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,
Plaintiff-Appellant-Petitioner;

MEAGAN GORDON,
Plaintiff-Intervenor-Petitioner;

v.

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

After a Request by the Ninth Circuit Court of Appeals
Consolidated Nos. 12-57130 and 12-57144

RESPONDENT NORDSTROM, INC.'S

ANSWERING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons to list in this certificate pursuant to California Rule of Court 8.208(e)(3).

Dated: September 2, 2015

Respectfully submitted,

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I. INTRODUCTION

This case is not about whether employers must provide employees with at least one rest day each week. Nordstrom agrees employees are entitled to a rest day and the trial court factually found Nordstrom provided Petitioners Christopher Mendoza and Meagan Gordon with the required rest days each week. Nor is this case about harsh or oppressive working conditions. Indeed, the trial court factually found Petitioners voluntarily decided to work over six consecutive days on each alleged occasion at issue, "frequently worked for less than six hours a day" on those occasions, and "submitted no evidence to suggest harsh or difficult working conditions at Nordstrom." *Mendoza v. Nordstrom, Inc.,* 2012 U.S. Dist. LEXIS 188379, at *31-32 (C.D. Cal. 2012). The central issue here is whether employees, like Mendoza and Gordon, may voluntarily choose to work through a rest day that the employer has made available. As the trial court correctly concluded, the law unquestionably provides employees that right.

Nordstrom feels strongly about the welfare of its employees, recognizing they are the lifeblood of its business and the driving force behind its renowned customer-service standards. For that reason, Nordstrom's policy and practice is to ensure its employees have the opportunity to take not one, but two, rest days each workweek. However, Nordstrom also recognizes a "one size fits all" approach to scheduling does not suit the personal needs of every employee, every week. Thus, like

many employers, Nordstrom provides employees the flexibility to voluntarily forgo their rest day if they wish to do so. This is in keeping with the employee protections and flexibility the rest day laws were designed to guarantee.

In contrast, Petitioners' interpretation of the rest day laws, which would impose forcible rest days on employees, would not protect or benefit California workers. Instead, Petitioners' interpretation would deprive employees of the opportunity to request changes to their schedules to accommodate personal needs, thereby undermining workplace flexibility. The Legislature never intended such a result. The overarching protective purposes of the Labor Code and the history of the rest day statutes confirm that the rest day laws are intended to allow employees to choose whether to take their rest day or work additional hours for personal reasons—to make more money, to guarantee eligibility for benefits, to accommodate a personal schedule or to enlarge vacation time.

Here, the trial court correctly found that Petitioners voluntarily exercised their right to work additional days. Nordstrom ***never*** scheduled Petitioners to work more than six consecutive days, whether on a rolling or workweek basis. To the contrary: (1) Nordstrom had a policy of scheduling employees to work only five days per workweek; (2) Nordstrom in fact always scheduled Mendoza and Gordon to work only five days per workweek; (3) Mendoza and Gordon voluntarily picked up additional shifts

to earn more money, guarantee their health benefits and/or accommodate their personal schedules; (4) when Mendoza and Gordon picked up extra shifts, they still always took at least one rest day each week; and (5) on the occasions Mendoza and Gordon worked over six consecutive days, they still ended up working no more than 43 hours each workweek.

Mendoza made it widely known to his manager and coworkers he wanted to work ***more*** than his scheduled shifts to make more money and guarantee his eligibility for health benefits. And ***when Mendoza was offered additional shifts by his coworkers, he alone decided whether he wanted to work them***. At trial, Mendoza confirmed he never would have worked over six consecutive days without voluntarily choosing to work the extra shifts offered by coworkers.

For her part, Gordon understood Nordstrom's rest day policy, noting "we had to have two days off in a workweek and that was all I knew as far as rest days policy."[1] Although Gordon claimed she worked over six consecutive days on a single occasion (when her time records indicate she did not), the trial court held that such work occurred, if it did at all, only because ***Gordon voluntarily chose to trade shifts with a coworker.***

The rules of statutory construction dictate there is no rest day law violation based on the facts of this case. Rather, the plain text of the rest

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[1] MER01392-MER01393, 131:16-132:17 (including video-clip at SER0083, 14:7-24).

day laws and all other indicators of legislative intent establish: (1) the rest day laws must be applied on a workweek basis; (2) the rest day laws do not apply when an employee works six or fewer hours on any one day of a workweek; and (3) under Sections 551 and 552, no employer may require an employee to work over six days in a workweek, but employers may allow employees to voluntarily choose to work a seventh day.

II. STATEMENT OF THE CASE

A. Statement of Facts

Petitioners assert that Nordstrom had no rest day policy.[2] Yet, the trial court specifically factually found that Nordstrom had a policy and practice of making rest days available. *Mendoza,* 2012 U.S. Dist. LEXIS 188379, at *3-4. Nordstrom's policy and practice is to schedule employees "to work no more than five days during each workweek."[3] *Id.* Trial witnesses consistently confirmed Nordstrom provided two rest days each workweek:

- Nordstrom's Corporate Human Resources Representative testified: "Our general policy and expectation is that...employees are scheduled five days in a workweek with two days of rest."[4]

[2] Mendoza's Opening Brief ("MOB"), p.4, ¶¶2-3; Gordon's Opening Brief ("GOB"), pp.5-6.
[3] Nordstrom also posts Wage Order 7 in its stores, which informs employees about their rest day rights. MER01051, 37:6-12.
[4] MER01045-MER01048, 31:17-32:6, 32:21-22, 33:6-34:15.

- Mendoza's manager scheduled employees for "five days a week, 33 hours a week" because "if you have some rest, you give great customer service, and we're in the job of giving great customer service."[5]
- Mendoza confirmed he was never scheduled over five days per week on the occasions at issue. [6]
- Gordon's Store Administrator testified, "you do not schedule your employees to work more than five days, six days if need be with the employee's approval."[7]
- Gordon testified that, when she first started working for Nordstrom, she was informed "we had to have two days off in a workweek and that was all I knew as far as rest days policy."[8]

1. Mendoza's Employment With Nordstrom

Nordstrom always scheduled Mendoza to have at least two days off each week.[9] However, Mendoza wanted to work more than his scheduled hours to make more money and guarantee eligibility for benefits. [10]

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[5] MER01438, 177:9-18; MER02014-5, 109:23-110:6; *see also* MER01173, 159:19-22.

[6] MER01317-MER01318, 56:9-23, 57:16-19; MER01324, 63:2-15; MER01327-MER01330, 66:25-67:8, 68:24-69:8.

[7] MER01237-MER01238, 223:24-224:14. The Store Administrator also testified that Gordon and other employees were informed of their entitlement to two rest days per workweek because their rest days were designated on the schedule each week. MER01251, 237:16-23.

[8] MER01392-MER01393, 131:16-132:17 (including video-clip at SER0083, 14:7-24).

[9] *See supra* nn.5, 6.

[10] Both Mendoza and his manager confirmed Nordstrom employees must

Mendoza, 2012 U.S. Dist. LEXIS 188379, at *4-5, *23-24, *27-29. Mendoza therefore made it widely known to his manager and other employees that he was available for, and wanted to work, extra shifts: "***[I] 'made it be known' ... that [I] wanted to work***" "***I [made] a lot of people aware, I'm available. You can come to me, but I'll decide if I can't [sic] or can't.***"[11] *Id.* (emphasis added).

Mendoza worked more than six consecutive days only three times during the limitations period. *Id.* at *6. On each of those three occasions, Mendoza did so only because ***he decided*** to voluntarily accept extra shifts in addition to his regularly scheduled hours:

- **First Occasion**:[12] Mendoza first worked more than six consecutive days from January 26 through February 5, 2009.[13] In both workweeks, Nordstrom scheduled Mendoza to have at least ***two*** days off.[14] However, Mendoza was offered and accepted two additional shifts—

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work only 33 hours per week to be eligible for benefits, and Mendoza's manager scheduled Mendoza for 33 hours a week. MER01281-MER01282, 20:20-21:4; MER01313, 52:5-20; MER01438, 177:19-23; MER01441, 180:16-24.

[11] Nordstrom does not impose an absolute prohibition on employees such as Mendoza working more than six consecutive days because employees "want flexibility and choice in their schedule, either potentially to work additional shifts for personal reasons...[or] to make extra money." MER01049, 35:12-25; MER01439-MER01440, 178:9-179:7 (employees constantly changed schedules to accommodate personal needs).

[12] MER00691, 15:10-28.

[13] MER01791, 4:21-5:17.

[14] MER03785-MER03788 (initial master schedule); MER01318, 57:2-19; MER01324, 63:2-20.

one from his manager and one from a coworker—when other employees were sick or unavailable.[15] Mendoza conceded he could have refused the additional shifts: "***[My manager] said it was my choice;***"[16] "So when I got called [***directly by my co-worker*** Jessica] I was available and I took [the extra day of work]."[17] Mendoza also confirmed he would not have worked more than six consecutive days had he not voluntarily accepted either one of the extra shifts.[18] *Id.* at *24-25.

- **Second Occasion:**[19] Mendoza's second occasion of work on more than six consecutive days took place from March 23-29, 2009.[20] In both workweeks, Nordstrom again scheduled Mendoza to have at least ***two*** days off.[21] However, Mendoza was offered and accepted an additional shift from another employee who was sick. Mendoza admitted he could have refused his coworker's offer: "***It was my choice to work if I***

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[15] Mendoza's manager offered Mendoza additional shifts because Mendoza specifically asked for them. *Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *4-5, *23-24.

[16] MER01320-MER01321, 59:14-60:10.

[17] MER01324-MER01326, 63:16-65:3 (Mendoza admitting to voluntarily accepting a shift directly offered to him by his co-worker, Jessica Hoffman).

[18] MER01321, 60:15-19; MER01325-MER01326, 64:24-65:3 ("Q:...had you not agreed to pick up the shift [from co-worker Jessica]...you would not have ended up working more than six consecutive days; isn't that correct? A: Because I took the shift, yeah, there's extra days.").

[19] MER00692, 16:1-6.

[20] MER01793, 6:3-25.

[21] MER03790-MER03793 (initial master schedule), MER03794-MER03795; MER01327-MER01328, 66:25-67:21, MER01457-MER01458, 196:2-197:22. Mendoza was inadvertently questioned as to March 28, 2009—the actual date was March 27, 2009. *See* SER0245.

wanted to."[22] Mendoza again confirmed he would not have worked more than six consecutive days had he not voluntarily accepted the extra shift.[23] *Id.* at *25-27.

- **Third Occasion:**[24] The last occasion Mendoza worked more than six consecutive days took place from March 31-April 7, 2009.[25] During both workweeks, Nordstrom once again scheduled Mendoza for at least ***two*** days off.[26] However, Mendoza was offered an additional shift from a sick coworker. Mendoza again admitted it was his choice to accept the shift: "***I could say no if I didn't want to go.***"[27] Mendoza also confirmed, as before, he would not have worked more than six consecutive days had he not voluntarily accepted the extra shift.[28] *Id.* at *27.

Mendoza also claimed Nordstrom pressured or encouraged him to work more than six consecutive days[29] by allegedly conditioning his eligibility for promotion on working extra shifts. However, his own trial testimony refuted that assertion: ***"I don't know that I could speak for***

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[22] MER01328-MER01329, 67:15-17, 68:4-7.
[23] MER01328, 67:18-21.
[24] MER00692, 16:8-14.
[25] MER001794-MER01795, 7:10-8:8.
[26] MER03796-MER03799 (initial master schedule); MER01330-MER01331, 69:4-70:4, MER01458-MER01459, 197:23-198:15, MER01468-MER01470, 207:6-209:3.
[27] MER01330, 69:18-20.
[28] MER01330-MER01331, 69:21-70:4.
[29] MOB, pp.5-6.

[Nordstrom] and saying [sic] they encouraged me to do anything, but I encouraged myself [to pick up extra shifts]."[30] Indeed, Mendoza admitted he continued to ask for additional shifts *after* his promotion, demonstrating he wanted extra shifts not to earn a promotion, but to earn more money.[31]

After considering all evidence at trial, including Mendoza's admission he was never told a promotion was contingent on working additional shifts, and credible testimony from Nordstrom representatives that promotions are not conditioned on working extra shifts,[32] the trial court factually found Nordstrom did not implicitly or explicitly require or pressure Mendoza to work more than six consecutive days. *Id.* at *23 ("the facts indicate otherwise").[33] The trial court explained:

> As used in Section 552, ***"cause" indicates a level of force or coercion that was simply not present in the relationship Mr. Mendoza had with Nordstrom***. After reviewing the testimony and evidence presented at trial, ***it is clear that Nordstrom did not cause Mr. Mendoza, either explicitly or implicitly, to work more than six consecutive days*** on the three occasions in question. Rather, ***Mr. Mendoza was an employee who desired additional work and who actively sought it out.***

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[30] MER01339, 78:11-17.
[31] MER01313-MER01314, 52:5-53:16.
[32] MER01315, 54:9-19; MER01473, 212:22-25; MER01048-MER01049, 34:19-35:3.
[33] The trial court found Mendoza's "exceeds expectation" rating for working scheduled shifts meant just what it said—Mendoza was not required to accept extra shifts and he exceeded expectations when he did so. MER01477-MER01479, 216:3-9, 217:20-218:2. Notably, the performance evaluation preceding Mendoza's promotion showed Mendoza had improved seven "Needs Improvement" ratings to "Meets Expectations" ratings. MER01475-MER01479, 214:5-218:2; MER03740-3746.

