No. EO70417

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT - DIVISION TWO

HOME DEPOT U.S.A., INC.,
Petitioner and Appellant,

v.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD; and DOES 1 – 10, inclusive ,
Respondent and Appellee.

CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY

Real Parties in Interest

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND PROPOSED BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER AND APPELLANT HOME DEPOT U.S.A., INC.

On Appeal from the Superior Court of California,
Riverside County, Case No. 1710947
Honorable Sunshine S. Sykes

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: E070417
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 307414 NAME: Sonia A. Vucetic FIRM NAME: Morgan, Lewis & Bockius LLP STREET ADDRESS: 300 So. Grand Ave., 22nd Floor CITY: Los Angeles STATE: CA ZIP CODE: 90071 TELEPHONE NO.: 213.612.2500 FAX NO.: 213.612.2501 E-MAIL ADDRESS: svucetic@morganlewis.com ATTORNEY FOR (*name*): Retail Litigation Center	SUPERIOR COURT CASE NUMBER: RIC 1710947
APPELLANT/ PETITIONER: Home Depot U.S.A., Inc. RESPONDENT/ REAL PARTY IN INTEREST: Occupational Safety and Health Appeals Board	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Retail Litigation Center

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 4, 2019

Sonia A. Vucetic
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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TO BE FILED IN THE COURT OF APPEAL

APP-008

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APPELLANT/ PETITIONER: Home Depot U.S.A., Inc. RESPONDENT/ REAL PARTY IN INTEREST: Occupational Safety and Health Appeals Board	

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1. This form is being submitted on behalf of the following party (*name*): National Federation of Independent Business

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
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Date: March 4, 2019

Sonia A. Vucetic
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Retail Litigation Center ("RLC") and the National Federation of Independent Business Small Business Legal Center ("NFIB") respectfully request leave to file the accompanying *amicus curiae* brief in support of Petitioner and Appellant Home Depot U.S.A., Inc. ("Home Depot").[1]

RLC is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC counts as its members many of the country's largest and most innovative retailers, across a breadth of industries. These member retailers employ millions of workers in the United States and account for tens of billions of dollars in annual sales. The RLC seeks to present courts with the industry's perspective on significant legal issues that impact its members, and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. It regularly files *amicus curiae* briefs before state supreme courts, federal district courts, federal courts of appeal, and the U.S. Supreme Court in cases involving workplace health and safety regulations and other matters of importance to its members.

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[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (*See* Cal. Rules of Court, rule 8.200(c)(3).)

NFIB is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide.

Amici's members have a substantial interest in ensuring that the California Occupational Safety and Health Administration's ("Cal-OSHA") regulations and corresponding standards are interpreted and implemented in ways that are fair and practical. All businesses with operations in California, including *Amici's* members, must comply with the footwear protection requirements set forth in the California Code of Regulations, title 8, section 3385(a), of Cal-OSHA and will be directly impacted if the Court upholds the Board's unsupported decision, as will their employees. Thus, this Court's review of the decision of the Occupational Safety & Health Appeals Board (the "Board") in *Home Depot U.S.A., Inc. v. Occupational*

Safety and Health Appeals Board ("*Home Depot*") will have major policy implications and affect millions of workers and employers in California.

The RLC and NFIB agree with Home Depot that the State of California's Occupational Safety and Health Appeals Board's decision upholding the foot protection citation is unreasonable, impractical and not supported by substantial evidence. RLC and NFIB write separately to provide examples of real-life implications of the Board's unsupported and overbroad application of the footwear protection regulations. The approach endorsed by the Board itself presents risks if extended to other workplaces where a forklift or other light truck may be present (for example, in the back of a grocery store), but employees rarely encounter the equipment while performing their primary duties (such as checking out customers at the front of a store). *Amici*'s examples demonstrate why this Court should reverse the Board's decision, which imposes on Home Depot strict liability for unforeseeable injuries caused by industrial trucks (including pallet jacks) and creates adverse implications to workplace safety.

Dated: March 4, 2019 Morgan, Lewis & Bockius LLP

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The Retail Litigation Center

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AMICI CURIAE BRIEF

THE BOARD'S DECISION WILL HAVE FAR-REACHING CONSEQUENCES FOR RETAILERS, SMALL BUSINESSES AND WORKERS AND SHOULD BE REVERSED

The California state legislature enacted the California Occupational Safety and Health Act ("Cal-OSHA") to assure safe and healthful working conditions for California workers by authorizing "the enforcement of effective standards." *See Cortez v. Abich* (2011) 51 Cal. 4th 285, 291 [citing Cal. Labor Code section 6300]. California has developed numerous regulations and standards to promote safe and healthy working conditions for California workers, including Section 3385(a) of the California Code of Regulations, which requires footwear protection for employees in certain circumstances. In a new interpretation of Section 3385(a), the Board issued a decision requiring all employees who work "on occasion in close proximity" to industrial trucks (including pallet jacks, a type of forklift used to move pallets of goods) to wear steel-toed boots, without defining the meaning of "on occasion" or "close proximity." (*See In the Matter of the Appeal of Home Depot USA, Inc.* (May 15, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 4.)

