IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KENNEDY DONOHUE,
Plaintiff and Appellant,

v.

AMN SERVICES, LLC,
Defendant and Respondent.

After a Published Decision From the Court of Appeal, Fourth Appellate District, Division One, Case No. D071865

San Diego Superior Court Case No. 37-2014-00012605-CU-OE-CTL
Honorable Joel Pressman (Ret.)
Case No. S253677

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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Pursuant to California Rule of Court 8.520(f), the Employers Group and the California Employment Law Council ("CELC") respectfully apply for leave to file an *amici curiae* brief in support of Respondent. The proposed brief is lodged concurrently with this Application.

The proposed *amici curiae* brief offers the perspective of two large, statewide employer associations, explaining why a neutral rounding practice, together with compliant written meal period policies, is consistent with the employer's obligation to provide meal periods. Many, although not all, of the *amici*'s members use time systems that have a rounding feature. Such practices, neutral in effect, have been held lawful for decades by the United States Department of Labor and have been approved by California courts. Such practices reduce administrative burdens and are not disguised methods to cheat employees.

Further, *amici* observe that the brief of the Plaintiff-Appellant misconceives the basis for many wage and hour regulations. Plaintiff's brief asserts, inaccurately, that meal and rest period rules are founded on concerns about employee health and safety, whereas overtime rules are not. In fact, overtime rules and other wage hour regulations are based on the same health and safety concerns. If neutral rounding practices are permitted for overtime calculation, there is no reason they should not be used, at least as the practice was in this case, with respect to meal period compliance.

Amici also will show that the positions urged by Plaintiff, if adopted, will undermine one of the fundamental holdings of this Court in *Brinker Restaurant Corporation v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*): an employer need only "provide" meal periods in accordance with the statutory and Wage Order requirements, and refrain from interfering with those meal periods. Plaintiff's arguments would lead to intrusive, time-consuming and expensive monitoring by employers, a

practice that this Court did not require in *Brinker* and that the Legislature has never seen fit to impose.

Finally, *amici* wish to comment on the proposal that an evidentiary "presumption," based on Justice Werdegar's concurring opinion in this Court's *Brinker* decision, should be adopted in the context of a motion for summary adjudication or summary judgment on the merits of a meal period claim. There is legally no such presumption. The Legislature has never adopted one, and the proposed evidentiary presumption would create the same inconsistency with the basis of the *Brinker* holding.

The viewpoint of these two proposed *amici* will assist the Court in evaluating the important legal issues in this case

INTERESTS OF AMICI CURIAE

California Employment Law Council. CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private-sector employers in the State of California, who collectively employ hundreds of thousands of Californians.

CELC has been granted leave as amicus curiae to file briefs and/or orally argue in many of California's leading employment cases, including *Frlekin v. Apple, Inc.* (9th Cir. 2017) 870 F.3d 867, request for certification granted Sept. 20, 2017, S243805, argued and submitted Dec. 4, 2019 (*Frlekin*); *Voris v. Lampert* (2019) 7 Cal.5th 1141 (*Voris*); *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175 (*ZB*); *Alvarado v. Dart Container Corporation of California* (2018) 4 Cal.5th 542 (*Alvarado*); *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*); *Troester v. Starbucks Corporation* (2018) 5 Cal.5th 829; *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257 (*Augustus*); *Kilby v. CVS*

Pharmacy, Inc. (2016) 63 Cal.4th 1; *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*); *Duran v. U.S. Bank, N.A.* (2014) 59 Cal.4th 1 (*Duran*); *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203; *Brinker, supra*, 53 Cal.4th 1004 and *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*).

Employers Group. Employers Group is one of the nation's oldest and largest human resources management organization for employers. It represents nearly 3,000 California employers of all sizes in a wide range of industries, which collectively employ nearly three million employees. As part of its mission, Employers Group maintains an advocacy group designed to represent employer interests in government and agency policy decisions and in the courts. As part of this effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions governing employment relationships.

Employers Group has appeared as amicus in many significant employment cases, including, most recently, *Frlekin, supra*, S243805, argued and submitted Dec. 4, 2019; *Voris, supra*, 7 Cal.5th 1141; *ZB, supra*, 8 Cal.5th 175; *Alvarado, supra*, 4 Cal.5th 542; *Dynamex, supra*, 4 Cal.5th 903; *Troester, supra*, 5 Cal. 5th 829; *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074; *Augustus, supra*, 2 Cal.5th 257; *Iskanian, supra*, 59 Cal.4th 348; *Duran, supra*, 59 Cal.4th 1 and *Murphy, supra*, 40 Cal.4th 1094.

