

No. S166350

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

---

BRINKER RESTAURANT CORP., et al.,

*Petitioners and ~~Defendants~~,*

v.

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

*Respondent.*

ADAM HOHNBAUM, et al.,

*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. G1C834348  
Honorable Patricia A.Y. Cowett, Judge

---

**BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER  
OF COMMERCE IN SUPPORT OF PETITIONERS BRINKER  
RESTAURANT CORP., ET AL.**

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## **APPLICATION**

Pursuant to California Rule of Court 8.520(f), the Chamber of Commerce of the United States of America (“U.S. Chamber”) and the California Chamber of Commerce (“CalChamber”) respectfully request leave to file an amicus curiae brief in support of Defendants and Petitioners, Brinker Restaurant Corporation, Brinker International, Inc., and Brinker International Payroll Company, L.P (collectively, “Brinker”).

### **STATEMENT OF INTEREST**

The U.S. Chamber is the world’s largest business federation and represents an underlying membership of more than three million companies and professional organizations nationwide. It regularly advocates the interests of its members in matters before Congress, the Executive Branch, and the courts. The U.S. Chamber often submits briefs as amicus curiae in litigation raising issues of concern to the Nation’s business community. This is such a case, because the U.S. Chamber’s members are often targets of class action litigation involving wage-and-hour issues.

The CalChamber is a non-profit business association with over 15,000 members, both individual and corporate, representing virtually

every economic interest in the State of California. For over 100 years, it has been the voice of California business. While the CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. It acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. The CalChamber often advocates before the courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community, like the wage-and-hour issues presented here, which will directly impact many of the CalChamber's members.<sup>1</sup>

Both the U.S. Chamber and CalChamber (collectively, "Amici") have reviewed the decision by the Court of Appeal and the parties' briefs before this Court. The Chambers believe they can assist this Court in reaching a correct decision by discussing (1) the proper interpretation of the meal-period obligation under the Labor

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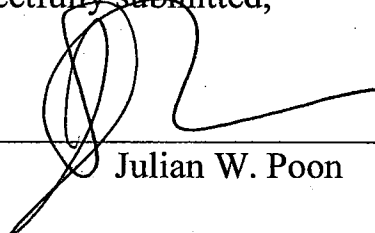
<sup>1</sup> Pursuant to California Rule of Court 8.520(f), the U.S. Chamber and CalChamber disclose that Wal-Mart Stores, Inc. contributed in part to the cost of preparing this brief. No other entities or persons contributed to funding the preparation or submission of the brief.

Code and Wage Orders, based on their plain text, other authorities, and policy considerations, and (2) the correct application, under any interpretation of the meal-period obligation, of class certification and due process principles to the meal-period class proposed by Plaintiffs here.

For the above reasons, the U.S. Chamber and CalChamber respectfully request leave to file the attached amicus curiae brief.

Dated: August 18, 2009

Respectfully submitted,



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## INTRODUCTION

This case turns on the proper interpretation of Labor Code Sections 226.7 and 512,<sup>2</sup> which require employers to “provide” meal periods to their employees. Plaintiffs advocate a counter-textual interpretation of the Labor Code and claim that “provide” means “ensure” and that employers must actually force their employees to take meal periods. The Court of Appeal rejected this interpretation and correctly construed “provide” to mean “make available” in keeping with its plain meaning, common sense principles of statutory interpretation, and the weight of extant authority and public-policy considerations. This Court should do the same and affirm.

The Court of Appeal’s construction of “provide” draws support from nearly every case to have squarely addressed the issue. Virtually all federal cases that have done so, for example, hold that under the Labor Code and Wage Orders, employers need only *provide* meal periods—*i.e.*, make them available—rather than *ensure* that they are taken. Likewise, cases outside the meal-period context have over-

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<sup>2</sup> All statutory references herein are to the Labor Code unless otherwise specified.

whelmingly construed “provide” consistent with its plain meaning to mean “make available.”

Policy considerations—such as the enormous burden that employers would shoulder if they had to force their employees to take all meal periods, and the perverse employee incentives that would result from such a system—also substantially favor according Sections 226.7 and 512 their plain meaning.

But Plaintiffs ask this Court to disregard the plain language of those sections and to hold that employers must actually *force* their employees to take all meal periods. Plaintiffs base their counter-textual interpretation primarily on the phrase “no employer shall employ,” which appears in the first paragraph of the Wage Order, but nowhere in the statutory text. This phrase, according to Plaintiffs, trumps the word “provide” wherever it appears—in the legislative history of Sections 226.7 and 512, in both statutes’ plain terms, and even in the second paragraph of the Wage Order. But the “no employer shall employ” phrase is wholly consistent with a “make available” standard and, in any event, could not override the plain meaning of the statutory text, if there were any conflict between the two, which there is not.

Plaintiffs also seek support from the meal-period waiver provisions of the Labor Code and Wage Orders. But those provisions address only waiver of the right to have meal periods made available, and thus are of no help to Plaintiffs.

The Court of Appeal therefore got it right by interpreting Sections 226.7 and 512 consistently with their plain meaning, and there is no reason to construe “provide,” as used in Sections 226.7 and 512, to mean anything other than “make available.”