....

> At trial, ***Mr. Mendoza testified that while at Nordstrom he outwardly encouraged others to come to him with the offer of additional work***, stating, ***"I made a lot of people aware, I'm available. You can come to me, but I'll decide if I can't [sic] or can't."*** Indeed, Mr. Mendoza was so motivated to secure additional work that he sought the permission of his supervisor to travel to a nearby Nordstrom's store to participate in their monthly inventory duties. ***And when offered additional work, such as on the three occasions in question, Mr. Mendoza readily accepted.***

Id. at *23-24 (emphasis added) (citations omitted).

2. Gordon's Employment With Nordstrom

Gordon claims she worked more than six consecutive days on only one occasion during her employment with Nordstrom, from January 14-21, 2011. However, the trial court ***never*** factually found that Gordon actually worked more than six consecutive days:

> [I]t is unclear whether Ms. Gordon did in fact work on January 19, 2011. Because Ms. Gordon's claim fails on other grounds, the Court need not determine which of the varying explanations Ms. Gordon has offered for why she worked on January 19, 2011, is true.[34]

Mendoza, 2012 U.S. Dist. LEXIS 188379, at *12, nn.3-4 & 6.

Even assuming Gordon worked on January 19 and therefore more than six consecutive days, the trial court factually found she did so only as a result of a voluntary, personal choice to trade shifts with another

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[34] Gordon's trial testimony regarding whether she worked on January 19 differed from four prior explanations offered ***under penalty of perjury***. Defendant-Appellee's Answering Brief ("AB"), Docket 23-1, p.35 and record citations therein.

employee, not because Nordstrom required or encouraged her to do so. Nordstrom originally scheduled Gordon for two days off the week of January 14-21, 2011.[35] Had she worked that schedule, she never would have worked more than six consecutive days.[36] Rather than take the January 17 rest day designated by Nordstrom, Gordon voluntarily chose to trade shifts with a co-worker and worked on the 17th.[37] *Id.* at *8 ("During the seven months Ms. Gordon was employed by Nordstrom, she was typically scheduled to have Tuesday and Thursday off from work each week."), *29-31 ("After considering Ms. Gordon's trial testimony, as well as that of Nordstrom's Human Resources Area Manager, the Court concludes that Nordstrom did not force Ms. Gordon to work more than six consecutive days. During Ms. Gordon's eight consecutive days of work, she voluntarily traded her January 19, 2011 shift with a coworker's January 17, 2011 shift.").

Had Gordon only worked her co-worker's January 17 shift, she ***still would not have worked seven consecutive days***. However, Gordon further

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[35] MER01386-MER01387, 125:19-126:2, MER01392-MER01394, 131:16-133:1 (including deposition video-clip at SER0083, 14:7-24), MER01427, 166:1-5; MER01220, 206:13-17.

[36] MER01396, 135:19-21.

[37] MER00694-MER00695, 18:5-19:11, citing MER01373-MER01374, 112:24-113:1, MER01211, 197:18-19; *see also* SER0208-SER0209; MER01372, 111:6-9; MER01208-MER01212, 194:11-198:7 ("Q: Do those arrows indicate to us this was a voluntary trade? A: Yes."). Gordon also chose to work on January 20, 2011, her second designated rest day that week. *See* MER01214-MER01219, 200:22-201:6, 201:11-15, 201:19-205:13; SER0173-SER0174, SER0208-SER0209, SER0211.

claims that she also worked on January 19 because the co-worker with whom she traded shifts did not report for work on the 19th, and Gordon felt responsible for covering the co-worker's shift.[38] Gordon cites the testimony of Larry Dare—who was Mendoza's, not Gordon's, manager—for the proposition that Gordon was responsible for the shift she traded away.[39] Yet Heather Niese, the Store Administrator at Gordon's store, testified, and the trial court factually found, that Gordon was not responsible for the shift she traded away.[40] *Id.* at *30-31 (finding there was no "policy of requiring employees to cover 'no show' shifts" that applied to Gordon's employment).

3. The Trial Court Correctly Found Petitioners Were Not Subject To Harsh Or Difficult Working Conditions

After two years of extensive litigation and a full bench trial, the trial court found no indication that Nordstrom subjected Petitioners to harsh or abusive working conditions:

> ***Plaintiffs submitted no evidence to suggest harsh or difficult working conditions at Nordstrom.*** During each of the instances in which Plaintiffs worked for more than six consecutive days, ***both frequently worked for less than six hours a day***. Indeed, Mr. Mendoza actively sought additional work because of the ability to earn more money and maintain

[38] GOB, pp.6-8.
[39] GOB, pp.7-8.
[40] MER01235, 221:14-24. The trial court referred to Ms. Niese as an HR Area Manager, which was her title at the time of trial. However, Ms. Niese's title during Gordon's employment was Store Administrator. MER01206-MER1207, 192:18-193:8.

> his health benefits, and Ms. Gordon voluntarily switched shifts with a coworker. In any event, ***Plaintiffs were not the victims of the harsh working conditions or exploitation that the labor laws were enacted to protect against.***

Mendoza, 2012 U.S. Dist. LEXIS 188379, at *31-32 (emphasis added).

Indeed, for each alleged occurrence, Mendoza and Gordon ***always took at least one rest day per workweek.***[41] And, for each alleged occurrence, Nordstrom never scheduled Mendoza or Gordon to work more than 36 hours in the week.[42] Even after voluntarily picking up additional shifts to work more than six consecutive days, they still ended up working no more than 43 hours per week, with multiple days at less than six hours.[43]

4. Petitioners' Discussion Of Other Employees' Purported Claims Is Irrelevant

Petitioners reference time punch data and schedules as "evidence" that other Nordstrom employees regularly work more than six consecutive days.[44] This data is irrelevant and Petitioners' reliance on it is unfounded.

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[41] *See* MER01392-MER01393, 131:16-132:17 (including video-clip at SER0083, 14:7-24); MER01317-MER01318, 56:9-23, 57:16-19, MER01324, 63:2-15, MER01327-MER01330, 66:25-67:8, 68:24-69:8; MER01173, 159:19-22. MER01438, 177:9-18; SER0241, SER0243.

[42] SER0208-SER0209 (Gordon's alleged occasion), SER0235 (Mendoza's first occasion), SER0237 (Mendoza's second occasion), SER0239 (Mendoza's third occasion).

[43] MER01792-1795 (charts showing Mendoza worked between 34.1-42.85 total hours per week on the three occasions when he worked more than six consecutive days); MER01796 (chart showing Gordon worked 32.48 hours, and assuming she actually worked on January 19, 41.47 total hours during the workweeks overlapping with the single occasion at issue).

[44] GOB, pp.5, 8, 10, 16, 29-31.

Even if it were relevant (which it is not), Petitioners' references to other employees working "more than six days consecutively on 26,002 occasions"[45] is taken out of context and distorts the reality of how often an average employee worked a seventh consecutive day. The supposed 26,002 violations include all purported occurrences from December 22, 2008 to November 19, 2011 for all 18,271 putative class members.[46] That means that, on average, each employee would have worked seven consecutive days only 1.42 times during the roughly three-year timeframe.[47] This data is consistent with the premise that Nordstrom employees occasionally work more than six consecutive days because they choose to trade shifts to accommodate personal needs. The data does not support Petitioners' false assertion that Nordstrom has an "informal 'culture'"[48] of regularly requiring employees to work seven consecutive days.

Moreover, the trial court correctly concluded that time punch data and schedules alone cannot establish a violation of California Labor Code sections 551 and 552 because that evidence does not indicate whether the work was voluntary. Determining ***why*** any particular employee may have

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[45] GOB, p.8.
[46] MOB, p.7; MER02726-2727.
[47] Petitioners' expert also claimed employees worked over six consecutive days with six or more hours worked each day on 9,573 occasions. This amounts to only about 0.52 occurrences per employee on average from December 14, 2008 to November 19, 2011. MOB, p.11; MER00264, MER02496.
[48] GOB, p.5.

worked more than six consecutive days is critical to establishing a rest day violation.[49] *See Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *15-22. Simply reciting the number of days an employee worked, divorced of any facts regarding whether the work was voluntary, cannot demonstrate a violation of the law.

Finally, and most importantly, the factual record in this case is and must be limited to only two people, Mendoza and Gordon, for at least three reasons. First, the trial court limited the trial to only Mendoza's and Gordon's individual claims.[50] Consequently, there was no determinative

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[49] A fact-finder cannot merely review "a schedule" to determine whether Nordstrom "caused" employees to work more than six consecutive days. The fact-finder must first determine which iteration of the schedule is the one Nordstrom managers originally prepared (versus the version that reflects shift changes voluntarily made by employees). For example, for Gordon's one alleged violation, the trial court reviewed three schedules—the original schedule prepared by the manager (which showed two rest days per week), the schedule with handwritten notes reflecting employee shift trades, and the final electronic schedule that summarized the days employees actually worked—to determine whether Nordstrom required Gordon to work more than six consecutive days. *See* MER00694-MER00695, 18:5-19:20. Even then, Gordon was adamant that the final electronic schedule, which showed she did not work January 19, was wrong. MER01373-MER01374, 112:23-113:5. Likewise, for Mendoza's three alleged occurrences, the trial court reviewed two sets of schedules—the original schedule prepared by the manager (which showed two rest days each week) and the schedule that reflected voluntarily shift changes—to determine whether Nordstrom required Mendoza to work more than six consecutive days. *See* MER00690-MER00694, 14:12-18:3. Assessing liability for other employees would require the exact same individualized analysis of "schedules."

[50] AB, p.51, n.148, MER00006-8 ("Plaintiffs also suggest that Nordstrom may be liable for scheduling employees to work more than six consecutive days....But these alleged violations were not part of Plaintiffs' claims.

litigation of the facts and circumstances surrounding other employees' alleged occurrences. Second, in the nearly six years since this matter has been pending, no other Nordstrom employee exhausted administrative remedies to gain standing to prosecute a rest day claim.[51] Thus, there is no pending case or controversy with respect to other employees.[52] Third, Petitioners assertion of purported "violations" involving other employees is premised entirely on their flawed interpretation of Sections 551, 552 and 556.[53]

B. Legal & Procedural Background

In December 2009, Mendoza brought this representative action alleging, in relevant part, that Nordstrom violated California's rest day rules embodied in California Labor Code sections 551 and 552 and therefore was

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Endless and inefficient litigation would result if Plaintiffs are allowed to substitute new representatives and add new claims, as they suggest. This is not only unfair, but also completely contrary to the Federal Rules of Civil Procedure.").

[51] Pursuant to the Private Attorneys General Act ("PAGA"), an aggrieved employee may file suit only after exhausting administrative remedies by providing "written notice" to the Labor and Workforce Development Agency and the employer regarding any alleged violations. Cal. Labor Code §2699.3(a)(1). Mendoza and Gordon are the only employees to have done so here. *See* MOB, p.7. While Gordon's opening brief argues that the trial court should have allowed substitution of new PAGA representatives, that issue does not relate in any way to the certified questions before this Court and Gordon's invitation to the Court to opine on that issue is therefore inappropriate. GOB, pp.29-31; Cal. R. Ct. 8.520(b)(3) ("briefs on the merits must be limited to the issues stated").

[52] AB, pp.5-6, n.16, MER00006-8 ("With the Court's finding in favor of Nordstrom on Plaintiffs' day of rest claims, there is no longer an aggrieved employee in this action.").

[53] *See* Sections IV-VI below.

liable for PAGA penalties. *Mendoza*, 2012 U.S. Dist. Lexis 188379, at *8-9.

In March 2011, Nordstrom filed a motion for summary judgment regarding Mendoza's rest day claim, arguing Mendoza worked more than six consecutive days only because he voluntarily chose to work extra shifts.[54] In May 2011, the trial court denied Nordstrom's motion, finding "cause" in Section 552 meant an employer was prohibited from either "requiring" or "permitting" an employee to work more than six consecutive days.[55]

At the pre-trial conference, Nordstrom argued, as it had throughout the litigation: (1) the rest day laws are measured on a workweek basis, Sections 551 and 552 do not apply when an employee works six or fewer hours on any one day of a workweek, and "cause" means require; and (2) the trial court's early summary judgment order, finding an employee could not voluntarily choose to skip a rest day, was not binding and could be changed at any time before judgment was entered.[56] The trial court then asked Petitioners' counsel if they wished to present a different plaintiff and

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[54] MER03554-MER03562. While Nordstrom's motion was pending, Gordon intervened in the action. GER0053, GER1040-GER1079.

[55] MER03179-MER3182, 5:3-8:16.