Due to their wide-ranging experience in employment matters, CELC and Employers Group are uniquely able to assess both the impact and implications of the legal issues presented in employment cases.

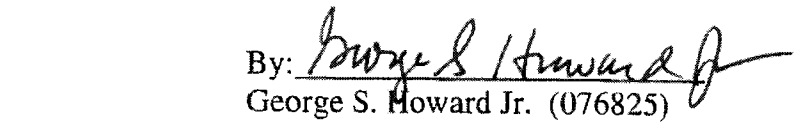
No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*

curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Respectfully submitted,

DATED: January 21, 2020

JONES DAY

By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 4655 Executive Dr., Suite 1500, San Diego, California 92121.

On January 21, 2020, I served the foregoing document(s) described as:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENT

on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

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[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

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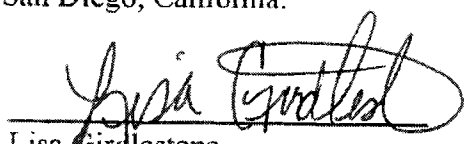
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 21, 2020, in San Diego, California.



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[PROPOSED] BRIEF OF *AMICI CURIAE* EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT

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I. SUMMARY OF ARGUMENT

Amici Employers Group and the California Employment Law Council (CELC) write because the arguments made by Plaintiff are based on flawed premises. Plaintiff's arguments, if adopted, would undermine a key element of this Court's holding in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), would impose new obligations on employers, and create an unbalanced and unfair system for litigation of meal period claims. The Court of Appeal correctly decided the questions presented. Its sensible application of a lawful, neutral rounding practice at the summary judgment stage aligns with the health and safety purposes animating multiple wage and hour standards and protections.

Plaintiff mistakenly argues that meal period rules are based on concerns about employee health and safety, whereas overtime rules, for which neutral rounding practices have been approved, are not. Untrue. Overtime rules and other wage/hour standards are based on the same concerns for employee health and safety. Further, Plaintiff fails to acknowledge the undisputed fact that the rounding practice in question in many cases overcompensated employees, including Plaintiff herself, therefore paying for time that the employees actually did not work. (See *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, fns. 22, 27, 29 (Court of Appeal Opn.).)

Plaintiff's argument ignores two long settled principles: First, a rounding practice that is neutral both on its face and in practice is not unlawful. Second, an employer need only "provide" a meal period; the employer need not police each employee to ensure that the employee takes a meal period if one is properly provided. (*See's Candy Shops, Inc. v. Superior Court* (2010) 210 Cal.App.4th 889, review den. Feb. 13, 2013 [rounding policy, if neutral on its face and in effect, is lawful]; *Brinker, supra*, 53 Cal.4th at pp. 1040-1041 [employer must only make meal periods available to employees and not interfere or prohibit employees from taking no periods].) Further, the premise of Plaintiff's brief, and her opposition to the summary judgment motion in the Superior Court, is that time-punch data alone may establish violations or, at least, create a factual issue for trial. Again,

untrue. A time punch showing a "late" or "short" meal period says nothing about *why* the meal period may have been "late" or "short." Further, the "drop down" feature of the timekeeping system in this case specifically asked employees to identify the *reason* that the employee may have recorded a "late" or "short" meal period. (Court of Appeal Opn., *supra*, at pp. 1072-1074.) The drop down feature thereby provided a clear mechanism for permitting employees to report any "late" or "short" meal periods that were the product of employer interference or coercion. Plaintiff's arguments, if adopted, would set an unfair precedent, allowing any plaintiff who could identify potential "violations" from meal period punches to avoid summary judgment, even though the employer, as here, had undisputed evidence of compliant written meal period policies and had actually overpaid its employees using a valid rounding system.

Further, Plaintiff's arguments would upend this Court's *Brinker* holding that employers need not police meal periods. Plaintiff's argument would force employers to monitor each and every employee's daily meal period(s) to ensure compliance—a result the *Brinker* Court wisely avoided. Such obligatory monitoring would be overwhelming to many small and medium sized employers; as well as an unnecessary intrusion into employees' personal discretion of how they choose to use (or not use) the break time they are provided.

