Case No. S215614

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

NYKEYA KILBY,
Plaintiff/Petitioner,

v.

CVS PHARMACY, INC,
Defendant/Respondent.

SUPREME COURT
FILED

JUL 31 2014

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KEMAH HENDERSON, et al.,
Plaintiffs/Petitioners,

v.

JPMORGAN CHASE BANK, N.A.,
Defendant/Respondent.

On Certified Questions from the United States Court of Appeals for the Ninth Circuit Pursuant to California Rule of Court 8.548
Ninth Circuit Case Nos. 12-56130 and 13-56095

PETITIONERS' REPLY BRIEF

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INTRODUCTION

All parties agree that the federal district courts below improperly construed §14(A) of the IWC Wage Orders as requiring them to count up the total number of tasks assigned to each employee and then to determine whether "many" or a "majority" of those tasks, as defined by the employer, require standing. That was the "holistic," "job-as-a-whole" approach applied by Judge Anello in denying class certification and granting summary judgment to defendant in *Kilby v. CVS Pharmacy, Inc.* and later followed by Judge Gutierrez as the basis for denying class certification in *Henderson v. JPMorgan Chase Bank, N.A.* *See* Petitioner's Opening Brief ("Opening Br.") 12-15.

Neither defendant continues to endorse that approach (which they both supported in the Ninth Circuit) or any other "quantitative" approach to analyzing "when the nature of the work reasonably permits the use of seats" within the meaning of the IWC Wage Orders. *See* CVS's Answer Brief ("CVS") 16, 28; Chase's Answer Brief ("Chase") 34-36. Moreover, both defendants largely concede that §14(A) requires courts to focus on each set of discrete workplace tasks (such as operating a cash register or conducting teller window transactions, or the types of seating-permitted tasks performed at times by the employees in plaintiffs' hypotheticals, *see* Opening Br. 19, 31-32), and that §14(A) does *not* require an aggregated analysis of all time spent performing different tasks in different parts of the workplace. *See* CVS 29-30; Chase 35-37.

Defendants still advocate what they still describe as a "holistic" approach, though, which would allow an employer to deny seating to its employees "even if *most* of the[ir] tasks could be done while seated," CVS 29 (emphasis in original), based on an ill-defined "totality of the circumstances" standard. Their new approach focuses *not* on the "nature of

the work" itself but on a combination of factors that employers could cite to justify their failure to provide seating, such as business judgment, industry custom and practice, the physical layout of each workplace, and the height and girth of each employee. *See, e.g.,* CVS 27-37; Chase 2-3, 38-42. Yet defendants fail to explain what weight should be given to any of these factors, or how *any* employee would be entitled to workplace seating under their proposed standard (except in the exceedingly rare case in which there was an industry custom or practice to permit seating, an employer's business preference that seats should be provided, similarity in the height and weight of all employees, and only "long, uninterrupted stretches of an isolated sitting-permitted duty," *see* CVS 31). Nor does either defendant even mention the "remedial" purposes of §14(A) or attempt to reconcile their totality-of-the-circumstances standard with those purposes.

Although the central dispute remains how to construe and apply §14(A), the fact that defendants no longer endorse the trial court's job-as-a-whole quantification analysis has somewhat narrowed the issues. Those issues may be more clearly addressed if the Court reformulates the certified questions (as permitted by Rule of Court 8.548(f)(5)) as follows:

> **Question 1:** Does Wage Order §14(A) entitle employees to a seat when performing a set of job duties (*i.e.*, "work") that, viewed objectively based on the physical demands, frequency, and duration of that work, can reasonably be performed while seated without interfering with the employees' performance of other job duties, even if: a) some of the employees' other job duties require standing; b) the employer trains and expects its employees to stand while performing all duties; or c) modifications to the existing workstation design would be required to accommodate a suitable seat?

> **Question 2:** If employees demonstrate that certain sets of job duties (*i.e.*, "work") can reasonably be performed when seated without interfering with those employees' performance

of other job duties, as viewed objectively based on the physical demands, frequency, and duration of that work, does the employer violate §14(A) by failing to provide *any* seating?

Plaintiffs say the answer to both questions is yes, based on the plain text, regulatory history, and remedial purposes of this longstanding worker-protection provision. Defendants CVS and Chase say no, without presenting any reasoned basis for their position.

Defendants repeatedly characterize their approach as "holistic" without defining that term or explaining *how* courts should apply their construction of §14(A) to any real-work scenarios. They reject the trial courts' quantitative approach, just as they reject plaintiffs' temporal, tasks-based focus (which is based on an objective assessment of "when" the "nature," or inherent characteristics, of a discrete set of workplace tasks "reasonably" permits the use of seats, *see* Opening Br. 3, 16-29, 32-45). But defendants fail to articulate any alternative standard that would enable any court predictably or consistently to determine when the mandatory language of §14(A) requires an employer to provide seats to its employees.

Defendants' apparent intent in using terms such as "holistic" and "totality of the circumstances" is to obtain a standard that requires worker-by-worker assessments. A construction of §14(A) that requires individual adjudication of every employee's seating situation and great deference to industry custom and employer preference would eliminate the only effective remedies available to redress this kind of workplace grievance, *i.e.*, class and representative actions. CVS, for example, insists that "[j]ust because an employee's work could be performed while seated does not mean a seat is required," and that the proper inquiry is "not simply whether the employee could feasibly perform her duties while seated." *See, e.g.,* CVS 37. But the language of §14(A) requires an objective assessment of the "nature of the work" being performed; and the remedial purposes of §14(A)

can only be furthered by construing that language according to its plain, common sense meaning.

Defendants acknowledge that most jobs are comprised not of a single monolithic task repetitively performed, but of a combination of duties. *See* Chase 25; CVS 28; *see also* Opening Br. 19 n.6 (examples of mixed-duty jobs covered by the Wage Orders). Defendants also acknowledge that when the IWC promulgated the seating provision in 1919, its expressly stated intent was "to cover situations where the work is *usually* performed in a sitting position" – not just work that can *only* be performed while seated. CVS 25 (emphasis added) (quoting Defendant-Appellee's Supplemental Excerpts of Record, Dkt. 30, in *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 12-56130) ("SER"), at 252, 254). While defendants contend that the IWC's original intent no longer matters (CVS 26; Chase 31-32), they do not explain *why* the IWC would have enacted and re-enacted a supposed guarantee of workplace seating that, in practice, does not provide any protection to the overwhelming majority of California workers who perform mixed-function tasks. *See* Opening Br. 26-27 & n.9.

The IWC intended its mandatory seating provision to be flexible enough to encompass the multitude of workplaces and job positions covered by the 14 Wage Orders that guarantee workplace seating. *See* Opening Br. 5, 19 n.6. Only by construing §14(A) as requiring an objective assessment of what workers do and how they do it can this Court ensure that its protections will be uniformly and predictably applied to check-out cashiers like Ms. Kilby, who spent roughly 90% of her work time at the CVS cash registers performing standard, stationary checkout functions such as scanning and bagging small merchandise and processing payments (Opening Br. 8-9); bank tellers at Chase, who spent 50% to 90% of their work time at teller counters where their most common and essential

functions are to accept deposits, cash checks, and handle withdrawals (*id.* at 10-11); and the mixed-task teachers, security guards, ticket takers, and information-counter employees described by plaintiffs (*id.* at 19, 31-32).

ARGUMENT

I. Entitlement to Seating Under §14(A) Depends on Whether the Objective Requirements of the Employees' Fixed-Location Duties Can Reasonably Be Performed When Seated.

Plaintiffs contend that §14(A) entitles employees to seats whenever the objective requirements of their fixed-location duties can reasonably be performed when seated, regardless of whether: 1) some of their job duties *away* from the workstation require standing; 2) their employers subjectively prefer that they stand throughout their shifts; or 3) their existing workstations must be modified to accommodate seating. Plaintiffs' construction of §14(A) is compelled by the Wage Order's plain text, regulatory history, and strong worker-protection purposes. *See* Opening Br. 15-42.