[56] *See* SER0528-SER0530; SER0512, p.3, n.4.; SER0499-SER0501, 6:24-8:17; MER01945-MER01954 2:25-11:24, MER01957-MER01961 14:17-15:17, 15:22-18:26; SER0490-SER0491, 15:13-16:2, SER0405-SER0471; MER01878-MER01887, ii:14-xi:2; SER0330-SER0338; SER0321-SER0328; SER0306-SER0319; SER0281-SER0297, 2:7-18:6, SER0302, 23:18-27).

they declined:[57] "We don't have anybody in mind, and we could maybe run down the list and cherry-pick somebody, but I've never met them....So I know what Mr. Mendoza's view of the world is, and I'm happy for him to testify."[58]

The trial court thereafter warned the parties to proceed as if no final decisions about the rest day statutes had been rendered:

> I assure both sides I'm going to give you full opportunity to brief all the legal issues. I haven't made up my final mind on anything. I think it would be a mistake on both sides' parts to rely on anything I have said in a summary judgment order or anything I said at the [pretrial conference hearing].[59]

The trial court then proceeded with a bench trial as to only Petitioners' individual claims, leaving the possibility of a representative action for later consideration. *Mendoza*, 2012 U.S. Dist. Lexis 188379, at *2, *9.[60]

After trial and closing briefs, the trial court concluded that the rest day laws prohibit employers from requiring employees to work more than

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[57] There was no other viable plaintiff because no other employee had exhausted the administrative remedies required by PAGA. *See* footnote 51.
[58] MER01735, 55:8-14.
[59] MER01272, 11:17-21. Mendoza's assertion that the trial court told the parties not to present evidence regarding whether the rest day laws must be interpreted on a workweek basis or whether an employee may voluntarily choose to work through a rest day (*see* MOB, p.10) ignores the trial court's express confirmation that "***all legal issues***" remained open.
[60] AB, p.4, MER01732, 52:1-25 ("It's a PAGA action, it's a representative action on behalf of the attorney general, but I'll just try the named plaintiffs and the issues first and get a handle [on] it, and then I'll be able to, I think, efficiently case-manage."); MOB, p.10.

six consecutive days, but permit employees to choose to work on designated rest days: "The day of rest statutes only prohibit an employer from requiring or causing an employee to work more than six consecutive days." *Id.* at *3. Applying this standard, the trial court found:

> The evidence presented at trial established that in each instance on which Plaintiffs worked for more than six consecutive days, they ***voluntarily chose*** to waive their day of rest, ***free of any coercion by Nordstrom***.

Id. at *15-16 (emphasis added).

The trial court also found that under Section 556, employers have no duty to provide a rest day when employees work six or fewer hours in any one day in the workweek: "The wording of this exemption is clear. Section 556 exempts employers from providing a seventh day of rest to their employees...when the hours worked on any day of that week do not exceed six hours." *Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *37-38. Applying this standard, the trial court additionally found neither Mendoza nor Gordon could establish a rest day claim because they worked six or fewer hours on multiple days during their alleged occurrences. *Id.* at *39.

The trial court then asked the parties to brief whether Petitioners' representative action could proceed. After full briefing, the trial court dismissed the action because Petitioners were not aggrieved employees, no

other plaintiffs with standing were before the court, and therefore no remaining case or controversy required for federal jurisdiction existed.[61]

Petitioners appealed to the Ninth Circuit. Following briefing and oral argument, the Ninth Circuit certified the three questions regarding California's rest day laws that this Court accepted for review on April 29, 2015. *Mendoza v. Nordstrom, Inc.*, 778 F.3d 834, 841 (9th Cir. 2015); *Mendoza v. Nordstrom, Inc.*, 2015 Cal. LEXIS 2399 (2015).

III. STANDARD FOR ANALYZING REST DAY LAWS

In determining the meaning of a statute, courts "look first to the words of the statutes, giving them their usual and ordinary meaning." *Lennane v. Franchise Tax Bd.*, 9 Cal.4th 263, 268 (1994) (internal quotations omitted). "If there is no ambiguity in the language of the statute, 'then the legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" *Id.* (citations omitted); *Nolan v. City of Anaheim*, 33 Cal.4th 335, 340 (2004) ("When the language of a statute is clear, we need go no further."); *Klein v. U.S.*, 50 Cal.4th 68, 77 (2010) (explaining courts "look first to the words of the statute, 'because the statutory language is generally the most reliable indicator of legislative intent'" (citation omitted)).

If the statutory language is "susceptible of more than one reasonable interpretation," courts may use a "variety of extrinsic aids" to ascertain and

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[61] AB, pp.5-6.

effectuate the legislative intent. *Nolan*, 33 Cal.4th at 340. These extrinsic aids include examination of the statutory scheme in which the statute appears, the legislative history, contemporaneous administrative construction, the historical circumstances behind the law's enactment, and public policy. *Id*: *Klein*, 50 Cal.4th at 77. Courts "may consider the likely effects of a proposed interpretation because '[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.'" *Klein*, 50 Cal.4th at 77 (citations omitted); *Burns v. Mass. Bonding & Ins. Co.*, 62 Cal.App. 2d 962, 971-72 (1944) ("it is the duty of the courts, within the framework of the statutes passed by the Legislature, to interpret the statutes so as to make them workable and reasonable"). As provided in Code of Civil Procedure section 1858:

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

The plain meaning of the rest day statutes and all available extrinsic aids, including the relevant statutory framework, legislative/regulatory history and public policy considerations, confirm: (1) the rest day statutes must be applied on a weekly basis; (2) the rest day statutes do not apply when an employee works six or fewer hours on any one day of the week; and (3) "cause" as used in Section 552 means "require."

IV. SECTIONS 551 AND 552 REQUIRE EMPLOYERS TO PROVIDE AT LEAST ONE REST DAY EACH WORKWEEK

Since 1941, Section 556 has explicitly provided that Sections 551 and 552 are to be applied on a "week[ly]" basis. In 1999, the Legislature not only re-confirmed the weekly application, but further confirmed the weekly measuring period is a fixed, not rolling, measuring period that must begin on the same day each week.

All extrinsic aids also confirm that a workweek measuring period applies: (1) all comparable obligations in the same statutory chapter, including Section 510 providing seventh day overtime premiums, apply a workweek measuring period; (2) the regulatory history extending back to the 1917 wage order confirms a weekly measuring period; (3) the history of Sections 551 and 552 confirms the Legislature's intent was to provide a day of rest on a fixed weekly basis, with the "in seven" representing a secular alternative to "Sunday" rest laws; and (4) a workweek measuring period best effectuates the Legislature's purpose of protecting employees and ensuring workplace flexibility by avoiding rigid scheduling and unmanageable policing requirements.

A. The Plain Meaning Of The Rest Day Laws Establish That Rest Days Are Measured On A Workweek Basis

Petitioners arbitrarily and incorrectly restrict their analysis of the appropriate measuring period for the rest day laws to the language of

Sections 551 and 552 alone.[62] While Sections 551 and 552 establish an employer's duty to provide a rest day, since 1941 Section 556 has defined how to measure compliance with the rest day laws. Section 556 entitled, "***Application of*** §§ 551 and 552," confirms that the rest day laws are to be measured on a weekly basis: "***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*** or six hours ***in any one day thereof [referring to week].***" (Emphasis added). Indeed, when Section 556 was originally enacted, its impact on the Labor Code was explained in the 1941 Summary Digest of Statutes Enacted: "Declares provisions [of rest day laws] do not apply when hours do not exceed 30 in any ***week*** or 6 in any one day of that ***week***." Request for Judicial Notice ("RJN"), Ex. 27 (emphasis added). Thus, by the express terms of Section 556, compliance with Sections 551 and 552 must be measured on a "week[ly]" basis.

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[62] Moreover, as discussed in Section IV.D. below, the Legislature's reference to "one day's rest in seven" is a reference to the seven-day week. The "in seven" language was simply a secular reference to avoid constitutional challenges to Sunday laws. Indeed, since at least 1936, California courts have interpreted the rest day laws to apply on a workweek basis. *See, e.g., In Re Boehme*, 12 Cal.App.2d 424, 429 (1936) (finding a purported rest day law prohibiting barbers from opening their shop more than six days a week to be an unlawful restraint of trade in part because Sections 551 and 552 already provided for rest days by "limiting the number of days ***per week*** that any employee may work"); *Deese v. City of Lodi*, 21 Cal.App.2d 631, 639 (1937) ("So far as one day's rest ***every week*** is concerned, that is amply provided for by [Sections 551 and 552.]") (emphasis added).

Moreover, in 1999, the Legislature enacted Assembly Bill 60 ("AB60"), in part, to add key definitions to the statutory chapter in which the rest day statutes appear. These definitions included the definition of "week." RJN, Ex. 30, p.5. When the Legislature added the definition of "week" in 1999, it is presumed to have understood that Section 556 already mandated that the rest day laws be applied on a "week[ly]" basis. *See Singh v. Super. Ct.*, 140 Cal.App.4th 387, 400 (2006) ("The Legislature is presumed to know existing law at the time it enacts a statute.").

And here, there can be no dispute that when the Legislature added the definition of "week" in 1999, it understood that measuring period would be applicable to Sections 551 and 552. Prior to AB60's passage, Section 556 exempted an employee and employer from all statutory obligations found in ***the chapter,*** which up until AB60 included only rest day obligations. RJN, Ex. 26 ("This ***chapter*** shall not apply...."). AB60 amended Section 556 to apply specifically to only Sections 551 and 552.[63] *See* RJN, Ex. 30, p.3 ("Under existing law, employment [described in Section 556 is] exempt from the general provisions of the Labor Code

[63] Thus, Petitioners are incorrect when they assert that "'workweek' was not utilized in any way" in Sections 551 and 552. MOB, pp.17-19; GOB, pp.11-12. In fact, the Legislature has twice amended the statutory chapter to confirm the rest day laws must be measured on a weekly basis: (1) in 1941, the Legislature enacted Section 556 to confirm the rest day laws were to be applied on a weekly basis (RJN, Ex. 26); and (2) in 1999, the Legislature added the definition of week to the chapter ***and*** amended Section 556, including its weekly measuring period, to apply specifically to Sections 551 and 552. RJN, Ex. 30; Cal. Lab. Code §500.

relating to the hours and days that constitute a workday and a workweek....This bill would clarify that the exemption applies to the requirements for a day's rest [i.e., Sections 551 and 552].”). By limiting Section 556 to apply specifically to the rest day laws, the Legislature confirmed Section 556, and its weekly measuring period, provides the measuring period for compliance with Sections 551 and 552.

Through AB60, the Legislature further confirmed that the weekly measuring period in Section 556 would be a fixed, not a rolling, one. Section 500 defines “week” to mean, “any seven consecutive days, ***starting with the same calendar day each week***.” (Emphasis added.) This definition is consistent with the common definition of “week” as a fixed period of seven days beginning on either Sunday or Monday. *See* RJN, Exs. 1 (Webster's New International Dictionary 2896 (1940) defining “week” as “[a] period of seven days, usually reckoned from one Sabbath or Sunday to the next”), 2 (Webster's New International Dictionary 2896 (1948), same), 3 (Merriam-Webster's Collegiate Dictionary 1418 (2004), same), 4 (Black's Law Dictionary 1731 (2009), same), 5 (Oxford English Dictionary (2015), same). Thus, the weekly measuring period is indisputably a fixed period, not a rolling one.

The DLSE has also confirmed that the weekly measuring period for the rest day laws is fixed, not rolling. RJN, Ex. 43 (DLSE Manual §48.1.3.1). Section 48.1.3.1 of the DLSE Manual affords employers the

right to designate their own fixed workweek. If they do not, the state will use a default, fixed workweek:

> Normally the workweek is the seven-day period used for payroll purposes. If it is not otherwise established in the record, for enforcement purposes DLSE will use the calendar week, from 12:01 a.m. Sunday to midnight Saturday, with each workday ending at midnight.

Id. Therefore, the rest day laws are to be applied on a fixed weekly basis, not on a rolling period of any seven days.[64]

Finally, several of the authorities cited by Petitioners themselves confirm rest day laws should be applied on a weekly basis: "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.'" GOB, p.15; MOB, p.21, both citing *McGowan v. Md.*, 366 U.S. 420, 479 (1961); *see also* MOB, p.26 (quoting §48.3 of the DLSE Manual titled "Work On Seventh Day In ***Workweek***"), p.27 (quoting DLSE Manual §48.3.1 referencing "7 days in a ***workweek***" and California Labor Law Digest stating "every employee is entitled to at least one day off in a seven-day ***workweek***"), p.28 (quoting §4.1 of Simmons' *Wage and Hour Manual* describing Section 556's exemption as being measured based on a "***week***") (emphasis added).

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[64] Here, Nordstrom defined its workweek from Sunday through Saturday. MER01046, 32:21-22.

B. The Statutory Framework Of The Rest Day Laws Confirm One Rest Day Must Be Provided Each Workweek

The statutory framework of the rest day laws further establishes the relevant measuring period is a workweek rather than a rolling seven day period.

First, every employer obligation in the same statutory chapter—except for the meal period obligation, which is necessarily a daily obligation based on hours worked—is measured on a weekly basis. *See* Cal. Lab. Code §§ 510 (using "workweek" measurement for overtime pay); 511 (alternative "workweek" schedules); 513 (make-up time for hours "in one workweek"); 556 (stating that the rest day obligations in Sections 551 and 552 apply on a "week[ly]" basis).

Second, the seventh day overtime provisions in Section 510 expressly refute Petitioners' proposed rolling seven-day measuring period. Under Section 510, the seventh day overtime premium is owed ***only*** when an employee works seven days in a workweek—***not on a rolling basis.*** RJN, Ex. 42, p.6 ("premium pay for the 'seventh day of work in any one workweek' refers to the seventh consecutive day of work in a workweek"). ***It is illogical that the Legislature would make it a criminal act to permit employees to work seven consecutive days on a rolling basis, while explicitly allowing employees to work seven consecutive days in a workweek so long as overtime is paid.*** *See Yoffie v. Marin Hosp. Dist.*, 193

Cal.App.3d 743, 748 (1987) ("[W]e cannot read words or sections of statutes in isolation. Every statute must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect.").