The Court of Appeal’s correct interpretation of “provide” leads to the inescapable conclusion that certification of Plaintiffs’ proposed class would run afoul of California law, not to mention the Due Process Clauses of the California and Federal Constitutions.<sup>3</sup> Brinker’s meal-period policy is clear that all employees who work shifts longer than five hours are entitled to a meal period, and even Plaintiffs estimate that the vast majority of class members took their meal periods. Plaintiffs thus do not challenge any class-wide policy denying them meal periods, but rather the application of Brinker’s policy in particu-

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<sup>3</sup> While this appeal raises a number of certification issues, Amici will address only whether the meal-period class was properly certified.

lar circumstances in which an individual manager may have allegedly required an individual employee to work through his or her meal period at one of Brinker's 137 restaurants in California despite Brinker's express corporate policy to the contrary.

Yet the essential question of *why* a given employee may not have taken a meal period on a particular day cannot be answered on a class-wide basis, because resolving each such claim would require individualized proof from the plaintiffs and individualized rebuttal and defenses from the defendant. Each individual plaintiff would have to prove that he or she was impeded or prevented from taking his or her meal period, and the employer defendant would then be entitled to respond with evidence that it made the meal period available to be taken, but for whatever reason, the employee declined to take that meal period. Such evidence would be specific to each individual employee, and, indeed, to each individual meal period, and could not be determined or adjudicated on a class-wide basis without abridging the defendant's due-process rights. The individualized analyses thus predominate over any common questions that may be raised by Plaintiffs' putative class, thereby rendering class certification inappropriate here under this Court's well-established precedents.

Even if this Court were inclined to reverse the Court of Appeal's decision on the meaning of an employer's obligation to "provide" a meal period, Plaintiffs' proposed class still should not be certified because even if employers must "ensure" that employees take their meal periods, employers such as Brinker would still have a right to assert certain affirmative defenses that can only be resolved on an individualized basis. Such defenses include an employee's statutory waiver of his or her meal period, the employee's failure to exercise ordinary care in taking the meal period, and the argument that any missed portion of a meal period was "de minimis" and not deserving of an entire meal-period premium. Allowing classes such as Plaintiffs' to be certified would prevent defendants such as Brinker from asserting such defenses effectively in violation of defendant's due-process rights. Such a dramatic change in the substantive law would also run afoul of well-established principles of California class-action procedure.

The Court of Appeal thus correctly reversed the trial court's certification of Plaintiffs' proposed class and this Court should affirm the Court of Appeal's decision.

## ARGUMENT

### **I. UNDER THE LABOR CODE AND WAGE ORDERS, EMPLOYERS NEED ONLY MAKE MEAL PERIODS AVAILABLE TO THEIR EMPLOYEES.**

The plain language of the Labor Code and Wage Orders establishes that employers need only make meal periods available to their employees. Virtually every case to have squarely confronted this issue has so concluded, and this plain-meaning interpretation of the statutory text finds support from cases across the country outside the meal-period context. Public policy also strongly supports this view.

Plaintiffs' arguments to the contrary are unavailing. They focus on the phrase "no employer shall employ" from the Wage Order, but that phrase is entirely consistent with a "make available" standard. In addition, Plaintiffs seek support from the waiver provisions of the Labor Code and Wage Orders, but those provisions address only waiver of the right to be provided with meal periods and not an employee's decision to skip an otherwise-provided meal period.

The Labor Code and Wage Orders should therefore be interpreted pursuant to their plain meaning, and this Court should hold that meal periods need only be made available to employees.

**A. The Plain Language Of Labor Code Sections 226.7 And 512 Makes Clear That Meal Periods Need Only Be Made Available.**

Labor Code Section 226.7 states as follows:

(a) No employer shall *require any employee to work* during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.

(b) If an employer fails *to provide* an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

(Lab. Code, § 226.7, italics added.) Under the statute, therefore, an employer must “provide” an employee a meal period. The plain meaning of “provide,” according to the dictionary cited by this Court in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104 (“*Murphy*”), is simply “[t]o make available.” (Am. Heritage Dict. (4th ed. 2000) p. 1411; see also *ibid.* [“[t]o furnish; supply”]; Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 937 [“to supply or make available,” “to make something available to”]; New Oxford Am. Dict. (2001) p. 1372 [“make available for use; supply,” “equip or supply someone with”].) Meal periods thus must be “made available,” and employers may not “require any employee to work during” them.

Section 512 contains the same requirement. It states:

(a) An employer may not employ an employee for a work period of more than five hours per day without *providing* the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without *providing* the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(Lab. Code, § 512, italics added.) Section 512, therefore, like Section 226.7, requires only that employers “provid[e]” meal periods—*i.e.*, make them available.

**B. Federal Cases And Cases Outside The Meal-Period Context Interpret “Provide” As “Make Available.”**

Rather than repeating the same arguments and authority discussed at length by Brinker (AB 24-64),<sup>4</sup> Amici will instead focus on additional authority that supports interpreting “provide” consistent with its plain meaning.

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<sup>4</sup> As used herein, “AB” refers to Brinker’s Answer Brief on the Merits, “OB” refers to Plaintiffs’ Opening Brief on the Merits, and “RB” refers to Plaintiffs’ Reply Brief on the Merits.

