No. S224853

IN THE SUPREME COURT OF CALIFORNIA

JENNIFER AUGUSTUS, et al.,
Plaintiffs and Respondents,

v.

ABM SECURITY SERVICES, INC.,
Defendant and Appellant,

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division One, Case Nos. B243788 & B247392

The Superior Court of Los Angeles County,
The Honorable John Shepard Wiley Jr.
Case Nos. BC336416, BC345918, & CG5444421

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs' Petition for Review misrepresents the Court of Appeal's decision, distorts it implications, and misinterprets this Court's decisions in *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 840 (*Mendiola*), and *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*). Far from "effectively eliminat[ing] rest breaks altogether" (Pet. at p. 20), the Court of Appeal made clear that rest breaks must be free from "work," and held only that "simply being on call"—i.e., "remaining available to work," such as in the event of an emergency—does not automatically render a rest break invalid. (*Augustus v. ABM Security Services, Inc.* (2015) 233 Cal.App.4th 1065, 1076–1077 (*Augustus*)). This reasonable conclusion does not conflict with any other decision, depends on the unique facts of this case, and is firmly supported by the text of the statutes and regulations governing rest breaks. The Petition should be denied.

Plaintiffs, who represent a statewide class of security guards employed by ABM Security Services, Inc., obtained a classwide summary judgment of nearly $90 million based on the faulty and unprecedented legal premise that "if you are on call, you are not on [a rest] break." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1074.) This judgment was entered after the trial court reached the remarkable conclusion that ABM had not provided *any* of its over 14,000 security guards with even a single compliant rest break merely because ABM's alleged "policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed" and thus guards purportedly "must keep their cell phones and pagers on" and "remain on call." (13JA3757–3758.) The trial court believed that this *potential* for interruption—without more—rendered each and every one of the millions of uninterrupted rest breaks ABM provided to its employees

legally invalid. As a result, the trial court granted summary judgment even though "[p]laintiffs offered no evidence indicating anyone's rest period had ever been interrupted," ABM submitted "substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest breaks during which they performed no work," and that "any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1073.)

The Court of Appeal unanimously reversed, correctly concluding that the trial court's *per se* rule that on-call rest breaks are always legally invalid finds no support in the Labor Code, the relevant Wage Order, the pertinent case law, or the DLSE's guidance. Despite plaintiffs' assertions to the contrary, the Court of Appeal repeatedly emphasized that Labor Code section 226.7 "prohibits . . . working during a rest break." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077; see also *id.* at p. 1071 ["An employee who works more than three and one-half hours per day must be permitted to take a paid 10-minute rest period—during which the employee shall not be required 'to work'—per every four . . . hours of work or major fraction thereof"]; *id.* at p. 1078 ["section 226.7 . . . requires only that an employee not be required 'to work' during breaks"].) But, on the facts of this case, the court concluded that the mere possibility that ABM's security guards might have to "return to duty if requested" did not constitute "work," and thus the guards were not deprived of valid rest breaks simply because they were reachable while on break. (*Id.* at p. 1078.)

Plaintiffs' Petition does not attempt to defend the trial court's unprecedented and illogical *per se* rule, and thus fails to address the question at the center of the Court of Appeal's decision—"whether simply

being on call constitutes performing 'work.'" (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077.) Rather, plaintiffs attack a decision that the Court of Appeal did not render, one that supposedly "endors[ed] across-the-board on-duty rest breaks." (Pet at p. 19.) But the Court of Appeal did not sanction "working" rest breaks. Rather, it merely held that ABM's guards were not deprived of rest breaks solely because there was a *possibility* that they might have to resume "work." (*Augustus*, *supra*, 233 Cal.App.4th at pp. 1076–1077.)

Plaintiffs' attempts to manufacture a conflict with *Mendiola* and *Brinker* also miss the mark. The Court of Appeal's refusal to hold that all on-call rest breaks are invalid is entirely consistent with this Court's recent decision in *Mendiola*, which made clear that not all "on-call time constitutes hours worked," and that "use of a pager" counsels against a finding that on-call time is time spent working. (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) Moreover, the Court of Appeal's decision does not conflict with *Brinker*, which held only that an employer must "relieve [an] employee of all duty" during *meal* breaks—not rest breaks—and emphasized that this standard is a flexible one that "may vary from industry to industry." (*Brinker*, *supra*, 53 Cal.4th at pp. 1038, 1040.) Nothing in *Brinker* suggests that this Court intended to endorse the simplistic legal rule—"if you are on call, you are not on [a rest] break"—that the Court of Appeal rejected here.