For the reasons set forth below, this decision creates confusion and uncertainty for employers regarding the standard for compliance with Cal-OSHA's footwear protection requirements. *Amici* fully support the goals and objectives of the Cal-OSHA statute and regulations to create safe

working environments for all employees. *Amici's* members take their responsibility to protect workers seriously and dedicate significant resources toward risk assessments, safety protocols, employee training, and personal protective equipment, all as appropriate. *Amici* are concerned that the Board's recent decision undermines both Cal-OSHA's objective and *Amici's* members' efforts to ensure worker safety because the decision could be construed so broadly as to impose a blanket rule requiring steel-toed boots for *virtually all e*mployees who work in any environment where forklifts (including pallet jacks, a type of forklift used to move pallets of goods) or industrial trucks are present and who may briefly pass near the equipment, regardless of the employees' specific work duties, working conditions, or the potential adverse consequences of steel-toed boots.

Part A below elaborates on how the Board's decision prohibits *Amici's* members from exercising discretion to determine appropriate protective footwear for each employee based on the employee's particular job duties and work environment. Part B provides examples of how the Board's decision—which read broadly virtually mandates the use of steel-toed boots or similar protective footwear in any environment with pallet jacks—could apply to a broad range of workers with minimal or no safety risks, leading to irrational results for California businesses. Part C elaborates on how the Board's decision could very well harm employees

because it ignores the risks to workers' safety resulting from a virtually universal protective footwear requirement.

A. Cal-OSHA's Regulations Require Employers To Balance the Benefits and Detriments of Protective Footwear

Section 3385(a) of the California Code of Regulations requires employers to provide "[a]ppropriate foot protection . . . for employees who are exposed to foot injuries from . . . falling objects [or] crushing or penetrating actions." (*See* Cal. Code Regs., tit. 8, § 3385(a).) To determine whether an employer provided "appropriate" foot protection, the Board must consider Section 3385(a) in the context of the regulation as a whole rather than in isolation. (*Coast Waste Management, Inc.* (Oct. 7, 2016) Cal/OSHA App. 11-2385, Decision After Reconsideration ["Legislative intent must be assessed according to the language of the whole regulation."].)

The Board's prior application of the footwear protection requirement illustrates how this works in practice. For example, while protective footwear typically must meet the requirements of the American Society for Testing Materials ("ASTM"), employers may offer evidence demonstrating that footwear meeting the ASTM standard (in this case, steel-toed boots) "would not offer protection or [] would be inappropriate for the workplace hazards." (*See In the Matter of the Appeal of: United Parcel Service, Employer*, 2018 WL 6982176, at *4–5 (Cal/OSHA Appeals Bd. Nov. 15,

2018).) The ASTM Standard itself acknowledges that there may be circumstances where protective footwear is not appropriate. (*See* American Society for Testing and Materials, Standard Test Methods for Foot Protection, Active Standard No. F2412-05, *available at* http://www.astm.org/DATABASE.CART/HISTORICAL/F2412-05 (last visited Mar. 1, 2019).) This makes sense because working conditions and job duties vary widely between work sites, and from employee to employee.

Against this backdrop, agencies and reviewing courts should support a standard that affords employers latitude to evaluate their workplaces and determine the appropriate footwear that most effectively protects their employees, rather than blindly adhering to a single approach that achieves minimal safety improvements and otherwise create safety and well-being concerns. In other words, the proper interpretation of Cal-OSHA regulations and standards demands that employers balance the benefits and detriments of protective footwear, particularly where the evidence shows protective footwear may increase the risk of hazards and injury to employees rather than mitigate such risks. Here, however, the Board disregarded the plain meaning of the statute, regulations and case law and instead upheld a Cal-OSHA citation for a violation of section 3385 with a decision that could effectively require virtually all workers in worksites with industrial trucks (including pallet jacks or forklifts) to wear steel-toed

boots, without regard to the consequences of their use in diverse work environments.[2]