## 1. Federal Decisions Support A Plain-Language Interpretation Of The Labor Code.

Recent federal court decisions—in addition to those cited by Brinker (AB 55-58)—continue to hold that an employer need only make meal periods available.<sup>5</sup> In *Jasper v. C.R. England, Inc.* (C.D.Cal. Mar. 30, 2009) 2009 WL 873360, at \*5, for example, the district court, after distinguishing *Cicairos, supra*, 133 Cal.App.4th at p. 949, and noting recent cases holding that “employers are required only to make meal breaks . . . available to employees,” held that plaintiffs “hav[e] to prove that [an employer] had a policy of preventing them from taking breaks.” And in *Kohler v. Hyatt Corp.* (C.D.Cal. July 23, 2008) 2008 U.S.Dist. LEXIS 63392, at \*19-20 (“*Kohler*”),

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<sup>5</sup> Plaintiffs attempt to suggest otherwise by citing four federal cases, *Valenzuela v. Giumarra Vineyards Corp.* (E.D.Cal. 2009) 614 F.Supp.2d 1089, 1098, fn. 3 (“*Valenzuela*”); *Robles v. Sunview Vineyards of Cal., Inc.* (E.D.Cal. Mar. 31, 2009) 2009 WL 900731, at \*8, fn. 3; *Doe v. D.M Camp & Sons* (E.D.Cal. Mar. 31, 2009) 2009 WL 921442, at \*8, fn. 2; *Stevens v. GCS Serv., Inc.* (C.D.Cal. Apr. 6, 2006, No. 04-1337CJC) [nonpub. opn.], which supposedly support Plaintiffs’ counter-textual “ensure” interpretation. (RB 18.) But *Valenzuela, Robles*, and *Doe* explicitly *declined* to address “[w]hether employers are required to do more” than simply “offer employees a meal period.” (AB 57, fn.20.) So Plaintiffs are left with *Stevens*, an unpublished decision that, to our knowledge, has never been cited by any other court, and that relies on a discredited reading of *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (“*Cicairos*”). (See AB 53-55, 58.)

the court also distinguished *Cicairos* and then rejected “Plaintiffs’ contention that California law requires [an employer] affirmatively to ensure that each of its employees took appropriate meal and rest breaks.” (See also *id.* at \*19 [liability would depend on “whether an employee had been ‘forced to forego’ meal breaks”]; *Forrاند v. Federal Express Corp.* (C.D.Cal. Feb. 18, 2009) 2009 WL 648966, at \*3 [“the Court finds that California law requires employers must only make available meal . . . breaks to employees and that employees may choose not to take such breaks”] [citing *Brown v. Federal Express Corp.* (C.D.Cal. 2008) 249 F.R.D. 580, 584-586 (“*Brown*”).])

**2. Cases Outside The Meal-Period Context Demonstrate That The Plain Meaning Of “Provide” Is “Make Available.”**

Cases outside the meal-period context also support a plain-meaning interpretation of “provide” as “make available,” and this is true of cases both in California and elsewhere. For example, in *Behrens v. Fayette Mfg. Co., Inc.* (1992) 4 Cal.App.4th 1567, the Court of Appeal interpreted a Labor Code requirement that a product be “provided for the employee’s use” to mean that the product “must be given or furnished to the employee in order for the employee to ac-

complete some task.”<sup>6</sup> (*Id.* at p. 1574 [quoting Lab. Code, § 3602, subd. (b)(3)]; see also, e.g., *Lagomarsino v. Market St. Ry. Co.* (1945) 69 Cal.App.2d 388, 395.)

Federal cases have interpreted “provide” in a similar manner. The Tenth Circuit, for example, in a case concerning the proper interpretation of a workplace-safety standard, held that “‘shall be provided’ [could not be read] to mean ‘shall require use.’” (*Usery v. Kennecott Copper Corp.* (10th Cir. 1977) 577 F.2d 1113, 1118-1119.) This was because the “meaning usually attributed to the word provide is to furnish, supply or make available.” (*Id.* at p. 1119, citing Am. Heritage Dict. (1976 ed.) p. 1053; see also *Borton, Inc. v. OSHRC* (10th Cir. 1984) 734 F.2d 508, 510 [employer had met its obligation of “provid[ing]” a ladder by making ladder available, without requiring its use]; *Castillo v. Case Farms of Ohio, Inc.* (W.D.Tex. 1999) 96 F.Supp.2d 578, 622 [“to provide housing within the meaning of the AWPAs, means to make housing available, procure housing, or furnish

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<sup>6</sup> Similarly, if a statute required employers to “provide” meals to their employees, surely that would not entail requiring employers to force their employees to eat those meals. All such a statute would require is that the employer make the meal available to the employee, which is all that the obligation to “provide” meal periods requires.

housing”]; *United States v. Rocky Mountain Helicopters, Inc.* (D. Utah 1989) 704 F.Supp. 1046, 1050 [“‘Provides’ is not normally interpreted to mean ‘shall require,’ but rather ‘to furnish, supply, or make available.’”].)

And several state courts have also interpreted “provide” consistently with its plain meaning as “make available.” For example, in construing a “statute that requires only that the employer ‘provide’ safety devices,” the New Mexico Supreme Court rejected a counter-textual interpretation of the meaning of “provide.” (*Jaramillo v. Anaconda Co.* (N.M. 1981) 625 P.2d 1245, 1246-1247.) The court explained that “[t]o construe [the “provide”] requirement as obligating the employer to monitor all devices at all times, and to ‘watchdog’ careless employees . . . is to read more into the statute than it contains. [Citation.] The employer had installed a kind of safety device required by law; it thus complied with the statutory mandate ‘to provide’ such a device.” (*Id.* at p. 1246; see also, e.g., *LeSuer-Johnson v. Rollins-Burdick Hunter of Alaska* (Alaska 1991) 808 P.2d 266, 267 [“The term ‘provide’ is defined in Webster at 1144 as ‘to make available, supply, afford; furnish with . . . .’ We find that . . . [the employer] made available to its employees a field on which to play soft-

ball.”]; *Thurston v. Department of Employment Sec.* (Ill.App.Ct. 1986) 498 N.E.2d 864, 865-866 [rule stating that “‘Board of Review shall provide transcripts’” required “the Board . . . to either make the file available to a party for inspection at its office or to provide a copy at the party’s own expense”]; *State v. Stoneking* (Iowa 1985) 379 N.W.2d 352, 356 [“using the ordinary meaning of ‘provide,’ the last sentence in [Iowa Code] section 321B.4 logically is construed to require only that the test be made *available* within the time period stated” (original italics)].)