Indeed, the Legislature enacted Section 510, with its weekly overtime standards, knowing full well an employee could work ***up to 10 consecutive days*** on a rolling basis at 8 hours per day ***for 80 hours of work, with no overtime due***:

Sun.	**Mon.**	**Tues.**	**Wed.**	**Thurs.**	**Fri.**	**Sat.**	**Total Hours**
0 hrs	0 hrs	8 hrs	8 hrs	8 hrs	8 hrs	8 hrs	**40 hrs**
8 hrs	8 hrs	8 hrs	8 hrs	8 hrs	0 hrs	0 hrs	**40 hrs**

See e.g. Cal. Lab. Code §510 (requiring overtime after 8 hours a day, 40 hours in a week and on "seventh day of work in any one workweek"); RJN, Ex. 43 (DLSE Manual §48.1.3.2: "If an employee's workweek begins on Monday morning, but she is not called in to work until Wednesday to work seven consecutive 8-hour days, until Tuesday, she is not due any overtime. His or her workweek ends Sunday night and she has only worked 40 hours with no daily overtime Wednesday through Sunday. Monday begins a new workweek, and she could work 8-hour days through Friday without any overtime due, thus having worked 10 consecutive days without overtime."); *Seymore v. Metson Marine, Inc.*, 194 Cal.App.4th 361 (2011) *overruled on*

other grounds in Mendiola v. CPS Sec. Solutions, Inc., 60 Cal.4th 833, 846 (2015) (it is "widely recognized" that "schedules may entail employees working more than 40 hours in a calendar week or more than seven consecutive days without benefit of the overtime premium otherwise required if the workdays fall into more than one 'workweek'").

The statutory framework of Sections 551 and 552 thus firmly establishes employers must provide rest days on a workweek basis.

C. The Regulatory History Of The Mercantile Wage Orders Confirms Sections 551 and 552 Apply On A Workweek Basis

The interaction between the early mercantile wage orders and the rest day statutes also establishes Sections 551 and 552 must be measured on a fixed workweek basis. The California Industrial Welfare Commission ("IWC") was vested with the authority to issue wage orders, which govern working conditions for employees in various industries.[65] With only minor alterations in wording, the early mercantile wage orders mandated: "no [employer] shall employ, or suffer or permit ***any woman or minor*** to work in any mercantile establishment more than...***six (6) days in any one week.***" *See* RJN, Exs. 31-39 (wage orders 1917-1963) (emphasis added). The 1943 mercantile wage order confirmed the weekly measuring period was fixed:

[65] "[T]he IWC's wage orders are entitled to 'extraordinary deference, both in upholding their validity and in enforcing their specific terms.'...The IWC's wage orders are to be accorded the same dignity as statutes." *Brinker*, 53 Cal.4th at 1027 *quoting Martinez v. Combs*, 49 Cal.4th 35, 61, 65 (2010); Cal. Lab. Code §§1173, 516.

"Every woman and minor shall have one day's rest in seven. ***Sunday shall be considered the established day of rest...unless a different arrangement is made by the employer for the purpose of providing another day of the week as the day of rest.***" RJN, Ex. 35, §3(C) (emphasis added).

Importantly, the Legislature originally intended the wage orders, to provide ***additional protections***—beyond those contained in the statutes—***for women and minors***, who were considered particularly vulnerable at the time. *Cal. Labor Fed'n, AFL-CIO v. Indus. Welfare Comm'n*, 63 Cal.App.4th 982, 998 (1998) ("From 1913 to 1973 there were paternalistic...rules for women and minors, but not for the male adult employees...."). Petitioners cannot be correct that Sections 551 and 552 are to be measured on a rolling basis. Otherwise, contrary to their purpose, the early wage orders would have provided ***less*** protection to women and minors by requiring only that they could not work over six days in a workweek, while the Labor Code provided stricter protections for male employees by not permitting them to work more than any rolling six consecutive days.

Moreover, ever since the wage orders were amended to apply equally to all employees, the rest day provisions have still explicitly applied on a workweek basis:

> Employment beyond...six (6) days in any one ***workweek*** is permissible provided the employee is compensated for such overtime....

> An employee may be employed on seven (7) workdays in one ***workweek*** with no overtime pay required when the total hours of employment during such ***workweek*** do not exceed thirty (30) and the total hours of employment in any one workday thereof do not exceed six (6).

RJN, Ex. 41, §3(A),(F) (1976 wage order) (emphasis added). As the Ninth Circuit noted, "The phrasing of the Wage Order suggests...sections 551 and 552 apply to a 'workweek....'" *Mendoza,* 778 F.3d at 839.

Guidance from the DLSE regarding the current wage order similarly states: "the purpose of the seventh day [overtime] premium is to provide extra compensation to workers ***who are denied the opportunity to have a day off during the workweek.***" RJN, Ex. 42, p.6 (emphasis added). Indeed, Mendoza cites to a 1999 DLSE Memorandum,[66] where in the context of explaining the seventh day overtime premium, the DLSE implicitly condoned scheduling employees to work more than six consecutive days on a rolling basis:

> An employer has no pre-designated workweek. An employee of that employer works the following schedule: Sunday-off; Monday-off; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-8 hours; Saturday-8 hours; Sunday-8 hours; Monday-8 hours; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-off; Saturday-off. Is the employee entitled to any...seventh day premium pay? Answer-NO....***[E]ven though the employee worked ten days in a row, there is no seventh day premium pay, because the employee did not work seven consecutive days in any one workweek.***

[66] MOB, pp.24-25.

RJN, Ex. 44, p.2; *see also Yamaha Corp. of Am. v. St. Bd. of Equalization*, 19 Cal.4th 1, 22 (1998) (Mosk, J., concurring) ("the administrative agency—by virtue of the necessity of performing its administrative functions—creates a body of de facto law in the interstices of statutory law, which is relied on by the business community and the general public to order their affairs and, after a sufficient passage of time, is presumptively accepted by the Legislature"). Thus, as Petitioners' own research confirms, the regulatory history of the mercantile wage orders and accompanying guidance from the DLSE establish employers must provide rest days on a workweek basis.

D. The History Of The Rest Day Laws Confirms A Workweek Interpretation

The historical significance of a "day of rest" also supports a workweek measurement period. *See McGowan*, 366 U.S. 420. The Biblical day of rest, Sunday, falls within a seven-day week, not a rolling seven-day period. *Id.* (evaluating constitutional challenges to laws restricting sales on Sundays and noting "undeniably religious" nature of predecessor laws). Consequently, the phrase "in seven" was a commonly-recognized secular alternative to explicit "Sunday" restrictions and was designed to avoid establishment clause challenges. *Id.* at 517 (opining a Legislature could "convert[] the Sunday labor ban, in effect, into ***a day-of-***

rest-in-seven statute, with choice of the day left to the individual") (emphasis added).

In *Ex Parte Newman*, this Court declared a 1855 law prohibiting shops from opening on Sunday unlawful, primarily because the law interfered with religious freedom since it designated Sunday (as opposed to any other day) as a rest day and therefore violated the Constitution by establishing a compulsory religious observance. *Ex Parte Newman*, 9 Cal. 502 (1858). In response, the California Legislature again passed a rest day law in 1861, but changed the phrasing to emphasize its civil rather than religious aspects. *See Ex Parte Andrews*, 18 Cal. 678 (1861). This time, this Court found the rest day law constitutional, focusing its analysis on the law's secular purpose, including by using the phrase, "one day's rest in seven," to describe the law. *Id.* at 683-86. Although upheld, the law was later repealed and additional "Sunday" rest laws were implemented and subsequently attacked in the courts. *See, e.g., Ex parte Westerfield,* 55 Cal. 550 (1880) (finding law that prohibited Sunday work for bakers unlawful); *Ex Parte Koser*, 60 Cal. 177 (1882) (finding Sunday rest statute unlawful as religious discrimination, but referencing need for "one day's rest in seven" as a "***weekly*** cessation of labor") (emphasis added).

Against this backdrop, in January 1893, the precursor bills for Sections 551 and 552 were introduced in the Labor Committee ***and*** the Committee on Public Morals, and were referenced by the San Francisco

Chronicle as the "Sunday Rest Bill." RJN, Exs. 21-24. Sections 551 and 552, with their secular language omitting any reference to Sunday and referring instead to "six days in seven," represented a final and lasting attempt by the Legislature to implement a day of rest per workweek in California after a long line of failed "Sunday" rest laws. Therefore, when the Legislature enacted Sections 551 and 552, "six days in seven" was a known and accepted way to provide a day of rest per fixed workweek without risking an establishment clause challenge. *See Boehme*, 12 Cal.App.2d at 429; *Deese*, 21 Cal.App.2d at 639.

Petitioners' rolling seven day interpretation of Sections 551 and 552 fails for multiple additional reasons. First, Petitioners ignore that Sections 551 and 552 do not use the terms "rolling" or "consecutive." *Cf., e.g.,* 2 Cal. Code Regs. §11090(b) (specifically permitting a "rolling" period to calculate protected leave). Instead, Section 552 prohibits employers from requiring an employee to work more than six days "in seven." If the Legislature wanted to prohibit working more than any six rolling or consecutive days, it could have eliminated the "in seven" language as superfluous. Section 552 would then prohibit an employer from causing "his employees to work more than six days," as opposed to "six days in seven." The only way for "in seven" to have meaning is for it to reference the fixed measuring period of the 7-day workweek.

Second, while Petitioners argue that the term "week" is not found in Sections 551 and 552, as noted in Section IV.A. above, they ignore Section 556 and its imposition of a weekly measuring period for Sections 551 and 552. It would be improper to apply Sections 551 and 552 on a rolling basis when Sections 500 and 556 require that they be applied on a fixed, weekly basis. Sections 551, 552 and 556 all relate to the same subject matter in the same statutory chapter and should be viewed in harmony with one another, which requires the application of a workweek standard.

E. A Workweek Interpretation Benefits Employees

Public policy and the protective purpose of the Labor Code also mandate a workweek interpretation. By contrast, adopting a rolling rest day standard would (1) create a rigid rest day scheduling requirement for employees; and (2) impose unmanageable policing requirements on employers and managers—***even when employees, like Mendoza and Gordon and their coworkers, prefer and consistently ask for flexibility in workplace scheduling.***

A rolling measurement period would necessitate employers to designate and employees to take the ***same*** rest day each week, with no flexibility for personal needs. For example, a hypothetical employee who works six days a week and is designated to take Wednesday off would

almost always have to take Wednesday off.[67] The employee would ***never*** have the option to take a rest day on Thursday, Friday or Saturday of the following week to attend a child's event, a wedding, or any other personal event, because doing so would result in the employee working more than six consecutive days between the two workweeks:

Sun.	**Mon.**	**Tues.**	**Wed.**	**Thurs.**	**Fri.**	**Sat.**
Work	Work	Work	Rest	Work	Work	Work
Work	Work	Work	Work	Work	Work	Rest

This same problem would also impact employees who receive two rest days (as Nordstrom employees do). For example, an employee who is typically scheduled to take Wednesdays and Thursdays off would never have the option of taking Friday and Saturday of the following week off to attend a personal event without working over six consecutive days:

Sun.	**Mon.**	**Tues.**	**Wed.**	**Thurs.**	**Fri.**	**Sat.**
Work	Work	Work	Rest	Rest	Work	Work
Work	Work	Work	Work	Work	Rest	Rest

Thus, the rolling measurement period espoused by Petitioners would actually work to employees' detriment by limiting flexibility in scheduling

[67] The employee could take off an earlier day in the week, such as a Monday or Tuesday, but then the following week, that employee could not go back to their customary schedule of taking Wednesday off without working more than six consecutive days.

employees' rest days. *See Klein*, 50 Cal.4th at 77 (consideration should be given to the consequences that will flow from a particular interpretation); *McGowan*, 366 U.S. at 517 (noting that "choice of the [rest] day" should be "left to the individual"). Such a result is unwarranted. There is every indication that the California Legislature intended to provide employees the opportunity to work more than six consecutive days over two workweeks and to schedule rest days flexibly.

Likewise, Petitioners' rolling rest day interpretation would deter employers from permitting employees to make changes to their schedules. Many employers, like Nordstrom, are open each day of the week, and their employees may work variable schedules, including opening, mid, and closing shifts. If, as Petitioners suggest, employers are required to police rest days on a rolling basis, managers are likely to prohibit employees from trading shifts independently for fear such trades will result in more than seven consecutive days of work. Likewise, the complexity of managing employee schedules on a rolling basis, rather than the set workweek basis on which managers create schedules and manage labor budgets, will inevitably prompt managers to reject requests for schedule changes for fear such changes will unwittingly result in a violation of the rest day laws and create criminal liability.

In summary, this Court should interpret California's rest day laws in the context of the plain meaning of the statutes, the statutory scheme, the

IWC's contemporaneous interpretation, the historical context of Sunday rest laws and the public policy interests of employees in California. Interpreting the rest day laws in this full context requires this Court to find employers must provide rest days on a workweek basis.

V. THE REST DAY RULES DO NOT APPLY TO AN EMPLOYEE WHO WORKS LESS THAN SIX HOURS ON ANY ONE DAY OF THE WORKWEEK

The trial court correctly concluded that under Section 556 employees who ***either*** (1) work 30 hours or less in the week ***or*** (2) work six hours or less on any one day of the week may be required to work more than six days in seven. The plain language of the statute as well as extrinsic aids support the trial court's conclusion.

In contrast, Petitioners' interpretation would impermissibly change the language in Section 556 in two respects. First, it would require the Court to substitute "and" for "or" in Section 556. Second, it would require the Court to replace "any one" with "each" or "every" in Section 556. As set forth below, such an interpretation would violate the cannons of statutory interpretation and betray the plain language of the statute.