Plaintiff also improperly seeks to elevate statements made in a concurring opinion from the *Brinker* decision—that gathered the votes of only two of this Court's members—into an evidentiary "presumption" at the summary judgment stage or even at trial. A concurring opinion does not establish any binding rule, as the Court of Appeal noted at pages 28-29 of its opinion (reported at pages 1087-1079). But, more importantly, the language of Judge Werdegar's concurring opinion applies only where an employer's records "show no meal period for a given shift over five hours . . ." (emphasis added). *Brinker*, *supra*, 53 Cal.4th at p. 1055. Her concurring opinion does not apply to a situation where, as here, employees record their meal breaks in the employer's detailed timekeeping system, employees have the ability to indicate the

reason for a "late" or "short" meal punch, and there is undisputed evidence that the written meal policy was lawful in practice and on its face.

Finally, employers are not legally required to use electronic timekeeping systems. Many employers do not use electronic systems and other employers cannot afford them. For those employers who can afford to implement electronic timekeeping, the interest in efficiency is to minimize the administrative burden and cost of monitoring masses of data—it is emphatically not about computational efficiency or to "short" employee wages.

II. INTEREST OF THE TWO AMICI AND THEIR MEMBERS

The two proposed *amici* are Employers Group and the California CELC, both of which have appeared numerous times before this Court as *amici curiae*, including in very recent decisions. Their interests are more particularly described in the Application for leave to file this brief. However, collectively, these two organizations represent several thousand California employers of all sizes.

Many, although not all, of the members of the two *amici* use timekeeping systems with rounding features. Plaintiff would have this Court find that any such systems would be *per se* unlawful with respect to meal period claims. Her argument is based on plainly false policy assumptions; namely, that the meal period law stands unique and apart from the overtime law because it is based on "employee health and safety."[1]

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[1] See argument at page 26-27 of the Opening Brief (AOB), that rounding in the overtime context "protects employees' financial interest and fair wages . . . but this rationale does not transfer to the meal period context, where employees' interest in strict enforcement of the meal period protections is not that they are fully compensated for all their work, but that they get an uninterrupted, 30 minute meal period to rest, recharge, be free of the employer's control and even attend to personal matters"; or the claim, at page 28, that rounding in the "overtime arena" does not interfere "with the underlying right and guarantees—that is, fair wages. But the same policy cannot be neutral in the meal period arena . . . [because] it still eviscerates employees' noneconomic, incompensable interest in health and safety . . .")

To the contrary, the law is clear that, like meal period requirements, protection of employee health and safety is a primary purpose underlying California's overtime requirements.

Plaintiff attempts to further distance herself from the court-approved use of neutral rounding policies for purposes of overtime pay by suggesting that, unlike overtime, meal period requirements provide "precise" and "bright line" rules that must be scrupulously observed.[2] But, again, this false comparison distorts the overtime rules: the overtime rules are every bit as "clear and unambiguous" to use Plaintiff's own words (AOB at p. 18) as the meal period rules, and also impose "precise" requirements. Yet neutral rounding has been repeatedly approved in the overtime context. Put another way, if neutral rounding is permissible as a timekeeping practice for overtime claims, it is permissible on the same basis for meal period claims.

To be clear, *amici* do not argue that a rounding policy can excuse meal break violations. However, on this record, the employer had meal period policies and practices that fully comply with the law. Summary judgment was properly granted and the Court of Appeal properly found that "over time, [the employer] did not fail to properly compensate the recruiters, as a class, for all the time they worked based on the rounding policy in effect." (Court of Appeal Opn., *supra*, at p. 1090.)

This Court should affirm the judgment of the Court of Appeal.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. AMN'S ROUNDING SYSTEM – IN PRINCIPLE

[2] See AOB at page 17: "meal and rest period provisions in both the Labor Code and relevant IWC wage orders provide bright lines on the precise timing requirements for full, timely and compliant meal and rest periods..." and at page 26, "admittedly, using time rounding as a wage calculation tool in the overtime area has been deemed fair and neutral where, in the long run, employees paid a few minutes less one day because of rounding up are theoretically paid a few minutes extra another day due to rounding down."