These authorities make clear that, under the plain-meaning interpretation of Sections 226.7 and 512, employers need only make meal periods available.

**C. Public Policy Supports A Plain-Meaning Interpretation Of Sections 226.7 And 512.**

Sound considerations of public policy also undergird a plain-meaning interpretation of Sections 226.7 and 512. For example, under a “make available” standard, employees have greater flexibility with their time at and away from work. Brinker servers testified, for example, that they preferred skipping meal periods provided to them because “they lost money by having to clock out and forego tips.” (AB 60, fn. 23.) And one named Plaintiff testified that he declined

meal periods that were provided to him because he was concerned that another employee would provide inadequate service to customers at his tables. (AB 60, fn. 22.) Other employees might decline meal periods to take on a second job or because of family commitments. (See AB 59-62.) The flexibility of a “make available” standard allows these situations—and others like them—to occur.

In addition, a “make available” standard spares employers the enormous burden of policing their employees to ensure that meal periods are taken. Under Plaintiffs’ “ensure” standard, an employer would have to undertake such policing to make sure that each of its employees was taking a full thirty-minute meal period before the fifth hour of his or her shift in order to avoid paying the costly meal-period premiums. Yet, such policing duties “would be impossible to implement” for significant segments of various industries “in which large employers may have hundreds or thousands of employees working multiple shifts.” (*White v. Starbucks Corp.* (N.D.Cal. 2007) 497 F.Supp.2d 1080, 1088 (“*White*”).) Such policing would also saddle California employers with undue costs and burdens. (See *Brown, supra*, 249 F.R.D. at p. 585 [“Requiring enforcement of meal breaks would place an undue burden on employers whose employees are nu-

merous or who . . . do not appear to remain in contact with the employer during the day.”].) To undertake this policing duty, employers might have to install expensive new monitoring systems or substantially upgrade their current technologies. But such systems and technologies still would not explain *why* employees missed breaks and would also be susceptible to misuse by employees. More than just technology would thus be required. New personnel would also have to be hired to investigate situations in which meal periods were apparently missed, to monitor employees, and to handle the significant amount of new paperwork such a policing system would generate.

Plaintiffs nonetheless claim that because the Wage Orders require employers to “record every meal period,” “[t]he mandatory meal period compliance standard adds nothing to the burden employers already bear.” (OB 75.) But meal-period records do not reflect *why* meal periods were not taken, or even if they were taken at all. (See, e.g., AB 15 [noting Plaintiffs’ witnesses who testified that employees would forget to clock in or out]; AB 109-110). Such records thus would not ease the undue burden on employers of ensuring that all employees took their meal periods.

Plaintiffs' interpretation would also force employers to discipline and possibly terminate employees who missed or cut short their meal periods. Indeed, this would create situations "in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee." (*White, supra*, 497 F.Supp.2d at p. 1089.) An "ensure" interpretation would also invite abuse by some employees trying to game the system to collect extra compensation in the form of premium payments. (*Ibid.* ["employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation"]; *Brown, supra*, 249 F.R.D. at p. 585 ["It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws."].) These perverse incentives could not have been intended by the Legislature.

In sum, policy considerations weigh decidedly in favor of according Sections 226.7 and 512 their plain meaning.

**D. Neither The Wage Orders Nor Section 512's Waiver Provisions Support Plaintiff's Counter-Textual Interpretation Of The Labor Code.**

Disregarding the plain language of Sections 226.7 and 512, Plaintiffs insist that "provide" means "ensure" and that employers must force employees to take meal periods in full and on time. But Plaintiff's interpretation of the meal-period obligation finds no support in the Wage Order's language or in the statutory waiver provisions.

**1. The Wage Orders Fully Support A "Make Available" Standard And, In Any Event, Cannot Trump The Plain Meaning Of The Statutory Text.**

Plaintiffs' primary argument is that the phrase "no employer shall employ," which appears in the first paragraph of the Wage Orders, mandates their counter-textual interpretation of the Labor Code. (See, e.g., OB 36; RB 5, 9-10.)<sup>7</sup> This argument is flawed for the following reasons.

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<sup>7</sup> The Wage Order states:

(A) 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, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent

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As an initial matter, a proper interpretation of Sections 226.7 and 512 begins with the language of those statutes, rather than with the phrase “no employer shall employ” from the Wage Orders. (See *Murphy, supra*, 40 Cal.4th at p. 1103 [when interpreting a statute, “it is well-settled that we must look first to the words of the statute”].) And the unambiguous language of Sections 226.7 and 512 makes clear that meal periods need only be made available. (See *ante* Section I.A.) Moreover, the current version of the Wage Order was promulgated after the enactment of Section 512. (AB 41-42.) Thus,

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of the employer and employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each work day that the meal period is not provided.

