Case No. S215614

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NYKEYA KILBY, individually and on behalf of all others similarly situated,

Plaintiff/Petitioner

v.

CVS PHARMACY, INC.,

Defendant/Respondent.

On Questions Certified by Request of the
United States Court of Appeals for the Ninth Circuit
Case No. 12-56130

APPLICATION OF RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS/RESPONDENTS CVS PHARMACY, INC. AND JPMORGAN CHASE BANK, N.A.

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Pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, the Retail Litigation Center, Inc. ("RLC") and California Retailers Association ("CRA") respectfully request the Court's permission to file a brief as *Amici Curiae* in support of Respondents CVS Pharmacy, Inc. and JPMorgan Chase Bank, N.A. ("Respondents"). The proposed brief of *Amici Curiae* is lodged concurrently with this timely application.

THE *AMICI CURIAE*

The *Amici* are organizations of retailers of all types whose members are of great significance to the California economy. Members of the *Amici* employ more than 2 million people in California. The membership of CRA operates more than 150,000 stores in California, with annual sales of almost $600 billion. The RLC is a national public policy organization which represents many of the largest and most innovative retailers across the United States. Ninety percent of the members of the RLC have stores and other facilities in California and employ California residents.

INTEREST OF *AMICI CURIAE*

This case presents an issue of great importance because it is a matter of first impression that will affect every employer in the state of California, and will undoubtedly attract *Amici* on both sides. Subdivision (A) of Section 14 of the Industrial Welfare Commission's Wage Order 7-2001, applicable to retailers, states: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The language of this "suitable seating" section has not been interpreted by the California courts. There is no guidance for retailers as to what constitutes a "suitable seat". Nevertheless, in the last two years, dozens of retailers have been the targets of class action and Private Attorney General Act lawsuits for the alleged failure to provide "suitable seating".

NEED OF FURTHER BRIEFING

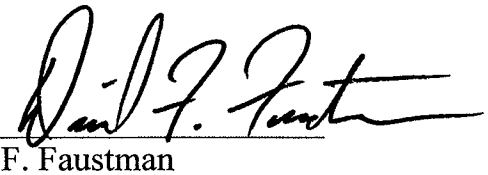
RLC and CRA and their counsel are familiar with the issues presented in this case. The *Amici* believe there is a need for further briefing, analysis and discussion of the questions presented for review. The *Amici* seek to provide the Court with additional context about the retail environment. The *Amici* believe that this case requires the Court to evaluate the "suitable seating" provision of the Wage Order using a holistic approach that gives deference to the employer's business judgment in determining whether a job reasonably permits the use of seats.

For the foregoing reasons, RLC and CRA request that the Chief Justice grant their application for the filing of the attached brief as *Amici Curiae* in support of Respondents CVS and JPMorgan Chase Bank, N.A.

Dated: September 2, 2014

Respectfully submitted,

FOX ROTHSCHILD LLP

By: 

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I. INTRODUCTION

Sales associates are the front lines for successful retailers. Retailers depend on them to fulfill a myriad of functions at the store, and to provide a level of service that will encourage customers to return. The "nature of the work" in today's dynamic retail environment requires mobile and engaged sales associates, whose duties necessitate standing, not sitting.

Sales associates have jobs that typically include broad responsibilities -- much more than just standing behind a checkstand waiting on customers. Sales associates contribute to the success of the store in multiple ways, including greeting customers, receiving and stocking merchandise, keeping store displays orderly, maintaining a clean and safe store, ringing transactions, packing purchases, assisting customers in fitting rooms and on the sales floor, processing credit applications, preparing custom orders and assisting with loss prevention efforts.

Even when ringing up customers, sales associates are not stationary. They lift items for scanning, remove ink tags, wrap and bag items, reach and bend to scan large items, move clothing on or off hangers, fold items, place bags in carts, hand merchandise to customers, and assist customers to their vehicles.

Good customer service is the lifeblood of a retail enterprise. A sales associate who is standing contributes to the customer's perception of good customer service. Standing by sales associates signifies respect for the customer (who is also standing), and projects professionalism. We are taught to stand when we meet or greet people. We stand when a judge enters the courtroom, the National Anthem is played, or a military color guard presents the flag. Standing conveys a readiness to serve and sense of anticipation that reflect the image retail employers desire to create. Standing is necessary for performing the customer-assistance tasks of the job.

Nonetheless, Petitioners ask this Court to disregard the needs of the job and customers, as well as the business judgment of employers, and to reject the conclusions of other courts and agencies that have considered whether the "nature of the work" in the retail industry requires standing or permits the use of a seat. The two district courts below properly applied a holistic legal analysis and recognized that the nature of retail work, in light of the totality of the circumstances, does not reasonably allow for sitting.