The underlying citation in the instant case arose from an accident in a Home Depot distribution warehouse when an employee driving an electric pallet jack lost control and caught her foot between two machines. (*See* Appellant's Opening Brief, *Home Depot U.S.A., Inc. v. OSHA*, No. E070417, at p. 17-24 (Cal. Ct. App. Sept. 19, 2018).) The Board upheld the citation on appeal based on a series of highly speculative conclusions of a single Cal-OSHA inspector at one distribution warehouse,[3] including that: "industrial trucks come as close as four to five feet to workers on foot" and "all employees who operate industrial trucks or work in proximity to those industrial trucks without foot protection are exposed employees." (*See In the Matter of the Appeal of Home Depot USA, Inc.* (May 15, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 4.) The Board decided that "the existence of industrial trucks *working on occasion in close proximity* to workers on foot makes it reasonably predictable by

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[2] As detailed more fully in Home Depot's opening brief, the Board's use of a citation to establish a novel interpretation of the applicable ASTM Standard violated Home Depot's due process rights. Thus, this brief will not focus on that specific argument.

[3] The Board did so even after acknowledging that the inspector's testimony "was insufficient considered alone" and had "several issues which significantly weakened the evidentiary value of [his] testimony." (*See* Decision After Reconsideration at p. 4.)

operational necessity or otherwise, including through inadvertence, that employees will be in the *zone of danger*." (*See id.* at p. 8 (emphasis added).) This decision creates confusion and uncertainty for employers must comply with this standard without any guidance as to what "on occasion in close proximity" means, and whether this decision applies outside the context of a distribution warehouse. If it means anything other than driving industrial trucks or working directly with industrial trucks in a warehouse environment—like the injured worker in the underlying citation—then the decision could be read to require that employers provide protective footwear to *any* employee who passes within four or five feet of a pallet jack during their workday, regardless of other factors like the employee's job duties or work environment. This result is unreasonable and could actually present a greater risk to employee safety, as set forth below.

Moreover, Cal-OSHA contemplates assessing hazards based on a hierarchy of controls, with personal protective gear such as steel-toed boots as the least preferable control against a safety risk when compared to engineering or administrative controls. This decision effectively eliminates employers' ability to reasonably evaluate their own work sites, employees' individual job duties, and the other controls in place to ensure that protective footwear such as steel-toed boots will benefit each worker in a

specific work environment and that those benefits will outweigh potential harm.

B. The Board's Decision Will Lead to Irrational Results for Employees In Large and Small California Retailers and Businesses

The Board's decision faults an employer for not providing an employee with steel-toed boots because of the "existence of industrial trucks working *on occasion in close proximity* to workers on foot." (*See id.* at p. 4 (emphasis added).) The Board offers no guidance whatsoever as to the meaning and scope of this standard, leaving employers to guess as to whether their employees work "on occasion in close proximity" to industrial trucks even if they do not work in a warehouse or drive industrial trucks. Such an uncertain standard will have far-reaching consequences for employees in a wide range of businesses, including large retailers and small independent businesses that may have industrial trucks or pallet jacks in the facility even though the majority of employees encounter them only rarely.

For example, grocery and retail store stock clerks have a variety of responsibilities in the front and back of the store. They spend some time unloading goods from delivery trucks and moving merchandise from the backroom to the store floor. They also work on the store floor stocking shelves and maintaining the overall appearance of the store. These employees may have some exposure to pallet jacks and other industrial trucks while unloading or moving merchandise, but they may not actually

operate the trucks and their exposure may be minimal compared to the time spent walking around on the store floor completing other tasks. The same is true for every other kind of retail store employee, from cashiers to sales clerks. They may visit a back area of a store where pallet jacks are located at some point to retrieve merchandise or to access a break room, and may come within four or five feet of a pallet truck for a few minutes, but spend the rest of their shift nowhere near the "zone of danger" described by the Board. Their "occasional" exposure must be weighed against what is most beneficial to the employee for the vast majority of their shift.

Many small independent businesses may also have an industrial truck or forklift on-site. These include craft breweries and wineries, small batch or specialty manufacturers, landscaping companies, repair companies, product dealers and distributors. Within each of these operations, protective footwear may be appropriate for some employees in order to mitigate the safety risks created by their work. But many other employees in these businesses, such as receptionists, customer service representatives, human resources or information technology specialists, designers, and accountants will face no or minimal risk from the fact that a pallet jack may be present somewhere in the facility.[4]

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[4] Even within warehouse operations like Home Depot's in this case, not all employees face similar safety risks requiring protective footwear. Some, such as the injured worker in this case, operate industrial trucks and pallet jacks, while others may work exclusively within the warehouse front office

These examples illustrate the problem of upholding an uncertain standard that could require *all* employees who pass within four or five feet of a pallet jack to wear steel-toed boots. Steel toed boots are heavy and requiring all employees to wear them full-time because of incidental exposure to a pallet jack has the potential to cause discomfort if not outright physical problems or injury.