(8 Cal. Code Regs., § 11050, subs. (11)(A)-(B).)

the Wage Order's "[n]o employer shall employ" language must be read in light of Section 512's definition of the basic obligation to "provid[e]" meal periods. (8 Cal. Code Regs., § 11050, subd. 11(A); Lab. Code, § 512, subd. (a); see *Clean Air Constituency v. State Air Res. Bd.* (1974) 11 Cal.3d 801, 815-816.) By emphasizing the Wage Orders over the Labor Code, Plaintiffs have it backwards.

Further, Plaintiffs rely so heavily on the phrase "no employer shall employ" that, under their interpretation, the word "provide" is either ignored or interpreted as "ensure" wherever it appears—in the legislative history of Sections 512 and 226.7, in both statutes' plain language, and in the second paragraph of the Wage Orders' meal-period provision (8 Cal. Code Regs., § 11050, subd. 11(B)).<sup>8</sup> (See, e.g., RB 7 ["The word 'provide' [in Section 226.7] serves to . . . capture . . . the Wage Orders' directive meal period compliance standard ('no employer shall employ')."]; RB 8 [The Wage Orders "use[d] the

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<sup>8</sup> Plaintiffs criticize the Court of Appeal for allegedly "focus[ing] in on a single word" (OB 42), but it is Plaintiffs' focus on the phrase "no employer shall employ" that is overly rigid and that requires a contortion of the "plain and commonsense meaning" of the words in the Labor Code and Wage Orders (*Murphy, supra*, 40 Cal.4th at p. 1103). Thus, Plaintiffs, not the Court of Appeal or Brinker, are the ones "advocat[ing] blind adherence" to some definition. (OB 42.)

word ‘provide’ [in the second paragraph of the Wage Order] to incorporate the adjacent paragraph[’s] compliance standards”—*i.e.*, the phrase “no employer shall employ.”]; OB 40 [“[T]he Wage Orders use the term ‘provide’ as a shorthand way to refer . . . to the directive meal period requirement”—*i.e.*, “no employer shall employ”; “Section 226.7(b) . . . uses the word ‘provide’ to refer to . . . the Wage Orders’ directive meal period requirement”; and “Labor Code section 512(a) . . . uses the word ‘provide’ in similar fashion.”].)

Indeed, Plaintiffs’ interpretation also entirely disregards the fact that other Wage Orders use the word “provide” with respect to a second meal period,<sup>9</sup> while also using “no employer shall employ” with respect to the first. (See, e.g., 8 Cal. Code Regs., § 11070, subd. (11)(B) [“An employer may not employ an employee for a work period of more than ten (10) hours per day without *providing* the employee with a second meal period of not less than 30 minutes.” (italics

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<sup>9</sup> Plaintiffs are wrong that “provide” is only used in what they call the “remedy provisions” of the Wage Orders (8 Cal. Code Regs., § 11050, subd. 11(B)), but not in the “compliance provisions” (8 Cal. Code Regs., § 11050, subd. 11(A)). (RB 8-9.) “Provide” does appear in the “compliance provisions” with respect to the second meal period in several of the Wage Orders. (See, e.g., 8 Cal. Code Regs., § 11070, subd. (11)(B).)

added)].) Under the plain language of the Wage Orders, it is clear that second meal periods need only be made available. Plaintiffs' heavy reliance on "no employer shall employ" is thus entirely misplaced because it suggests that the Industrial Welfare Commission ("IWC") created an obligation to "provid[e]" second meal periods that differs from the obligation with respect to the first. Surely, the IWC did not intend to create such a purposeless anomaly. Thus, Plaintiffs' argument can only survive by completely ignoring the directive to "provide" a second meal period. But this interpretation should be rejected because it violates "one of the guiding principles of statutory construction, that significance be accorded every word of an act." (*People v. Johnson* (2002) 28 Cal.4th 240, 246-247.)

Furthermore, even if "provide" is mere surplusage that only "incorporates" the phrase "no employer shall employ," that would still be of no help to Plaintiffs because that phrase fully supports Brinker's text-based interpretation of the Labor Code. "No employer shall employ" addresses only an employer's obligation not to employ any-

one—or “permit [anyone] to work”<sup>10</sup>—without *offering* a meal period, and says nothing to indicate that an employer must force its employees to take every meal period offered. Indeed, under 8 Cal. Code Regs., § 11050, subd. 11(B), only if “an employer fails to provide an employee a meal period”—*i.e.*, fails to make one available—would there be any violation.

Plaintiffs, however, highlight what they claim is a “stark contrast between the meal period standard (‘no employer shall employ’) and the rest break standard (‘authorize and permit’).” (RB 9.) This “stark contrast,” according to Plaintiffs, establishes that employers have a duty to ensure that meal periods are taken. But, as Brinker has forcefully argued, there is no contrast, and the meal- and rest-period provisions in the Wage Order “are identical in the only way that matters: Neither provision contains language indicating that employers must *force* employees to take the breaks they provide.” (AB 30-32.)<sup>11</sup>

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<sup>10</sup> Plaintiffs harp on the definition of “employ,” which the Wage Order says is “engage, suffer, or permit to work,” and insist that it supports their counter-textual reading of the Labor Code. (RB 5, 9-10.) But the Wage Order only describes how often the meal periods must be given and does not establish that employees must take them.

<sup>11</sup> Plaintiffs make much of Wage Order 14, which covers agricultural workers and uses the phrase “authorize and permit” for

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Indeed, the only case Plaintiffs rely on for support, *Valenzuela, supra*, 614 F.Supp.2d at p. 1098, states that a “plain reading of the meal period language . . . standing alone, suggests . . . that ‘authorize and permit’ should be read as equivalent to ‘no employer shall.’”

