No. S166350

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRINKER RESTAURANT CORPORATION, BRINKER INTERNATIONAL, INC., and BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO,
Respondent.

ADAM HOHNBAUM, ILLYA HAASE, ROMEO OSORIO, AMANDA JUNE RADER and SANTANA ALVARADO,
Real Parties in Interest.

Petition for Review of a Decision of the Court of Appeal, Fourth Appellate District, Division One, Case No. D049331, Granting a Writ of Mandate to the Superior Court for the County of San Diego, Case No. GIC834348
Honorable Patricia A.Y. Cowett, Judge

SUPPLEMENTAL BRIEF SUBMITTING NEW AUTHORITY: *MARTINEZ v. COMBS*, 49 Cal.4th 35 (2010) [CAL. RULES OF COURT, RULE 8.520(d)(1)]

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. DISCUSSION 1

A. Under *Martinez*, Employers May Not "Suffer" or "Permit" Work to Occur During Required Meal Periods 1

B. Under *Martinez*, the Labor Code and Wage Orders Must Be Construed in Light of Their Language, History, and Place in the Context of California Wage Law 7

III. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Brown v. Federal Express Corp.,
249 F.R.D. 580 (C.D. Cal. 2008) 6

Cicairos v. Summit Logistics, Inc.,
133 Cal.App.4th 949 (2005) 5

Commonwealth v. Beatty,
15 Pa. Super. 5 (1900) 6

Curtis & Gartside Co. v. Pigg,
134 P. 1125 (Okla. 1913) 3

Martinez v. Combs,
49 Cal.4th 35 (2010) ..... *passim*

Murphy v. Kenneth Cole Productions, Inc.,
40 Cal.4th 1094 (2007) 9

People v. Sheffield Farms-Slawson-Decker Co.,
167 N.Y.S. 958 (N.Y. App. Div. 1917) 3

People v. Sheffield Farms-Slawson-Decker Co.,
aff'd, 121 N.E. 474 (N.Y. 1918) 3, 5, 6

Purtell v. Philadelphia & Reading Coal & Iron Co.,
99 N.E. 899 (Ill. 1911) 3

Sullivan v. Oracle Corp.,
___ Cal.4th ___, 2011 WL 2569530 (2011) 7

Valenzuela v. Giumarra Vineyards Corp.,
614 F.Supp.2d 1089 (E.D. Cal. 2009) 5

Statutes

Cal. Labor Code

Section 226.7 ..... 7, 9
Section 226.7(b) 7, 9
Section 512 ..... 7, 9
Section 512(a) 9
Section 1194 ..... 7, 9

Cal. Rules of Court

Rule 8.520(d)(1) 1
Rule 8.520(d)(2) 1

IWC Wage Orders – Current Versions

California Code of Regulations, Title 8
Section 11050 (MJN Ex. 5) 1, 3, 4
Section 11120 (MJN Ex. 255) 3, 4
Section 11140 (MJN Ex. 274) 1, 3, 4

IWC Sanitary Orders – Pre-1947

Wage Order 1 (Fruit and Vegetable Canning Industry)
(Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Ex. 116) 1

Wage Order 2 (Fruit and Vegetable Canning Industry)
(Feb. 14, 1916, eff. Apr. 14, 1916) (MJN Exs. 76, 116) 1, 2

Wage Order 18 (Sanitary Regulations for Any Occupation,
Trade or Industry) (Dec. 4, 1931, eff. Feb. 26, 1932)
(MJN Exs. 11, 80) 2

IWC Wage Order 5 (Public Housekeeping Industry) – Historical Versions

Wage Order 5NS
(Apr. 14, 1943, eff. Jun. 28, 1943) (MJN Ex. 12) 2

Wage Order 5-52
(May 15, 1952, eff. Aug. 1952) (MJN Ex. 14) 4

Miscellaneous

Amici Curiae Brief of Former DLSE Chief Counsel Miles Locker
and Former IWC Commissioner Barry Broad,
filed August 26, 2009 ..... 2, 4, 8

I. INTRODUCTION

Real Parties in Interest respectfully submit this supplemental brief to address this Court's recent, unanimous decision, *Martinez v. Combs*, 49 Cal.4th 35 (2010). *See* Cal. Rules of Court, rule 8.520(d)(1).