For these reasons, and as explained further below, the Court should deny the Petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. "ABM employs thousands of security guards at locations in California." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1070.) Named

plaintiffs "[Jennifer] Augustus, Emmanuel Davis, and Delores Hall worked for ABM as security guards." (*Ibid.*) Augustus was for a time a "relief supervisor," and in that role she "would relieve people for breaks." (4JA1011.)

ABM produced significant evidence that it provided rest breaks to the vast majority, if not all, of its security guards. ABM's written rest break policies informed guards that they were "authorize[d] and permit[ed]" to take rest breaks "as required by California law." (9JA2418; see also 3JA628.) And, in fact, numerous ABM guards stated in declarations that they received rest breaks. (E.g., 10JA2933 ["[E]ach day I take two rest breaks to use the bathroom or step outside for some fresh air"]; 10JA2946 ["I always receive 15 minute rest periods" twice per shift]; 11JA2995 ["I take my scheduled meal and rest breaks every day"].) In many locations, rovers like Augustus herself were employed specifically to give guards an opportunity to take breaks. (E.g., 11JA3012–3013; 4JA1011; 9JA2660.)

Class member depositions revealed that while some employees believed they were required to carry radios and respond to calls during breaks (24JA6838), others did not carry their radios with them at all (24JA6814-24JA6815). Class members who did respond to emergencies during breaks could re-start and take their breaks without interruption after the emergency subsided. (E.g., 24JA6828; 24JA6833–6834.)

2. Plaintiffs' "master complaint," filed in 2007, "alleges ABM 'fail[ed] to consistently provide uninterrupted rest periods,' or premium wages in lieu of rest breaks, as required by [Labor Code] section 226.7." (*Augustus, supra*, 233 Cal.App.4th at pp. 1071–1072.) Plaintiffs moved for class certification in 2008, "arguing class certification was warranted

because, inter alia, ABM had a uniform companywide policy requiring all guards to remain on duty during their rest breaks." (*Ibid.*)

"Plaintiffs supported the motion with the deposition testimony of Fred Setayesh, an ABM senior branch manager, who admitted" that some employees would "not [be] relieved of all duties during rest breaks." (*Id.* at p. 1072.) Setayesh clarified, "I said they're not relieved from all duties, but they are—they can take their breaks" (11JA3098), and explained that employees "would be taking a break as they need." (12JA3504). The context of Setayesh's statements demonstrates that he was referring only to employees who worked at single-guard sites for which ABM had sought a rest-break exemption from the DLSE; he did not describe the rest breaks provided to *all* employees during the entire class period. (See 11JA3098.) Setayesh also did not describe any ABM policy; at most, he assessed the actual experience of a single subset of ABM employees.

Nonetheless, "[t]he trial court granted certification in 2009, stating without elaboration that plaintiffs had 'provided substantial evidence that the common factual and legal issues predominate over individual factual and legal issues.'" (*Augustus*, *supra*, 233 Cal.App.4th at p. 1072.)

3. "In 2010, plaintiffs moved for summary adjudication of their rest period claim, contending it was undisputed ABM's employees were required to remain on call during their rest breaks, which . . . rendered them per se invalid." (*Augustus*, *supra*, 233 Cal.App.4th at pp. 1072.) "Plaintiffs supported the contention with Setayesh's" deposition testimony but "offered no evidence indicating anyone's rest period had ever been interrupted." (*Id.* at pp. 1072–1073.) ABM "submitt[ed] substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves, that class members regularly took uninterrupted rest

breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Id.* at p. 1073.) ABM also "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Ibid.*)

The trial court granted plaintiffs' motion. (13JA3765.) Citing two cases for the proposition that "the time an employee is on duty and subject to call is compensable work time" (13JA3757–3758), the trial court jumped to the conclusion that so long as guards "remain on call," "it is irrelevant that an employee . . . may engage in leisure activities during [rest] breaks" (13JA3759–3760). That rest breaks were rarely interrupted, or that guards used breaks for "non-work related activities . . . such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc." was irrelevant. (13JA3757–3758.) Instead, the trial court reasoned, "[w]hat is relevant is whether the employee remains subject to the control of an employer," because "a rest period must not be subject to employer control; otherwise a 'rest period' would be part of the work day for which the employer would be required to pay wages in any event." (13JA3760.) And "because [ABM's security guards] remain on call," the court posited, "the guards are *always* subject to [ABM's] control," (13JA3758, italics added), and no guard *ever* took a legally compliant rest break (13JA3761).