A. The Plain Meaning Of Section 556 Establishes The Rest Day Laws Do Not Apply To Employees Who Work Six Or Fewer Hours In Any One Day Of The Week

Section 556 states: "***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 ***or six hours in any one day thereof.***" (Emphasis

added.) Thus, the trial court correctly concluded the rest day statutes do not apply under two separate and distinct scenarios:

> Section 556 exempts employers from providing a seventh day of rest to their employees when the total hours of employment in a week do not exceed thirty hours, *or* when the hours worked on any day of that week do not exceed six hours.

Mendoza, 2012 U.S. Dist. LEXIS 188379, at *37-38.

1. Petitioners Cannot Substitute "And" For "Or" In Section 556

Petitioners argue Section 556 must be interpreted to require an employee to work fewer than 30 hours per week ***and*** fewer than six hours on each day in the week to be exempt from the rest day rules.[68] But their interpretation would only apply if the statute used "and" instead of "or." It does not. "'When used in a statute, the word 'or' indicates an intention to designate separate, disjunctive categories.'" *Eddie E. v. Super. Ct.*, 234 Cal.App.4th 319, 327 (2015) (citation omitted). Courts may not change or insert language that does not appear in a statute, but must interpret the language as written. *Doe v. City of L.A.*, 42 Cal.4th 531, 545 (2007) (the court's role "is simply to ascertain and declare what is in the relevant statutes, not to insert what has been omitted, or to omit what has been inserted") (internal quotations omitted). Replacing "or" with "and" would fundamentally and improperly change the meaning of Section 556.

[68] MOB, pp.22-23; GOB, p.17.

Petitioners attempt to rely on statutory construction principles to undo the plain meaning of Section 556,[69] but such attempts must fail where the statutory language is clear. *See Nolan*, 33 Cal.4th at 340 (inquiry into statutory interpretation principles is unnecessary "[w]hen the language of the statute is clear"). Here, the plain language of the statute is unambiguous and confirms that the 30-hour weekly requirement and the 6-hour daily requirement—separated by the word "or," not joined by the word "and"—are two independent threshold inquiries for application of the rest day laws. *Castillo v. Usery*, 1976 U.S. Dist. LEXIS 13151, at *33 (N.D. Cal. 1976) ("Since the two conditions are separated by the disjunctive term 'or', the notice must be issued if either condition occurs"); *In re Hardesty*, 190 B.R. 653, 655 (D. Kan. 1995) ("A disjunctive 'or' ordinarily means that the conditions stand on equal footing and that compliance with any one condition satisfies the requirement."). In other words, if ***either*** of the two threshold limitations is met, then Sections 551 and 552 do not apply.

The Legislature concluded that employees who work six or fewer hours on any one day of a workweek have received sufficient time to recharge, and thus may be required to work all seven days of the week, with all hours worked on the seventh day paid at premium overtime rates. Cal. Lab. Code §510 (providing overtime for "seventh day of work in any one

[69] GOB, pp.16-21.

workweek"). Given the clear meaning of the terms used, there is no reason to second-guess the Legislature's policy determination. Rather, the Court should interpret and enforce the words of the statute according to their plain meaning.

2. Petitioners Also Cannot Replace "Any One" With "Each" Or "Every" In Section 556

Petitioners' interpretation of Section 556 would also require the Court to replace "any one" with "each" or "every." The plain meaning of "one" is "a single" unit, which in this case would be a single "day." RJN, Exs. 6 (Webster's New International Dictionary 1702 (1940), defining "one" as "Being ***a single unit***, or entire being or thing, and ***no more***; ***not multifold***; ***single***; ***individual***"), 7 (Webster's New International Dictionary 1702 (1948), same), 8 (Merriam-Webster's Dictionary (2015), defining "one" as "having ***the value of 1***; used to refer to ***a single*** person or thing; ***used before a noun to indicate that*** someone or ***something is part of a group of similar*** people or ***things***") (emphasis added).

Section 556 does not contain "dense grammar" as Petitioners contend.[70] It simply states: "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 or six hours in any one day thereof." With respect to the 6-hour scenario, the plain language of the statute refers to "any one day

[70] MOB, p.23.

thereof." There is no confusion regarding whether "any" in "any one day" means "one," "each" or "all." The Legislature expressly confirmed the meaning of "any" by modifying it with the word "one." *Kirby v. Immoos Fire Prot., Inc.*, 53 Cal.4th 1244, 1250 (2012) (words of the statute control); *Agnew v. St. Bd. of Equalization*, 21 Cal.4th 310, 330 (1999) ("whenever possible, significance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage").

Indeed, as the Oxford Dictionary's usage note explains, "any one" emphasizes singularity of a particular thing/person whereas "anyone" (i.e., everyone, each one) does the ***opposite*** and emphasizes inclusiveness. *See* RJN, Ex. 45 (Oxford Dictionary (2015) (usage note explaining: "Any one is not the same as anyone, and ***the two forms should not be used interchangeably***. Any one, meaning '***any single*** (person or thing),' is ***written as two words to emphasize singularity***: 'any one of us could do the job'")); *see also* RJN, Ex. 46 (Webster's New International Dictionary 2896 (1940) (defining "anyone" as: "Any person indiscriminately; anybody...often written also as two words, but ***to be disting. from any one, meaning*** 'any ***single or particular person or thing***.'")) ("any one" italicized in original, remaining emphasis added).

Moreover, if the Legislature intended to refer to every day of the workweek, it could have used "every" or "each" day of the workweek,

rather than "any one day" of the workweek. It did not.[71] *See* Cal. Code Civ. Proc. §1858 (courts may not insert words that were omitted or omit words that were inserted in interpreting statutes).

Finally, Petitioners claim Section 556 applies only to "part-time" employees and even change the question presented by the Ninth Circuit to reference "the part-time employee exception."[72] However, the phrase "part-time" does not appear anywhere in Section 556. On the contrary, Section 556 applies to "***any*** employer or ***employee***." Cal. Lab. Code §556. Furthermore, even Petitioners admit that under Section 556, the rest day laws do not apply to employees who work six or fewer hours ***each*** day of the workweek.[73] Employees who work six hours all seven days of a workweek work a total of 42 hours, a full-time schedule.[74] Thus, the second prong of Section 556—the 6 hours per day provision—plainly

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[71] Indeed, when the Ninth Circuit certified its question regarding whether the exception in 556 applies whenever an employee works six or fewer hours on "a single day" or "every day," it distinguished between the two by using the exact same verbiage—"any one day"—as the Legislature used: "Does [the Section 556] 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?" *Mendoza*, 778 F.3d at 837.

[72] MOB, pp.21, 23-26.

[73] MOB, p.23; GOB, p.17.

[74] Full-time employment is defined as 40 hours per week. Cal. Lab. Code §515(c).

establishes that Section 556 applies to both full-time and part-time employees.[75]

B. Extrinsic Aids, Including Administrative Interpretations And Secondary Resources, Confirm The Trial Court's Analysis Of Section 556's Plain Meaning

Even if the Court is inclined to conclude that the plain language of Section 556 is ambiguous, a variety of extrinsic sources, cited by Petitioners themselves, support the trial court's interpretation that employers have no duty to provide a rest day when employees work six or fewer hours in any one day in the workweek.

While Petitioners claim that secondary sources confirm their interpretation of Section 556, ***none of the authorities Petitioners cite say an employee must work six or fewer hours "each" or "every" day of the workweek***. Indeed, a number of the authorities Petitioners rely upon confirm the "any one day" interpretation by reiterating the plain language of the statute:

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[75] Petitioners quote a 1999 DLSE memorandum (discussed at page 31 above) to argue Section 556 applies only to part-time employees. MOB, pp. 24-26. However, when the cited memo refers to "such a part-time schedule," it could only be referring to the 30-hour-per-week prong of Section 556. Again, the 6-hour prong of Section 556 expressly contemplates a full-time schedule. Moreover, ***that same memorandum elsewhere provides an example of an employee who works eight hours a day for ten straight days (i.e., works a full-time schedule during two consecutive workweeks) without being owed overtime and (impliedly) without violating the rest day laws***. RJN, Ex. 44, p.2.

- The DLSE Manual at §48.3: "hours of employment do not exceed 30 in the week ***or 6 in any one day***."[76]
- The Legislative Counsel's Digest on Assembly Bill 1396: "provisions do not apply when hours do not exceed 30 in any week ***or 6 in any one day for that week***."[77]
- The California Chamber of Commerce Digest of California Labor Laws: "the hours do not exceed 30 hours a week, ***or 6 hours in any one day***."[78]
- DLSE December 23, 1999 Memorandum: "the total hours of employment do not exceed 30 hours in a week or ***six hours in any one day*** of that week."[79]

To the extent any secondary resource changes the plain language of the statute, the plain language of the statute controls. *See Lennane*, 9 Cal.4th at 268. The Court should not read an "every" into Section 556 where the Legislature chose the words "any one."

C. Public Policy Considerations Confirm The Trial Court's Interpretation Of Section 556

Petitioners argue that reading Section 556 to allow an employee to work consecutive days indefinitely, as long as the employee worked only 5.9 hours once every seven days, would defeat the purpose of the rest day

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[76] MOB, p.26 (emphasis added).
[77] MOB, p.26, n.6 (emphasis added).
[78] MOB, p.26, n.6 (emphasis added).
[79] MOB, p.25 (emphasis added).

statutes.[80] To the contrary, California's seventh day premium laws are designed to deter indefinite scheduling by requiring employers to pay premium wages for every hour worked (i.e., 1.5 times the regular rate for the first 8 hours and 2 times the regular rate for hours over 8) on a seventh day in a workweek. Cal. Lab. Code §510(a).

Relying on hypotheticals of extreme overwork, Petitioners ask the Court to reject the trial court's interpretation. However, Petitioners' conjecture can be equally matched with hypotheticals of extreme forced underwork resulting from their interpretation. Specifically, an employee who works just one hour each day for five days and 6.1 hours on the sixth day, ***for a total of 11.1 hours in the workweek***, could not be required (or per Petitioners' interpretation, even permitted) to work a seventh day:

Sun.	**Mon.**	**Tues.**	**Wed.**	**Thurs.**	**Fri.**	**Sat.**	**Total Hours**
1 hr	1 hr	1 hr	1 hr	1 hr	6.1 hrs	0	11.1

Indeed, under Petitioners' interpretation, if the employee did work a seventh day, the employer would owe PAGA penalties and be guilty of a misdemeanor. This Court does not have to ponder such extremes because the plain language of Section 556 governs: Sections 551 and 552 do not apply when the total hours of employment do not exceed "six hours in ***any one day of the workweek***." (Emphasis added).

[80] MOB, p.29; GOB, p.21.

The Legislature made a policy determination that employees who work six or fewer hours on any one day of the workweek have received sufficient rest that they may be required to work an additional day. This Court should not second-guess the Legislature's judgment. Rather, the Court should interpret the statute according to its plain terms.

VI. REST DAY LAWS PROHIBIT AN EMPLOYER FROM "CAUSING" EMPLOYEES TO WORK MORE THAN SIX CONSECUTIVE DAYS, BUT EMPLOYEES MAY VOLUNTARILY CHOOSE TO WORK THROUGH REST DAYS

The plain meaning of "cause" and extrinsic aids confirm that Nordstrom's practice of providing designated rest days fully complied with Sections 551 and 552.

The plain meaning of "cause" is to "require," i.e., to force, coerce, or pressure an employee to work over six consecutive days.[81] Further, as clarified in *Brinker* and applied by the trial court, this standard also prohibits "creating incentives to forgo, or otherwise encouraging the skipping of legally protected [rest days]." *Brinker Rest. Corp. v. Super. Ct.*, 53 Cal.4th 1004, 1040 (2012); *Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *23-29 (concluding, "it is clear that Nordstrom ***did not*** cause Mr. Mendoza, ***either explicitly or implicitly***, to work more than six consecutive days") (emphasis added). Likewise, the legislative and regulatory history of the rest day laws and public policy all confirm the rest day laws prohibit an

[81] *See* Section VI.A. below.

employer from requiring an employee to work over six days in seven, but permit an employee to voluntarily choose to work through his/her designated rest day.

Relying on an interpretation of "cause" that has no basis in common parlance or legislative history, Petitioners argue that an employer may never ***permit*** an employee to work more than seven consecutive days, even when the employee wants to do so for personal reasons.[82] The scope and implications of Petitioners' proposed interpretation are enormous. For example, under Petitioners' interpretation of Sections 551 and 552:

- No employee who wishes to earn the premium pay associated with working the seventh day in a workweek (i.e., 1.5 times the regular rate for the first 8 hours and 2 times the regular rate for hours over 8) to fund their child's education or a family vacation could do so.
- No employee who wants to trade shifts to work seven days in one workweek to enlarge vacation time in a subsequent workweek could do so.
- No employee who wants to trade shifts to work seven days in one workweek to free up a day the following workweek to attend a wedding, a child's school performance, or any number of other personal events could do so.

[82] *See* MOB, pp.32-33; GOB, p.22.

Moreover, the rest day laws apply to ***all*** employees, not just non-exempt employees. *See* Cal. Labor Code §§ 551 ("***Every person*** employed in ***any occupation of labor*** is entitled to one day's rest therefrom in seven"), 552 ("***No employer of labor*** shall cause his employees to work more than six days in seven.") (emphasis added). Thus, no lawyer, corporate executive, banker, small business/close corporation owner or any other employee could ever voluntarily choose to work seven days in a workweek based on Petitioners' reading of the law.