II. DISCUSSION

A. Under *Martinez*, Employers May Not "Suffer" or "Permit" Work to Occur During Meal Periods

In *Martinez*, this Court examined the word "employ" as used in the Wage Orders, and its definition, "to engage, suffer, or permit to work." 49 Cal.4th at 57 (citing Wage Order 14, 8 Cal. Code Regs. §11140, ¶2(C)).[1]

Martinez observed that "the phrases the IWC presently uses to define the term[] 'employ' ... first appeared in orders dated 1916." *Id.* at 50. Those orders:

> contained no separate definition of the term "employ," but various substantive provisions imposing duties on employers began with language like that the IWC still uses today in all of its industry and occupation wage orders to define the term. For example: "No person, firm or corporation *shall employ or suffer or permit* any woman or minor to work in the fruit and vegetable canning industry ... at time rates less than the following...." (IWC former wage order No. 1, §2, italics added....)

Martinez, 49 Cal.4th at 57.

The same is true of the first Wage Order with a meal period requirement: "No person, firm or corporation *shall employ or suffer or permit* any woman or minor to work in any fruit or vegetable canning establishment in which the conditions of employment are below the following standards: .... (20) TIME FOR MEALS.- Every woman and

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[1] Wage Order 5, governing this case, contains the same definition. 8 Cal. Code Regs. §11050, ¶2(E).

minor shall be entitled to at least one hour for noon day meal; provided, however, that no woman or minor shall be permitted to return to work in less than one-half hour." Wage Order 2 (Feb. 14, 1916, eff. Apr. 14, 1916), §1(20) (MJN Ex. 76) (emphasis added).

Each subsequent Wage Order with a meal period requirement began with the same preamble, including the 1931 uniform "sanitary regulations": "No person, firm or corporation *shall employ or suffer or permit* any women or minor to work in any establishment or industry in which the conditions of employment are below the standards set forth hereinafter;.... 10. MEALS ...." Wage Order 18 (Dec. 4, 1931, eff. Feb. 26, 1932) (MJN Exs. 11, 80) (emphasis added).[2]

The IWC continued to use the words "employ or suffer or permit" at the beginning of each Order until the 1943 "NS" series, which included definitions for the first time. *See* Wage Order 5NS (Apr. 14, 1943, eff. Jun. 28, 1943), ¶2 (MJN Ex. 12). Then, as now, the word "employ" was defined as "to engage, suffer or permit to work." *Id.* ¶2(c).

Martinez explains what the word "employ," as used in the Wage Orders, means. The IWC "borrowed [the] definition ... in 1916 from the language of early 20th-century statutes prohibiting child labor." 49 Cal.4th at 69. Its meaning was "well-understood." *Id.* at 67. "Statutes so phrased were generally understood to impose liability on [employers] who knew child labor was occurring in the enterprise but failed to prevent it." *Id.* at 69. As courts of that era explained:

> "[T]he statute ... makes use of a term even stronger than the term '*permitted.*' It says that [a child] shall be neither

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[2] *See also* Amici Curiae Brief of Former DLSE Chief Counsel Miles Locker and Former IWC Commissioner Barry Broad, filed 08/26/09 (hereafter "Locker-Broad Amicus Brief"), at 2-12 (discussing Wage Orders' meal period language, 1916-1943).

> employed, permitted, nor *suffered* to engage in certain works." The standard thus meant that the employer "shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder." .... "[W]hile the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute."

49 Cal.4th at 58-59 (quoting *Curtis & Gartside Co. v. Pigg*, 134 P. 1125, 1129 (Okla. 1913); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 99 N.E. 899, 902 (Ill. 1911)) (original italics; underscore added).