4. "In 2012, plaintiffs moved for summary judgment on their damages claim, contending the only remaining task was to apply the court's earlier finding to undisputed facts." (*Augustus*, *supra*, 223 Cal.App.4th at p. 1073.) "Plaintiffs contended that because ABM forced its security guards to remain on duty during their rest breaks, it owed each employee an additional hour of payment, a waiting time penalty, and interest for '*every*

single rest break taken by every single class member, for the duration of the Class Period.'" (*Ibid.*, italics added.)

"In a tentative ruling issued before the hearing, the trial court incorporated its prior summary adjudication ruling and stated that '[p]ut simply, if you are on call, you are not on [a rest] break.'" (*Augustus*, *supra*, 223 Cal.App.4th at p. 1074.) The court "acknowledged evidence existed that not all security guards were required to carry radios during their breaks." (*Ibid.*) And, in fact, "ABM presented numerous depositions that indicated many guards took breaks without radios." (*Id.* at pp. 1073–1074.) But "the court ruled that whether a guard actually carried a radio was immaterial, as '[t]here are many alternatives to the radio for hailing a person back to work: cell phone, pager, fetching, hailing and so on.'" (*Id.* at p. 1074.) On that basis, the court inferred "'that [ABM] required all its workers to be on-call during their breaks, and so these on-call breaks are all legally invalid.'" (*Ibid.*)

"After the hearing, the court adopted its tentative ruling[,] granted plaintiffs' motion[,] denied ABM's motion for decertification," and awarded plaintiffs approximately $89 million in damages. (*Augustus*, *supra*, 223 Cal.App.4th at p. 1074.) "Six months later, the court entered an amended judgment that awarded plaintiffs approximately $27 million in attorney fees, representing 30 percent of the common fund, plus $4,455,336.88 in fees under Code of Civil Procedure section 1021.5." (*Ibid.*) ABM appealed from both judgments, and the Court of Appeal consolidated the appeals. (*Ibid.*)

5. In an opinion filed on December 31, 2014, and modified on January 29, 2015, the Court of Appeal unanimously reversed the trial

court's summary adjudication and summary judgment orders, and affirmed the court's class certification order.

With respect to the summary judgment orders, the Court of Appeal stated that the "issue" was "whether *simply being on call* constitutes performing 'work.'" (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077, italics added.) Based on the text of the Wage Order and Labor Code section 226.7, the Court of Appeal concluded that "it does not." (*Ibid.*) While "[t]he text of the wage order does not describe the nature of a rest period," Labor Code section 226.7 makes clear "only that an employee cannot be required 'to work' during a break." (*Id.* at p. 1076) Applying this test to the facts here, the Court of Appeal reversed because "although ABM's security guards were required to remain on call during their rest breaks, they were otherwise permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet"—in other words, a "security guard who is on call performs few if any of the activities performed by one who is actively on duty." (*Id.* at pp. 1076–1078.)

With respect to the class certification ruling, the court of appeal found that "the trial court could reasonably conclude ABM possessed a uniform policy of requiring its security guards to remain on call during their rest breaks." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1084.) The court determined that "[w]hether such a policy is permissible is an issue 'eminently suited for class treatment.'" (*Ibid.*, quoting *Brinker*, *supra*, 53 Cal.4th at p. 1033.) "[S]ubstantial evidence indicating the policy was not uniformly applied," the court concluded, "would go only to the issue of damages." (*Ibid.*)

DISCUSSION

I. The Court of Appeal Held Only That Simply Being "On Call" Does Not Invalidate a Rest Break.

"The issue" before the Court of Appeal in this case was "whether simply being on call constitutes performing 'work'" and thus renders an on-call rest break impermissible. (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077.) The Court of Appeal's common-sense conclusion that it does not is supported by the Labor Code, the Wage Order, DLSE guidance, and this Court's recent decision in *Mendiola*, which made clear that not all "on-call time constitutes hours worked," and "use of a pager" counsels against a finding that on-call time is time spent working. (*Ibid.*; *Mendiola*, *supra*, 60 Cal.4th at p. 841.) This factbound and uncontroversial decision does not warrant review.