Petitioners' arguments to the contrary are unpersuasive. The seating provision at issue in this case was not intended to apply to retail jobs, and was enacted before the meal periods and rest breaks mandated today were adopted. The job of a sales associate requires constant movement that cannot be safely accomplished from a seated position. Checkstand areas – which in some cases may be work stations for multiple employees – were not designed to house seats, and adding them now would present obstacles and trip hazards. Petitioners' demand that retailers remove and redesign workplaces without regard to cost or safety is patently unreasonable. Finally, Petitioners improperly attempt to sidestep the question of whether they have the burden to prove what constitutes "suitable seats" in order to impose liability on an employer.

The *amici* thus respectfully submit that the interpretation of Section 14(A) of the relevant Wage Order articulated by Respondents should be adopted by this Court, including:

1. The phrase "nature of the work" refers to the overall nature of the job, including the entire range of duties an employee must perform, not to discrete tasks that, in a vacuum, might be performed while seated;
2. When determining whether the "nature of the work" reasonably permits the use of a seat, all relevant circumstances should be considered, including the employer's business judgment and the realities of the workplace; and

3. Petitioners' have the burden of proving the feasibility of a "suitable seat" that permits the employee to perform the job while seated.

II. THE *AMICI*

A. Retail Litigation Center

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. Ninety percent of RLC members have facilities in California and employ California residents. The member entities whose interests the RLC represents employ millions of individuals throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. The RLC has filed *amicus* briefs or supporting letters in numerous important labor and employment actions including: *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348; *Duran v. U.S. Bank N. A.* (2014) 59 Cal.4th 1; *Verdugo v. Target Corp.* (2014) 59 Cal.4th 312; *CarMax Auto Superstores Cal., LLC v. Fowler* (2014) 134 S.Ct. 1277; *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541; *University of Texas Southwestern Medical Ctr. v. Nassar* (2013) 133 S.Ct. 2517; *Comcast Corp. v. Behrand* (2013) 133 S.Ct. 1426, and in other cases before the Supreme Courts of Pennsylvania, Massachusetts, Missouri, several federal courts, and the National Labor Relations Board.

B. California Retailers Association

The California Retailers Association ("CRA") is the only statewide trade association representing all segments of the retail industry, including general merchandise stores, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain

drugstores, and specialty retailers such as auto, vision, jewelry and home improvement stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with annual sales over $570 billion and employing approximately 2,776,000 people – nearly one fifth of California's total employees. Like RLC, CRA has appeared frequently as *amicus curiae*, filing briefs or supporting letters in numerous cases.

III. ARGUMENT

A. The Totality of the Circumstances of a Sales Associate's Work Demonstrates that the "Nature of the Work" Does Not Reasonably Permit the Use of Seats, and Requires Standing.

The language of Subsections A and B of Section 14 of the Wage Order establishes that the "nature of the work" either "reasonably permits the use of seats" (Subsection A) or "requires standing" (Subsection B). As both federal and state authorities have explained, the "nature of the work" should be evaluated holistically in light of the totality of the circumstances, including the full range of duties actually performed by the employee during his or her shift. In the retail context, customer service is an essential element of these duties. The totality of the circumstances also includes the employer's business judgment, which is entitled to substantial weight.

1. Section 14 of the Wage Order must be construed as a whole.

The Industrial Welfare Commission Wage Order 7-2001, Cal. Code Regs., tit. 8, §11070 ("Wage Order") at Section 14(A) states:

> All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

This subsection is informed by Section 14(B) of the Wage Order, which states:

> When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

(Cal. Code Regs., tit. 8, §11070, subd. (14)(B).)

These subsections are mutually exclusive. If the nature of the work allows for sitting, Subsection 14(A) applies and employees must be allowed a suitable seat; however, if the nature of the work requires standing, Subsection 14(B) applies and employees must be provided with break time seating. (See *Echavez v. Abercrombie & Fitch Co.* (C.D. Cal. Aug. 13, 2013, No. 2:11-cv-09754), 2013 WL 7162011 at pp. *5-6.)

2. The *nature of the work* requires standing.

An understanding of the entire range of actual duties of the employees subject to the Wage Order is essential to evaluating the "nature of work" in any environment, but especially in retail. Petitioner in the case against CVS is a "cashier," but this title can be misleading. Cashiers do not simply stand behind a counter all day waiting for customers to approach them. Indeed, petitioner Kilby acknowledged that she operates a cash register, straightens and stocks shelves, organizes products in front of the sales counter, faces and stocks the tobacco section behind the sales counter, cleans the register, vacuums, gathers shopping carts and hand baskets, and handles trash. (CVS, Defendant-Appellee's Answering Brief, Dkt. 14 at pp. 5-6.)

Other duties that a sales associate might perform include unpacking inventory, climbing ladders to reach or stock merchandise, setting and maintaining store displays on the sales floor, answering the phone, obtaining merchandise for customers from other areas of the sales floor or stock room, welcoming customers, offering and providing assistance to customers on the sales floor, processing special orders, folding and hanging clothes, cleaning

fitting rooms, locking and unlocking display cases, attaching price and sales tags to merchandise or shelves, sorting the stock room, auditing and scanning merchandise, dusting shelves, keeping the store clean and the aisles free of merchandise, watching for shoplifters, and demonstrating products.