AMN's written policies for meal and rest periods incorporate the requirements under California law that nonexempt workers be afforded an uninterrupted, unpaid break of not less than thirty minutes that starts before the end of the fifth hour of work in a workday. (1 AA 235-64, 10 AA 2773; see Lab. Code §§ 226.7(b)-(c), 512; Wage Order No. 4 § 11-12.)[3] Accordingly, AMN's written policy is facially compliant with California law. (See also AMN's Answer Brief on the Merits (Answer) at pp. 4-9.)

For timekeeping, AMN used a system called "Team Time," which enables employees to 'punch' in and out on the Team Time application on their desktop computers. (8 AA 1973, 2206 ¶ 3.) This program rounds employees' punch times to the nearest ten-minute increment, meaning that times ending in 5 through 9 are rounded up and times ending in 1 through 4 are rounded down. (8 AA 2707 ¶ 5.)

If the resulting time values reflect a possible missed, late or short meal period, a "drop-down menu" appears on the employee's screen, requiring a choice to be made with respect to each applicable period. (1 AA 245; 8 AA 2072-2073, 2209 ¶ 15.) The employee could respond (1) he or she was provided an opportunity to take a 30-minute break but chose not to take it; (2) he or she was provided an opportunity but chose to take a shorter/later break; or (3) he or she was not provided such an opportunity, in which case a meal period penalty payment would be sent to the employee in their subsequent pay period. (1 AA 232 ¶ 4, 236-237, 245; 8 AA 2209 ¶ 15.)

Additionally, for each biweekly timesheet, the employees were again asked whether they had been provided the opportunity to take all meal periods during the relevant period, and were again given the opportunity to indicate that they had been denied such an opportunity. (1 AA 248; 8 AA 2075-2077, 2196-2196 ¶ 9.)

B. AMN'S ROUNDING SYSTEM – AS APPLIED

Each time the aforementioned drop-down menu appeared on Plaintiff's own screen, she never selected the third option, which would indicate that a compliant meal

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[3] All subsequent statutory references are to the Labor Code.

period was not provided. (8 AA 2195 ¶ 5, 2165 ¶ 10.) In other words, the record shows that based on Plaintiff's own affirmations, she was always provided an opportunity to take a full and timely meal period. She did, however, indicate on 31 occasions that a short or delayed meal period had been her own choice. (8 AA 2165 ¶ 10.) And, on each biweekly timesheet, Plaintiff consistently indicated that she was given the opportunity to take a compliant meal period. (8 AA 2195 ¶ 5.)

As to her colleagues, the average class member meal period was about 45.6 minutes long. (8 AA 2169 ¶ 31.) Of the 39 employees surveyed voluntarily before class certification, 30 asserted under oath that they "always" or "usually" took uninterrupted lunches of at least 30 minutes. (5 AA 1288-7 AA 1899, Tabs 1-40, ¶¶ 19-20.) Others stated that they only "sometimes" took their meals or breaks, but that it was their choice—and a few sometimes worked during lunches without their supervisors' knowledge. (5 AA 1296.)

IV. ARGUMENT

A. Employee Health And Safety Concerns Animate Both Overtime And Meal Period Protections, So Rounding Is As Valid For Meal Breaks As It Is For Overtime.

1. Employee Health and Safety

Plaintiff tries to distinguish meal period rules from other wage hour standards (notably, overtime rules), but there is no reason to require different time reporting systems for meal periods than for time worked, including overtime. At page 31 of her opening brief, Plaintiff refers to the supposed "fundamentally different rationales between overtime and meal period laws . . ." To the contrary, both overtime regulations and meal period rules are based on concerns about the health and safety of employees. (See, e.g., *Alvarado v. Dart Container Corp.* (2018) 4 Cal.5th 542, fn. 7 (*Alvarado*).)

As this Court recently explained, overtime "policy is not focused solely on ensuring adequate compensation for workers; rather, it is also focused on making the eight-hour workday and the 40-hour workweek the norm, and making overtime work the exception." (*Alvarado, supra*, 4 Cal.5th at fn. 7.) Continuing, this Court cited several

reasons for the employee health and safety purposes supporting the regulations, including that "[n]umerous studies have linked long work hours to increased rates of accident and injury." (*Id.* [citing Stats. 1999, ch. 134, (Assembly Bill 60) § 2, p. 1820].)[4] And courts routinely permit neutral rounding in the context of overtime claims. (See *Silva v. See's Candy Shops, Inc.* (2016) 7 Cal.App.5th 235, review den. Mar. 22, 2017 (*See's Candy II*).) As a straightforward matter then, neutral rounding likewise may lawfully apply with respect to time reporting of meal periods.

