands of employees who worked seven or more days consecutively. While this question may be moot, but in the event that Petitioners are not eligible to proceed as aggrieved employees, it seems the appropriate methodology would be to allow a new employee to stand in as representative, in a similar manner to that of a class action. Such a procedure would not be unheard of in California or in the federal court system. Per the California Supreme Court in *La Sala v. American Sav. & Loan Assn* (1971) 5 Cal. 3d 864, 872:

> If, however, the court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative. [Citations] If, after the court has thus extended an opportunity to amend, the class still lacks a suitable representative, the court may conclude that it must dismiss the action. At this point, the further issue arises whether the court must notify the class of the proposed dismissal.

Accord Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal.App.4th 572, 578 [105 Cal. Rptr. 2d 896].) *Nat'l Solar Equip. Owners' Ass'n v. Grumman Corp.,* 235 Cal. App. 3d 1273, 1286 (1991); *Malibu Outrigger Bd. of Governors v. Superior Court*, 103 Cal. App. 3d 573, 575 (1980); *Kagan v. Gibraltar Sav. & Loan Assn.*, 35 Cal. 3d 582 (1984); *Chico Feminist Women's Health Center v. Butte Glenn Medical Society* (E. D. Cal. 1983) 557 F. Supp. 1190, 1200-1201. As this area of law is still relatively new, the issue is unsettled.

V.

CONCLUSION

> Thus the heavens and the earth were finished, and all the host of them. And on the seventh day God ended his work which he had made; and he rested on the seventh day from all his work which he had made. And God blessed the seventh day, and sanctified it: because that in it he had rested from all his work which God created and made.
>
> Genesis, Ch. 2:1-3.

In 1893, the California Legislature passed Labor Code §§551 and 552, creating the oldest protections for employees in the State of California. Yet in all that time, no Court has defined what it means to have a day of rest in the State of California. Now, finally, is that time. The Court must decide whether the right to a day of rest in seven is a tangible right, or if it is an illusory one. And indeed, if the Court determines that §551 is constrained by an employer defined workweek, and that §556 requires that employees must work over six hours each day of the seven days they work, and if the Court determines that an employer need only allow its employees to occasionally take a day off, then the right to a day of rest will be illusory. That cannot be the case.

Instead, Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon respectfully requests the Court insure that these statutes truly provide one day's rest in seven days, not one day within an employer-defined workweek. She respectfully requests the Court insure that the part-time exemption of Labor Code §556 apply to people who are truly part-time, not those, like her, who worked over fifty hours during her eight consecutive days of work. She lastly, respectfully request the Court recognize that employers, not employees, control the hours and days an employee works, and that, as such, only the employer can cause an employee to work seven or more days consecutively. In short, she respectfully requests the Court

insure that all California employees finally receive their right to a day of rest granted to them over a hundred and twenty years ago.

Respectfully Submitted,

Dated: July 2, 2015

CLARK & TREGLIO

By: _____

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8.204

In compliance with Rule of Court 8.204, the text of this brief is in 13 point type, with left and right margins of one and a half inches. The text of this brief consists of 9,465 words as counted by the Microsoft Word for Mac 2011 word-processing program used to generate the brief.

Dated: July 1, 2015

James M. Treglio

PROOF OF SERVICE AND FILING

Documents: Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Opening Brief

Caption: Christopher Mendoza, et. al., v. Nordstrom, Inc.

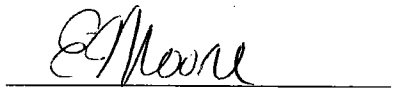
Filed: California Supreme Court

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

I am a citizen of the United States and a resident of or employed in the City of San Diego and County of San Diego, California, I am over the age of eighteen years and not a party to the within action; my business address is 205 West Date Street, San Diego, CA 92101. On this date, I caused Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Opening Brief to be filed in the California Supreme Court and served the following persons interested in said action, pursuant to California Rule of Court 8.25(a) and (b). On July 2, 2015, I sent via Federal Express Overnight Service, one original and 8 copies of Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Opening Brief, and a copy to all parties and interested persons, and one copy to the District Court and to the Ninth Circuit Court of Appeal by the placing of true copies of Plaintiff-Intervenor-Appellant-Petitioner Meagan Gordon's Opening Brief enclosed in a sealed envelope via Federal Express Overnight Service addressed as follows:

(SEE ATTACHED SERVICE LIST)

I certify and declare under penalty of perjury that the foregoing is true and correct. Executed on July 2, 2015 at San Diego, California



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