Sales associate duties vary depending on the retail sector, the size of the particular store and the store's layout. Checkout lane procedures, checkout stands, and register types vary across types of stores. Indeed, the trend in modern retailing is to move away from fixed checkout stations in order to meet the customer where he or she is -- anywhere in the store -- to provide a more service-oriented experience. Retailers are adopting technologies such as Square (a credit card processing application that works on hand-held mobile devices) and mobile checkout that allows sales associates to scan or enter custom orders on a portable tablet that can be carried throughout the store. Scanning can be mobile and payment then taken at a register, or scanning and payment can both be mobile.

Tasks also vary because of changing circumstances, such as the ebb and flow of customers over the course of a day, the different types of purchases customers make, the number of other employees in the store, and the time of year. Holiday seasons and "back to school" periods affect types of inventory and associates' duties.

Moreover, even the task of ringing up purchases at a register requires some standing and movement that cannot be accomplished well or safely from a seated position. (See, e.g., *Garvey v. Kmart Corp.* (N.D. Cal. Dec. 18, 2012, No. C 11-02575) 2012 WL 6599534 at p.*7 [finding that although many of the tasks done by a Kmart cashier could be done while seated, standing tasks, such as processing heavy items and looking inside closed items in a customer's cart, occurred so regularly that the cashier would be up and down frequently].) Sales associates working as cashiers must scan and bag merchandise of varying sizes and weight, including, depending on the

retailer, building materials and furniture, and often must lift these items onto the checkstand or walk around the checkstand to handscan the items. Indeed, virtually every transaction will require a cashier to stand for at least portions of the transaction.

In sum, working in today's retail environment requires a full range of movement, frequently alternating between multiple tasks. The tasks Kilby identified are typical of those performed by retail sales associates. Petitioners' view that "cashiers" can remain idle and sitting whenever there is no customer ready to check out is pure fiction. The "nature of the work" of a retail sales associate – both in terms of the breadth of duties required and the movement required even at a checkstand – necessitates standing, and does not permit (reasonably or otherwise) the use of a seat.

3. Customer service is a critical duty.

High quality customer service is critical to the success of the retail enterprise. (See Grewal et al., Retailing in the 21st Century: Current and Future Trends (2010) p. 24 ["Retailers that attend to aspects of customer service can contribute to customer perceptions of value, resulting in a strong competitive position."].) By providing quality customer service at the point of purchase, retailers improve the shopping experience and increase the likelihood of a successful sale. (Quelch & Cannon-Bonventre, *Better Marketing at the Point of Purchase* (Nov./Dec. 1983) 61:6 Harv. Bus. Rev. 1, 1.)

While aesthetics and displays are established before the customer enters the store, the human factor, or customer service, is not. A helpful sales associate should actively engage with customers, on the sales floor and at checkout, and thereby positively influence customer buying decisions. (See *Better Marketing at the Point of Purchase, supra,* at p. 8 ["The difference between . . . [making a sale or not] often depends on the last 5% of effort rather than the 95% that preceded it. In consumer marketing, that last 5%

manifests itself at the point of purchase."].) For instance, in *Garvey,* the trial court found that Kmart had proved a genuine customer service rationale for requiring its cashiers to stand:

> When customers are in a long line, they too are standing. They are waiting. Their attention is focused on the progress of the line and particularly on the cashier, for it is the cashier whose efficiency signals how long the wait will be. As frustrations mount, the customers may regret that they chose one lane over another. The longer the wait, the more likely customers will become irritated and, next time, will try a competitor's store. Kmart has every right to be concerned with efficiency – and the appearance of efficiency – of its checkout service.

(*Garvey, supra,* 2012 WL 6599534 at p. *13, at ¶ 67.) This rationale is fully supported by studies and articles on consumer behavior. (See, e.g., Maister, *The Psychology of Waiting Lines* in The Service Encounter (Czepiel et al. edits., 1985) p. 119 ["Ignorance [of the reasons for a wait in line] creates a feeling of powerlessness, which frequently results in visible irritation and rudeness on the part of customers . . . ."]; Goodwin et al., *An Equity Model of Consumer Responses to Waiting Time* (1991) 4 Journal of Consumer Satisfaction, Dissatisfaction, and Complaining Behavior pp. 133-34 [Consumers "will resent waiting even a few seconds if the teller appears to be 'doing nothing' while waiting for the consumer to respond. . . ."].) When a company's success depends on consumer transactions, the interaction between store employees and customers is critically important. (See *People Make the Difference*, World Alliance for Retail Excellence & Standards (Jan. 5, 2012)[1]; Smith, *Shopping Secrets of the Pros*, Wall St. J. (Feb. 15, 2012) ["Shoppers . . . [will not] go to stores to avoid bad customer

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[1] Online at: http://www.worldalliance-retail.org/Newsroom/Article/tabid/234/ArticleID/171/ArtMID/772/Default.aspx (as of August 29, 2014)

service."][2].) Good customer service requires active, engaged employees. (See *The Shopper Experience Impact on Loyalty*, World Alliance for Retail Excellence & Standards (Mar. 29, 2012)[3].)