Finally, even if the Wage Orders somehow could be read to support Plaintiffs’ interpretation, the Wage Orders nonetheless could not contravene the plain language of the statutes (Sections 226.7 and 512), which only require employers to make meal periods available.<sup>12</sup> As noted in *California Teachers Ass’n v. California Com’n on*

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both meal and rest periods. (See OB 38; RB 10; 8 Cal. Code Regs., § 11040, subds. 11(A)-(B).) Plaintiffs suggest that Wage Order 14’s use of “authorize and permit” with regard to meal periods demonstrates that “no employer shall employ,” the meal-period language in all the other Wage Orders, obligates employers to ensure that meals are taken. Under Plaintiffs’ logic, this would mean that agricultural workers covered by Wage Order 14, whom Plaintiffs characterize as deserving the most “protection[]” (see OB 5, 73), would actually receive less “protection[]” (OB 5) than workers covered by the other Wage Orders. Such a result would be nonsensical. Rather, under a proper interpretation of the Wage Orders, agricultural workers receive the same safeguards that the Legislature has afforded all other workers.

<sup>12</sup> Section 516, which states that “[e]xcept as provided in Section 512, the Industrial Welfare Commission may adopt or amend working condition orders with respect to . . . meal periods,” also forecloses Plaintiffs’ interpretation of the Wage Orders. (Lab. Code, § 516, italics added; see AB 45-46.)

*Teacher Credentialing* (2003) 111 Cal.App.4th 1001, 1011, “[t]o the extent a regulation conflicts with a statute, it is well settled that the statute controls.” (See also *Ass’n for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391 [“Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void.”]; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321 [“a regulation which impairs the scope of a statute must be declared void”].)

The Wage Orders thus provide no support for Plaintiffs’ counter-textual interpretation of the Labor Code.

**2. The Waiver Provisions In The Labor Code And Wage Orders Involve Only The Right To Be Provided Meal Periods.**

Plaintiffs also contend that the “Court of Appeal’s interpretation contradicts the plain language of the statutes and Wage Orders, which expressly allow meal periods to be waived only in limited circumstances.” (OB 45.) The statutory waiver provisions, however, address only the duty imposed by “the plain language of the statutes and Wage Orders”—that is, the obligation to make meal periods available. Thus, the waiver provisions concern only waiver of the right to have a meal period made available. Whether an employee ac-

tually takes a meal period provided to him or her is not governed by these provisions. As noted in *Kenny v. Supercuts, Inc.* (N.D.Cal. 2008) 252 F.R.D. 641, 645 (“*Kenny*”), “[t]he structure of [Section 512] and the Wage Order demonstrate that the waiver applies to the employer’s obligation to ‘provide’ a meal break, not to the employee’s decision to take a meal break.” (See also *ibid.* [“The Court does not interpret the waiver language to mean that an employer must ensure that an employee actually take a meal period made available.”].)

Still, Plaintiffs suggest otherwise by pointing to the “authorize and permit” language in the Wage Orders and arguing that the lack of a rest-break waiver provision demonstrates that, unlike meal periods, rest breaks “may be generally [skipped or] waived already.” (OB 48-49.) Thus, according to Plaintiffs, because the Wage Orders *do* contain waiver provisions for meal periods, meal periods cannot be skipped. But this argument ignores Wage Order 14,<sup>13</sup> which uses the

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<sup>13</sup> Wage Order 14 states, in relevant part, that “[e]very employer shall authorize and permit all employees after a work period of not more than five (5) hours to take a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by

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phrase “authorize and permit” with regard to meal periods and states that, under certain circumstances, “*the meal period may be waived by mutual consent of employer and employee.*” (8 Cal. Code Regs., § 11040, subd. 11, italics added.) Thus, under Wage Order 14, even under Plaintiffs’ interpretation, meal periods that have been provided to employees may be skipped—and yet that Wage Order contains a meal-period waiver provision. This disproves Plaintiffs’ claim that skipping a meal period is no different than waiving the right to have that meal period made available. (RB 11; OB 48-49.) Indeed, if Plaintiffs’ claim that “authorize and permit” allows breaks to “be generally waived” were true (OB 49), then there would have been no reason for the IWC to have included the meal-period waiver provision in Wage Order 14. But the IWC did. (See *Johnson, supra*, 28 Cal.4th at pp. 246-247 [“one of the guiding principles of statutory construction[is] that significance be accorded every word of an act”].) Accordingly, the waiver provisions of the Labor Code and Wage Orders ad-

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mutual consent of employer and employee” and that “[e]very employer shall authorize and permit all employees to take rest periods.” (8 Cal. Code Regs., § 11040, subds. 11-12.)

dress only waiver of the right to be *provided* meal periods, and not an employee's voluntary skipping of an otherwise-provided meal period.

The Court of Appeal thus got it right, and there is no reason to depart from its plain-meaning interpretation of the Labor Code and Wage Orders.