Surely, this is not what the Legislature, which amended the chapter to ensure workplace flexibility, intended. *See Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal.4th 995, 1003 (2001) (statutes are construed "with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences") (internal quotations omitted).

The correct interpretation, arrived at by the trial court after careful consideration of employees' best interests, is that an employer may not require an employee to work all seven days in a workweek, but employees afforded a day of rest may nonetheless voluntarily choose to work on their designated rest day(s). This interpretation achieves a balance between protecting an employee's right to a rest day and protecting the employee's right to request a work schedule that accommodates his/her personal priorities. It also aligns with the policy of affording employees scheduling

flexibility, which guided this Court's interpretation of the meal period statute located in same chapter. *See Brinker,* 53 Cal.4th 1004.

A. Sections 551 and 552's Plain Meaning Confirms "Cause" Means To Require Or Force

Section 551 states every employee is "entitled" to one day's rest in seven. The plain meaning of "entitled" is to "designate" or "furnish." RJN, Exs. 14 (Standard Dictionary 608 (1894), defining "entitle" as "1. ***To give a*** title, name, or ***definite designation*** to; name; ***designate***...2. To ***bestow a claim*** or right upon; ***give a right to receive*** or require"), 15 (Webster's Revised Unabridged Dictionary 497 (1913), defining "entitle" as "[t]o ***give a claim to***; to qualify for, with a direct object of the person, and a remote object of the thing; ***to furnish with grounds for seeking or claiming*** with success"), 16 (Merriam-Webster's Collegiate Dictionary 417 (11th ed. 2004), same), 17 (Oxford English Dictionary (2015), defining "entitle" with historical etymology extending back to 1471 as "To ***furnish*** (person) with a 'title' *to* an estate....[T]o give (a person or thing) ***a rightful claim to*** a possession, privilege, designation, mode of treatment, etc.") (emphasis added). Thus, the legal duty arising from Section 551, i.e., the duty to designate or furnish a rest day, tracks the legal duty created by Section 512, which this Court held in *Brinker* requires employers to "provide" meal periods. *See Brinker,* 53 Cal.4th at 1040-41. *Brinker* clarified that once an

employer satisfies its duty to provide meal periods, employees may choose whether to take them:

> ***An employer's duty*** with respect to meal breaks...***is an obligation to provide a meal period to its employees.*** The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and ***permits them a reasonable opportunity to take an uninterrupted 30-minute break***, and does not impede or discourage them from doing so....***[T]he employer is not obligated to police meal breaks and ensure no work thereafter is performed.***

Brinker, 53 Cal.4th at 1040 (emphasis added).

Separately, Section 552 states employers shall not "cause" employees to work over six days in seven. The plain meaning of "cause" is to "compel" or "force." RJN, Exs. 9 (Standard Dictionary (1894), defining "cause" as "1. To ***be the cause or occasion of***; ***produce***; effect; ***bring to pass***. 2....To lead, ***induce, make, or compel*** (one to do something)...." (emphasis added)), 10 (Webster's Revised Unabridged Dictionary (1913), defining "cause" as "***To effect*** as an agent; ***to produce***; to be the occasion of; ***to bring about***; to bring into existence; ***to make***" (emphasis added)), 11 (Merriam-Webster's Dictionary (2004), same), 12 (Oxford English Dictionary (2015), defining "cause" with historical etymology extending to 1340 as "1. To be the cause of; ***to effect***, ***bring about***, produce, induce, ***make***; 2. To actuate, move, ***force***, ***drive*** (an agent) to (some action or emotion)" (emphasis added)). Hence, a violation of Section 552 occurs only if an employer compels, or at a minimum, actively encourages an

employee to work over six days in a workweek. This interpretation of "cause" aligns with this Court's interpretation of "require" as used in Section 226.7, which prohibits employers from "requiring" an employee to work through a mandated meal period. Both "cause" and "require" mean to "compel" or "coerce." RJN, Exs. 9, 11, 13, 19 (Merriam-Webster's 2004 defining "require" as to "impose a compulsion or command on: COMPEL").

Indeed, the California Legislature confirmed that "cause" as used in Section 552 means "require" when it amended Section 556 in 1999 as part of AB60, noting: "This bill would clarify that the exemption [in Section 556] applies to the requirements for a day's rest within a period of 7 days of labor and ***the prohibition against requiring*** an employee to work more than 6 days in 7."[83] *See* RJN, Ex. 30, p.3 (emphasis added). Likewise in *Boehme*, 12 Cal.App.2d at 429, the court also construed Section 552 as only prohibiting employers from requiring work on the seventh day: "The petitioner here, however, is not charged with such a violation; and it is obvious that he could keep his establishment open every day of the year

[83] Notably, Mendoza himself cites authority supporting this conclusion, quoting the California Employer Advisor §6.18 stating: "Employees generally cannot ***be required*** to work more than 6 days in every 7." MOB, p.28 (emphasis added).

and still not ***require*** his employees (if any) to work more than six days a week."[84] (Emphasis added.)

Thus, Petitioners' comparison[85] of "cause" in Section 552 and "provide" in Section 512 misses the point. The "entitled to" language of Section 551 tracks the "provide" language of Section 512, and the "cause" language of Section 552 tracks the "require" language of Section 226.7. In *Brinker*, the Court explained that where the employer "permits [its employees] a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so" the employer has fulfilled its obligations under Section 226.7. *Brinker*, 53 Cal.4th at 1040-41. Just as *Brinker* interpreted "provide" and "require" in the meal period statutes to mean that employers must make meal periods available, but need not police whether employees actually take them, Sections 551 and 552 mean that employers must make rest days available, but need not ensure they are taken.

Petitioners' proposed definition of "cause" also fails because it defies the maxim of statutory interpretation that each word in a statute must

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[84] Reading "cause" to mean "require" also aligns with other states' rest day laws, which permit employees to voluntarily choose to work on a designated day of rest. *See, e.g.,* Mass. Gen. Ls., Chapter 136 §§5,6(50) (Sunday work for retail employees allowed if voluntary); Code of Ala. §13A-12-1 (employee may not be compelled to work on Sunday); RI Gen. Ls. §5-23-2(d) (Sunday work permitted if "work performed by the employee is strictly voluntary").

[85] *See* MOB, pp.32-34.

be given significance. *See Tuolumne Jobs & Small Bus. Alliance v. Super. Ct.*, 59 Cal.4th 1029, 1038 (2014) ("courts should give meaning to every word of a statute"). Petitioners interpret the rest day statutes to create strict liability, contending an employer violates the law and commits a misdemeanor every time an employee works more than six consecutive days, ***regardless of the "cause."*** If that is what the Legislature intended, it could have simply stated, "no employee may work more than six days." The Legislature did not. Instead the Legislature used the term "cause" to confirm that there is a violation only when an employer actively requires the employee to forego his/her rest day. Because the term "cause" must be given significance, it cannot include simply allowing an employee to work a seventh day as Petitioners suggest.[86] *See id.*

Petitioners' contention that "cause" means "permit" is also at odds with the common understanding of the word "permit." "Permitting" conduct is not the same as "causing" it. "Permit" connotes ***a lack of*** action, whereas "cause" connotes ***active conduct*** aimed at achieving (or compelling) a particular result. *Compare* RJN, Exs. 13 (American Heritage Dictionary (2015), defining "cause": "To be the cause of or ***reason for***; result in" and "To ***bring about or compel by authority or force***" (emphasis

[86] *See* MOB, pp.32-33 (suggesting a definition of "cause" that includes to "schedule [regardless of the reason]...suggest, encourage, reward, incentivize ***or*** permit"); GOB, p.22 (asserting that "allowing" an employee to work a seventh day is the same as "causing" work on a seventh day).

added)) *with* 20 (same source defining "permit": (1) "To allow the doing of (something); consent to"; (2) "To grant consent or leave to (someone); authorize"; and (3) "To afford opportunity; allow: *if circumstances permit*").

Gordon provides a definition of "cause" from the 1891 Black's Law Dictionary, which defines the term, in part, as "that which ***produces an effect***; whatever moves, ***impels*** or ***leads***."[87] This definition comports precisely with Nordstrom's interpretation of the word—an employer must engage in active conduct in order to "cause" an employee to work through a rest day. Neither the Black's definition nor any other authority cited by Petitioners supports their assertion that "cause" includes passive conduct such as to allow or permit. Indeed, Gordon omits the remaining portion of the Black's definition, which states: "The civilians use the term 'cause,' in relation to obligations, in the same sense as the word 'consideration' is used in the jurisprudence of England and the United States. It means ***the motive, the inducement*** to the agreement[.]" Black's Law Dictionary 181 (1st ed. 1891), *available at*: http://blacks.worldfreemansociety.org/1/C/c-0181.jpg (emphasis added).

Petitioners' tortured logic why "permit" and "cause" are the same therefore defies common sense and ignores the plain meaning of both terms. *See People v. Davis*, 68 Cal.2d 481, 483 (1968) ("statutes are to be

[87] GOB, p.23 (emphasis added.) .

given a reasonable and common sense construction which will render them valid and operative rather than defeat them").

B. The Statutory Framework Confirms Employees May Choose To Work Through Rest Days

1. The Statutory Framework Emphasizes The Importance Of Employee Flexibility

The statutory framework within which Sections 551 and 552 appear confirms an employer's duty is only to make rest days available, not to force employees to take them. *Securitas Sec. Servs. USA, Inc. v. Super. Ct.*, 197 Cal.App.4th 115, 121 (2011) (a statute must be construed "in the context of...the entire scheme of law of which it is a part").

Sections 551 and 552 fall within the statutes adopted in the Eight-Hour-Day Restoration and ***Workplace Flexibility Act.***[88] RJN, Ex. 30. As its title suggests, the Act's purpose was to ensure flexibility in scheduling work. Indeed, the Statement as to the Basis for the current Wage Order 7 discusses the Act's focus on, and the DLSE's interest in, providing flexibility to employees: "in the interest of...greater ***flexibility***"; "After receiving testimony and correspondence from...employers who sought ***flexibility*** in work schedules"; "The IWC received several inquiries concerning ***flexibility*** for employees switching alternative workweek options"; "In order to provide ***flexibility*** in accommodating the personal

[88] Petitioners conveniently ignore the second half of the Act's title. *See* MOB, pp.17-19; GOB, p.12. AB60's purpose was not just to restore daily overtime—it was also to ensure flexibility for scheduling work.

needs of employees, the IWC further clarified that employers may grant employee requests to switch...shifts on an occasional basis"; "These employees also emphasized the need for ***flexibility*** in work scheduling...." RJN, Ex. 42, pp.7-9 (emphasis added).

The Legislature's intent to provide employers and employees flexibility in managing work schedules is readily apparent in reading the statutory chapter in which Sections 551 and 552 appear. Throughout the chapter, a pattern exists wherein the Legislature first establishes a legal obligation and then provides flexibility in applying the obligation. For example, Section 510 requires employers to pay daily overtime when an employee works over eight hours in a workday. Then:

- Section 511 ***permits employees to choose to work*** an alternative workweek schedule, such as four 10-hour days, without imposing daily overtime obligations on the employer.
- Section 513 ***permits employees to choose*** to work over eight hours on one day of the workweek in order to take time off on another day of the workweek to attend to personal obligations, again, without imposing daily overtime obligations on the employer.

Similarly, Section 512 of this chapter requires employers to provide meal periods, but the statute permits employees to choose whether to actually take the breaks provided. *Brinker*, 53 Cal.4th at 1037, 1040-41

(compliance turns on whether employer provided a bona fide opportunity to take breaks).

This same flexibility applies to the rest day laws. Sections 551 and 552 require employers to furnish employees with a day of rest, but allow employees to choose whether to work on the designated rest day. Other provisions of the chapter confirm this interpretation. For example, Section 510 expressly contemplates that employees may choose to work on the seventh day of a workweek by providing overtime premiums for such work. Cal. Lab. Code §510; Cal. Code Regs., tit.8, §11070(3)(A)(1) ("Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime....") As noted above, it would be irrational for the Legislature to provide overtime premiums for a "seventh day of work" if the very same statutory chapter made it a criminal act to permit employees to work a seventh day. *See Singh*, 140 Cal.App.4th at 400 (the Legislature "is presumed to know existing law").

The only way to harmonize the chapter's seventh day premium provisions with the rest day provisions is to find that an employee may choose to work through his/her rest day after the employer has made it available.

2. Applying A Definition Of "Cause" That Limits Employees' Flexibility Would Undermine The Legislature's Intent And Employee Interests

The statutory framework surrounding the rest day laws also refutes Petitioners' rigid definition of "cause," which would prohibit employers from ever granting an employee's request to work a seventh day even if the employee voluntarily requested the additional work. Such a result would diminish employee rights and worker flexibility, which is the antithesis of what the Legislature intended.