In both *CVS* and *Chase*, plaintiffs' evidence – including testimony from CVS's and Chase's own store managers and corporate designees – demonstrated that the physical duties required to check out customers at CVS cash registers (principally scanning and bagging merchandise and processing payments, and only occasionally leaving the cash register to retrieve controlled merchandise or lift heavier merchandise from customer carts), and the physical duties required to handle customer transactions at the Chase teller counters (principally accepting deposits, cashing checks, and handling withdrawals, and only occasionally leaving the teller counter to go to the printer or vault) can, viewed objectively, reasonably be performed when seats are made available. *See* Opening Br. 8-12 (citing record); *see also* Plaintiff-Appellant's Opening Brief, Dkt. 9 at 6-14, in *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 12-56130); Plaintiffs-Appellants'

Opening Brief, Dkt. No. 10-1 at 7-17, in *Henderson v. JPMorgan Chase Bank, N.A.* (9th Cir. 13-56095). In these cases, as in the companion case of *Brown v. Wal-Mart Stores, Inc.* (9th Cir. 12-17623), plaintiffs demonstrated that the putative class members' most common and essential fixed-workstation functions could reasonably be accomplished while seated, and that those employees could simply stand up when necessary to perform the occasional standing-required task. *Id.*[1]

In responding to plaintiffs' Opening Brief, defendants had no choice but to concede – at least with respect to plaintiffs' hypothetical teachers, security guards, amusement park workers, and bookstore employees (*see* Opening Br. 19, 31-32) – that the proper inquiry under §14(A) must focus on the nature of the employees' *fixed-location* tasks (*e.g.*, watching security video monitors, selling tickets from a booth, answering customer inquiries

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[1] Chase devotes more than 12 pages of its brief to a one-sided version of the "facts" it claims to have presented in opposing plaintiffs' motion for class certification. Chase 9-21. CVS similarly presents a highly debatable version of the trial court "facts." CVS 6-10. Plaintiffs strongly dispute the accuracy and completeness of both characterizations, for the reasons we fully briefed to the Ninth Circuit. *See* Plaintiff-Appellant's Reply Brief, Dkt. 19-1 at 19-27, in *Chase* (9th Cir.); Opening Brief, Dkt. 9 at 6-14, in *Kilby* (9th Cir.); Opening Brief, Dkt. No. 10-1 at 7-17, in *Henderson* (9th Cir.). For purposes of the certified questions, though, there is no need for this Court to resolve those factual disputes. While this Court might refer as background to the records in the three pending Ninth Circuit cases (*CVS, Chase,* and *Wal-Mart, see* Opening Br. 2-3 n.2), or to such pending state court seating cases as *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278 (reversing denial of seating class certification), *pet. for review pndg.* No. S219434, the certified questions ask how the IWC intended its mandatory seating provision to be construed, not how that construction should be applied to a particular case or in the context of a particular federal court class certification motion. Nonetheless, for the Court's convenience, plaintiffs demonstrate *infra* at 35-39 why the facts in these cases compel the Ninth Circuit's reversal of the lower courts' orders denying class certification and granting summary judgment to CVS.

from a desk), regardless of what additional tasks the workers perform when assigned at different times of the day to different workplace locations. *See* CVS 30; Chase 36-37.

This critical concession undermines the principal argument in defendants' briefs, which continue to urge a very different construction of §14(A) that looks to the "entire range of an employee's duties" and allows employers to deny seats to any employees who perform some duties, at some point during the pay period, that (in the employer's opinion) require standing. CVS 39; Chase 1. Defendants' recitation of the "facts" conspicuously ignores the objective requirements of checkout-counter and teller-counter work, while focusing instead on: 1) whether variations exist in the types of duties employees perform when *not* working at the cash registers or teller counters, *see, e.g.*, CVS 6; Chase 13-17; 2) CVS's subjective preference that employees stand at all times, *see, e.g.*, CVS 6-7; and 3) variations in the "layout and design" of different CVS cash register areas and Chase teller counters, *see, e.g.*, CVS 8; Chase 11-12.[2]

The trial courts' denials of class certification and grant of summary judgment to CVS were likewise based on these considerations, *not* on any assessment of whether the objective requirements of CVS Clerk/Cashiers'

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[2] CVS mischaracterizes the record, claiming that "although certain tasks at the cash register could be performed while seated, not all of them could." CVS 6; *see also id.* at 30-31. In fact, the only record citation on which CVS relies for this statement is an excerpt from Ms. Kilby's deposition, in which she acknowledged that, if provided a seat at the cash register, she would "[on] occasion" have to stand up to reach over the counter and scan an exceptionally large product in the shopping cart. *See* Defendant-Appellee's Answering Brief, Dkt. 14 at 7, in *Kilby v. CVS Pharmacy, Inc.* (9th Cir. 12-56130) (citing SER 157). CVS never introduced any evidence regarding the frequency with which Ms. Kilby would have to stand up in order to scan large merchandise. Nor did it introduce any evidence demonstrating why the occasional need to stand would preclude the reasonable use of a cash register seat at all other times.

duties at the cash register, or Chase tellers' duties at the teller counter, could reasonably be met with the use of seats. *See* Opening Br. 12-15 (citing ER 9, 20; *Chase*-ER 12-15).[3]

Defendants' position is that *even if* the employees' core duties at fixed-location workstations can reasonably be performed when seated, those employees are not entitled to any seating under §14(A) if either: 1) some of their job duties *away* from the workstation require standing, 2) their employers subjectively prefer that they stand while working, or 3) their existing workstations must be modified in order to accommodate a suitable seat. That position cannot be reconciled with the plain text of the Wage Order, its underlying worker-protection purposes, or plaintiffs' hypothetical examples that demonstrate why any job-as-a-whole approach is illogical and unworkable.

A. The Phrase "Nature of the Work" in §14 Refers to the Objective Requirements of the Employees' Particular Sets of Duties, Not the Entire Range of Employment Duties.

1. The Text of the Wage Order Supports a Duties-Based Construction of the Phrase "Nature of the Work."

As plaintiffs have demonstrated, the most common plain meaning dictionary definition of "work" is "task" or "duty." Opening Br. 18. Although Chase and CVS quote different dictionaries, none define work as "the job as a whole, encompassing, but not limited to, all of the tasks or duties performed." Chase 29. Instead, they simply define work as the duties a person performs in relation to an employer. For example, *Black's Law Dictionary* (6th ed. 1990) at 1605, cited by Chase, defines "work" as "physical and mental exertion controlled or required by employer and

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[3] All citations to "ER" refer to the Excerpts of Record submitted to the Ninth Circuit in *CVS*. All citations to "*Chase*-ER" refer to the Excerpts of Record submitted to the Ninth Circuit in *Chase*.

pursued necessarily and primarily for benefit of employer and business."[4] Similarly, the *Oxford Dictionary*, which Chase also cites, defines "work" as "[m]ental or physical activity as a means of earning income."[5] Those definitions say nothing about what *range* of physical and mental exertion must be aggregated to constitute "work." If ringing up customer transactions at the cash register for even 10 minutes is at the direction and for the benefit of CVS, those tasks satisfy these definitions of "work." Similarly, time spent depositing customer checks at the teller counter, if performed at the direction and for the benefit of Chase, also constitutes "work."

To the extent any dictionary definition *could* be construed as supporting defendants' "job as a whole" construction, such a construction would undermine the IWC's worker-protection purposes and should be rejected. *See* Opening Br. 28-33. Dictionary definitions of statutory terms are useful only to the extent they are consistent with the stated legislative intent. *See Clayton v. Superior Court* (1998) 67 Cal.App.4th 28, 32.

CVS provides various examples of how the term "work" is used in the IWC Wage Orders, but all of those examples are consistent with the common definition of "work" as physical and mental exertion performed for the employer's benefit. None logically refer to an aggregation of the employees' every assigned duty. For example, §2(G) of Wage Order 7-

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[4] Chase relies on a particular sub-definition in *Black*'s Sixth Edition that defines the term work "for purposes of determining employee's right to compensation." Because employees often earn different rates of compensation depending on what work they are performing at different times (for example, different piece rates for different tasks), this definition clearly refers to the specific set of tasks being performed at any given time, rather than the sum total of all assignments.