**II. ADJUDICATING ON A CLASS-WIDE BASIS WHETHER AN EMPLOYER HAS "PROVIDE[D]" ITS EMPLOYEES A MEAL PERIOD WOULD VIOLATE CALIFORNIA LAW AND THE CALIFORNIA AND FEDERAL CONSTITUTIONS.**

Under a proper interpretation of an employer's obligation to "provide" meal periods, Plaintiffs' proposed class could not properly be certified. Where there is a "necessity for . . . very particularized individual liability determinations," "the community of interest requirement [under Civ. Proc., § 382] is not satisfied [because] every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class." (*Dunbar v. Albertsons, Inc.* (2006) 141

Cal.App.4th 1422, 1431-1432.)<sup>14</sup> Numerous individualized inquiries regarding *why* an employee failed to take a given meal period would predominate over any common questions presented in Plaintiffs' proposed class, and class-wide adjudication of Plaintiffs' claims would therefore be wholly inappropriate. Indeed, even under Plaintiffs' proposed reading of the statute, if Brinker were forced to defend itself on a class-wide basis, it would be precluded from asserting its defenses effectively, in violation of California law and the California and Federal Constitutions.

**A. Under A Proper Interpretation Of "Provide," Individualized Issues Predominate Over Any Common Issues.**

**1. The Nature Of A Meal-Period Claim Does Not Lend Itself To Class-Wide Adjudication.**

In *Sav-On Drug Stores, Inc. v. Superior Court* (2000) 34 Cal.4th 319 ("*Sav-On*"), this Court held that the "critical inquiry" when certifying a class is whether "the theory of recovery advanced

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<sup>14</sup> (See also *Lockheed Martin v. Superior Court* (2003) 29 Cal.4th 1096, 1108, 1111 ("*Lockheed Martin*") [affirming the overturning of class certification because plaintiffs had not sustained their burden of "not merely . . . show[ing] that some common issues exist, but, rather, . . . plac[ing] substantial evidence in the record that common issues *predominate*" (original italics)].)

by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.” (*Id.* at p. 327.) Courts must “examine the issues framed by the pleadings and the law applicable to the causes of action alleged” and determine whether “common questions of law or fact predominate.” (*Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916; see also Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof* (2009) 84 N.Y.U. L.Rev. 97, 164 [“Courts should stand ready to ‘say what the law is’ when its content will determine whether dissimilarities exist within a proposed class.”].) The starting point, therefore, is the elements of the claim Plaintiffs must prove, and the elements required for them to prove it.<sup>15</sup>

Under a proper interpretation of “provide”—namely, “make available”—the facts Plaintiffs must prove in support of their claims are wholly inappropriate for class-wide adjudication. Plaintiffs must

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<sup>15</sup> Plaintiffs are wrong that the Court of Appeal improperly re-weighed the evidence Plaintiffs offered in support of class certification. The Court of Appeal reversed the trial court’s order because the trial court had applied the wrong legal standard, not because the Court of Appeal rejected the trial court’s factual determinations. (AB 102-105; see, e.g., *Washington Mut. Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 911-912 (“*Washington Mut.*”).)

prove not simply that they were unable to take a meal period, but rather that they were somehow “forced to forego” their meal periods. (*Salazar v. Avis Budget Group, Inc.* (S.D.Cal. 2008) 251 F.R.D. 529, 532 (“*Salazar*”); see Section I.A-B, *ante.*) They must offer reliable evidence that Brinker somehow “impede[d], discourage[d] or prohibit[ed]” employees from taking their breaks. (*Perez v. Safety-Kleen Sys.* (N.D.Cal. 2008) 253 F.R.D. 508, 515 (“*Perez*”).) Thus, even if Plaintiffs were able to prove from computerized time records that they did not take a meal period, they would still need to show *why* the meal period was not taken, and prove that it was not due to the employee’s choice or negligence, but rather because the employer prevented them from taking a meal period. (*Kohler, supra*, 2008 U.S. Dist. Lexis 63392, at \*19; *Kenny, supra*, 252 F.R.D. at p. 646.)

As numerous courts have held, certification of these claims for class adjudication is inappropriate because “individualized inquiries concerning the circumstances of each class member’s missed meal breaks would have to be conducted.” (*Kohler, supra*, 2008 U.S. Dist. LEXIS 63392, at \*19; see also *Kenny, supra*, 252 F.R.D. at p. 646 [“plaintiff has failed to identify any theory of liability that presents a common question”]; *Brown, supra*, 249 F.R.D. at pp. 585-587; *Sala-*

zar, supra, 251 F.R.D. at pp. 531-532.)<sup>16</sup> Each member of Plaintiffs' putative class may have a different argument as to why she allegedly missed her meal period. As the Court of Appeal below explained, some employees skipped meal periods of their own free volition (e.g., to earn extra money, to leave early, or to take a meal period at a more convenient time); others may have skipped their meal period due to a manager's request or inadequate staffing. (Slip Op. pp. 47-48; see also *Kenny*, at p. 646 [citing multiple reasons for missing a meal period, including "work[ing] through [a] meal break in order to earn more in tips or [to avoid keeping] a valued customer waiting. . . . On the other hand, . . . [a] store manager [may] instruct[] an employee to help a customer rather than take a lunch break"].) But each putative plaintiff's claim would be different and would require proof of individualized facts—an employee would be required to put forth evidence that she was forced to forego a meal period, which the em-

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<sup>16</sup> While these cases were decided under Federal Rule of Civil Procedure 23, "[i]n the absence of California authority, California courts may look to the Federal Rules of Civil Procedure and the federal cases interpreting them." [Citation]." (*In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298; see also *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 318 [California courts look to federal law "when seeking guidance on issues of class action procedure."].)

ployer could rebut with, for example, testimony from the plaintiff's manager. And "[e]ven with respect to an individual employee, the evidence supporting [her] claim could vary depending on the circumstances of each particular missed meal break." (*Kohler*, at \*19.) There is simply no way of proving that the putative class *as a whole* missed meal periods for the *same reason*. The innumerable individualized issues in adjudicating each putative plaintiff's claim clearly predominate over any common issues that exist.