2. *Brinker*'s Refusal To Require Employer Policing

The larger concern for the members of the *amici* is that prohibiting rounding in the meal period context will result in the kind of policing by employers that the *Brinker* court expressly rejected. (See *Brinker*, *supra*, 53 Cal.4th at pp. 1040-1041.)

As relevant here, *Brinker* held that an employer "is not obligated to police meal breaks and ensure no work thereafter is performed." (*Id.*) Instead, "[b]ona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations...." (*Id.*) Even though employer policing would have been helpful to employees' health and safety, the court elected not to require employers to ensure that no work was being done during meal periods. The *Brinker* court rightly recognized that it was in both employees and employers' best interest for employers not to police the meal periods. (See *id.*)

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[4] We discuss the example of overtime here, but the purpose behind much of wage and hour regulation is to protect the health and safety of employees, which has been deemed consistent with neutral rounding practices. (See, e.g., 29 C.F.R. § 785.48 [Fair Labor Standards Act regulation accepting "rounding" practices, "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked."].)

Courts have repeatedly held that "evidence" of time punch data reflecting potential "short" or "late" meal periods does not establish a violation, including the majority opinion in *Brinker* itself.[5]

The same principle applies to rounding. And if employers are forced to police meal periods by investigating every employee meal punch that was "late" or "short", notwithstanding the fact that they have compliant meal policies in place, the core holding of *Brinker* would be reversed. That will result in minimal, if any, benefits to employees and significant intrusion by employers into employee meal and rest breaks. In this case, there were some time punches that appeared to reflect short or late meal break periods. (See AOB at pp. 2, 33.) Nevertheless, as the Court of Appeal found, the expert retained by the employer concluded that the rounding policy in practice resulted in a "net *surplus* of 1,929 work hours in paid time for the Nurse Recruiter class as a whole." (Court of Appeal Opn., *supra*, at p. 1084 [emphasis in original].). And the named Plaintiff herself benefited from the rounding policy by approximately $151.03. (*Id.*, fn. 19.)

3. Legislative Inaction Since The *See's Candy* Opinion.

The Legislature has been active annually in regulating employment standards in California,[6] but it has never indicated that timekeeping for meal periods should be treated differently from other protections directed at employee health and safety, such as overtime regulations. Specifically, in the nearly eight years since *See's Candy I* was

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[5] "Proof an employer had knowledge of employees working through meal periods will not alone subject the employer to liability for premium pay[.]" (*Brinker, supra,* 53 Cal.4th at p. 1040; see *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 781 [employer has no duty to investigate potential meal violations appearing in time records without further evidence that workers were prevented from taking meal periods]; *Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 49, review den. Sept. 25, 2019 [meal period premiums not available for "every short, missed or late meal period reflected in [the employer's] time punch data . . . absent proof of actual violations of the meal period statute."].)

[6] The Legislature defunded the Industrial Welfare Commission in 2004 and has not subsequently funded the Commission. However, the Legislature has since 2004 made frequent amendments to the Labor Code in numerous areas involving wage and hour rules.

decided, the Legislature has neither prohibited nor regulated rounding. (See *See's Candy Shops, Inc. v. Superior Court (Silva)* (2010) 210 Cal.App.4th 889, 903 (*See's Candy I*).) And this perspective is shared nationally: the U.S. Department of Labor has for decades approved the use of neutral rounding practices (See, e.g., 29 C.F.R. § 785.48.) This Court should not supplant the province of the Legislature and establish a rule the Legislature has not established.

4. Rounding Does Not Excuse Any Violation.

An employer's timekeeping practices do not and cannot excuse an actual meal period violation. Here, the employer's written policies were facially compliant with the Labor Code and Wage Order standards. (Court of Appeal Opn., *supra*, at pp. 1088-1091.) Plaintiff does not claim otherwise. The employees were unquestionably provided with a drop down menu that permitted them to report whether "he or she was not provided the opportunity to take a timely 30-minute meal period," in which case "[the employer] paid the recruiter the full statutory meal period penalty." (*Id.*). Ignoring both the compliant written policy and the employee's opportunity to report a violation, Plaintiff instead asserts that a rounding policy can never be used as evidence, along with other evidence, to establish compliance. But, this misses the mark: time punches alone cannot establish a violation because the time punch itself did not establish *why* an employee may have taken a "late" or "short" meal period. (See *Brinker*, *supra*, 53 Cal.4th at 1040.)