This definition, *Martinez* holds, "'cast[s] a duty upon the owner or proprietor to prevent the unlawful condition .... *The basis of liability is the owner's failure to perform the duty of seeing to it that the prohibited condition does not exist.*" *Id.* at 69 (quoting *People v. Sheffield Farms-Slawson-Decker Co.*, 167 N.Y.S. 958, 961 (N.Y. App. Div. 1917), *aff'd*, 121 N.E. 474 (N.Y. 1918)) (original italics). Put another way, "'the omission to discover and prevent was a sufferance of the work.'" *Id.* (quoting *Sheffield*, 121 N.E. at 477 (Cardozo, J.)); *see id.* at 70 ("the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring" (original italics)).

Since 1952, the Wage Orders have all contained the following meal period language:

> No employer shall *employ* any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes ....

8 Cal. Code Regs. §11050, ¶11(A) (emphasis added); *see* Wage Order 5-52, ¶11 (MJN Ex. 14) (same).[3] The word "employ" continues to be defined as

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[3] The exceptions are Order 12, permitting 6-hour work periods, and Order 14, imposing an "authorize and permit" standard for meal periods

"to engage, suffer or permit to work." 8 Cal. Code Regs. §11050, ¶2(E).

Under *Martinez*, therefore, the meaning of this language is clear. "No employer shall *employ* any person" means no employer shall "*suffer* or *permit* [any person] to work" without the required meal periods. "The verbs 'to suffer' and 'to permit' ... are terms of art in employment law." 49 Cal.4th at 64. They mean that the employer may neither "*permit*" work "by acquiescence" nor "*suffer*" work "by a failure to hinder" it from occurring. *Id.* at 58, 69, 70. To paraphrase *Martinez*, "[a] proprietor who knows that persons are working" during their meal periods "clearly suffers or permits that work by *failing to prevent it*, while having the power to do so." *Id.* at 69 (emphasis added).

Employers will uniformly know whether or not persons are working during their meal periods because the Wage Orders require them to know it. Employers must keep accurate records of every meal period. 8 Cal. Code Regs. §11050, ¶7(a)(3).[4] If the required meal periods do not appear in these records, the employer is charged with knowledge that the meal periods are not being taken and that work is instead continuing through them. Under *Martinez*, "[t]he basis of liability" is the employer's "failure to perform the duty of *seeing to it* that the prohibited condition does not exist"—namely, that work does not occur during the meal periods. 49 Cal.4th at 69 (emphasis added).

Martinez thus confirms that under the Wage Orders, employers have an affirmative obligation to ensure that workers are relieved of all duty—that is, neither "suffered" nor "permitted" to work—during meal periods. To state the obligation another way, employers are charged with a "duty of

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(like rest breaks). 8 Cal. Code Regs. §11120, ¶11(A); *id.* §11140, ¶11(A).

[4] *See also* Locker-Broad Amicus Brief at 36-40 (discussing Wage Orders' longstanding recording requirement).

using reasonable care to see that [workers] are not suffered or permitted to work" without the required meal periods. *Id.* at 59; *see also id.* at 69 ("the duty of seeing to it"). This duty encompasses not just recording, but also scheduling and monitoring, meal periods. The employer must take all of these steps, or be liable for "failing to hinder" or "failing to prevent" work from occurring during meal periods. *Id.* at 58, 70; *see Cicairos v. Summit Logistics, Inc.*, 133 Cal.App.4th 949, 962-63 (2005); *Valenzuela v. Giumarra Vineyards Corp.*, 614 F.Supp.2d 1089, 1098 n.3 (E.D. Cal. 2009).

A decision cited in *Martinez* illustrates the point. In *People v. Sheffield Farms*, the law stated that "[n]o child ... shall be employed *or permitted* to work" in certain industries. 121 N.E. at 475 (emphasis added). The employer adopted a paper policy prohibiting child labor, but Justice Benjamin Cardozo, writing for New York's highest court, found that insufficient. "[T]he [employer's] duty [does] not end with the mere promulgation of a rule. There [is] some duty of enforcement." *Id.* The employer "was not blind to the fact that the rule was often broken," yet took no effective steps to enforce it. *Id.* The employer was criminally responsible for "permitting" the unlawful work because it had "no adequate system either of repression or detection." *Id.*

Justice Cardozo flatly rejected the employer's argument that its operations were too big for such monitoring, holding that employers of every size must *make* themselves aware of the state of their business:

> [The employer] must neither create nor suffer in his business the prohibited conditions. .... The personal duty rests on the employer *to inquire* into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates.