Plaintiffs point to the question of *whether* each employee missed a meal period as the "common" issue warranting certification of their putative class because, they claim, payroll records can show which meal periods were taken and which were not. (OB 126.) But even if these records could reliably show when meal periods were not taken, the records still could not show *why* the meal periods were not taken. (See Section I.C, *ante*.) As discussed above, the determination of *why* a meal period was taken involves numerous individualized inquiries, which completely outweigh the supposedly common issue of *whether* the meal period was taken. Plaintiffs' argument to the contrary ignores the standard for proving that they were not "provide[d] a meal period." (See *Kenny*, *supra*, 252 F.R.D. at p. 646 [common

questions “predominate only if defendant’s liability for the additional hour of pay is established simply because the employee did not clock in and out for a full 30-minute meal break”].) Because the standard for liability requires not only that a plaintiff show he missed a meal period but also that he was “forced to forego” it, the “resolution of [this] common question . . . would not resolve the issue of [Brinker’s] liability for statutory wage violations.” (*Kohler, supra*, 2008 U.S. Dist. LEXIS 63392, at \*19, citing *Kenny*, at p. 646.)

Plaintiffs also claim that ““most courts’ have certified, and continue to certify [meal- and rest-period] claims” (RB 48), and cite a number of cases they say support the trial court’s certification of the meal- and rest-period classes. But *none* of the cases involved a *California meal-period* claim where, as here, there was not a common policy being challenged. Some of the cases they cite did not involve meal-period claims,<sup>17</sup> and those that did all involved challenges to a clearly stated common class-wide policy that did not provide meal pe-

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<sup>17</sup> (E.g., *Smith v. Cardinal Logistics Management Corp.* (N.D. Cal. Sept. 5, 2008) 2008 WL 4156364, at \*1 [misclassification case]; *Kurihara v. Best Buy Co.* (N.D. Cal. Aug. 30, 2007) 2007 WL 2501698 (“*Kurihara*”) [unpaid wages]; *Chun-Hoon v. McKee Foods Corp.* (N.D. Cal. Oct. 31, 2006) 2006 WL 3093764 [misclassification].)

riods for the plaintiffs.<sup>18</sup> Indeed, several of the cases they cite involved *misclassification* pursuant to a common, class-wide policy,<sup>19</sup> but this line of cases has been disapproved by the Ninth Circuit in *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 944-947 (“*Vinole*”) [abrogating, inter alia, *Wiegele v. Fedex Ground Package Sys., Inc.* (S.D.Cal. Feb. 12, 2008) 2008 WL 410691; *Wang v. Chinese Daily News, Inc.* (C.D.Cal. 2005) 231 F.R.D. 602]. Plaintiffs cite no analogous case in which a court has certified a class of plaintiffs seeking California premiums for meal or rest periods that were missed despite there being a policy that allowed for such periods.<sup>20</sup>

Cases involving a common policy or practice of denying *all* employees their meal periods are wholly inapposite to the present

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<sup>18</sup> (E.g., *Cervantez v. Celestica Corp.* (C.D.Cal. 2008) 253 F.R.D. 562, 573 (“*Cervantez*”); *Kurihara, supra*, 2007 WL 2501698, at \*2; *Ortega v. J.B. Hunt Transp., Inc.* (C.D.Cal. May 18, 2009) 2009 WL 1851330, at \*6.)

<sup>19</sup> (E.g., *Krzesniak v. Cendant Corp.* (N.D.Cal. June 20, 2007) 2007 WL 1795703; *Alba v. Papa John’s USA, Inc.* (C.D.Cal. Feb. 7, 2007) 2007 WL 953849, at \*14; *Tierno v. Rite Aid Corp.* (N.D.Cal. Aug. 31, 2006) 2006 WL 2535056, at \*5-10.)

<sup>20</sup> One of the cases Plaintiffs cite did not even involve class certification, but rather just an arbitration provision. (*Franco v. Athens Disposal Co.* (2009) 171 Cal.App.4th 1277, 1304.)

case, and it may be that in some of those cases there may not have been individualized questions regarding why a given employee missed a meal period. (E.g., *Amalgamated Transit Union Local 1309 v. Laid-law Transit Servs.* (S.D.Cal. Feb. 2, 2009) 2009 U.S. Dist. LEXIS 7171, at \*17-19 (“*Amalgamated Transit*”); *Cervantez, supra*, 253 F.R.D. at p. 573.) For example, in *Amalgamated Transit*, the court certified a class where an employer had a companywide policy of offering no meal periods and paying no meal-period premiums. (2009 U.S. Dist. LEXIS 7171, at \*19.) But there was plainly no such policy or practice in this case,<sup>21</sup> and Plaintiffs do not even purport to challenge a single policy of not providing meal periods (rather than, for example, its application in varying circumstances).

To be sure, Plaintiffs claim that there was a “companywide pattern and practice” and “companywide awareness” of understaffing, which “lead[] to missed meal periods [and] rest breaks.” (RB 43.) But the record shows Plaintiffs are incorrect,<sup>22</sup> and even if it were true that some portion of the class missed meal periods through under-

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<sup>21</sup> (AB 9, 11-12.)

<sup>22</sup> According to Plaintiffs’ own evidence, for most of the class period, meal periods were apparently missed less than 25 percent of the time. (1PE54.)