These studies and commentaries illustrate two related ideas: (1) that an essential element of a retail employee's job is customer service; and (2) if a retailer, in its business judgment, determines that its cashiers should stand to enhance customer service, this decision should be afforded great weight in determining whether the nature of the work reasonably permits the use of seats. As CVS correctly states, a standing employee projects a sense of anticipation, attentiveness, and readiness to serve, whereas a sitting employee "appears less welcoming, productive and ready to serve [the] customers, and may appear lazy and disinterested." (Answer Brief, p. 7). As the court in *Garvey* found, customers react negatively to seated employees. (2012 WL 6599534 at p. *13.)

4. The employer's business judgment is a critical factor.

An employer's business judgment in evaluating whether the "nature of the work reasonably permits the use of seats" is an important element of the "totality of the circumstances" standard and should be accorded substantial weight. The "isolated duty" approach advocated by Petitioners is not only inconsistent with the language of the Wage Order, it would also undermine long-established business practices and the business judgment of countless employers.

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[2] Online at: http://online.wsj.com/news/articles/SB10001424052970204795304577223133572097286 (as of August 29, 2014)

[3] Online at: http://www.worldalliance-retail.org/Newsroom/Article/tabid/234/ArticleID/159/ArtMID/772/Default.aspx (as of August 29, 2014)

This Court recently endorsed consideration of "the totality of the circumstances" in deciding whether there is a joint employer relationship between franchisor and franchisee. (*Patterson v. Domino's Pizza, LLC* (Aug. 20, 2014, S204543) ___ Cal.4th ___ [2014 WL 4236175 at p. *1].)

This Court has also consistently recognized "business realities" as a factor in evaluating employment issues. (See, e.g., *Armendariz v. Foundation Health Psychcare Serv., Inc.* (2000) 24 Cal.4th 83, 117 [Arbitration agreement in the employment context may be unenforceable "without at least some reasonable justification . . . based on business realities."]; *State Comp. Ins. Fund v. Workers Comp. App. Bd.* (1998) 18 Cal.4th 1209, 1219-20 ["A short delay in processing workers' compensation claims caused by business realities may be reasonable."]; *Judson Steel Corp. v. Workers Com. App. Bd.* (1978) 22 Cal.3d 658, 667 [In the workers' compensation context, the discrimination prohibition in Labor Code Section 132a "does not compel an employer to ignore the realities of doing business by reemploying unqualified employees or employees for whom positions are no longer available."].)

In general, the courts are not well suited to serve as a "super-personnel department that reexamines an entity's business decisions." (*Farnham v. Superior Court* (1997) 60 Cal.App.4th 69, 78; see also *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, 64, superseded on other grounds by *Guz v. Bechtel Natl, Inc.* (2000) 24 Cal.4th 317, 358 ["Business people, rather than judges, are presumed to know what is best for their own businesses."].) Further, employers are permitted to make reasonable business judgments about their image and brand. (See *Cloutier v. Costco Wholesale Corp.* (1st Cir. 2004) 390 F.3d 126, 135 ["It is axiomatic that, for better or worse, employees reflect on their employers. This is particularly true of employees who regularly interact with customers, as [the plaintiff] did in her cashier position."]; *Wislocki-Goin v. Mears* (7th Cir. 1987) 831 F.2d 1374, 1378-80 [noting that the employer is allowed to apply dress and grooming standards

based on legitimate business concerns about maintaining public confidence in the staff's professionalism].)

5. Courts and the Labor Commissioner have adopted the holistic approach.

The "totality of the circumstances" approach is the proper standard for evaluating the "nature of the work" in the retail industry. The California Labor Commissioner endorsed the totality of the circumstances standard in a "suitable seating" lawsuit as recently as December 2012. (Amicus Brief of California Labor Commissioner in *Garvey, supra,* (N.D. Cal. Dec. 18, 2012, No. C 11-02575) 2012 WL 6599534; see also *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571 [expressing that DLSE interpretations in particular actions may be persuasive as precedents in subsequent actions].) In *Garvey*, the Labor Commissioner stated that she would consider the employer's view of the nature of the work and existing or historical industry and business practices. (Amicus Brief in *Garvey, supra,* p. 3-4.) This interpretation is consistent with an earlier Labor Commissioner's opinion concerning Section 14:

> "Section 14(a) of Order 7-80 [a precursor to the Wage Order] specifically states that 'all working employees shall be provided with suitable seats when the "nature of the work" reasonably permits the use of seats,' the key being the 'nature of the work.' The nature of work for salespersons is such that it requires them to be mobile and as [DLSE official Al Reyeff] states, to be in a position to greet customers and move freely throughout the store. Section 14(B) of Order 7-80 refers to employees who are not engaged in active duties of their employment, and if the 'nature of the work requires standing,' (e.g. ***saleswork***,) an adequate number of seats shall be provided, and employees shall be permitted to use seats 'when it does not interfere with the performance of their duties,' ***i.e., during their rest periods.***"

(Dept. of Industrial Relations, DLSE Opn. Letter No. 1987.01.13 (Jan. 13, 1987) (emphasis added).) The DLSE's opinion letters "constitute a body of

experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11.)