[5] http://oxforddictionaries.com/definitions/american_english/work ?q=work (last accessed July 22, 2014).

2001 defines "[h]ours worked" as all time an employee is "suffered or permitted to work." But in that context, "work" clearly refers to physical or mental exertion performed at the direction or for the benefit of an employer, not "holistically to all of an employee's duties." CVS 2-3; *see* CVS 13. Likewise, "day's work" in §3(A)(1) refers to physical or mental exertion performed for the benefit of the employer on a given day, not an aggregation of all work performed over the course of employment. *See* CVS 13. CVS also cites the phrase "report for work" in §5 to argue that the term means "an employee's performance of his or her job in general." *Id.* But that phrase clearly refers to reporting for duty to begin performing labor for the benefit of the employer on a particular day, *not* reporting at the beginning of employment for one's "job as a whole."

Defendants contend that "work" cannot mean "duties" because the IWC used both terms in §14(B) and must have intended them to have different meanings. Chase 23. Legislative bodies, however, commonly use different terms to convey the same meaning for reasons of grammar, diction, or clarity. *See Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1030 (word selection can reflect "idiomatic choice" rather than "semantic distinction"); *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1104 n.6 (noting that the California Legislature and the IWC frequently use "pay," "compensation," and "wages" interchangeably as synonyms).

Other sections of the Wage Order make clear that this is precisely what the IWC intended here. As plaintiffs pointed out in Opening Br. 23, §1 of the Wage Orders uses the terms "work" and "duties" interchangeably to mean the same thing. *See* 8 C.C.R. §11070(1)(A)(1)(e) (describing the "*duties* which meet the test of the exemption," *i.e.*, "exempt *work*") (emphases added); *id.* §11070(1)(A)(3) (defining a professionally exempt

employee as one "[w]ho customarily and regularly exercises discretion and independent judgment in the performance of *duties* set forth in subparagraph (a) and (b)," including, for example, "[*w*]*ork* that is original and creative in character") (emphases added). As Chase acknowledges, "identical words used in different parts of the same act are intended to have the same meaning." Chase Br. 27-28 (quoting *Sorenson v. Sec'y of Treasury of U.S.* (1986) 475 U.S. 851, 860); *see also People v. Dillon* (1983) 34 Cal.3d 441, 468, *superseded by statute on other grounds*. Presumably, the IWC intended "work" to have the same meaning as "duties" in §14 just as it does in §1 – and defendants offer no reason to conclude otherwise.

A duties-based construction of the phrase "nature of the work" is also consistent with the IWC's use of that same phrase in §11(C) of the Wage Orders, governing "on duty" meal periods. *See* Opening Br. 21-22. Chase contends that the phrase "nature of the work" as used in §11(C) "is defined holistically, without a limited linkage to specific job duties or tasks." Chase 26-27. Nothing in the DLSE opinion letter cited by Chase or the text of §11(C), however, indicates that the legality of an on-duty meal period depends on an assessment of the employee's "entire range of assigned duties." To the contrary, the context makes clear that an on-duty meal period (an *exception* to the usual rule requiring 30-minute off-duty meal periods) is permitted "only when the nature of the work" being performed at the time of the meal period in question "prevents an employee from being relieved of all duty." 8 C.C.R. §11070(11)(C). It would make no sense to permit employers *always* to require on-duty meal periods, even when the actual work being performed at a given time does not require the employee to remain on call.

Defendants next argue that the structure of §14 and the absence of a linking phrase such as "and" or "also" between subsections (A) and (B) indicates that the subsections are "mutually exclusive," and that employees can only be covered by one but not both. Chase 25; CVS 17-19. Notwithstanding defendants' concession that bookstore employees may be entitled to a seat when assisting customers at the information desk even if they would not be entitled to a seat while re-shelving books (*see* Opening Br. 32; CVS 30; Chase 37), defendants assert that every job must be classified as one that either categorically "permits the use of seats" (and is thus subject to §14(A)) or that categorically "requires standing" (and is thus subject to §14(B)), because it would be "absurd" for a single worker to be "simultaneously subject to 14(A) and (B)." Chase Br. 25; *see also* CVS 17-19. But defendants do not explain *why* such a result would be absurd.

Under plaintiffs' construction, §14(A) guarantees suitable seating whenever employees are engaged in a set of job duties that can reasonably be performed while seated (ticket takers who must occasionally lean over to hand change to a child customer), while §14(B) guarantees nearby seating for the employees' use during "lulls in operation" whenever the employees are assigned to job duties that require standing (ring toss operators when no customers are waiting to play, *see* Opening Br. 31). *See* Plaintiff-Appellant's Request for Judicial Notice, Dkt. 10-1, in *Kilby* (9th Cir.) ("RJN") Ex. 1 at 3 (1976 Summary of Basic Provisions, explaining that §14(B) guarantees seating during operation "lulls" and not only during breaks). The two subsections, read together, reflect the IWC's understanding that employees' duties may sometimes require standing (when §14(B) applies) and sometimes reasonably permit the use of seats (when §14(A) applies).

Other provisions of the Wage Order similarly contain multiple subsections unlinked by any conjunction, even when it is abundantly clear that the IWC intended each subsection to apply simultaneously. *See, e.g.*, 8 C.C.R. §§11070(4)(A)-(C) (minimum wage provisions), 11070(5)(A)-(B) (reporting time pay), 11070(7)(A)-(D) (records), 11070(9)(A)-(B) (uniforms and equipment), 11070(11)(A)-(E) (meal periods), 11070(12)(A)-(B) (rest periods), 11070(13)(A)-(B) (change rooms and resting facilities), 11070(15)(A)-(C) (temperature). Far more revealing is the absence of a disjunctive "or" between §14(A) and §14(B) (*compare* 8 C.C.R. §11070(5)(C)(1)-(3)), particularly when considered together with the IWC's use of the temporal word "when," which means "at or during the time that," or "at any or every time that." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). By mandating seats "when" the nature of the work reasonably permits the use of seats, and by also mandating that seats be placed in reasonable proximity to the work area for employees to use "when" the nature of the work requires standing but employees are not actively engaged in those duties, the Wage Order protects all employees in all covered industries throughout the course of their workdays. *See* Opening Br. 19-21.

CVS ignores this most common definition of "when," and argues that the IWC must have intended a secondary meaning, not "at the time that" but "if." CVS 15. Yet CVS offers no explanation why the IWC would have used "when" instead of "if" had it intended that unlikely meaning. In any event, even if there is any ambiguity in the word "when," such ambiguity must be resolved "in favor of protecting employees," consistent with the IWC's intent. *Peabody v. Time Warner* (July 14, 2014) __ Cal.4th __, 2014 WL 3397770, *2 (internal quotation marks and citations omitted).

CVS also asserts that under plaintiffs' tasks-focused construction, the phrase "nature of" is superfluous, because the "nature" of operating a cash register is simply operating a cash register. CVS 14-15; *see also* Chase 30. There is nothing superfluous about focusing on the "inherent character" or "essential attributes" of employees' job functions in determining when seating must be provided. *See* Opening Br. 35. By using the phrase "nature of the work," the IWC made entitlement to seating depend on whether the objective, functional requirements of the work (for example, operating a cash register) reasonably permits the use of seats, *not* on how the employer chooses to define the assignment (for example, "operating a cash register while standing").