Further, an employer may not require an employee to take a break of less than 30 minutes on the basis that, once the timekeeping system rounds, the break will appear as 30 minutes. The system at issue here, however, did no such thing. In fact, it is undisputed that the system *overcompensated* employees as a group and the named Plaintiff herself in particular. (Court of Appeal Opn., *supra*, at p. 1084, fn. 19.)

Section 512, after all, is not a timekeeping statute—it is simply a requirement that an employer provide certain employees "with a meal period of not less than 30 minutes."

Under *See's Candy I* and *Brinker*, the timekeeping system should permit rounding, which is equally appropriate for all protections rooted in employee health and safety.

B. EMPLOYERS' VALID INTEREST IN EFFICIENCY IS MORE ABOUT ADMINISTRATIVE OVERSIGHT THAN TIMEKEEPING TECHNOLOGY.

It is true that many, perhaps most, employers, now use automatized, electronic timekeeping systems. But not all do. The Labor Code and Wage Orders require only that the employer keep accurate records of hours worked—they do not require electronic systems. Indeed, the Wage Orders still refer to paper systems. (Wage Order 4 § 7(c) [records must be "in ink or other indelible form. . . ."].) By claiming there is no longer any "need for rounding to either pay employees for all the time they worked or to ensure meal and rest period compliance," Plaintiff's Opening Brief (p. 40) flies in the face of existing law which permits handwritten timecards and does not require electronic timekeeping.

Many smaller and mid-sized employers cannot afford the sophisticated electronic systems used by this employer. The Legislature has not seen fit to impose that cost on employers in general. Plaintiff's argument would in essence require electronic timekeeping systems that are not currently required and that small employers might not need or be able to afford. (See AOB at pp. 39-44.) It would also require redesign or re-programming of multiple existing lawful systems.

Contrary to the suggestions in Plaintiff's brief, rounding is not an inherently sinister method designed to cheat employees. If that were the case the United States Department of Labor would not, for many decades, have approved neutral rounding practices. Rounding polices have historically been used in the interest of efficiency. With the advent of computerized timekeeping systems, the interest in one type of efficiency may be diminished. However, a rounding practice, if neutral on its face and in practice, reduces the burden of administrative oversight and the burden to filter what is important from what is not. If rounding is barred from the meal period context, then a human resources assistant will inevitably monitor each punch that does not reflect at least

30 minutes and/or that is started 'late.' That means more oversight, more unnecessary monitoring, more unnecessary administration, and a higher cost of maintaining employees.

The advertising material cited in Plaintiff's brief is grossly distorted by being taken out of context. (See AOB at pp. 39-44.) Vendors that provide timekeeping systems do not advertise them as a method of cheating employees.[7] But as happened in this case, applying a neutral rounding practice to meal periods can benefit employees and employers alike, while providing for greater efficiency in administrative oversight. (See 5 AA 1288-7 AA 1899, Tabs 1-40, ¶¶ 19-20; 8 AA 2169 ¶ 31.)

C. THE PROPOSED "REBUTTABLE PRESUMPTION" IS NOT LAW, WOULD NOT APPLY WHERE THERE ARE DETAILED TIME RECORDS AND IS NOT APPROPRIATE IN A SUMMARY JUDGMENT PROCEEDING.

Justice Werdegar's concurrence in *Brinker* is not part of the majority's holding. As such, it is not binding on the trial and reviewing courts. (See Court of Appeal Opn., *supra*, at pp. 1087-1088, fn. 25; *In re Marriage of Dade* (1991) 230 Cal.App.3d 621, 629.) Additionally, Plaintiff's argument concerning the "Werdegar presumption" egregiously distorts Justice Werdegar's own concurrence. Justice Werdegar stated that "if an employer's records show *no* meal period in a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." (*Brinker*, *supra*, 53 Cal.4th at p. 1053 [emphasis added].) But,

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[7] For reference, Plaintiff's brief's citation on page 42 to ADP's advertising material was incorrect and misleading. Plaintiff quoted an ADP advertising web page titled "Workforce Management," not "Time and Attendance," and it is available at https://www.adp.com/what-we-offer/time-and-attendance/workforce-management.aspx (last visited Jan. 21, 2020). ADP is not advertising to save employers money by shaving employees' time. ADP does advertise that employers can "[s]ave an average of 40 minutes per week *per manager* with automated alerts, timecard approvals, scheduling, exception reports and more" (emphasis added). Note that although Plaintiff treats the issue as one of computational efficiency, even the passage quoted by Plaintiff indicates that employers' interest in efficiency is about reducing the costs of human/administrative oversight.