The totality of the circumstances standard also has been adopted by several federal district courts that have analyzed this issue. (See *Echavez v. Abercrombie & Fitch Co.* (C.D. Cal. Aug. 13, 2013, No. 2:11-cv-09754), 2013 WL 7162011 at pp. *5-6 [taking a "holistic rather than a piecemeal approach to a determination of the 'nature of the work'", and stating that "[r]ead as a whole, the phrase 'the nature of the work' suggests the entirety of the duties and responsibilities of a particular job. The job – 'the nature of the work' – either 'permits the use of seats' or 'requires standing', but it cannot do both."]; *Tseng v. Nordstrom, Inc.* (C.D. Cal. Jan. 15, 2014, 2:11-cv-08471), 2014 WL 174946 at p. *4 ["[C]ourts construing § 14(A) have repeatedly interpreted the Wage Order to impose a broad standard that examines the totality of the circumstances of the employees[']' work situation and assigned duties."].)

Given the "nature of the work" described above, tallying the amount of time to perform specific tasks under the quantitative analysis advocated by the Petitioners in the "isolated duty" test is impractical. Such an approach ignores the varying daily and seasonal operations of the retail industry. The DLSE recognized this aspect of retail work over 20 years ago:

> "[H]istorically and traditionally, salespersons have been expected to be in a position to greet customers, move freely throughout the store to answer questions and assist customers in their purchases."

(Dept. of Industrial Relations, DLSE Opn. Letter No. 1986.12.05 (Dec. 5, 1986).) The "totality of the circumstances" standard for evaluating whether the nature of the work reasonably permits the use of seats is thus a far better, and accepted, standard than the minute-by-minute quantification

approach that Petitioners advocate. Petitioners' approach deviates from the language of the Wage Order, and is both unreasonable and impractical.

B. Petitioners' Arguments Are Unpersuasive.

None of the arguments made by Petitioners are persuasive. Petitioners mischaracterize the nature of retail work, and ignore the meal period and rest break protections already afforded by California law. Petitioners' argument that seats are necessary for the health and safety of employees is outdated and contradicted by reliable authority. Indeed, adding seats can create hazards in the workplace. Petitioners' attempt to rely on disability accommodation law is misplaced, and their reference to European practices is irrelevant.

1. Mandatory rest breaks and meal periods already protect California employees.

Petitioners assert that employees have "prolonged and uninterrupted hours spent in a standing position." (Opening Brief, p. 28, fn 10.) They argue that sales associates stand "throughout the entirety of their up to nine hour shifts." (*Id.* at p. 13.) This is not true.

Retail workers in California are entitled to regular rest breaks and meal periods. Employees are entitled to an unpaid 30-minute, duty-free meal period after working for five hours, and a paid 10-minute rest break for every four hours of work or major fraction thereof. (Wage Order, Cal. Code Regs., tit. 8, § 11070, subds. 11 & 12.) In a standard eight-hour workday, employees typically work approximately two hours at a time, with a 10-minute rest break, a 30-minute meal period, and another 10-minute rest break. Moreover, by law, employers must attempt to provide a reasonable accommodation to employees who cannot stand due to a disability. Petitioners' cited medical references (Opening Brief, p. 28, fn 10) all refer to "prolonged standing" and do not apply in California where employees are afforded the opportunity to sit every two hours. In addition, Petitioners' argument is inapplicable to the

vast majority of retail sales associates who work part-time, with only four- to five- hour shifts.

The seating provisions of Section 14 of the Wage Order were issued in 1919, long before California's rest break requirements were adopted in 1932. (See *Murphy v. Kenneth Cole Prods. Inc.* (2007) 40 Cal.4th 1094, 1105.) The 1919 version of Section 14 required employers to provide suitable seating to female and minor employees who worked in non-retail positions, such as manufacturing, altering, repairing, finishing, cleaning, or laundering. But even before mandatory rest break provisions were adopted, Section 14 "was not intended to cover those positions where the duties require employees to be on their feet, such as salespersons in the mercantile industry." (Dept. of Industrial Relations, DLSE Opn. Letter No. 1986.12.05 (Dec. 5, 1986).) Today, the modern workplace provides all employees, including retail employees, with even more opportunities to sit and rest at regular intervals throughout a workday, typically no longer than two hours apart.