Defendants warn that if the Court adopts a tasks-based construction of "nature of the work," every elevator ride, group meeting, passing encounter, or other ephemeral task would require seating. Chase 44; *see* CVS 29. Not so. Plaintiffs' Opening Br. at 30 makes clear (as did plaintiffs' Ninth Circuit briefs in these cases and in the companion *Wal-mart* case) that §14(A) requires suitable seating only when the nature of the work "reasonably" permits the use of seats; and that in determining whether seating for a particular task is "reasonabl[e]," courts may consider the duration and frequency of a particular task. While seating may not be required for fleeting tasks (where the benefits of having a seat available may be *de minimis* at best), or where having a seat would physically interfere with the employees' ability to perform their duties, the language and purposes of §14(A) – including its "reasonableness" standard – reflect the IWC's intent to require an employer to provide seating whenever its employees are performing a set of tasks that could be performed while seated, even if those employees must also intermittently stand or move while performing those tasks. Given the remedial purposes of the seating

provision, if being allowed to sit periodically provides a potential comfort or welfare benefit to employees performing a series of regularly performed tasks, the "nature of the work" performed by those employees "reasonably permits the use of seats."

2. The Regulatory History and Purpose of the Wage Order Seating Law Supports Construing "Nature of the Work" as the Job Tasks Being Performed.

The prior versions and stated purposes of the Wage Order's seating provision further support plaintiffs' construction of §14(A). *See* Opening Br. 24-28. Nothing in defendants' responses undermines this conclusion.

Chase all but concedes that plaintiffs' construction is the correct interpretation of *earlier* versions of the Wage Order, which expressly required suitable seats "at work tables or machines" "[a]s far as, and to whatever extent, in the judgment of the Commission, the nature of the work permits." ER 52, 75. Chase contends that the IWC's later elimination of the phrases "as far as, and to whatever extent" and "at work tables or machines" changed the meaning of "nature of the work" from a focus on the nature of the particular duties being performed at any given time, to a "holistic" aggregation of an employee's entire range of employment duties. *See* Chase 32. But any suggestion that the IWC amended the 1919 seating law in order to *reduce* its protections is negated by the IWC's clearly expressed actual intent to *expand* coverage. *See Bldg. Profit Corp. v. Mortg. & Realty Trust* (1995) 36 Cal.App.4th 683, 691 (presumption can always be overcome by "consideration of the surrounding circumstances," which may include "the application of the relevant principles of logic and statutory construction") (internal quotation marks and citation omitted); *see also W. Sec. Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 ("[C]onsideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to

clarify a statute's true meaning."); *United States v. Wilson* (1992) 503 U.S. 329, 336 (general presumption overcome by fact that inferring an intent to change would lead to absurd results).

The only time the IWC provided any explanation of its amendments to §14, it made clear that its purpose was to *extend* the seating provision to employees in "some kinds of work places . . . that were not covered by previous orders," not to curtail existing rights. RJN Ex. 2 at 16; *see* Opening Br. 27-28. As the IWC clearly stated in its 1976 Statement of Findings, "It continues to find that *humane consideration for the welfare of employees* requires that they be allowed to sit *at their work* or between operations when it is *feasible* for them to do so." RJN Ex. 2 at 16 (emphases added); *cf.* ER 104, 107. The IWC's intent in amending §14 was to extend seating protections to more workers, not to eliminate existing protections for already covered employees.[6] In short, there is no evidence that the IWC ever intended to narrow the scope of the suitable seating provision, and Chase offers no logical explanation why the IWC would have made such a significant substantive change in coverage. Had the IWC intended to change the meaning of "nature of the work" from "nature of the duties" (*i.e.*, work being performed at any given time) to "nature of the job as a whole" (*i.e.*, entire range of employment duties), surely the more sensible revision would have been to substitute the term "work" with "job as a whole." The IWC did no such thing.

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[6] This explanation also reiterates the IWC's understanding that §14(A) protects the right of employees to sit *at their work* (*i.e.*, at their workstations), while §14(B) protects the right of employees to sit *between operations*. It does *not* suggest that employees be allowed to sit only if their "entire range of assigned duties," as defined by the employer's "business judgment," reasonably permits the use of seats.

CVS's regulatory history argument likewise ignores the IWC's 1976 Statement of Findings. CVS asserts that the original intent of the seating law was to protect only factory workers, *i.e.*, "'situations where the work is usually performed in a sitting position with machines, tools or other equipment.'" CVS 25 (quoting SER 252, 254). But the 1976 amendments were in response to the Legislature's decision in 1973 to expand the IWC's authority to promulgate minimum standard conditions of labor for *all* employees; and the IWC itself stated that its intent was to extend the protections of its Wage Orders to employees in "some kinds of work places . . . that were not covered by previous [wage] orders." RJN Ex. 2 at 16. Nothing in the regulatory history suggests that the IWC ever abandoned its position that covered workers whose job functions could "usually" be performed while seated should be entitled to seats – even if those workers, like all workers, sometimes had to stand to pick up or deliver materials, replace a machine part, or check the status of an upcoming assignment.

CVS also relies on two informal letters from the mid-1980s, one from the DLSE and one from the IWC, but neither involved a job similar to those at issue here. Those non-binding, non-precedential letters described salespersons whose entire job was to "greet customers" and "move freely throughout the store to answer questions and assist customers in their purchases," SER 252, 254, not employees who spent significant periods of time working in stationary locations (as Ms. Kilby did when operating the CVS cash registers or as Ms. Henderson did when working at the Chase teller counters). As the IWC explained in a third letter dated December 28, 1979 (in response to an inquiry about whether a department store could lawfully refuse to provide workers seats at the gift wrap counter):

> It may be that the nature of the work *would* reasonably permit employees to sit on stools at their work, in which case '*All working employees shall be provided with suitable seats*.' An

investigator from the Division of Labor Standards Enforcement would have to make the judgments involved.

ER 174 (emphasis in original); *see* ER 172. Ms. Kilby's duties when assigned to the front-end cash register (scanning and bagging merchandise, and processing payments) and Chase tellers' duties when assigned to the teller counter (accepting deposits, cashing checks, and handling withdrawals) are far more similar to the duties of a gift wrapper in a department store than those of a roaming salesperson.

Finally, defendants rely heavily on selective excerpts from a trial court amicus brief submitted by the DLSE in *Garvey v. Kmart* (where, notably, the district judge *denied* the employer's motion for summary judgment and certified a one-store class for trial). *See* Defendant-Appellee's Motion for Judicial Notice, Dkt. 15-1, in *Kilby* (9th Cir.) ("MJN"), Ex. A. Defendants assert that the factors addressed in that brief represent the DLSE's "long-standing interpretation" of §14(A), but their reliance on that brief misrepresents both the weight it should be given and the substance of its analysis.

The DLSE's amicus brief in *Garvey* is *not* a formal interpretative regulation or guideline adopted consistent with the APA's procedural requirements. *See Tidewater Marine W., Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576; *cf. State ex rel. Nee v. Unumprovident Corp.* (2006) 140 Cal.App.4th 442, 451. Neither the DLSE nor LWDA played any role in drafting the Wage Orders. Neither has issued any interpretive regulations or guidelines. Thus, notwithstanding defendants' call for "heightened deference," the DLSE's brief is useful only to the extent it has "power to persuade." *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14-15 (internal quotation marks and citation omitted); *see also Harris v. Superior Court* (2011) 53 Cal.4th 170, 190. Even the DLSE itself acknowledges that responsibility for construing §14 lies with the courts

rather than the DLSE or LWDA. MJN Ex. A at 2; *see Harris*, 53 Cal.4th at 190; *Dyna-Med, Inc. v. Fair Emp't & Housing Com.* (1987) 43 Cal.3d 1379, 1389.

In any event, the DLSE's brief in *Kmart* supports plaintiffs' proposed construction of §14(A) far more than defendants'. For example, the DLSE noted that: in any dispute over the meaning of §14(A), "the language . . . itself must control," MJN Ex. A at 5; proper enforcement of §14(A) requires careful consideration of "the underlying remedial purpose of the seating requirement," *id.*; and "the regulatory standard to be applied is a reasonableness standard," which is necessarily an "objective standard," *id.* at 4-5. Rejecting several of Kmart's specific arguments, the DLSE also stated that, for purposes of construing §14(A), "[a] prevailing custom or industry practice does not indicate or determine compliance with differing legislatively-established requirements or interpretations of law," *id.* at 5 n.2; and an employer's business judgment "cannot control or otherwise provide a basis for defeating the remedial purpose of the regulation," *id.* at 4-5. Each of these statements supports plaintiffs' construction, and nothing in the DLSE's stated approach limits the mandatory obligations imposed by §14(A) to those few (if any) employees whose "entire range of assigned duties" or "job as a whole" could, in an employer's subjective judgment, be performed while seated.