A. The Court of Appeal's Decision Prohibits Working Rest Breaks.

Plaintiffs (and their amici) attack a strawman, claiming that the Court of Appeal's decision "endors[ed] across-the-board on-duty rest breaks" and held "that employers may require their employees to engage in compensable work" during breaks, thus "nullify[ing] California's rest break requirements" and "effectively eliminat[ing] rest breaks altogether." (Pet. at pp. 14, 19, 20.) That is nonsense.

To the contrary, the Court of Appeal repeatedly reaffirmed that section 226.7 "prohibits . . . working during a rest break." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077; see also *id.* at p. 1071 ["An employee who works more than three and one-half hours per day must be permitted to take a paid 10-minute rest period—during which the employee shall not be required 'to work'—per every four . . . hours of work or major fraction thereof"]; *id.* at p. 1078 ["section 226.7 . . . requires only that an employee

not be required 'to work' during breaks"]; *id.* at p. 1082 ["Section 226.7 proscribes . . . work on a rest break"].) Indeed, the actual issue addressed by the court was not whether working rest breaks were permissible, but whether the mere possibility that a break might be interrupted (and later restarted in full in the event of any interruption) renders it invalid. And answering that question, the court concluded that "simply being on call [does not] constitut[e] performing 'work'"—especially here, where "ABM's security guards . . . were otherwise permitted to engage and did engage in various non-work activities, including smoking reading, making personal telephone calls, attending to personal business, and surfing the Internet," where ABM "submitted affirmative evidence that any rest period interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved," and where "[p]laintiffs offered no evidence indicating anyone's rest period had ever been interrupted." (*Id.* at pp. 1072–1073, 1076–1077.)

The common-sense conclusion that the mere risk that a rest break might be interrupted does not, without more, render a break legally invalid is consistent with the text of the Labor Code and the relevant Wage Order. As the Court of Appeal correctly noted, Wage Order No. 4 "requires that an employee be 'relieved of all duty' during a meal period"— but it "contains no similar requirement" for rest breaks. (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077.) And Labor Code section 226.7 only prohibits "requir[ing] an employee to work" during a rest break. Lab. Code, § 226.7, subd. (b). But simply the "status" of being "[o]n-call" and "remaining available to work"—for example, in the case of an emergency—does not contravene the prohibition on "work" during rest breaks. (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077.)

B. The Court of Appeal's Decision Is Supported By *Mendiola*.

The Court of Appeal's conclusion that "simply being on call" does not "constitut[e] performing 'work,'" and thus does not render an employee's rest break legally invalid, does not conflict with any other decision, and is consistent with this Court's recent decision in *Mendiola*.

Plaintiffs contend that "*Mendiola* establishes," as a general proposition, "that, when security guards are on call, their employer is obligated to pay them for their time," and "therefore . . . necessarily stands for the proposition that guards may not be forced to remain on call during their rest breaks." (Pet. at p. 22.) "That holding," plaintiffs argue, "should have been decisive in this case." (*Id.* at p. 3.) Plaintiffs are wrong: *Mendiola* addressed a question not at issue in this case—whether time employees spend on call is *compensable* as hours worked. In any event, the Court's reasoning in *Mendiola* firmly supports the Court of Appeal's decision in this case.

Contrary to plaintiffs' blanket assertions (Pet. at p. 22), *Mendiola* explains that "[i]t is well established that an employee's on-call or standby time *may* require compensation" only in certain circumstances. (*Mendiola*, *supra*, 60 Cal.4th at p. 840, italics added.) Specifically, "California courts considering whether on-call time constitutes hours worked have primarily focused on the extent of the employer's control," and that inquiry turns on "various factors . . . : ' "(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions; and

(7) whether the employee had actually engaged in personal activities during call-in time." ' " (*Id.* at pp. 840–841, quoting *Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 523 (*Gomez*).) "[N]one" of those factors "is dispositive." (*Gomez*, 173 Cal.App.4th at p. 523; see also *Madera Police Officers Assn. v. City of Madera* (1984) 36 Cal.3d 403, 411–412 [disapproving of opinions "analyzing the single restriction of on-call status [as] controlling"].)[1]

The question in *Mendiola*—whether time spent on call is compensable as hours worked—is plainly not at issue in this case. As the Court of Appeal explained, "[w]hat constitutes *compensable* work time is not the issue here, as it is undisputed rest breaks are compensable." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1082, italics added.) Here, the question was whether "on-call rest breaks are *permissible*," and the court properly concluded they are. (*Ibid.*, italics added.)