Brinker acknowledged the obligation to interpret employment laws in accordance with the public policy underlying the statutory scheme and in a manner that protects employees. Still, this Court held a "make available" standard for meal periods was in the employees' best interests and a standard that forced employees to take meal periods was not. *Brinker*, 53 Cal.4th at 1026-27, 1038-41.[89] In doing so, the Court recognized that forcing an employee to take a break violates the public policy supporting employee choice and flexibility in the workplace. *See id.* Accordingly, *Brinker* held that once an employer provides the opportunity for a break,

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[89] Petitioners argue the rest day laws must be interpreted more stringently than the meal period laws because a violation of Sections 551 and 552 gives rise to a PAGA penalty claim and constitutes a misdemeanor. (MOB, pp.42-46.) However, violating the meal period laws triggers PAGA penalties and constitutes a misdemeanor as well. *See* Cal. Lab. Code §§ 2699.5 (stating violations of Sections 512, 551 and 552 can give rise to a PAGA claim) and 553 (declaring any violation of the chapter, which includes §512 and not just §§ 551 and 552, a misdemeanor). Thus, the two laws should be interpreted the same way.

there is no liability to an employee who voluntarily chooses to work instead. *Id.* at 1026-27, 1038-41.

Brinker's rationale applies equally to the rest day statutes. The employer must provide rest days, but the employee is free to choose to take the rest day or not. If an employee wants to work more to earn more money, guarantee eligibility for benefits or rearrange his/her schedule for personal needs, public policy—as evidenced in the statutory framework of the Eight-Hour-Day Restoration and ***Workplace Flexibility Act***—allows him/her to do so.

As illustration, consider the employee referenced by Mendoza as having been scheduled for over six consecutive days, Employee No. 703595.[90] That employee worked seven consecutive days from a Thursday to a Thursday. In doing so, the employee accumulated four rest days the following Friday, Saturday, Sunday and Monday. The employee then took paid time off on the following Tuesday, Wednesday and Thursday:[91]

Sun.	**Mon.**	**Tues.**	**Wed.**	**Thurs.**	**Fri.**	**Sat.**
7.5 hrs	7.5 hrs	Off	Off	7.19 hrs	7.25 hrs	7.04 hrs
7 hrs	7.17 hrs	7.11 hrs	7.32 hrs	7.12 hrs	Off	Off
Off	Off	Vacation	Vacation	Vacation		

[90] MOB, p.64; MER00589-591.
[91] *Id.*

While Mendoza uses this as an example of Nordstrom "overworking" employees, it is at least equally likely this employee ***requested to be scheduled*** for seven consecutive days across two different workweeks in order to enlarge her paid vacation, ***all while taking two rest days each workweek.*** Under Petitioners' interpretation of "cause," this employee would not have the flexibility to trade shifts in order to expand her vacation.

Likewise, here, Mendoza admittedly voluntarily sought out additional shifts because he wanted to make more money and guarantee eligibility for health benefits. He announced to coworkers and managers he wanted extra shifts and that he alone would decide whether to accept them. *Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *4-5, *23-24. Regarding Gordon, the trial court never found she worked a seventh consecutive day—even if she had, it would only have been on a single occasion due to her voluntary, personal choice to trade shifts with a co-worker. *Id.* at *8.

To allow Petitioners to assert a violation of the law—and indeed a criminal act—because they were permitted to work the schedule they desired would allow them to generate liability by manipulating the flexibility granted by Nordstrom for their benefit. As this Court recognized in *Brinker*, California law does not permit such a result. *See Brinker*, 53 Cal. 4th at 1040-41 ("employees cannot manipulate the flexibility granted them by employers...to generate [] liability").

While Nordstrom acknowledges an employer may not require or actively encourage employees to work a seventh day in a workweek, the trial court's factual findings make clear that was not the case here. Indeed, as Petitioners note, the trial court recognized the "opportunity for mischief" and the dangers in "overwork" implicit in allowing employees to choose to work over six consecutive days.[92] But the trial court nevertheless found Nordstrom did not "either explicitly or implicitly" encourage or require Petitioners to work over six consecutive days. *Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *23-29, *32. Other trial courts can and should be empowered to make this same determination—i.e., whether an employee's work on a seventh day was voluntary or required/coerced—based on facts of each case. Accordingly, Petitioners' interpretation requiring forcible rest days would be contrary to the statutory structure surrounding Sections 551 and 552, which emphasizes workplace flexibility and protecting employees, rather than imposing rigid limitations on their personal choices.

C. The Regulatory History Of Rest Day Laws Confirms Employees May Choose To Work On Their Designated Rest Day

The regulatory history of the mercantile wage order similarly confirms employees may choose to work through a rest day designated by their employer. *See Brinker*, 53 Cal.4th at 1035 (looking to wage order

[92] MOB, p.47.

history to define the employer's meal period obligations in the same statutory chapter).

As noted above, California first commissioned the wage orders in 1916 to provide greater protections for women and minors than those afforded to men. *See, e.g., Indus. Welfare Comm'n v. Super. Ct.*, 27 Cal.3d 690, 700 (1980). At the time the wage orders were first implemented, the rest day statutes already required employers to provide at least one day of rest each workweek. Still, they did not prohibit employers from permitting employees to choose to work all seven days of the week. In contrast, the original wage orders ***did prohibit employers from permitting women and children*** to work seven days a week: "[No employer] ***shall employ or suffer or permit*** a woman or minor to work in the mercantile industry more than eight hours in any one day or more than forty-eight hours in any week [i.e., more than six days a week]." RJN, Ex. 31 §7 (1917 wage order) (emphasis added). In 1943, this prohibition was strengthened:

> Every woman and minor ***shall have*** one day's rest in seven. Sunday shall be considered the established day of rest....

RJN, Ex. 35 §3(c) (1943 wage order); RJN, Ex. 28 p.8 ("many of the new [wage] orders...call for one day of rest in seven for women and minors, ***with no exemptions***") (emphasis added). Modifications to the wage orders in 1947-1963 created exceptions to the rest day provisions for women and minors, but retained the same mandate that no woman or minor "shall be

employed ... more than six(6) days in any one week..." *See* RJN, Ex. 39 §3; *see also* RJN 36-38, §3.

Then, in 1968 and 1976, when the wage order finally became applicable to ***all employees***, the ***mandatory rest day language was eliminated*** and the "permissible" standard that the rest day laws have always provided, was added: "***Employment beyond*** eight (8) hours in any workday or more than ***six (6) days in any workweek is permissible*** provided the employee is compensated for such overtime[.]" Cal. Code Regs., tit.8, §11070(3)(A) (emphasis added); RJN, Exs. 40-41; *c.f.* RJN, Exs. 32-39 (1917-1963 wage orders); *Brinker*, 53 Cal.4th at 1027 (wage orders are entitled to "extraordinary deference").

The rest day statutes, which predate the wage orders, have never contained an absolute prohibition on working more than six days. Rather, from 1893 to today, the rest day statutes have had the same core language: an employee is "entitled" to a rest day and no employer shall "cause" an employee to work more than six consecutive days. RJN, Exs. 21-23, 29; Cal. Lab. Code §§551-552. If the rest day statutes already prohibited work on more than six consecutive days for all employees, it would have been completely unnecessary to create greater protections for women and minors in the early wage orders. *See Agnew*, 21 Cal.4th at 330 (courts should avoid a construction that renders language in statutes meaningless). Petitioners' interpretation is therefore inconsistent with the regulatory

history surrounding the rest day statutes. *See Coca-Cola Co. v. St. Bd. of Equalization,* 25 Cal.2d 918, 921 (1945) ("the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized").

Petitioners argue the wage order's language permitting work on more than six consecutive days applies only when exceptions to the rest day rules exist.[93] However, there is no such limitation in Wage Order 7. Instead, it expressly states employment beyond six days in a workweek is "permissible," without any caveats. Cal. Code Regs., tit.8, §11070(3)(A).

Petitioners also urge the Court to disregard Wage Order 7 because if there is conflict between a wage order and the Labor Code, the Labor Code controls. But there is no conflict. Both state it is permissible for an employee to work a seventh day if the employee receives overtime. Cal. Code Regs., tit.8, § 11070(3)(A); Cal. Lab. Code §510. Thus, interpreting the rest day statutes to prohibit employees from voluntarily deciding to work more than six consecutive days would contradict Sections 510, 551, 552 ***and*** Wage Order 7.

Petitioners further argue the definition of "employ" means anytime an employee arrives to work, Nordstrom "caused" that employee to work.

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[93] MOB, pp.41-42.

This interpretation, however, ignores the wage orders' history in which a strict prohibition against "employ[ing] or suffer[ing] or permit[ing]" women/minors to work more than six consecutive days evolved to a standard wherein "employment beyond...six (6) days in any workweek is permissible." Cal. Code Regs., tit.8, §11070(3)(A); *c.f. Dubins v. Regents of Univ. of Cal.*, 25 Cal. App. 4th 77, 85 (1994) (explaining that courts should not assign a meaning to a statute that would render an amendment to the statute "purposeless"). Furthermore, this Court rejected nearly the same argument in *Brinker*. *Brinker*, 53 Cal.4th at 1039 (rejecting "conten[tion] that 'employ' includes permitting or suffering one to work, and so the employer is forbidden from permitting an employee to work during a meal break"). Thus, the regulatory history surrounding the rest day laws also confirms an employer's obligation is to make rest days available, not to force employees to take them.

D. Public Policy Considerations Weigh Heavily In Favor Of A "Provide" Standard And Against An "Ensure" Standard

Petitioners' interpretation of the rest day laws would benefit no one in California, save for perhaps plaintiffs' counsel who would reap the benefits of the flood of new litigation that would ensue. Employees would be harmed by an interpretation of "cause" that mandates they cannot decide for themselves whether to work a seventh consecutive day. Workplace flexibility, freedom of choice, and economic and personal opportunity

would all be diminished for vast numbers of workers without justification. There is no rational explanation why the Legislature would endorse such an outcome.

The state did not make a determination for every worker, in every situation, on every occasion, that it is always in their best interest not to work a seventh day.[94] Nor is there any public policy reason why the Legislature would want to deny employees a *bona fide* choice whether to work a seventh day. Adopting a "provide" test would protect employees from exploitation by requiring employers to make a day of rest available while still affording employees the freedom to request schedule changes to accommodate personal needs. *See Brinker,* 53 Cal.4th at 1026-27 (explaining that Labor Code provisions must be liberally construed with an eye toward protecting the interests of employees and concluding an

[94] Nordstrom fully recognizes that the state has broad powers to regulate the workplace for the health and welfare of employees. However, Petitioners' overly-paternalistic reading of the rest day laws, which would prevent employees from voluntarily working a seventh day for purely personal reasons, raises questions as to whether the law is even minimally rational so as to survive constitutional scrutiny. This is particularly true with respect to sophisticated individuals with significant bargaining power, such as lawyers, executives and bankers, who are also subject to the rest day laws. *See* Cal. Labor Code §551 (day of rest laws apply to "[e]very person employed in any occupation of labor"). This Court should avoid interpreting the rest day laws in a manner that would raise constitutional concerns. *See People v. Gutierrez,* 58 Cal.4th 1354, 1373 (2014); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (same); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (same).

interpretation of meal/rest break laws that provides employees freedom of choice best effectuates that purpose).

Practical policy considerations also weigh against imposing forcible rest days and in favor of a "provide" test. The standard in *Brinker* and applied by the trial court, that "cause" means "require," sets the appropriate balance between employee protection and scheduling flexibility. Trial courts are well-acquainted with *Brinker's* language and can similarly protect employees by determining whether an employer explicitly or implicitly required or encouraged an employee to work more than six consecutive days. *See, e.g., Koval v. Pac. Bell Tel. Co.*, 232 Cal.App.4th 1050, 1058 (2014) (applying *Brinker's* guidance that employers cannot impede or discourage employees from taking breaks, but need not ensure they are taken); *Rodriguez v. Taco Bell Corp.*, 2014 U.S. Dist. LEXIS 150702, at *18-19 (E.D. Cal. 2014) (same); *Novoa v. Charter Comm'ns., LLC*, 2015 U.S. Dist. LEXIS 53102, at *20-21 (E.D. Cal. 2015) (same). The Legislature's intent to provide employees flexibility is best effectuated by allowing trial courts and juries to determine whether an employee's decision to work a seventh day is truly "voluntary" based on the specific facts of each case. That is exactly what occurred here. *See Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *23-29.

Public policy considerations relating to California's employers and overall economic welfare further weigh in favor of a "provide" standard.

Petitioners' "ensure" standard would automatically impose liability on employers for simply allowing their employees to work a seventh day, even if the employees' decision was voluntary. The implications for employers of adopting Petitioners' interpretation would be widespread and staggering. Since at least 1968, Wage Order 7 has explicitly permitted employers to allow employees to work over six consecutive days in any workweek provided the employer pays the requisite seventh day premiums. *See* Cal. Code Regs., tit.8, §11070(3)(A); RJN, Exs. 40-41 ("Employment...more than six (6) days in any workweek ***is permissible*** provided the employee is compensated for such overtime...." (emphasis added)). And even before 1968, as Petitioners' acknowledge, there are no court decisions imposing liability on an employer for merely allowing an employee to voluntarily work a seventh day under Sections 551 and 552.

If Petitioners' interpretation of "cause" were to prevail, it could unfairly taint the practices of nearly every employer in California. It would potentially impose crushing liability on California businesses, even though the state's explicit guidance for nearly 50 years has been that allowing employees to voluntarily work a seventh day "is permissible." *See* Cal. Code Regs., tit.8, §11070(3)(A) (explicitly stating that work over six days in any workweek "is permissible" provided the employee is compensated with premium wages); RJN, Exs. 40-41. If the Court were to adopt Petitioners' "ensure" standard it would also embroil vast numbers of

employers in costly compliance efforts and potentially wreak financial havoc on California's business community for no legitimate reason. Petitioners provide no basis for ambushing Nordstrom and other California employers in this manner.