To the extent the Court finds any ambiguities in the text or regulatory history, it must construe §14(A) "broadly in favor of protecting employees." *Peabody,* 2014 WL 3397770, *2 (internal quotation marks and citations omitted); *see also Brinker*, 53 Cal.4th at 1026-27; *Indus. Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690, 702; Opening Br. 28-29 (citing additional cases). Neither CVS nor Chase seriously disputes that plaintiffs' construction better serves the IWC's goals of employee comfort and

welfare. While defendants cite studies showing that prolonged and unbroken periods of sitting may also create occupational health risks, Chase 33 n.20; CVS 27 n.5, plaintiffs have never contended that employees whose workplace tasks reasonably permit the use of seats must remain seated at all times without moving once a seat is provided. *See* Opening Br. 43 n.14. Moreover, evidence that prolonged sitting poses its own hazards in no way contradicts the long line of medical and public health studies demonstrating that prolonged and uninterrupted hours of standing creates significant health risks, including foot and lower leg pain and discomfort, musculoskeletal disorders, chronic venous insufficiency, preterm birth and spontaneous abortion, and carotid atherosclerosis. *See id.* 28 n.10.

CVS also makes the new argument that §14(A) should not be construed as promoting worker safety or comfort because the IWC intended the *meal period and rest break* provisions in its Wage Orders to provide "the main mechanism for addressing prolonged standing." CVS 26. That argument defies common sense, would leave §14 without any purpose, and is directly contradicted by the regulatory history of the Wage Order, which makes clear that §14(A) *and* (B) apply to *non*-break time. In a May 4, 1982 letter addressing Macy's refusal to provide seats to its sales employees when they were not actually engaged in sales activity, for example, the Executive Officer of the IWC wrote:

> The intent of the Commission, long established in the record, is that *the requirement to provide seats applies to employees at work during their working time, not during meal and rest periods*. The Commission's Statement of the Basis for the Seats Section of the 1976 orders, which was validated by the courts, states in part: 'It [the IWC] continues to find that *humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations* when it is feasible for them to do so, as provided in [subdivision] (B).

ER 57, 181 (emphases added); *see also* ER 177, 179; RJN Ex. 1 at 3 (explaining that §14(B) guarantees seating during operation "lulls" and not only during breaks); RJN Ex. 2 at 16.

3. DLSE's Limited Prior Enforcement Activities Do Not Reflect a Regulatory Construction Inconsistent with the Wage Order's Plain Language and Underlying Purposes.

Unable to derive support from the regulatory history of §14, CVS asks the Court instead to consider the U.S. retail industry's supposed longstanding custom and practice of forcing cashiers to stand, and to treat the fact that these companies "have not been subject to enforcement actions by the DLSE for suitable seating concerns" as DLSE's legally binding "acquiescence" in a construction permitting such conduct. CVS 21. CVS takes this argument further still, suggesting that private plaintiffs bringing suit under PAGA should not be allowed to pursue any claims unless they can first demonstrate that their claim precisely tracks the factual allegations of a prior DLSE enforcement action. *Id.* at 22-23.

These arguments are directly precluded by PAGA's legislative history, which demonstrates that PAGA's purpose was to encourage private enforcement of previously under-enforced Labor Code provisions and to compensate for the agency's lack of resources and staffing. *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 327 P.3d 129, 145-46; *see also, e.g., Arias v. Superior Court* (2009) 46 Cal.4th 969, 980, 986. Although CVS relies on language in *Christopher v. SmithKline Beecham Corp.* (2012) 132 S.Ct. 2156 suggesting that an agency's non-enforcement may be evidence of its acquiescence, even *SmithKline* recognized that "an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred." *Id.* at 2168 (citing *Heckler v. Chaney* (1985) 470 U.S. 821, 831).

The legislative history of PAGA makes clear that any non-enforcement of the mandatory seating law is a consequence of under-funding, under-staffing, and competing priorities, not acquiescence in employers' violations. PAGA's legislative history makes equally clear the Legislature sought to encourage private attorneys general to bring representative actions under the statute in order to enforce the neglected corners of the Labor Code and Wage Orders, not to hide in the shadows of the DLSE's under-enforcement.

To the extent CVS is attempting to make an estoppel argument by suggesting that retail employers would be "unfair[ly] surprised" by a change in practice, it falls far short of the applicable estoppel standard. Equitable estoppel requires four elements: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489 (internal quotation marks and citation omitted). Moreover, governmental inaction can only be grounds for estoppel where the result would not nullify a policy provision adopted for public benefit and where the injustice to the party seeking estoppel would outweigh any negative impacts on the public interest. *Id.* at 496-97; *cf. Arias*, 46 Cal.4th at 986 (an action to recover civil penalties under PAGA "is fundamentally a law enforcement action designed to protect the public and not to benefit private parties") (internal quotation marks and citation omitted). "[T]he facts upon which such an estoppel must rest go beyond the ordinary principles of estoppel." *Mansell*, 3 Cal.3d at 495 n.30 (citation omitted).

Neither CVS nor Chase has made the requisite evidentiary showing. CVS merely *asserts* that retail businesses in California have relied on the DLSE's history of non-enforcement, and on that basis argues that PAGA actions brought to enforce the IWC's seating law should be estopped. *See* CVS 21-22. But it provides no evidence to support that assertion, and California courts have repeatedly rejected such an argument. *See, e.g.*, *Feduniak v. Cal. Coastal Comm'n* (2007) 148 Cal.App.4th 1346, 1369 ("[I]f it were reasonable . . . to think that the [ordinances] would never be enforced because they had not been enforced for many years, then more generally, one could argue against the enforcement of a law that had not been enforced for many years and seek estoppel on that ground. However, courts have never accepted such reasoning."). "[T]he mere failure to enforce the law, without more, will not estop the government from subsequently enforcing it." *Id.* (citing cases).

In sum, plaintiffs' construction is the only reasonable construction of §14, and the only one consistent with the Wage Order's plain text, regulatory history, and worker-protection purpose. The "nature of the work" under §14(A) must refer to the discrete task or set of tasks being performed at any given time, not an abstract assessment of an employee's aggregated "entire range of assigned duties" or "job as a whole."

B. Whether the "Nature" of the Work "Reasonably Permits" the Use of Seats Requires an Objective Inquiry into the Inherent Functional Requirements of the Work Itself, and Cannot Be Dictated By an Employer's Arbitrary Preference or Choice of Workstation Design.

Defendants urge a construction of §14(A) that would allow an employer's "subjective business judgment" and past practices to dictate

whether working employees are entitled to suitable seating.[7] Their proposal turns the remedial, worker-protection purpose of the Wage Order on its head, for employer preference and industry custom and practice are the very obstacles the Wage Orders' minimum labor standards were designed to overcome. *See* Opening Br. 33-40. After all, in every seating case brought under §14(A), the employer's "business judgment" is that its employees' work should be performed while standing. If deference to such judgment were required, no violation of §14(A) could ever be found, and the IWC's mandatory seating law would become merely hortatory.

When the IWC wanted to incorporate limitations based on industry custom and practice into its Wage Order seating provisions, it knew how to do so. In Wage Order 16-2001 (which applies to the construction, drilling, logging and mining industries), the IWC limited the guarantee of such seating to circumstances "[w]here practicable *and consistent with applicable industry-wide standards*." 8 C.C.R. §11160(12) (emphasis added); *see* Opening Br. at 6 n.4. No such limitation exists in an any other Wage Order seating provision, including either of the Wage Orders at issue in *CVS* and *Chase*.[8]

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[7] Chase and CVS disagree about the weight to be given an employer's "business judgment." CVS states that an employer's business judgment "while not controlling, must be accorded deference to the extent that they are a part of the employee's job." CVS 32. Chase states that "[e]mployer business judgment is one of several factors that [should be] considered when interpreting and applying the Wage Order," but expresses no opinion on whether to accord deference to an employer's business judgment, except to recognize that such judgment cannot be the "sole or dispositive factor that trumps all others." Chase 41-42. Plaintiffs disagree with both formulations.