Id. at 476 (emphasis added). In other words, the employer is liable for "permitting" child labor if, "through reasonable diligence," the employer could have "acquire[d] knowledge" of the labor and repressed it. *Id.* "[T]he omission to discover and prevent was a sufferance of the work." *Id.* at 477, *quoted in Martinez*, 49 Cal.4th at 69. This was true even for the *Sheffield* employer, a seller of milk with 125 delivery drivers. *Id.* at 475.

Justice Cardozo's analysis reveals the flaws in decisions such as *Brown v. Federal Express Corp.*, 249 F.R.D. 580 (C.D. Cal. 2008), which held that enforcing the law as written "would place an undue burden on employers whose employees are numerous or who ... do not ... remain in contact with the employer during the day." *Id.* at 585 (cited by *Brinker* Court of Appeal, slip op. 07/22/08 at 43-44); *cf. Sullivan v. Oracle Corp.*, ___ Cal.4th ___, 2011 WL 2569530, *6 (2011) ("asserted burdens" on employer were "entirely conjectural"). Employers have been making this argument for a century, and it has always been rejected as inconsistent with statutes prohibiting "sufferance" of work, such as Wage Order 5.

Similarly, in *Commonwealth v. Beatty*, 15 Pa. Super. 5 (1900), *cited in Martinez*, 49 Cal.4th at 58 n.26, the court rejected another century-old argument still echoing today—that a statute prohibiting employers from "suffer[ing] or permit[ting]" work over 12 hours per day interfered with the flexibility and personal desires of employees "who from their own necessities, ambition, or ... cupidity" wished to work longer hours. *Beatty*, 15 Pa. Super. at 8.

In this case, the Wage Orders' recording requirement assures that employers will always have actual knowledge of missed meal periods. And, under *Martinez*, they will always be empowered to prevent work from occurring because it is they who "set [workers'] hours, telling them when and where to report to work *and when to take breaks*." 49 Cal.4th at 71

(emphasis added). Employers who fail to prevent the work have violated their "duty of seeing to it" that the condition the Wage Orders prohibit does not exist, and are liable for premium wages under Labor Code section 226.7(b).

B. Under *Martinez*, the Labor Code and Wage Orders Must Be Construed in Light of Their Language, History, and Place in the Context of California Wage Law

The next question is whether the Legislature's entry into this field of regulation in 1999 and 2000, culminating in the enactment of Labor Code sections 226.7 and 512, diminished the Wage Orders' 95-year-old compliance standard. *Martinez* helps answer this question as well.

Martinez concerned Labor Code section 1194, which creates a cause of action for unpaid minimum wages. *Martinez*, 49 Cal.4th at 49. The Court was tasked with deciding how to "define the employment relationship, and thus identify the persons who may be liable as employers, in actions under section 1194." *Id.* at 51.

To answer this question, the Court considered not only "the four corners of section 1194," but also "the statute's context and legislative history." *Id.* at 52; *see id.* ("statutory and historical context"). The "context" included the 1913 bill of which section 1194 was originally part (*id.* at 52, 56), the "wave of minimum wage legislation that swept the nation in the second decade of the 20th century" (*id.* at 53), wage and hour legislation enacted in 1911 (*id.*), "a comprehensive 1912 report by the State Bureau of Labor Statistics" (*id.*), and a 1914 constitutional amendment confirming the Legislature's power to create and confer broad powers on the IWC (*id.* at 54). The "context" also included subsequent amendments to "the laws defining the IWC's powers and duties." *Id.* at 55.