Further, Section 14(B) of the Wage Order dispels Petitioners' concerns on this issue, as it provides for seating for employees whose jobs require standing. Thus, contrary to Petitioners' argument, Section 14 is not "without any purpose" (Reply Brief, p. 20). The meal period and rest break provisions discuss the need for employers to allow breaks; those provisions do not address what types of facilities employers should make available during those breaks. Most retailers have separate break rooms with chairs and tables for use during scheduled meal periods and rest breaks. Such circumstances meet the requirements for jobs that require standing under Section 14(B).

2. Sitting is not necessarily "healthy," and standing is not necessarily "unhealthy."

Petitioners argue that sitting is healthier for cashiers than standing, but this simply is not so. Sales associates working at the register must engage in

significant movement in order to scan and bag merchandise of different sizes, and they must often walk around the checkstand for hand-scanning items. Many of these duties cannot be performed by a seated cashier without significant twisting, leaning and bending, all of which would substantially increase the risk of injury from a seated position. A seat will not provide any meaningful benefit to employees whose duties require lifting, moving, reaching, and bending throughout each shift, and thus it is not reasonable. And the movement of constantly getting in and out of a seat creates ergonomic and other health/safety issues of its own.

The federal Occupational Safety and Health Administration has stated that the following essential cashiering duties should *not* be performed in a seated position:

- Receiving items from the conveyor belt;
- Scanning items by moving them across the scanner or with the hand scanner; and
- Moving heavy or bulky items.

(See *Guidelines for Retail Grocery Stores*, Occupational Safety & Health Administration (2004)[4] [stating that operations in retail involving similar tasks or operations may find the guidelines instructive].) The guidelines do *not* include a requirement of a seat or stool for cashiers.

Further, recent scientific research has concluded that prolonged sitting may be correlated to significant health issues, such as coronary heart disease, diabetes, and musculoskeletal disorders. (See, e.g., Hu et al., *The Joint Associations of Occupational, Commuting, and Leisure-time Physical Activity, and the Framingham Risk Score on the 10-year Risk of Coronary Heart Disease* (2007) 28 Eur. Heart J. pp. 492-98; Hu et al., *Occupational,*

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[4] https://www.osha.gov/Publications/osha3192.pdf (as of August 29, 2014).

Commuting, and Leisure-time Physical Activity in Relation to Type 2 Diabetes in Middle-aged Finnish Men and Women (2003) 46 Diabetologia pp. 322-29; Thune et al., *Physical Activity and the Risk of Breast Cancer* (1997) 3336 N. Eng. J. Med. pp. 1269-75; Griffiths et al., *Prevalence and Risk Factors for Musculoskeletal Symptoms with Computer Based Work Across Occupations* (2012) 42 Work pp. 533-54.) Petitioners' assertion that sitting promotes "health" and "welfare" is antiquated.

3. The addition of seats may create unsafe conditions.

Most checkstands must meet OSHA and building code guidelines, which are developed to maximize worker safety. Checkstands are carefully designed to: (1) allow cashiers to perform all of their duties in the most effective way possible, and (2) help ensure the safety of the cashiers. Designs typically undergo rigorous processes, including analysis by ergonomists. Petitioners' suggestion that retailers should be forced to rebuild their stores to add seats for cashiers could increase the risk of injury by introducing seats into an area that was not designed to accommodate them, would add significant cost for virtually all retailers, and is unreasonable.

Common sense suggests the obvious trip hazard of placing a stool or chair within the limited space of a checkout area. In fact, the court in *Garvey* found that a seat could be an unsafe obstacle in an already restricted work area:

> If a stool were introduced in the "box" area occupied by the cashier – which area measures only 27 inches by 35 inches -- the stool would be an obstacle course in moving back and forth from the cash register to the bagging area with respect to those tasks that concededly would have to be done while standing. The Court concludes and finds that this would inevitably lead to stumbles as the cashier hustled from one end of the box to the other. It would be unsafe.

(*Garvey, supra,* 2012 WL 6599534 at p. *8.) Further, many retailers have ergonomic mats for cashiers to stand on and placing chairs or stools on the mats would exacerbate the hazard posed by the stool itself.

Some retail store formats, often seen in department stores, have "cash wrap" stations that may accommodate up to four or even six workers. These cash wrap stations were not configured to accommodate seated work. Moreover, if each sales associate had a seat in these stations, the seats would create a trip hazard for the other employees working in the area, in addition to the hazard created for sales associates that intermittently sit and stand. Seats would likely need to be moved frequently to allow an accessible route. Further, retailers are subject to California's Occupational Safety and Health regulations that require a certain amount of space for egress from work stations and prohibit obstruction of work areas. (Cal. Code Regs., tit. 8, §§ 3272 & 3273.) Thus, the forced addition of seats to checkout areas would likely have unintended and unsafe consequences that are also contrary to California regulatory requirements.

4. Disability accommodation laws are not instructive here.

In addition, Petitioners argue that an employer who accommodates an injured or disabled employee, temporarily or even permanently, with a chair or stool demonstrates conclusively that the "nature of the work" is such that it can be performed while sitting. (Opening Brief, pp. 8-11.) This argument turns the law of "accommodation" on its head, and should be summarily rejected.