[8] This additional language in Wage Order 16-2001 further rebuts Chase's argument that plaintiffs' construction of §14(A) would require (continued...)

As reflected in the Wage Order's plain language, entitlement to a seat under §14(A) must be based on an assessment of the objective functional requirements of the tasks being performed – *i.e.*, the "nature" of the work itself – *not* the employer's unsubstantiated, subjective preference for standing employees or noncompliant workstations.

1. There is No Textual or Purposive Basis in §14(A) for Deferring to an Employer's Subjective Preference That Employees Stand While Performing Work that Otherwise Reasonably Permits the Use of Seats.

As explained in Opening Br. 34-37, the plain and unambiguous text of the Wage Orders, supported by the IWC's worker-protection purposes and earlier versions of the seating law, dictates that employers "shall" provide employees with suitable seats whenever the "nature" of the work reasonably permits, based on the objective requirements of the work, rather than the subjective opinions of the employer.

Largely ignoring plaintiffs' textual and legislative purpose arguments, CVS argues that in applying §14(A), courts should defer to employers' subjective business judgment about which tasks "require standing" because courts consider an employer's "judgment" in other employment law contexts. CVS 33. The statutes and cases on which CVS relies are distinguishable in several material ways, and do not support defendants' position in any event.

CVS notes that courts may consider an employer's judgment in determining an employee's "essential job functions" under the Americans with Disabilities Act and California Fair Employment and Housing Act. *See* CVS 34. But those statutes expressly require consideration of an

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[8] (...continued)
construction-industry employers to provide seating at busy construction sites.

"employer's judgment" as part of the analysis. *See* 42 U.S.C. §12111(8) ("consideration shall be given to the employer's judgment as to what functions of a job are essential"); Govt. Code §12926(f)(2)(A) ("Evidence of whether a particular [job] function is essential includes . . . [t]he employer's judgment as to which functions are essential."). Section 14 contains no such reference to employer judgment.

Moreover, even those statutes do not require deference to an employer's judgment above other factors. FEHA, for example, identifies an "employer's judgment" as one of seven non-exhaustive factors that may be considered in evaluating whether a particular function is essential. Govt. Code §12926(f)(2). As the DLSE explained in its *Kmart* amicus brief, an employer's views of the nature of its employees' work cannot be controlling because §14(A) requires application of an objective standard of reasonableness and is therefore "unlike other areas of regulation in which specific statutory provisions, regulatory language, or judicial decisions expressly defer to an employer's business decision or judgment." MJN Ex. A at 5.

CVS next argues that "[i]n the discrimination context, courts evaluate whether an employer's stated reasons for its actions are legitimate or pretextual." CVS 33 (citing *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 354-66). But that is because an employer's discriminatory *intent* is a specific element of a disparate treatment claim. *See Guz*, 24 Cal.4th at 354 n.20 ("'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds.") (emphasis in original). Section 14(A) contains no analogous element requiring courts to inquire into employers' subjective intent.

CVS also cites *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal.4th 93, a breach of contract case that considered what role the trier of

fact plays in determining whether an employer's stated reasons for terminating an employee amount to "just cause." *Cotran* held that the proper inquiry in a just-cause dismissal case is neither to assess the underlying basis for the termination decision nor to defer to the employer's mere assertion of good faith. Rather, "the jury's role is to assess the *objective reasonableness* of the employer's factual determination of misconduct." *Id.* at 103 (emphasis in original). Under this *objective* good faith standard, "the role of the jury is to assess, through the lens of an objective standard, the reasonableness of that decision under the circumstances known to the employer at the time it was made." *Id.*

A standard that calls for an *objective* assessment of the *reasonableness* of an employer's business decisions is vastly different from a standard that *defers* to an employer's stated opinion "without second-guessing it." CVS 32. Here, neither CVS nor Chase provided any reasonable basis for their subjective belief that cashiers and tellers must stand in order to provide excellent customer service. CVS admitted that it had never studied whether there is a relationship between seated Clerk/Cashiers and checkout speed or customer satisfaction. *See* SER 212-13. Although CVS claims to have received customer complaints about seated employees, it could recall only three complaints in the past three years and could not confirm that any of them actually involved a Clerk/Cashier. *See* SER 217-23; ER 681. Likewise, Chase was unable to point to a single study comparing or analyzing customer perceptions of standing versus seated tellers. *See Chase*-ER 306-07.[9]

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[9] In its Answer Brief, Chase cites for the first time to a declaration of "Dr. C. Dev," Chase 42 n.24, but that declaration was obtained *after* the trial court issued its decision on class certification and, like the transcript of Dr. Dev's later deposition, is not part of the record before the Ninth Circuit.

Defendants' assertion that it is "intuitive and documented" that standing is required for a retail cashier or bank teller to deliver quality customer service (CVS 32) is belied by evidence that retail cashiers throughout Europe and Korea are allowed to sit while performing standard checkout functions (*see, e.g.*, ER 1018-20, *see also* ER 1021-33), and by evidence that many of Chase's competitor banks (including Wells Fargo, Citibank, Union Bank, and even Washington Mutual, whose California branches Chase acquired) have permitted their tellers to sit while performing identical teller functions of accepting deposits, cashing checks, and handling withdrawals (*see, e.g.*, *Chase*-ER 345, 350, 355, 360, 365, 370).[10] While an employer's objectively reasonable judgment as to whether certain tasks require standing may be relevant under §14(A), that is a far cry from deferring to an employer's subjective *preference*, unsupported by objective evidence, that employees must stand while working. Besides, once §14(A) is construed under a standard of objective reasonableness, any perceived competitive benefit from depriving employees of the right to sit will soon disappear, because every retail store and bank will be subject to the same legal standard.

Chase points to the dictionary definition of "work" as "a specific task, duty, function, or assignment often being a part or phase of some larger activity," in making the novel argument that "employer expectations and business judgments must come into play [in determining whether the nature of an employee's work reasonably permits the use of seats] because work 'assignments' do not materialize out of thin air." Chase 41. This argument fundamentally misapprehends the distinction between assigning

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[10] *See also* Plaintiff-Appellees' Answering Brief, Dkt. No. 16-1 at 14, in *Brown v. Wal-Mart Stores, Inc.* (9th Cir. 12-17623) (citing evidence that cashiers in Wal-Mart's stores in the United Kingdom perform their check-out functions while seated).

work to employees and dictating whether that work must be performed while standing. Certainly an employer has the prerogative to allocate work among employees and thus to determine which employees perform the work for which seating must be provided. For example, an employer may assign one employee the work of unloading delivery trucks (which by its *nature* requires standing) and may assign another the work of answering customer telephone calls (which by its *nature* reasonably permits the use of seats). But there is no textual or logical support for allowing an employer to assign anyone the duty of "answering customer telephone calls *while standing*," in order to circumvent the Wage Order's mandatory seating law. Under §14(A), employees are entitled to a suitable seat so long as the "*nature* of the work," meaning the "inherent character" or "essence" of the work, reasonably permits the use of seats. *See* Opening Br. 35. An employer's "idealized job description" cannot change the result of that inquiry. *See* *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802.

Chase also asserts that employer preference is relevant because the IWC added the term "reasonably" in 1976 to make the seating requirement "more flexible and more subject to administrative judgment as to what is reasonable." Chase 40. Chase interprets this as evidence that the IWC intended courts to defer to an *employer*'s judgment, notwithstanding the IWC's explanation that it added the term "reasonably" to make the seating requirement "more subject to *administrative* judgment." In its 1976 Statement of Findings, the IWC clearly stated that it "continues to find that *humane consideration for the welfare of employees* requires that they be allowed to sit *at their work* or between operations when it is *feasible* for them to do so." RJN Ex. 2 at 16 (emphasis added); *see* Opening Br. 36. The IWC did not write, "when the employer permits them to do so," or "when the employer believes it is reasonable for them to do so." Rather, the

IWC provided in clear, unambiguous terms that employees shall be permitted to sit whenever it is *feasible* for them to do so. Further, as Chase acknowledges, "[e]ven the early Wage Order iterations recognized that the 'nature of the work' was to be evaluated based on 'the judgment of the [IWC],'" Chase 31 – *not* the judgment of the employer.