Nonetheless, to the extent *Mendiola* is relevant here, it supports the Court of Appeal's decision. *First*, by affirming that not all "on-call time constitutes hours worked" (*Mendiola*, *supra*, 60 Cal.4th at p. 841), *Mendiola* bolsters the Court of Appeal's conclusion in this case that "simply being on call [does not] constitut[e] performing 'work.'" (*Augustus*, *supra*, 233 Cal.App.4th at p. 1077.)

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[1] The DLSE applies similar factors. (E.g., Dept. Industrial Relations, DLSE Opn. Letter No. 1993.03.31 (Mar. 31, 1993) p.4 ["such factors as (1) geographical restrictions on employees' movements; (2) required response time; (3) the nature of the employment; and, (4) the extent the employer's policy would impact on personal activities during on-call time, must all be considered"]; Dept. Industrial Relations, DLSE Opn. Letter No. 1994.02.16 (Feb. 16, 1994) pp. 3–4 [same]; Dept. Industrial Relations, DLSE Opn. Letter No. 1998.12.28 (Dec. 28, 1998) p. 4 [considering similar factors]).

Second, *Mendiola* confirms California courts' and the DLSE's longstanding guidance that the "use of a pager could *ease* restrictions" on on-call employees. (*Mendiola*, *supra*, 60 Cal.4th at p. 841, italics added.) Here, the trial court reached the unprecedented and erroneous conclusion that simply carrying a radio, pager, or cell phone, or otherwise being reachable during a break, *by itself* invalidated guards' rest breaks. (See 13JA3757–3758.) That conclusion turned California's compensable-time analysis on its head and cannot be reconciled with *Mendiola*. The Court of Appeal's unanimous decision reversing the trial court is entirely consistent with *Mendiola*.

Third, the stark contrast between the facts in *Mendiola* and the facts in this case supports the Court of Appeal's conclusion that ABM's guards were not performing work while on call. In *Mendiola*, this Court concluded that "guards' on-call time was spent primarily for the benefit of [their employer]" only where "guards were required to 'reside' in their trailers as a condition of employment and spend on-call hours in their trailers or elsewhere at the worksite." (*Mendiola*, *supra*, 60 Cal.4th at p. 841.) Guards "were obliged to respond, immediately and in uniform, if they were contacted by a dispatcher or became aware of suspicious activity." (*Ibid.*) Moreover, "[g]uards could not easily trade on-call responsibilities," and "could only request relief from a dispatcher and wait to see if a reliever was available." (*Ibid.*) "If no relief could be secured, as happened on occasion, guards could not leave the worksite." (*Ibid.*) "Even if relieved," the Court explained, "guards had to report where they were going, were subject to recall, and could be no more than 30 minutes away from the site." (*Ibid.*) Additionally, "[r]estrictions were placed on nonemployee visitors, pets, and alcohol." (*Ibid.*)

Here, the Court of Appeal rejected plaintiffs' assertion, repeated in their Petition, that "when security guards are on call . . . they are performing their core job duty—i.e., maintaining a constant state of readiness and vigilance." (Pet. at p. 22; see *Augustus*, *supra*, 233 Cal.App.4th at p. 1078.) Instead, the court properly concluded that an ABM "guard's on-call rest time" does not "constitut[e] work for purposes of section 226.7," in part because "a security guard who is on call performs few if any of the activities performed by one who is actively on duty." (*Ibid.*) The court explained that, at ABM, "a guard on duty must observe the guarded campus and perform many tasks, for example, greeting visitors, raising or lowering the campus's flags, or monitoring traffic or parking." (*Ibid.*) Yet "*[n]o* evidence in the record suggests an ABM guard taking a rest break is required to do any of these things." (*Ibid.*, italics added.)

