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December 30, 2014

Chief Justice Tani G. Cantil-Sakauye
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Apple Inc. v. Superior Court (Felczer)*, No. S222973
Amici Curiae Letter in Support of Apple Inc.'s Petition for Review

Dear Chief Justice and Associate Justices:

The Retail Litigation Center **("RLC")** and the California Retailers Association **("CRA")** urge this Court to grant Apple Inc.'s petition for review in the above-referenced matter.

Statement of Interest

The 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. The member entities whose interests the RLC represents employ millions of people 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 the courts with retail industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. Ninety percent of the RLC's members have facilities in California and employ Californians. In light of this, the RLC has filed amicus briefs or letters in many cases before this Court that impact California's retailers, including *Duran v. U.S. Bank National Association*, No. S200923, *Kilby v. CVS Pharmacy, Inc.*, No. S215614, *Verdugo v. Target Stores*, No. S207313, *Iskanian v. CLS Transportation of Los Angeles*, No. S204032, *Gonzalez v. Downtown LA Motors*, No. S200923, *Bluford v. Safeway Stores, Inc.*, No. S211498, and *Hall v. Rite Aid Corp.*, No. S219434.

The CRA is the only statewide trade association representing all segments of the retail industry including: general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drugstores, and specialty retailers such as auto, vision, jewelry, hardware and home

stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually and employing approximately 2,776,000 people—nearly one fifth of California's total employment.

Reasons Why Review Should Be Granted

The class certification decision in this case represents a continuing trend of decisions from California courts certifying vastly overbroad wage-and-hour class actions because the courts have accepted plaintiffs' assertions about the requirements of California law without scrutiny, and have relied on unsubstantiated allegations of purportedly unlawful classwide conduct. The amici believe further guidance is needed in this area, particularly given the proliferation of wage-and-hour class actions in California.

Of particular concern to California's retailers, the trial court here accepted Plaintiffs' contention that, under this Court's decision in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), California law requires employers to adopt formal written policies informing their employees of their right to take meal and rest breaks, and that any error or omission in such written policies is sufficient to establish classwide liability. *Brinker*, of course, held no such thing. Rather, under *Brinker*, an employer is required only to "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity" to take a break. (*Id.* at p. 1040.) Far from mandating that employers satisfy these obligations through a single mechanism—the adoption of a formal written policy—this Court instead recognized that "[w]hat will suffice may vary from industry to industry" and declined to "delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Ibid.*) Like Apple, many retailers use a wide array of means to communicate to employees their rights regarding breaks, such as reminders in employee schedules, emails, and time-keeping systems. Nothing in *Brinker* suggests these alternative approaches are unlawful.

Other courts have firmly rejected this distortion of *Brinker* and the views that formed the basis for certification here. For example, in *Dailey v. Sears, Roebuck & Co.* (2013) 214 Cal.App.4th 974, the Court of Appeal affirmed an order denying class certification, holding that the fact that an employer did "not have formal written policies regarding rest breaks and meal periods" did not mean the employer had failed to provide the required breaks in practice. (*Id.* at p. 1002.) Federal courts have similarly recognized that California law does not require employers to authorize meal and rest breaks in formal written policies. (*See e.g., Green v. Lawrence Service Co.* (C.D. Cal. July 22, 2013, No.

LA CV12-06155) 2013 WL 3907506, at p. *8 ["under California law, the absence of a formal written policy does not constitute a violation of the meal and rest period laws"]; *Roberts v. Trimac Transp. Servs. (W.), Inc.* (N.D. Cal. Aug. 28, 2013, No. C12-05302 HRL) 2013 WL 4647223, at p. *3; *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. Sept. 13, 2013, No. C-13-02377 JSC) 2013 WL 5090869, at p. *4.)

Despite this authority, Plaintiffs claimed in the Court of Appeal that the trial court was obliged to accept their view of the requirements of California law—even if erroneous. According to Plaintiffs, the trial court was required to view certification through a lens blocking consideration of what Plaintiffs would *actually* be required to prove at trial. But this Court recognized in *Brinker* that "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them." (*Brinker*, *supra*, 53 Cal.4th at p. 1024.) Whether Plaintiffs' view of the governing substantive law is correct is just such a "disputed threshold legal . . . question[]" because its answer is central to determining if classwide adjudication is appropriate or manageable in this class action.

Without knowing if California law is concerned with whether an employer actually provided its employees with meal and rest breaks or instead is concerned only with whether it had appropriate formal written policies in place, a trial court cannot possibly assess whether common issues will predominate or whether trial will be manageable. And separate and apart from the class certification question, this lack of consistency renders the already complicated California wage and hour landscape even more cumbersome for retailers doing business—or thinking about doing business—in California.

Finally, the procedural posture of this case—after a decision granting certification of an expansive class action—further supports review. The importance of an order granting class certification is hard to overstate. "A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims." (*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (2010) 130 S.Ct. 1431, 1465, fn. 3, dissenting opn. of Ginsburg, J.; accord *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453 ["a grant of class status can propel the stakes of a case into the stratosphere" and the "pressure to settle may become irresistible"].) And unjustified class settlements harm not just employers, but also consumers and employees, as litigation-related costs are passed on in the form of higher prices, and funds available for employee-compensation are diverted to legal expenses.

Faced with the potential for a substantial adverse classwide judgment, an employer's right to an appeal after trial is often illusory—particularly in cases in which courts certify expansive classes like the one here. Absent immediate review, the important issues raised by this case may evade review altogether.

Respectfully submitted,
RETAIL LITIGATION CENTER

By: Deborah R. White/by KB
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President *Amicus Curiae*
Retail Litigation Center, Inc.

By: Bill Dombrowski/by KB
Bill Dombrowski
President & Chief Executive Officer
California Retailers Association

cc: *See* attached Proof of Service.

PROOF OF SERVICE

I, Cassandra Horton, declare as follows:

I am employed in the County of Arlington, State of Virginia, I am over the age of eighteen years and am not a party to this action; my business address is 1700 North Moore Street, Suite 2250, in said County and State.

On December 31, 2014, I served the foregoing amicus letter on the parties stated below, by placing a true copy in an envelope addressed as indicated below, on the above-mentioned date, and placing the envelope for collection and mailing, following our ordinary business practices:

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I am readily familiar with our practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited with the U.S. Postal Service in the ordinary course of business in a sealed envelope with postage fully prepaid.

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

Executed on December 31, 2014, at Arlington, Virginia.

Cassandra Horton