here, there was (1) undisputed evidence of a compliant written meal period policy; (2) undisputed evidence that employees had the ability on the "drop down" system to report when the employee was not provided with the meal period due to employer interference or coercion; and (3) thousands of meal period punches together with clear evidence that the rounding system, as applied to the group as a whole, actually over compensated the employees for hours worked. There is an enormous difference, which Plaintiff's brief ignores, between showing *no* meal period in a given shift versus time punches that the employee that himself or herself enters.

As noted with respect to rounding, the Legislature has actively intervened in wage/hour law in recent years, but in the nearly eight years since *Brinker* was decided, it has not decided to codify Justice Werdegar's concurrence.

The argument concerning the supposed presumption also misses a key point: here, and in the great majority of timekeeping systems (electronic or otherwise), the *employee* has control of the time the employee enters. It is up to the employee to accurately enter his or her time and most employer's policies so state. Employees are not in the habit of "under-reporting" their own time. Further, time records which may reflect a potential meal violation do not answer the question *why* the employee took a "late" or "short" meal, so those records have minimal evidentiary value absent separate, affirmative evidence of a violation.

In the real world, every timekeeping system will reflect some "short" or "late" meal periods. And that is true whether the employer uses rounding or not. The "presumption" advocated by Plaintiff would then be argued to create a factual issue for trial, notwithstanding written policies that are facially compliant and no other evidence of a violation Time punches do not themselves tend to prove a violation occurred: to argue otherwise is to ignore the *Brinker* holding (as well as the fact that Justice Werdegar's concurrence garnered only two votes). The time punches simply reflect the dynamics of a contemporary workplace, where employees will, by their own volition, choose to take a late or short meal break, or to work during the period, unbeknownst to their employer

(just as the employees who testified in this case did). (See 5 AA 1288-7 AA 1899, Tabs 1-40, ¶¶ 19-20.) Nearly every employer will be faced with this presumption, even though the great balance of missed or late break periods are the result of lawful employee choice.

As the Court of Appeal noted, the standards for granting a summary judgment motion are fundamentally different than the standards for addressing class certification. (Court of Appeal Opn., supra, at pp. 1087-1088.) The Court here properly applied the summary judgment construct established by this Court long ago. (*Id.* at pp. 1076-1078, 1085-1086, 1088, 1096-1097, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Importing a non-existent "presumption" into the clearly articulated summary judgment framework would place a heavy thumb on the scales of one side. Plaintiff's proposed presumption would in practice be often impossible or at least very difficult for an employer to rebut. Where an employer had hundreds or thousands of employees taking a meal period each day, it would have to marshal evidence to rebut the presumption based on thousands if not hundreds of thousands of time punches; even if the employer's written policies were compliant and there was no evidence of employer interference or coercion with meal periods.

The proposed presumption can be based only on the desire to defeat proper summary adjudications where the employer has compliant policies and there is no evidence of other violations. It cannot be justified on any other basis.

As the record in this case indicates, evidence of time records appearing to show missed or late periods, without more, only tends to make it more probable that an employer has employees, not that it's shorting them.

V. CONCLUSION

Because this case was correctly decided by the Court of Appeal, and for the reasons explained in this brief, we respectfully ask this Court to affirm the judgment of the Court of Appeal.

Respectfully submitted,

DATED: January 21, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, Counsel hereby certifies that the enclosed brief contains 4,574 words. Counsel relies on the word count of the computer program used to prepare this brief.

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I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 4655 Executive Dr., Suite 1500, San Diego, California 92121.

On January 21, 2020, I served the foregoing document(s) described as:

[PROPOSED] BRIEF OF *AMICI CURIAE* EMPLOYERS GROUP AND CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF RESPONDENT

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SEE SERVICE LIST

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below.

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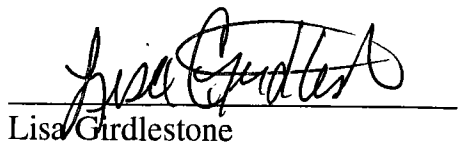
Executed on January 21, 2020, in San Diego, California.



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