Rather, the court found "that class members regularly took uninterrupted rest breaks," during which ABM's guards were "permitted to engage and did engage in various non-work activities, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the Internet." (*Augustus*, *supra*, 233 Cal.App.4th at pp. 1073, 1076–1077.) In many locations, rovers like Augustus herself were employed specifically to give guards an opportunity to take breaks. (E.g., 11JA3012–3013; 4JA1011; 9JA2660.) Class members' deposition testimony revealed that some employees believed they were required to carry radios and respond to calls during breaks (24JA6838), while others did not carry their radios with them at all (24JA6814–24JA6815). While plaintiffs had "fail[ed] to provide any example of a rest break actually having been interrupted," ABM "submitted affirmative evidence that any rest break interrupted by a call back to service could be restarted after the situation necessitating the callback was resolved." (*Augustus*, *supra*, 233

Cal.App.4th at p. 1073.) And although "an on-call guard must *return* to duty if requested," the court concluded that "remaining available to work is not [necessarily] the same as performing work." (*Id.* at p. 1078.) That conclusion is supported by *Mendiola* and other California decisions that weigh numerous factors to determine whether on-call time is even compensable as hours worked.

II. The Court of Appeal's Decision Is Consistent With *Brinker*.

The Court of Appeal's decision is also consistent with this Court's decision in *Brinker*. *First*, contrary to plaintiffs' assertion, *Brinker*'s holding that employees must be "relieved of all duty" during *meal* breaks does not extend to rest breaks. *Second*, even if it did, that would not change the result here, because the rest breaks ABM provided in this case would not violate that flexible, fact-dependent standard.

A. The Court of Appeal Correctly Concluded That *Brinker*'s Standard for Meal Breaks Does Not Apply to Rest Breaks.

Plaintiffs contend that *Brinker*'s holding that an employer's obligation to "'relieve the employee of all duty and relinquish any employer control over the employee and how he or she spends the time'" during meal breaks must "apply with equal force" to rest breaks. (Pet. at p. 16, quoting *Brinker*, *supra*, 53 Cal.4th at pp. 1038–1039.) The Court of Appeal correctly rejected that argument.

First, as the Court of Appeal explained, whereas "subdivision 11(A) of Wage Order No. 4 obligates an employer to relieve an employee of all duty on an unpaid meal break," neither subdivision 12(A), which pertains to rest breaks, nor Labor Code section 226.7, "which states only that an employee cannot be required 'to work' on a rest break," "contains [a] similar requirement." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1081.) As

this Court explained in *Brinker*, "the key language giving content to the employer's duty" regarding meal breaks "come from the wage order's . . . definition of what an employee is to receive"—for meal breaks, a 30-minute period in which "the employee is relieved of all duty." (*Brinker*, 53 Cal.4th at p. 1035.) The Court of Appeal's conclusion here that the Wage Order's separate language defining the scope of an employer's obligation to provide rest breaks is consistent with *Brinker*'s textual approach. In any event, *Brinker* simply did not address the legal issue at the heart of this case: whether an on-call break potentially subject to interruption in the event of an emergency is *per se* invalid.

Second, "[m]eal breaks and rest breaks are . . . qualitatively different." (*Augustus*, *supra*, 233 Cal.App.4th at pp. 1081–1082.) "Meal breaks are unpaid while rest breaks are paid." (*Id.* at p. 1081.) "Meal breaks last 30 minutes; rest breaks last 10 minutes." (*Ibid.*) And unlike for meal breaks, employers may prohibit employees from leaving the worksite during a rest break. (Dept. Industrial Relations, DLSE Opn. Letter No. 2002.01.28 (Jan. 28, 2002) p. 1 [recognizing that "rest periods differ from meal periods" in that employees must be allowed to "leave the employer's premises" during meal periods].)

Nothing in *Brinker* or the Wage Order suggests, as plaintiffs contend, that "rest breaks must already be 'off duty' by definition," much less that the Wage Order somehow forbids on-call rest breaks by its silence. (Pet. at p. 17.) And the fact that the Industrial Welfare Commission requires employers to treat time spent on a rest break as "hours worked" does not show that rest breaks cannot be on-call (*id.* at pp. 19–20); rather, it demonstrates the IWC's recognition that, in practice, the level of employer control over an employee during a rest break exceeds to some degree the

level of control during a meal break, given the inherent practical limitations on a brief, 10-minute break.

B. Even If *Brinker*'s Standard Applied, It Would Not Change the Result in This Case.

Even if *Brinker*'s relieved-of-all-duty standard for meal breaks were equally applicable to rest breaks, on-call rest breaks would not contravene that flexible standard. The Court should deny review for this reason as well.