C. The Board's Decision Establishes a Standard for Compliance That is Contrary to the Purposes of Cal-OSHA Because It Will Ultimately Harm Workers More than Help Them

While steel-toed boots minimize workplace hazards in some circumstances, in others it may actually hinder employee safety. Steel toed boots and other similar protective footwear can pose ergonomic and safety risks to employees. For example, steel-toed boots are heavier than normal boots (up to several pounds), making walking and maneuvering more difficult because the shoe itself does not afford the wearer with as much control, agility, or grip on the floor. Steel-toed boots also increase the likelihood of tripping while climbing a ladder or stepstool or simply walking. These risks are magnified for employees who work an eight-hour shift standing and walking around to assist customers. Accordingly, employees who primarily assist customers at the front of a store, yet occasionally retrieve merchandise from the back store where there is a

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and merely pass through the warehouse operations going to/from the office, breakroom or rest rooms.

pallet jack, should not be required to wear steel-toed boots throughout their shift. These same concerns apply to warehouse front office workers or employees in small businesses outside the retail context where any limited exposure to industrial trucks could trigger the requirement to wear steel-toed boots throughout the work day.

The Board failed to consider these concerns in its decision. Had it done so, the Board would have avoided imposing a confusing and uncertain requirement for protective footwear that is so vague and overbroad that it potentially encompasses situations in which protective footwear would not enhance employee safety, and possibly even hinder it. It is for good reason that the regulations require employers to take a more nuanced approach to protective footwear to assess various factors and determine the extent to which footwear protection enhances employee safety. These factors include: the degree of exposure to forklifts; the availability of other safety measures and controls such as yellow lines demarcating forklift routes; rules and guidelines requiring employees to keep a certain distance away from forklifts; consideration of the reasons for being near a forklift (*e.g.*, whether the employee passes by a forklift or operates the forklift); and, if operating a forklift, the types of materials that will be handled.

This approach allows employers to balance the benefits and risks of protective footwear and to consider other measures that might achieve the same workplace safety goals while reducing the overall risk to employees.

Using this framework, steel-toed boots are unlikely to be appropriate for all workers in a retail store or small business who assist customers or do other front office jobs, if the only reason for doing so would be because the employees infrequently encounter forklifts or other similar equipment. Although employees who work in a warehouse setting may encounter forklifts more frequently, employers can mitigate any associated safety risks by implementing other safeguards, such as forklift lanes and signals. For other employees who work with or encounter forklifts regularly, steel-toed boots may certainly be appropriate. The point is that a one-size-fits-all rule for steel-toed boots in any workplace simply because employees might pass within four or five feet of a pallet jack is not practically sound or legally supported where the risks to employees vary widely depending on the particular work environment and the job responsibilities of the employee.

The RLC and NFIB agree that employers want to provide their employees with a healthy and safe work environment, but it benefits no one to impose burdensome requirements on employers that may result in harm to employees. Affirming the Board's decision will ultimately subject employers to a confusing and uncertain footwear protection requirement that, read broadly, may apply the protective footwear requirement to employees in situations that do not actually enhance employee safety.

CONCLUSION

Accordingly, for the reasons set forth above and in Home Depot's brief, we respectfully urge the Court to reverse the Board's decision.

Dated: March 4, 2019 Morgan, Lewis & Bockius LLP

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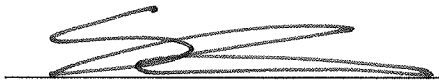
CERTIFICATION OF WORD COUNT

I certify that according to the word count generated by Microsoft Word, the program used to prepare this brief, this brief contains 3,655 words.

Dated: March 4, 2019 Morgan, Lewis & Bockius LLP



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PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Morgan, Lewis & Bockius LLP, 300 S. Grand Ave., 22nd Floor, Los Angeles, California 90071.

On March 4, 2019, I caused the following document to be served:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND PROPOSED BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER AND APPELLANT HOME DEPOT U.S.A., INC.

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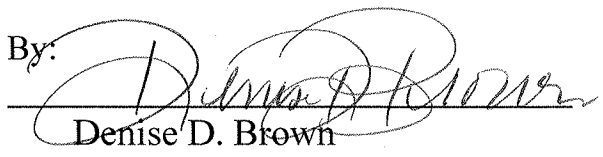
and via U.S. Mail. By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below:

Riverside County Superior Court
Clerk of the Court
Hon. Sunshine S. Skyes Dept.
4050 Main Street
Riverside, CA 92501

Superior Court (Trial Court)

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed March 4, 2019, at Los Angeles, California.

By: 

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