Simply because a job duty may be modified to be performed by a particular individual with a disability while seated, does not mean the "nature of the work" for all employees in the same position "reasonably permits" the use of seats. Employers are legally required to engage in a "timely, good faith interactive process" to accommodate disabled employees unless doing so

would create an undue hardship. (Cal. Gov't Code §§ 12940, subds. (m) & (n).) The interactive process considers the nature and extent of the disability as well as the availability of suitable and effective forms of accommodations that the employer can provide. This process is necessarily specific to each employee with a disability. (See, e.g., *Ross v. Ragingwire Telecomm., Inc.* (2008) 42 Cal.4th 920, 938 [explaining that a reasonable accommodation is determined on a case by case basis].)

If a chair is used as a reasonable accommodation for an employee, it means that the employer and the employee have determined that the seat is a reasonable accommodation *for that employee's specific disability*. Such a determination does not support Petitioners' notion that a retailer should be required to revise its business judgment, job tasks, and image to create a seated position *for all employees*.

Moreover, providing a seat to a disabled employee invariably constitutes only a small part of the accommodation – the accommodation in many cases also involves reassigning some of the accommodated employee's regular job functions (i.e., those that cannot be performed from a seated position) to other employees. Thus, providing a seat as an accommodation to a disabled employee is far different than providing a seat to *every* store employee. If every employee is permitted to work from a seated position, many essential duties simply would not be performed – a result that neither the Wage Order, nor disability law, requires.

5. Petitioners' comparison to Europe is inapt.

Petitioners also argue that "many supermarket and retail stores throughout Europe . . . provide seating for their cashiers". (Opening Brief, p. 9.) This argument is irrelevant. The focus of the instant dispute is the California Wage Order. Whether retailers outside the United States – indeed, outside California – are required or choose to provide seats to some workers

pursuant to the laws under which they operate has no bearing on the legal meaning of the California Wage Order at issue here.

Moreover, retail practices in Europe differ significantly from retail practices in the United States, and the concept of proper customer service varies by culture. (Low Wage Work in the Wealthy World (Gautie & Schmitt edits., 2010) p. 204.) As a result, duties of sales associates and expectations of customers in international markets also differ. (*Id.* at pp. 204-205 ["Dutch and Danish supermarkets are generally smaller than those in other countries . . . and rely[] on self-service. . . . French consumers expect to weigh their produce and bag their orders themselves."].) Work schedules in Europe also differ as a result of constraints from unions and regulations. (*Id.* at p. 206.) The practices of retailers in other countries are based on their customs and cultural standards, and should not dictate what is reasonably required of California retailers under the Wage Order.

C. Requiring the Reconfiguration of the Workplace without Regard to Costs Is Unreasonable.

Petitioners' superficial analysis of what is "reasonable" discounts the practical application of Section 14 to the workplace.

The physical layout of the workplace is an integral part of the totality of the circumstances that should be considered by the courts. Petitioners argue that Section 14(A) "requires modification of existing work stations" (Opening Brief, p. 37), regardless of the "employer's cost of compliance" (*id.* at p. 39), and that "economic hardship ...is no excuse" (*id.* at p. 38). This is an extreme and unreasonable position that ignores the phrase "reasonably permits" in Section 14(A). The physical configuration of the workplace is, indeed, relevant to whether the nature of the work "reasonably permits the use of seats."

This approach is consistent with laws requiring the modification of workplaces in the public accommodations context. For example, employers

have an affirmative duty to reasonably accommodate an individual with a disability, which includes making an existing facility readily accessible to and usable by an individual with a disability, if the employer knows of the disability, unless the employer can demonstrate that the accommodation would be an "undue hardship." (Cal. Code Regs., tit. 2, § 11065, subd. (p)(2)(A) & § 11068, subd. (a).) "Undue hardship" is defined as "an action requiring significant difficulty or expense incurred by an employer or other covered entity, when considered under the totality of the circumstances in light of the following factors: (1) the nature and net cost of the accommodation needed . . . ; (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility . . . ; (3) the overall financial resources of the employer . . . ; (4) the type of operation . . . ; (5) the geographic separateness, administrative or fiscal relationship of the facilities." (Cal. Code Regs., tit. 2, § 11065, subd. (r); see also *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 669-70 & fn 6 [California disability law incorporates the federal Americans with Disabilities Act (ADA) rules regarding access to public accommodations, which require the "remov[al] of architectural barriers . . . in existing facilities . . . where such removal is readily achievable. (42 U.S.C. § 12182(b)(2)(A)(iv)). The term 'readily achievable' means easily accomplishable and able to be carried out without much difficulty or expense (42 U.S.C. § 12181(9))."].) Similarly, it is appropriate to consider the physical layout and the cost of modification, in determining whether the nature of the work "reasonably permits" the use of seats.