For these reasons, Petitioners' suggestion that "cause" means "permit" presents a 'lose-lose' proposition, punishing employees by limiting when they can voluntarily choose to work and punishing employers for affording that flexibility to their employees. The Legislature cannot have intended such an absurd result, which would defeat the purpose of the flexibility aspects of AB60. *See Torres*, 26 Cal.4th at 1003.

E. Under A Forcible Rest Day Standard, Compliance Requires Active Policing Of Employees' Rest Days

Petitioners attempt to distinguish *Brinker* by arguing that *Brinker* dealt with a unique catch-22 situation where "the policing required to ensure meal breaks exerts the same type of control of which the employees are supposed to be free while on break."[95] However, this rationale equally applies here and makes *Brinker* controlling. Nordstrom may no more control what its employees do on rest days than it may control what they do during meal periods. In both cases, employees must be free from employer control and therefore employees may choose to rest or work.

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[95] MOB, p.39.

Furthermore, Petitioners' argument that ensuring employees take their rest days does not require "active policing," but "appropriate scheduling," ignores the reality of Nordstrom's workplace and many others.[96] *C.f. White v. Starbucks Corp,* 497 F.Supp.2d 1080, 1088 (N.D. Cal. 2007) (recognizing that "making employers ensurers of meal breaks...would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts").

As trial testimony illustrated, Nordstrom scheduled Mendoza and Gordon to work no more than five days a week.[97] However, Mendoza sought additional shifts to earn more money and Gordon traded shifts to suit her personal interests. While Nordstrom can look to time records after the fact to identify whether an employee worked over six consecutive days,[98] the only way to definitively prevent an employee from working a seventh

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[96] MOB, pp.40-41. The factual record at trial established Nordstrom management does ***not*** always know whether a particular employee is working until after the fact because employees often independently switch or pick up shifts on short notice, without management approval or knowledge. MER01438-MER01441, 177:9-18, 178:9-179:21, 180:9-15. This is also true for other employers, including those with remote workforces or employees who can work from home.

[97] MER01045-MER01048, 31:17-32:6, 32:21-22, 33:6-34:15, MER01317-MER01318, 56:9-23, 57:16-19, MER01324, 63:2-15, MER01327-MER01330, 66:25-67:8, 68:24-69:8; MER01173, 159:19-22, MER01392-MER01393, 131:16-132:17.

[98] Even this method is not fool-proof. Gordon had no time punches on Wednesday, January 19—so Nordstrom could not possibly have known she worked that day based on time records alone. *See Mendoza*, 2012 U.S. Dist. LEXIS 188379, at *8, n.3.

day is by policing the workplace and strictly prohibiting employees from switching or picking up shifts. The Ninth Circuit recognized that if this Court defines "cause" to mean "natural and probable consequence" of one's actions, then an employer could not allow employees to trade shifts voluntarily because a natural consequence of permitting such flexibility is that an employee may want to work more than Petitioners contend the rest day statutes allow. *Mendoza*, 778 F.3d at 841. Thus, Petitioners' reading of the law would require employers to conduct the same type of policing of their employees that this Court rejected as impractical and unnecessary in *Brinker.*

F. Petitioners' Express Waiver Argument Has No Merit

Nordstrom does not dispute that when the Legislature enacts a statute with a mandatory duty, an employee may not waive the employer's obligation to satisfy that duty.[99] However, ***California's rest day laws establish only a mandatory duty to make rest days available.*** *C.f. Brinker*, 53 Cal.4th at 1034-37 (interpreting the employer's meal period obligation

[99] *See* MOB, pp.34-39, 42-49. Petitioners incorrectly assert the Legislature intended to impose a strict duty on employers to ensure rest days are taken because it used "shall" in Section 552. Although "shall" has a mandatory connotation, the examples Mendoza cites confirm the key word is the verb following "shall." Compare the mandatory duty to pay overtime wages, "work...***shall be compensated***" (Section 510) to the mandatory duty to make toilets and fresh water available, but not to force employees to use them: "toilet facilities ***shall be provided***" (Section 2350) and "employer[s]...***shall...provide***...water" (Section 2441) (emphasis added). MOB, pp.36-39.

based on the word "provide" in Section 512(a), not the statutory waiver language, and confirming employers' duty is only to make meal periods available). The record here confirms Nordstrom did so.

Petitioners contend the absence of an express statutory waiver provision in Sections 551 and 552, similar to the express waiver provisions in the meal period statute, proves rest days are mandatory.[100] This is incorrect. Petitioners' waiver analysis conflates the waiver of an employer's statutory obligation to make a rest day available with an employee's right to voluntarily decide not to take (i.e., "waive") their designated rest day. This Court confirmed that a decision not to take a break that was provided can itself be referred to as a waiver: "[n]o 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*, 53 Cal.4th at 1033 (emphasis added).

The language of the express second meal period waiver in Section 512 also confirms that a decision not to take a meal period that was provided is a "waiver." Section 512 states an employee who works more than 10 hours is entitled to a second meal period but, "the second meal period may be waived by mutual consent of the employer and the employee ***only if the first meal period was not waived.***" (Emphasis added.) An employee who is eligible for a second meal period may not, as a matter of

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[100] *See* MOB, pp.34-36.

law, "waive" the employer's ***duty to provide a first meal period*** because the employee has worked more than 6 hours. Therefore, the second prong of a second meal period waiver—that "the first meal period was not waived"—***can only be referring to a decision to decline to take the first meal period*** because an employer would be required by law to make the first meal period available. Consequently, Petitioners' attempt to distinguish *Brinker's* analysis of Section 512 from the rest day laws is unavailing.[101]

G. There Is No Obligation To Have A Written Rest Day Policy

No authority supports Petitioners' claim that Nordstrom is required to have a ***written*** policy making rest days available to employees. [102]

When the California Legislature requires employers to have written policies, it says so unequivocally. *See e.g.* Cal. Lab. Code §§ 207 (requiring posting of policy regarding scheduled paydays); 6328 (requiring

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[101] There are also no grounds supporting Petitioners' claim that a waiver of an available rest day be in writing. As this Court explained in *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 31 (1995), a "waiver may be either express, based on the words of the waiving party, ***or implied, based on conduct indicating an intent to relinquish the right.***" *Id.* (emphasis added). Again, this Court's decision in *Brinker* is instructive. Nothing in *Brinker* requires a meal period waiver to be in writing. *See Brinker*, 53 Cal. 4th at 1035-36 *accord.* Cal. Code Regs., tit.8, § 11070(11)(A) (confirming existence of statutory waivers of an employer's duty to provide meal periods where the employee works 5-6 or 10-12 hours, but only requiring a written agreement for on-duty meals); *Bradescu v. Hillstone Rest. Grp., Inc.*, 2014 U.S. Dist. LEXIS 150978, at *15 (C.D. Cal. 2014) ("[t]here is no requirement in the statute for the mutual waiver to be in writing").

[102] MOB, p.50-54.

posting of safety policies); 6404.5(c)(1) (requiring posting of smoking policy); Cal. Code Regs., tit.2, § 7291.16 (requiring pregnancy disability leave policy in employee handbook). The California Legislature has not enacted any law requiring employers to have a written rest day policy.

Moreover, the absence of a policy does not constitute a violation of the law.[103] *See, e.g., Dailey v. Sears, Roebuck & Co.*, 214 Cal.App.4th 974, 1002 (2013) ("the absence of a formal written policy explaining salaried Managers' rights to meal and rest periods does not necessarily imply the existence of a uniform policy or widespread practice of either depriving these employees of meal and rest periods or requiring them to work during those periods"); *Green v. Lawrence Serv. Co.*, 2013 U.S. Dist. LEXIS 109270, at *25 (C.D. Cal. 2013) ("under California law, the absence of a formal written policy does not constitute a violation of the meal and rest period laws"); *Roberts v. Trimac Transp. Servs. (W.), Inc.*, 2013 U.S. Dist. LEXIS 122899, at *7-9 (N.D. Cal. 2013) (same).

Regardless, here, Nordstrom satisfied its burden to provide rest days by: (1) posting the wage order, which explains California's rest day laws; (2) informing employees they were only to be scheduled for five days a week, with two days off; and (3) scheduling employees to work no more than six consecutive days in a workweek. *See Mendoza,* 2012 U.S. Dist.

[103] Otherwise, all employers would be required to provide employees with copies of the full Labor Code to ensure employees received notice of all employer obligations.

LEXIS 188379, at *3 ("[i]n creating work schedules for its employees, Nordstrom...typically schedules its hourly-paid employees to work no more than five days during each workweek"); *Perez v. Safety-Kleen Sys., Inc.*, 253 F.R.D. 508, 515 (N.D. Cal. 2008) (concluding posting of wage order is sufficient to inform employees of meal break rights). The trial court also found Petitioners did, in fact, know about their right to rest days and, with that understanding, voluntarily decided to work through their rest days on the occasions in question. *Mendoza,* 2012 U.S. Dist. LEXIS 188379, at *29-31. Consequently, Petitioners' argument that rest day rights must be in a stand-alone policy is without merit.

VII. ANY NEW INTERPRETATION OF THE REST DAY LAWS, HOWEVER UNLIKELY, SHOULD APPLY PROSPECTIVELY ONLY

Petitioners' proposed interpretation of the rest day laws is contrary to the plain language of the statutes as well as decades of enforcement guidance. If the Court were to adopt any of Petitioners' interpretations of the rest day laws, the new interpretation(s) should apply prospectively only. *See Claxton v. Waters*, 34 Cal.4th 367, 378-379 (2004) (explaining there is a "recognized exception" to the general rule that judicial decisions are to be given retroactive effect where "a judicial decision changes a settled rule on which the parties below have relied"). The considerations "relevant to the retroactivity determination" include fairness, public policy, "the reasonableness of the parties' reliance on the former rule, the nature of the

change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule." *Id.*

Here, Petitioners' interpretations of Sections 551, 552 and 556's text would fundamentally change the interpretations relied on by employers, employees and regulatory agencies for over a century. For example:

- Since 1917, the wage orders have explicitly stated their rest day provisions are to be applied on a weekly basis. RJN, Exs. 31-41 (1917-1976 wage orders). Since 1936, California courts have interpreted the rest day laws to apply on weekly basis. *See, e.g., In Re Boehme*, 12 Cal.App.2d at 429; *Deese*, 21 Cal.App.2d at 639. In 1941 (and again in 1999 with the passage of AB60), the California Legislature unequivocally confirmed the rest day laws should be applied on a weekly basis. *See* Cal. Lab. Code §§ 500, 556. And since 1999, the Legislature and the DLSE have confirmed the weekly measuring period is a fixed, not rolling, one. *See* Cal. Lab. Code § 500; RJN, Ex. 43 (DLSE Manual §48.1.3.1).
- Since 1941, the plain language of Section 556 has provided that Sections 551 and 552 do not apply when an employee works 6 or fewer hours in "any one day" of the week.
- Since 1893, Section 552 has confirmed employers violate Section 552 only if they "cause," i.e., require or compel, an employee to work more

than six consecutive days in a week. Since 1968, Wage Order 7 has unequivocally stated it "is permissible" to employ workers over six consecutive days in any workweek so long as seventh day overtime premiums are paid. *See* Cal. Code Regs., tit.8, §11070(3)(A); RJN, Ex. 40-41. Since 1999, the California Legislature has confirmed that the rest day laws are to be applied in a manner that promotes flexible scheduling. RJN, Ex. 30, 42.

- ***No California appellate court or other controlling precedent has interpreted the rest day laws as Petitioners do here.***

See Sections IV-VI above.

There is no doubt employers have ***reasonably*** relied on the prevailing interpretations of the statutory text, the wage order and other regulatory guidance. To now impose civil and criminal liability on employers based on Petitioners' novel interpretations would be unfair, undermine trust in state administrative agencies and frustrate the administration of justice. Thus, if the Court were to adopt any aspect of Petitioners' interpretation of the rest day laws (which it should not), enforcement of any new interpretation should apply only on a prospective basis.

VIII. CONCLUSION

For the foregoing reasons, this Court should hold (1) the rest day laws obligate employers to provide at least one rest day per workweek; (2)

Sections 551 and 552 do not apply when an employee works six or fewer hours in any one day of a workweek; and (3) Sections 551 and 552 require employers to make rest days available, but employees are free to choose to work on designated rest days.

Dated: September 2, 2015

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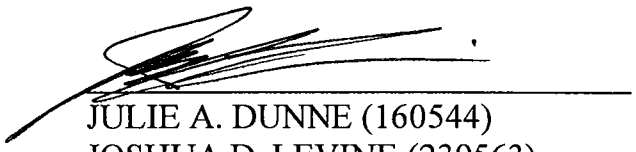
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(c), I certify that this brief is proportionally spaced in Times New Roman, has a typeface of 13 point, and contains 18,932 words as counted by Microsoft Word 2010, the word-processing program used to generate the brief. The word count is therefore below the 19,000 word limit set by the Court's July 21, 2015 order granting Nordstrom's request to file an answering brief in excess of 14,000 words.

Dated: September 2, 2015

Respectfully submitted,



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PROOF OF SERVICE BY VIA OVERNIGHT COURIER

I am employed in San Diego County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 501 W. Broadway, Suite 900, San Diego, California 92101.3577. On September 2, 2015, by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

RESPONDENT NORDSTROM INC.'S ANSWERING BRIEF

in a sealed envelope, postage fully paid, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on September 2, 2015, at San Diego, California.

Pamela Gomez