The Court in *Brinker* expressly disclaimed its ability to "delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker*, *supra*, 53 Cal.4th at p. 1040.) And contrary to the rigid, one-size-fits-all approach that the trial court adopted in this case, the Court in *Brinker* made clear that it was announcing a flexible standard that "may vary from industry to industry." (*Ibid.*)

Here, as explained above, the Court of Appeal repeatedly emphasized that "[s]ection 226.7 proscribes . . . work on a rest break." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1082.) The court thus did not "endors[e] across-the-board on-duty rest breaks" or "hol[d] that employers may require their employees to engage in compensable work" during rest breaks, as plaintiffs contend. (Pet. at pp. 19–20.) Rather, the court concluded, based on the facts of this case, that ABM guards did not perform "work" simply by being reachable during rest breaks. (E.g., *Augustus*, *supra*, 233 Cal.App.4th at p. 1078.) Nothing in *Brinker* would compel a different result.

Neither do the other decisions plaintiffs cite. In *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, as plaintiffs admit, the court found "no evidence of a policy or widespread practice of Sears to deprive

nonexempt employees of uninterrupted . . . rest breaks" even though managers "had the *ability* to contact each other by cell phone during breaks" and thus "could be reached if the need arose." (*Id.* at p. 1001; see Pet. at p. 15.) Neither *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal.App.4th 1193, nor *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, so much as suggests that on-call rest breaks are legally invalid *per se*. And *Godfrey v. Oakland Port Services Corp.* (2014) 230 Cal.App.4th 1267, bears no resemblance to this case. There, truck drivers "were encouraged . . . not to take, or [were] prevented . . . from taking, rest breaks"; the employer "provided no evidence of any formal policy on rest breaks"; there was "no indication drivers were, at a minimum, informed in any meaningful or consistent way that they could take rest breaks, or the definition of any such rest breaks"; and drivers "counted time in [a] truck, waiting in line at the Port . . . as break time." (*Id.* at pp. 1286–1287 & fn. 21.)

Here, in contrast, ABM's written rest break policies informed guards that they were "authorize[d] and permit[ed]" to take rest breaks "as required by California law." (9JA2418; see also 3JA628.) And, as the Court of Appeal explained, "substantial and uncontroverted evidence, including the deposition testimony of the named plaintiffs themselves," showed "that class members regularly took uninterrupted rest breaks during which they performed no work but engaged in such leisure activities as smoking, reading, and surfing the Internet." (*Augustus*, *supra*, 233 Cal.App.4th at p. 1073.)

Moreover, the DLSE has repeatedly refused to "take the position that simply requiring [a] worker to respond to call backs is so inherently intrusive as to require a finding that the worker is under the control of the employer" during meal breaks. (DLSE Opn. Letter No. 1993.03.31 at p. 4;

DLSE Opn. Letter No. 1994.02.16 at p. 4.) And, consistent with California courts' conclusion that "use of a pager could *ease* restrictions" on on-call employees (*Mendiola, supra*, 60 Cal.4th at p. 481, italics added), the DLSE has repeatedly affirmed that "the simple requirement that the employee wear a beeper and respond to calls, without more, is not so inherently intrusive as to require a finding that the employee is subject to the employer's control so as to require the employee be paid for all hours the beeper is worn" (DLSE Opn. Letter No. 1998.12.28 at p. 4); accord Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 47.5.5). The DLSE has taken no steps to change its policy on this issue since *Brinker* was decided, and no court has suggested that *Brinker* somehow repudiated the DLSE's longstanding view.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

DATED: March 24, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Answer to Petition for Review contains 5,443 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the court of appeal's order, the cover information, the signature block, and this certificate.

DATED: March 24, 2015 By: Theodore Boutrous Jr./LOF

Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I, Alma Y. Banuelos, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State.

On March 24, 2015, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

on the parties stated below, by the following means of service:

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Unless otherwise noted on the attached Service List, **BY MAIL:** I placed a true copy in a sealed envelope or package addressed as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing set forth in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 24, 2015, at Los Angeles, California.

Alma Banuelez /LSE

Alma Y. Banuelos

CERTIFICATE OF SERVICE

I, Alma Y. Banuelos, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, CA 90071-3197, in said County and State.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 24, 2015, at Los Angeles, California.

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Alma Y. Banuelos

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