D. Employees Bear the Burden to Prove the Feasibility of a Suitable Seat.

Petitioners concede that it is the burden of the aggrieved employee to show "that the nature of the work reasonably permits the use of seats," but then incorrectly assert that the "employer's failure to provide *any* seat" satisfies the employee's burden. (Reply Brief, p. 33.) Petitioners' conclusion that an employer who does not provide *any* seat has automatically violated Section 14 is nonsensical and allows the employee and class counsel to expose the employer to enormous damages without ever having to prove anything.

The alleged enforcement mechanism for violations of Section 14 – the Private Attorneys General Act ("PAGA"), California Labor Code sections 2698 et seq. – provides civil penalties of "one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." (Cal. Labor Code § 2699, subd. (f)(2).) Thus, violations of the Wage Order could subject an employer to millions of dollars in penalties and attorneys' fees, an amount entirely unrelated to any harm suffered, without notice of the harm suffered (i.e., whether a seat is suitable to the employee). This cannot be the intention of the Wage Order or PAGA. Such enforcement would be fundamentally unfair, and deprives employers of due process. In other areas of employment law, the employee bears the burden to prove a violation. (See, e.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 [discussing the employee's burden to prove "off-the-clock" work to establish liability under the Labor Code]; *Green v. State* (2007) 42 Cal.4th 254 [holding that the burden is on the plaintiff to show that he or she is a qualified individual under the Fair Employment and Housing Act]; *Yanowitz v. Loreal USA, Inc.* (2005) 36 Cal.4th 1028 [recognizing that the initial and ultimate burden is on the employee to prove discrimination

under the FEHA]; see also Cal. Ev. Code § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."].) Thus, it is inherent in the aggrieved employee's burden of proof to establish what constitutes a "suitable seat."

IV. CONCLUSION

Section 14(A) was never intended to require seats for the infrequent occasions when retail employees are not actively engaged in performing their multiple job duties. Such an isolated and episodic approach is inconsistent with the plain language of the Wage Order and well-established business practices. The courts below and the DLSE have correctly concluded that the totality of the circumstances must be considered in applying Section 14(A). This approach assigns significant weight to the business judgment of the employer. The "isolated duty" test that Petitioners advocate would lead to unworkable and unsafe results.

For these reasons, the Court should answer the certified questions in accordance with the answers presented by the Respondents in these cases, including:

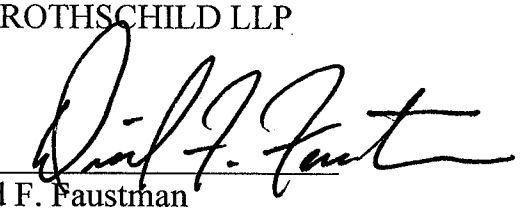
1. The phrase "nature of the work" refers to the overall nature of the job, including the entire range of duties an employee must perform, not to discrete tasks that, in a vacuum, might be performed while seated;
2. When determining whether the "nature of the work" reasonably permits the use of a seat, all relevant circumstances should be considered, including the employer's business judgment and the realities of the workplace; and
3. Petitioners bear the burden to prove the feasibility of a "suitable seat" that permits the employee to perform the job while seated.

The Ninth Circuit should thus be instructed to affirm the decisions of the Courts below.

Dated: September 2, 2014

Respectfully submitted,

FOX ROTHSCHILD LLP

By: 

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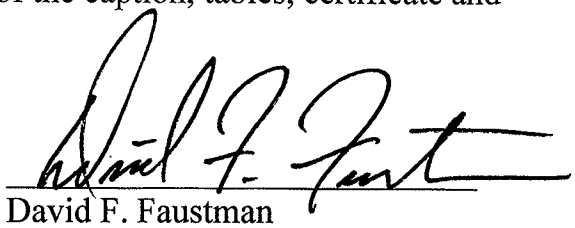
CERTIFICATE OF WORD COUNT

I certify that the Microsoft Word software program used to compose and print this documents contains, exclusive of the caption, tables, certificate and proof of service, is 6,661 words.

Date: September 2, 2014



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CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to this action. My business address is 235 Pine Street, Suite 1500, San Francisco, California 94104.

On September 2, 2014, I served the following documents: **APPLICATION OF RETAIL LITIGATION CENTER, INC. AND CALIFORNIA RETAILERS ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS/RESPONDENTS CVS PHARMACY, INC. AND JPMORGAN CHASE BANK, N.A.** on the interested parties in this action by by sending a true and correct copy thereof in sealed envelopes to:

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ARIF VIRJI LYNCH, GILARDI & GRUMMER 170 Columbus Avenue, 5th Floor San Francisco, CA 94133	Amicus class certified in *Pickett v. 99 Cents Only Stores*, Los Angeles Superior Ct. No. BC 473038

BY FIRST CLASS MAIL: I caused said document(s) to be deposited in a facility regularly maintained by the United States Postal Service on the same day, in a sealed envelope, with postage paid, addressed to the above listed person(s) on whom it is being served for collection and mailing on that date following ordinary business practices.

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

Dated: September 2, 2014

Lorraine R. Harris