2. An Employer's Choice of Noncompliant Workstation Design Cannot Defeat its Employees' Entitlement to Seating When the Nature of the Work Reasonably Permits the Use of Seats.

The "nature" of an employee's "work" is no more defined by an employer's arbitrary choice of workstation design than by an employer's subjective preference that its employees stand while working. *See* Opening Br. 37-40. When employees are engaged in job tasks whose inherent physical characteristics permit them to perform those tasks while seated, §14(A) requires seating, even if workstation modifications are required to comply with that mandatory obligation.

Defendants recognize that the exercise of their "business judgment" (including choices of workstation design) is already cabined by occupational health and safety regulations as well as by disability laws. An employer cannot evade such laws simply by asserting a subjective preference for a particular type of noncompliant workplace design. *See* CVS 35; Chase 42-43. Yet defendants offer no explanation why their obligation to comply with §14(A)'s seating mandate should be any different from their obligation to comply with Cal-OSHA or the ADA. Employers must comply with *all* applicable laws. An employer's "business preference" for a particular type of workstation design should never be adequate justification for violating the law.

Neither CVS nor Chase presented any evidence that they would be unable to make workstation modifications if required to provide seating

behind the cash registers or teller counters of their respective establishments. Their argument was simply that they should not be forced to incur the cost of providing seats to Clerk/Cashiers or tellers if workplace modifications were required. *See* Chase 43 (arguing, for example, that the placement of check printers beyond reach from the teller counter precludes tellers from being able to perform their work while seated); CVS 35 (arguing that class certification should be denied because different CVS checkout stand configurations might require different modifications to accommodate a suitable seat). As plaintiffs explained in Opening Br. 38-39, however, the fact that an employer might incur costs to comply with the Wage Orders' mandates – whether to pay overtime wages, provide and maintain uniforms, provide adequate work area heating, or modify workstations to accommodate suitable seats – is no excuse for noncompliance. *See* Opening Br. 38-39; *see also Garvey v. Kmart Corp.* (N.D. Cal. 2012) 2012 WL 6599534, *12 ("The fact that Kmart would have to invest some money in reconfiguring the stands would not be a showstopper . . . . Section 14 requires seating so long as the work reasonably permits. The reconfiguration expense and extra space would likely be nominal in relation to the interests involved."). This self-evident principle was made explicit in the 1919 version of the seating law, which directed employers to design employees' workstations so that "[w]ork tables . . . shall be of such dimensions and design that there are no physical impediments to efficient work in either a sitting or standing position . . . ." ER 52, 75.

Defendants offer no response. CVS suggests that "[i]njecting seats into cashier stands could create violations of [Cal-OSHA or the ADA]." CVS 35. But plaintiffs have never suggested that employers should be required to provide suitable seats at the expense of violating other laws. An

assertion that seats could not be provided without violating other laws, moreover, is an *affirmative defense* as to which the employer bears the burden of proof. *See* C.C.P. §431.30(b); *Shropshire v. Pickwick Stages, N. Div.* (1927) 85 Cal.App.216, 219; Evid. Code §500. Neither CVS nor Chase asserted such an affirmative defense in the trial courts below, nor did they introduce any evidence that compliance with §14(A) could not be achieved without violating other laws.

3. Section 14 Establishes a Standard Condition of Labor for All Employees, Regardless of Their Physical Characteristics.

There is likewise no textual, historical, or rational basis for conditioning an employee's entitlement to a seat under §14(A) on his or her physical attributes. Chase evidently agrees, as it makes no argument requiring consideration of employees' physical characteristics as part of its so-called "holistic" approach. *See generally* Chase 38-45.

CVS, though, asserts that "physical differences among employees . . . are part of the totality of the circumstances governing whether the work reasonably permits the use of a seat," CVS 36, seemingly suggesting that a physically heterogeneous workforce precludes the "nature of the work" from reasonably permitting the use of seats. This argument entirely disregards the Wage Order's mandate that suitable seats *shall be provided* to *all employees* whenever the *nature of* the *work* reasonably permits the use of seats. CVS does not even try to explain why the fact that different employees might need different types of seats would preclude the "nature of the work" from "reasonably permit[ting]" the use of seats. As all parties agree, the term "nature" means "essence" or "inherent character." An employee's physical traits have no bearing on the "essence" or "inherent character" of the work being performed. Moreover, the original 1919 version of the Wage Order expressly mandated that "individually adjusted

foot rests shall be provided" along with seats at employees' work tables, thus contemplating that the "nature of the work" would permit the reasonable use of seats even if different seats might be required for different employees performing identical work at the same workstations. ER 52, 75.

The IWC's Wage Orders are intended to establish a minimum *standard* condition of labor for the comfort and welfare of *all* employees. Given the strong worker protection purpose of the Wage Orders as reflected in the plain language of §14(A), the IWC could not have intended its mandatory seating law to apply to different employees in a discriminatory fashion based on factors as arbitrary as an employer's preference that employees stand, an employer's preference for an unaccommodating workstation design, or each employee's physiological traits. Rather, §14(A) requires employers to provide suitable seating to *all* employees whenever the inherent attributes of the *work* being performed reasonably permit the use of seats.

II. An Employer's Failure to Provide *Any* Seat Satisfies A Plaintiff's Burden to Prove that No Suitable Seat Was Provided.

The seating law instructs in mandatory terms, "All working employees *shall be provided* with suitable seats when the nature of the work reasonably permits the use of seats." (Emphasis added). The Wage Order thus imposes a burden *on employers* to provide seats, and to ensure that the seats provided are suitable. To state a claim for violation of §14(A), aggrieved employees must show that: 1) "the nature of the work [for which seating is sought] reasonably permits the use of seats," and 2) they were not "provided with suitable seats" while performing such work. If an employer does not provide working employees with *any* seat, then necessarily, the employer has not provided its employees with *suitable* seats. *See* Opening Br. 42-44.

Notwithstanding the plain and simple language of the Wage Order, defendants insist there is in fact a hidden *third* element to a §14(A) claim: that "a 'suitable' seat exists." Chase 46; *see also* CVS 37. Defendants have conjured this third element out of thin air. There is no textual or logical basis for it, as becomes obvious once one considers that §14(*B*) requires employers to place an adequate number of "suitable seats" in reasonable proximity to the work area for employees to use during lulls in work whose "nature" otherwise "requires standing." To state a claim under §14(B), an employee need not demonstrate that the nature of his or her work reasonably permits the use of seats to establish liability; the *only* required element is that the employer failed to provide a suitable seat. Surely a showing that the employer failed to provide *any* seating would suffice to state a claim under §14(B). The result should be no different under §14(A).

Plaintiffs agree that employees who seek seats pursuant to §14(A) bear the burden of demonstrating that the nature of the work reasonably permits the use of a seat. But defendants' argument is very different: they argue that unless a plaintiff identifies a particular seat that is "suitable" – apparently by make and model – an employer cannot be held liable under the Wage Order, *even if* a plaintiff establishes that the "nature of the work would reasonably permit the use of a seat" as a general matter. Chase 47. The corollary to defendants' argument is that a claim for violation of §14(A) could not be certified as a class action unless plaintiffs can show that the *same particular* seat would be suitable for all class members. *See Chase*-ER 15; ER 20.

Imposing on plaintiffs the onerous burden of identifying the particular make and model of seat that would be suitable for every employee in the workplace (as the district courts did, as one basis for denying class certification in *CVS* and *Chase*) would enable employers to

avoid classwide liability and thwart the Wage Order's worker protection purposes simply by having designed *different* noncompliant workstation layouts in different stores. Just as employers should not be allowed to circumvent the mandatory seating law by designing noncompliant workstations that do not accommodate seating without modification, neither should they be allowed to prevent employees from collectively asserting their seating rights in a class action by designing different noncompliant workstations across their different stores.