Turning to the Wage Orders, the Court considered not just their "language" but also their "history and place in the context of California

wage law." *Id.* at 52; *see id.* at 68 (applying Wage Order "according to its terms, having in mind its distinct language, history and function in the context of state wage law"). The Court examined the Orders' entire enactment history, beginning in 1916, through intermediate amendments in 1947, culminating in the present language. *Id.* at 57-60 & nn.26-30 (citing Wage Orders' historical text and Statement of the Basis). The Court also recognized and adhered to its duty to grant the Wage Orders "extraordinary deference, both in upholding their validity and enforcing their specific terms." *Id.* at 61.

This case, like *Martinez*, tasks the Court with determining the meaning of specific Labor Code and Wage Order provisions. The parties approach this task very differently. Brinker's proposed approach would consider certain selected words in isolation, with no historical context, and would ignore the Wage Orders entirely. Plaintiffs' proposed approach would consider the full statutory language and place it in context, considering all of the relevant bills, the reasons for their enactment, and the wording, regulatory history, and purposes of the Wage Orders from 1916 through the present.[5]

Martinez confirms that plaintiffs' approach is correct.

First, our state's regulation of employee working conditions has a history that, as *Martinez* recognizes, cannot be ignored. That history began in 1913, when the Legislature chose to regulate working conditions in California by creating the IWC, and by delegating very broad powers to it, rather than through detailed legislation of its own. All of the statutes and regulations in place today share a common origin in this Legislative

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[5] This approach is echoed in the Locker-Broad Amicus Brief, containing a detailed summary of the Wage Orders' rich adoption history, pulled from the Department of Industrial Relations archive.

decision—particularly sections 226.7 and 512. *See Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1110 (2007) (Legislature was "fully aware of the IWC's wage orders" when it enacted section 226.7).

Second, like *Martinez*, this case involves a statute under which an aggrieved employee "actually sues to enforce the applicable wage order." 49 Cal.4th at 62. Like section 1194, section 226.7(b) creates a right of action for violations of "an applicable order of the [IWC]." Lab. Code §226.7(b). Hence, "[o]nly by deferring to wage orders' definitional provisions do we truly apply [the statute] according to its terms...." *Martinez*, 49 Cal.4th at 62.

Third, section 512, like section 1194, requires turning to the Wage Orders' definitions. The Legislature used the words "employer" and "employ" in section 512, but "has not, within the four corners" of the statute, "defined" those terms. *Martinez*, 49 Cal.4th at 52; *see* Lab. Code §512(a) ("An *employer* may not *employ*...." (emphasis added)). To understand the meaning of those words, *Martinez* holds, the Court must turn to the Wage Orders' definitions.

Fourth, the lone word "provide," which appears in sections 226.7 and 512, is asserted (by Brinker and its amici supporters) to radically weaken the Wage Orders' 95-year-old compliance standard. To paraphrase *Martinez*, had the Legislature intended that, "one would expect [them] to have announced it in the plainest terms after vigorous debate." 49 Cal.4th at 70. The Legislature's announced intent was not to weaken, but to "codify," the Wage Orders. OBM 58-62; RBM 12-15.

III. CONCLUSION

For the reasons discussed above and in plaintiffs' prior briefing, the Court of Appeal's judgment should be reversed and the class certification order reinstated.

Dated: July 22, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH WORD COUNT REQUIREMENT

Pursuant to Rule of Court 8.520(d)(2), the undersigned hereby certifies that the computer program used to generate this brief indicates that the brief does not exceed 2,800 words, including footnotes.

Dated: July 22, 2011

_____
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PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. SUPPLEMENTAL BRIEF SUBMITTING NEW AUTHORITY: MARTINEZ v. COMBS, 49 Cal.4th 35 (2010);
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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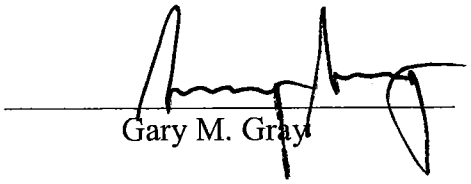

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