III. Under the Correct Interpretation of §14(A), CVS Should Have Been Denied Summary Judgment as to Ms. Kilby, and Class Certification in Both *CVS* and *Chase* Should Have Been Granted.

As the Ninth Circuit observed in certifying its questions concerning the interpretation of §14(A), this Court's ruling will have significant implications for the comfort and welfare of California workers, not only throughout the professional, technical, clerical, mechanical, and mercantile industries, but in all industries governed by the 14 wage orders with identical seating requirements. Although it is not this Court's role to resolve the underlying merits of these appeals, it may be useful to demonstrate how the parties' different proposed constructions, applied to the actual evidentiary records developed in these two cases, would yield opposite results.

Defendants urge a construction of §14(A) that would require courts to consider the employees' "entire range of assigned tasks," as defined by the employer, and to defer to employers' unsubstantiated subjective preferences that those employees stand while working. Defendants' proposed construction would therefore deny the fact-finder its role of determining whether the "nature of the work" for which employees seek seating, viewed objectively, "reasonably permits the use of seats," and

would instead effectively place that function largely in the hands of the employers who have already determined that no seats will be provided.

Plaintiffs, by contrast, urge a construction of §14(A) that would require the fact-finder to determine whether the employees perform any set of job duties, viewed objectively based on the physical demands, frequency, and duration of those duties, that can reasonably be performed while seated without interfering with the employees' performance of those duties. Such a determination is clearly one that can be made based on common evidence. *See Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 327 P.3d 165, 176-77; *Duran v. U.S. Bank Nat'l Ass'n* (2014) 59 Cal.4th 1, 27; *id.* at 53 (Liu, J., concurring); *Brinker*, 53 Cal.4th at 1024-25. To the extent defendants suggest that certain job tasks would require CVS Clerk/Cashiers and Chase tellers occasionally to rise from their seats at the cash register or teller counter, it is for a fact-finder at the merits stage (not the trial court at class certification) to determine whether such evidence precludes employees from being able reasonably to perform their cash-register and teller-counter duties with the use of a seat. *See Stockwell v. City & Cnty. of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1111-12.

Had the trial courts in *CVS* and *Chase* applied the proper construction of §14(A), summary judgment could not have been granted to CVS on Ms. Kilby's claim, and both classes should have been certified.

A. Plaintiffs Presented Considerable Evidence that They Were Not Provided Seats When Performing Stationary Tasks at Fixed-Location Workstations.

Notwithstanding the undisputed evidence that Ms. Kilby spent approximately 90% of her work time at the front-end cash register, where her primary functions were to scan and bag merchandise and process payments, the trial court granted summary judgment to CVS based on its finding that standing was required for "many" or a "majority" of Ms.

Kilby's other assigned tasks, such as gathering shopping carts at the end of the day, or re-stocking display cases. ER 10; *see* ER 249, 697, 847-60. Applying this same "job as a whole" analysis, the trial courts in *CVS* and *Chase* denied class certification based on a finding that the amount of time employees spent *away* from the cash register or teller counter, and what they did during that time, varied from employee to employee. *See* ER 20; *Chase*-ER 10, 12-15.

This Court has explained that in the class action context, whether common issues predominate "hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.'" *Duran*, 59 Cal.4th at 28 (quoting *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 327). In *CVS*, plaintiffs' theory of recovery was based solely on CVS's failure to provide seats *at the cash register* for employees when performing checkout work, not its failure to provide seats when those employees were gathering shopping carts or restocking shelves. Likewise, in *Chase*, plaintiffs' theory of recovery was based solely on Chase's failure to provide seats *at the teller counter* for employees when performing teller-counter work, not on its failure to provide seats when employees visited the vault or replenished the ATM. It is undisputed that all CVS Clerk/Cashiers and all Chase tellers spend at least *some* time during each pay period at the cash register or the teller counter, even if they do not spend *all* of their work time at those workstations. *See* ER 705-83; *Chase*-ER 13. Whether the nature of the work performed at these workstations reasonably permits the use of seats is undoubtedly susceptible of common proof. Thus, under the correct duties-based construction of the phrase "nature of the work," the trial courts' focus on the nature of Clerk/Cashiers' duties *away* from the cash register and the nature of tellers' duties *away* from the teller counter was not a proper basis

for denial of class certification or for a grant of summary judgment. *See also Rite Aid*, 226 Cal.App.4th at 292-93.

B. Plaintiffs Presented Considerable Evidence that the Nature of Their Cashier and Teller Work, Viewed Objectively, Reasonably Permits the Use of Seats.

The trial court granted summary judgment to CVS based largely on its finding that CVS "expects" and "trains" its employees to stand at all times. ER 9, 11. The trial court's conclusion that §14(A) did not entitle Ms. Kilby to a suitable seat while working at the cash register ignored that the functional requirements of cashier work objectively *could* be performed while seated, and was improperly driven by deference to CVS's belief that its Clerk/Cashiers *should* stand while cashiering. Ms. Kilby submitted considerable evidence that a Clerk/Cashier's duties at the cash register can reasonably be accomplished while seated, including declarations from seven Clerk/Cashiers who successfully performed their cashier duties while seated, an expert report from an industrial and workplace ergonomics expert, and evidence that retail cashiers throughout Europe and Korea are allowed to sit while performing standard checkout functions. *See* ER 26, 710-85, 1018, 1021-33. At the very least, plaintiffs' evidence created a triable issue of fact as to whether the nature of the work of a CVS Clerk/Cashier at the cash register can reasonably be performed while seated. Given the evidence in the record, summary judgment could not have been properly granted under the correct construction of §14(A).

Likewise, plaintiffs in *Chase* submitted considerable evidence that the nature of the work tellers perform at the teller counter reasonably permits the use of seats. Not only did plaintiffs submit evidence that many of Chase's competitor banks permit their tellers to sit while working, but plaintiffs also submitted testimony from Chase's own corporate designee confirming that Chase has provided teller stools as a medical

accommodation to hundreds of tellers for use at the teller counter, and those tellers have successfully performed their essential teller-counter duties even while seated. *See, e.g.*, *Chase*-ER 351, 361, 366. This evidence, too, supported class certification.

C. It is Undisputed That Defendants CVS and Chase Failed to Provide Employees *Any* Workstation Seating.

The *CVS* and *Chase* trial courts denied class certification, in part, because they concluded that what constitutes a "suitable seat" may vary from store to store. ER 20; *Chase*-ER 15; *see* Opening Br. 14-15. Because it is not plaintiffs' burden to identify a particular "suitable" seat where the employer entirely fails to provide *any* seating, this, too, was an impermissible basis for denial of class certification under the proper construction of §14(A).

CONCLUSION

For the foregoing reasons, the Court should answer the Ninth Circuit's certified questions as stated in plaintiffs' Opening Brief, or alternatively, should answer yes to each of plaintiffs' re-formulated Questions (1)(a), (b), and (c), and Question (2) above.

Dated: July 31, 2014 Respectfully submitted,

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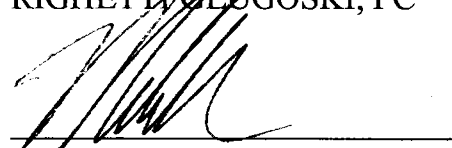

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the foregoing **Petitioners' Reply Brief** was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 11,996. The Court granted leave to file this overlength reply brief on July 7, 2014.

Dated: July 31, 2014

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PROOF OF SERVICE

Code of Civil Procedure §1013

CASE: *Kilby v. CVS Pharmacy, Inc.*
Henderson, et al. v. JPMorgan Chase Bank, N.A.

CASE NO: California Supreme Court #S215614,
U.S. Court of Appeals, 9th Cir., Nos. 12-56130, 13-56095

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On July 31, 2014, I served the following document(s):

Petitioners' Reply Brief

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this July 31, 2014, at San Francisco, California.

Jean Perley